

THE ASSOCIATION OF GLOBAL CUSTODIANS

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STATE STREET BANK AND TRUST COMPANY

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April 20, 2009

Mr. Stephen Schaeffer
Office of Associate Chief Counsel (Procedure & Administration)
CC:PA:LPD:PR (Notice 2009-17)
Courier Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Re: Reporting of Adjusted Basis in Securities Transactions – Notice 2009-17

Dear Mr. Schaeffer:

We write on behalf of the members of the Association of Global Custodians (“Association”) to express members’ views concerning the Internal Revenue Service’s Notice 2009-17 (the “Notice”) outlining new information reporting requirements under the *Energy Improvement and Extension Act of 2008* (Div. B of Pub. L. No. 110-343, 122). As outlined below, these requirements impact custodians in respect of information reporting of customers’ basis in securities transactions. Although the date for public comments set out in the Notice is March 2nd, we respectfully request that you include this letter in the file for this matter and consider the Association’s views as the information reporting requirements evolve.¹

¹ The Association is an informal group of eight global custodian banks that provide securities safekeeping services and related asset management functions to global institutional investors world wide, including US pension funds, insurance companies, and investment companies. Members’ assets under custody collectively are estimated to exceed US\$ 40 Trillion.

The Association regularly provides commentary to regulatory and administrative authorities on matters of concern to members. Members of the Association are listed on the letterhead above.

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The Association recognizes the significant impact of these new requirements, and some Association members have participated in the comment initiatives submitted to the Service in this matter by other industry groups such as the Securities Industry and Financial Markets Association. Comments submitted by these other groups have addressed the impact of the requirements both thoroughly and in a technical and practical manner and have identified with particularity the specific areas where guidance is needed to facilitate accurate reporting of basis information. Nonetheless, Association members believe it important to submit comments that we believe will complement those previously filed and that will underscore that the critical need for guidance from the Service to clarify reporting agents' new responsibilities and to facilitate effective compliance with the law's requirements. Our key comments in response to Notice 2009-17 follow.

Clarity Concerning the Applicability Triggers for Reporting Requirements

Several aspects of the rules' applicability would benefit from greater clarity. For example, further definition around the "acquisition" criteria that could trigger the basis reporting obligation would be helpful, as would guidance regarding situations where basis is only reportable on a portion of securities sold or transferred. In addition, some of the criteria for applicability of the basis reporting rules are dictated by the reason for which or means by which a security is acquired by a customer. This form of information typically is not available to a custodian bank acting as safekeeping agent for clients, and Association members generally are not in a position to know or otherwise have reason to know about a client's reasoning for transactions. To illustrate this point, a custodian for institutional customers such as partnerships would not generally know whether a security was acquired by a customer as a result of a gift or inheritance. In addition, in many cases a custodian is not in a position to possess all the underlying information required to accurately calculate a customer's basis, including cases where customers hold interests in partnerships or hybrid securities.

We therefore suggest that the Service consider more completely defining the scope of the reporting requirement triggers -- for example, exempting certain types of securities from these requirements entirely where there is an extremely low likelihood that reporting agents could accurately calculate cost basis at the time of disposition. In addition, we recommend that the Service consider the proposal made by other industry groups that penalties should be waived during the initial compliance years in recognition of the significant system development costs that these new rules impose on financial institutions. Further, in view of the overall complexity of these requirements and given

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that much of a reporting agent's information base does not originate with the agent, we suggest that the Service waive penalties -- even after the initial years -- in all cases where the reporting agent makes a good faith effort to comply with the new rules.

Adjustment Mechanics

Many commenters have requested further guidance around the method by which basis should be calculated for reporting purposes, and we concur fully in that request. There can be various, valid differences between a customer's actual basis versus the number reported by agents. A reasonable means of addressing these valid discrepancies should be formulated and a consistent method for reporting basis information should be specified.

We urge the Service to consider defining the timing of basis adjustments such that reporting agents can be relatively certain about the level of adjustment that has been performed by other agents prior to the transfer of a security by a customer to a new custodial account. As a practical matter, if some reporting agents perform basis adjustments only at year end while others perform adjustments throughout the year, a subsequent reporting agent for a customer would not be able to know with any reliability whether facts impacting the customer's basis were considered prior to the communication of basis information from the customer's previous agent.

