

Validity of Non-U.S. Approved Self-Certifications in Question

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Global Financial Services Industry



U.S. Treasury May Require Self-Certification Form Approval

Based upon guidance from the U.S. Department of the Treasury (“Treasury”), a Treasury official indicated that self-certifications used by Foreign Financial Institutions (“FFIs”) in Intergovernmental Agreement (“IGA”) jurisdictions must be approved by the Treasury for the forms to be considered valid. The position is grounded on language included in certain portions of the IGA stating that the FFI may use a Form W-8/W-9 to document an account holder “or other similar agreed form.” This language does not appear in the requirements for new account holders, but rather in the due diligence language for pre-existing account holders. As such, it is unclear whether Treasury will limit the approval requirement for self-certifications acquired in connection with pre-existing account due diligence or whether approval will be required for any self-certification used by an FFI in an IGA jurisdiction. To clarify its position, Treasury is currently working on further guidance regarding the approval process for self-certifications.

Despite Treasury’s position, tax authorities in many countries have issued guidance allowing FFIs in their respective jurisdictions to create their own versions of self-certifications subject to certain – typically less stringent – guidelines. Some jurisdictions have also issued their own versions of self-certifications allowing the FFIs in their jurisdictions to modify them as needed. In all cases, the self-certifications appear to not have been approved by Treasury. Given Treasury’s position, clients should they take precautions in designing any new account opening documents that include a self-certification. Using an unapproved form could cause the country and/or IGA FFI to be found in substantial non-compliance. In the worst case scenario, Treasury could rescind the IGA with the country or rescind the Global Intermediary Identification Number (“GIIN”) of any IGA FFI using unapproved forms.

Until further guidance is provided, clients have a few options to confirm FATCA compliance. One option is to use the Form W-8 in all circumstances and collect a more tailored self-certification to gather other information that may be required by the local jurisdiction (for example, tax residency information for UK FATCA or OECD’s Common Reporting Standard). Another potential option is to

develop a self-certification that satisfies the requirement of a substitute withholding certificate. Finally, Treasury has also indicated that it is open to reviewing and approving forms provided by individual FFIs, but prefers to approve forms channeled through the local tax authority.

We will keep you up to date with any further developments.

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