

THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK
BROWN BROTHERS HARRIMAN
CITIBANK, N.A.
HSBC SECURITIES SERVICES
INVESTORS BANK & TRUST COMPANY
JPMORGAN CHASE BANK, N.A.
MELLON FINANCIAL CORPORATION
NORTHERN TRUST
RBC DEXIA INVESTOR SERVICES
STATE STREET BANK AND TRUST COMPANY

COUNSEL AND SECRETARIAT TO THE ASSOCIATION:
BAKER & MCKENZIE LLP
815 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006

TELEPHONE: 202/452-7000
FACSIMILE: 202/452-7074

WWW.THEAGC.COM

September 28, 2006

Commissioner Mark W. Everson
Internal Revenue Service
1111 Constitution Avenue, N.W.
Room 3000 IR
Washington, D.C. 20224

Re: **Urgent Request for Delay in Implementation of User Fee for Processing of Treaty Residency Certifications**

Dear Commissioner Everson:

On behalf of the Association of Global Custodians (the "Association"), I am writing to urge you to delay the effective date of Revenue Procedure 2006-35, 2006-37 I.R.B, issued on August 24, 2006, which would impose a new user fee on the processing of Forms 8802, Application for United States Residency Certification, submitted with a postmark date on or after October 2, 2006. We respectfully *and urgently* request that the revenue procedure be delayed to apply only to Forms 8802 submitted to the Internal Revenue Service on or after March 1, 2007.

By way of introduction, the Association is an informal group consisting of the significant global custodians for cross-border portfolio investments. The Association's ten members, listed on the letterhead above, hold customer assets approximating \$55 trillion in value, which include the vast majority of cross-border portfolio investments in equity securities.

On September 19, 2006, representatives of the Association met with representatives of the Internal Revenue Service in a teleconference chaired by Susan Carol of the Service. The purpose of the call was to discuss the user fee issue. Although the Service representatives assured the Association representatives that their concerns would be relayed to key decision makers, no assurances were given regarding what, if any, prompt action would be undertaken to avert what could be an impending capital markets disruption caused by the imposition of the user fees on October 2, 2006, as now contemplated by the revenue procedure.

When a foreign corporation pays a dividend to a portfolio U.S. investor, it usually withholds a tax, often at 30 percent of the gross amount of the dividend, imposed by the jurisdiction in which the corporation is resident. Income tax treaties between the United States and the foreign country in which the payor corporation is resident often reduce that

Commissioner Mark W. Everson
Internal Revenue Service
September 28, 2006
Page 2

withholding tax to 15 percent. Most foreign governments, however, will not confer the rate reduction unless a certificate of residency is provided to the actual payor of the dividend resident in its country (called the "withholding agent"), certified by the taxing authority of the beneficial owner's residence country. The certificate indicates that the beneficial owner is a resident of that country for income tax purposes and is entitled to benefits under the treaty between that country and the United States. If the residency certificate is not presented in advance of the dividend payment, the withholding agent will withhold tax at the statutory rate. Although the beneficial owner can theoretically procure a refund of the over-withheld tax, in many countries the refund can take many years to obtain, amounting to an effective denial of treaty benefits. To make portfolio investment by U.S. persons in foreign corporations feasible, it is thus imperative that the residency certificate be submitted to the withholding agent prior to the dividend payment.

Many foreign corporations pay dividends only annually in March or April. In the case of U.S. investors, it is thus necessary for the Service to issue the residency certificate (the Form 6166) to the investor by the end of February in order to ensure timely compliance with foreign government requirements. Because the form on which the investor applies for the Form 6166, the Form 8802 referenced above, may not, according to the Service's instruction to the Form, be submitted for the following calendar year prior to December 1 of the current calendar year, there is effectively a window of approximately three months during which the vast majority of Forms 8802 must be submitted to and processed by the Service.

For several years prior to the issuance of the revenue procedure on August 24, the Association has met and otherwise communicated with the Service regarding various infirmities in the Forms 8802 and 6166 and their processing that have resulted in delays of the issuance of the residency certificates beyond the dates on which they must be submitted to the foreign governments so as to avoid the loss of treaty benefits. The Association has been working with the Service to solve these problems, with progress slow and mixed.