To illustrate -- where an issuer provides an estimate that a distribution is a return of capital, a broker or other custodial agent that adjusts basis information throughout the year could make an adjustment to the customer's basis at the time the estimate is released (and prior to the transfer of the asset to an account at another broker that customarily makes cost basis adjustments at the time of transfer or at year end prior to reporting cost basis information). In that case -- and not known to the broker that received the customer's asset -- the cost basis of the transferred security would already include this particular adjustment. Further, at a date later in the year when the customer sells the security, the acquiring broker would have to provide the customer's cost basis on Form 1099-B. However, to the extent that the acquiring broker has no knowledge about the extent to which the customer's basis was previously adjusted, it is possible, perhaps likely, that the adjustment related to the "return of capital" distribution would be taken into consideration again in the acquiring broker's adjustment process. The customer's basis as reported on 1099-B would then be inaccurate, the adjustment having been considered twice. Conversely, if the practices of the two brokers in the foregoing example is reversed (i.e., the transferring broker performs only year end

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adjustments while the acquiring broker's performs adjustments only at the time events occur) the outcome would effectively exclude the return of capital adjustment.

In addition to the foregoing, we request the Service to consider the impact of the timing of transactions in cases where certain basis reporting requirements – such as those to exclude wash sales -- are concerned. Other industry groups have noted in their comments the difficulties associated with identifying “wash” and “short” sale transactions in cases where a custodian would not know a customer's investment intentions or where a factor critical to the identification of a transaction qualifier cannot be known until a subsequent tax year. The Association concurs in these notes and strongly urges that they be taken into account in Service guidance. Also, guidance should address issues that exist with respect to the classification of certain complex securities and should take into account the timing of an issuer's announcement of the character of distributed amounts. In many cases, issuers do not announce the character of their distributions near in time to making payments, and this behavior complicates the application of the reporting rules (to illustrate, consider the case where a distribution is classified as a return of capital by the issuer well after basis would have been reported). We recommend that there not be a requirement to amend 1099 reporting in such cases given that the relevant information was not available prior to the due date of the information return.

Information Sourcing and Transfer Reporting

To comply with the new basis reporting rules, some Association members will likely need to engage the services of information vendors and third-party intermediaries to transfer and receive information. We recommend that the Service take notice that not all counterparties, including those ultimately outside of the United States, will use the same vendors to assist them in complying with the requirements to report or to transfer information. It will thus be essential that the Service's guidance include standard requirements around the transfer of information, specifying for example that a transferring agent report at least the date of purchase lot numbers, CUSIP, the number of units, the original cost basis, and the adjusted cost basis at the time of transfer.

In addition, the Association concurs with the recommendations made by other industry groups that the Service's guidance acknowledge a wide range of potential sources of basis information. This will enable reporting agents to acquire the most accurate information available. The Association also suggests that the guidance state that agents receiving information from transferring agents are not responsible for the

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origination of cost basis information or for verifying the accuracy of the basis information transmitted to them. We make this suggestion given that the receiving agent has no control over whether the transferring agent provides the information needed to satisfy the new requirements and in view of the reality that a number of factors can impact a cost basis determination.

Conclusion

The Association appreciates the opportunity to submit its members' views on this matter, including members' comments as to the nature and scope of guidance the Service and the Department of the Treasury should issue in respect of cost basis reporting of customer securities transactions. We respectfully request that these comments be included in the file for this matter and considered as guidance is drafted. We believe that our points, if followed, can provide meaningful support to the broader broker and reporting agent industry, will serve to clarify the responsibilities of parties involved in securities transactions, and will create a means for reporting agents to satisfy the requirements in a consistent and appropriate manner. If you have questions or would like to discuss these comments with Association members, please contact the undersigned at 312.861.2620 as an initial matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dan W. Schneider", with a long horizontal flourish extending to the right.

Dan W. Schneider
Baker & McKenzie LLP
Counsel to the Association