The Association was thus much surprised when, on August 24, the Service announced the new user fee with a mere five weeks lead time to implement the systems necessary to pay the fee. While the Association objects to the fee on the merits (notably, the United States is the *only* country, to our knowledge, that imposes such a fee to obtain a residency certificate), our immediate, critical concern is that the timetable for the requirement to include a user fee with each Form 8802 submitted will prove a serious setback to our efforts to accelerate the processing of Forms 8802 and result in the further loss of treaty benefits by many investors.¹

¹ The Service has advised Association representatives that if the person at the Philadelphia Service Center processing the Form 8802 believes the amount submitted with the Form to be incorrect, he or she will suspend the processing of the Form and try to contact the person at the Association member institution to sort out the problem. Given Association members' prior

Commissioner Mark W. Everson
Internal Revenue Service
September 28, 2006
Page 3

If the user fee must be imposed (and we reiterate our opposition thereto), a delay until March 1, 2007, when the current season for processing Forms 8802 with respect to dividends to be paid during calendar 2007 will have for the most part concluded, would give the Service and the Association, whose members will absorb the vast bulk of the fees, several months to work out a system in which the fee can be paid and processed without causing significant delay in the issuance of the residency certificate.

Again, our major concern is that the fee is being imposed without giving the custodian banks responsible for processing the Forms 8802 – and probably the Internal Revenue Service as well – sufficient time to establish a workable system for associating a fee with a Form 8802, ascertain any errors, correcting any errors, and still obtaining a completed Form 6166 in time to avoid over-withholding by the foreign government. The market for cross-border portfolio investments entitled to treaty benefits is huge, and any change as significant as the imposition of a user fee for obtaining the residency certificate on which the whole market depends must be approached with sensitivity. Our fear is that October 2 will arrive with both the custodian banks and the Service unprepared to deal with the new reality, a chaotic situation in which U.S. investors suffer the denial of treaty benefits to which they are entitled.

We are attaching our minutes of our teleconference with your staff to provide more detail on the substance of the Association's concerns with the new rule. We would be glad to discuss this matter further with you and/or your staff at your very earliest convenience.

Very truly yours,



Peter M. Daub
Baker & McKenzie LLP
Counsel to the Association

Attachment – Minutes of the September 19, 2006 Teleconference Between the Internal Revenue Service and Industry Participants Regarding the Form 8802 User Fee

experiences, we are not confident that delays can be avoided in this fashion, especially since the fee will be first imposed during the season in which the largest volume of Forms 8802 are submitted. In addition, we note that if the fee for a *single* Form 8802 is arguably incorrect, delays and loss of treaty benefits could result for investors who have nothing to do with the allegedly incorrect fee other than having been included in the same submission under the same check.

Commissioner Mark W. Everson
Internal Revenue Service
September 28, 2006
Page 4

cc: Eric Solomon
Acting Assistant Secretary (Tax Policy)
Department of the Treasury

Frank Y. Ng
Deputy Commissioner
Large and Mid-Size Business (International)
Internal Revenue Service

Donald Korb
Chief Counsel
Internal Revenue Ser.

Hal J. Hicks
International Tax Counsel
Department of the Treasury

Steven Musher
Associate Chief Counsel
Internal Revenue Ser.

Conference call attendees:

Marion Boyle
Tax Analyst
Internal Revenue Service

Elvin Hedgepeth
Deputy Director
Internal Revenue Service

Eva Williams
Management &
Program Analyst
Internal Revenue Service

Susan Carol
Deputy Director
Internal Revenue Service

Quyen Huynh
Attorney-Advisory
Internal Revenue Service

Glenn Coles
Field Director
Internal Revenue Service

Elizabeth Karzon
Branch Chief
Internal Revenue Service

Walter Harris
Director
Internal Revenue Service

Patricia Valancius
Competent Authority Analyst
Internal Revenue Service