

US Qualified Intermediary – are you ready to certify?

The IRS Qualified Intermediary (“QI”) Agreement applicable from 1 January 2017 imposes a series of compliance obligations on those institutions that have registered as QIs. One of the main requirements is to provide a periodic certification to the IRS for which the first deadlines are imminent. These requirements also impose obligations related to a QI’s FATCA compliance status, notwithstanding FATCA may be primarily subject to domestic tax authority oversight. Similar requirements are applicable to withholding foreign partnerships and trusts that have entered into equivalent agreements with the IRS.

What does the QI Agreement require?

As provided by Revenue Procedure 2017-15, the QI Agreement requires all QIs to appoint a Responsible Officer (“RO”) who has specific responsibilities to maintain processes and procedures to ensure compliance with the QI Agreement.

The RO of a QI is required to provide a three yearly periodic certification to the IRS (via the IRS on-line QI registration system). Appendix I of the QI Agreement sets out the specific statements upon which the certification is based. In particular, prior to making the certification a QI must have undertaken a periodic review of its compliance during one year of the certification period, unless it is able to meet specific conditions for a waiver. Even if a waiver from the periodic review requirement is envisaged the RO was required to apply for the waiver by 1 September 2018.

QIs that chose to undertake a periodic review for the 2017 calendar year should have notified the IRS by 1 September 2018. In that case the final deadline to submit the certification to the IRS is 1 March 2019.

Where a periodic review was undertaken in respect of an earlier year (2015 or 2016) or a waiver application was made the deadline for submitting the certification and/or waiver application was 1 September 2018.

What are the differences between the periodic review and the RO certification?

The requirements of the periodic review itself and the certification are described in the QI Agreement. The distinction is particularly relevant when you contrast with the former QI audit regime that existed up until 1 July 2014, which was the primary means by which the IRS monitored QI compliance.

Whilst the periodic review can be undertaken by an external party (or internal QI function subject to it being independent of the RO and technically competent to undertake the review) the RO is primarily responsible for ensuring the QI establishes and maintains an effective QI Compliance Programme (see below) throughout the certification period, as well as making the certification to the IRS. This would not typically be covered as part of a periodic review.

The initial certification period covers the period from 1 July 2014 – 31 December 2017 whereas a periodic review is undertaken in relation to one calendar year within the certification period.

The periodic review comprises a series of tests focused on a sample of the QI’s accounts in relation to customer documentation, withholding tax and IRS reporting. A written report must be produced covering the factual results of the periodic review, a copy of which may be requested subsequently by the IRS.

Whilst there is flexibility in choosing the year that is subject to the review (and hence no formal deadline for completing the review) the results of the review must be finalised prior to the RO making the certification. By comparison, the certification must be submitted by the RO by the relevant deadline.

Subsequent certification periods are expected to run for 3 whole calendar years e.g. 1 January 2018 – 31 December 2020 for which certifications will be due to be submitted to the IRS either by 30 June 2021 (where a periodic review is undertaken for 2018 or 2019) and 31 December 2021 (where a review is undertaken for 2020).

Future certifications will also include compliance with respect to Section 871(m) and QDD status where applicable, subject to the extensions announced by the IRS in September 2018.

Further information is available via the IRS QI FAQs contained at:

<https://www.irs.gov/businesses/corporations/qi-system-faqs>.

Penalties for non-compliance

Where a certification is not submitted before the relevant deadline or subsequently it is determined the QI has not complied with the requirements of the QI Agreement it remains to be seen how the IRS would penalise QIs. For example, the IRS could treat this as a material failure (at worst a possible event of default) and seek to remedy the position in accordance with the QI Agreement. The wider commercial and reputational aspects of imperilling QI status could also be substantial. Where any issue arose with respect to the QI's FATCA compliance and the QI is resident in a Model 1 Intergovernmental Agreement jurisdiction it is anticipated the IRS would contact the domestic tax authority and appropriate action taken to address the FATCA requirements.

What does a good Compliance Programme look like?

Whilst there is no "standard" Compliance Programme it is expected that it will reflect the complexities of the QI's business and be consistent with other processes the QI manages as part of its wider regulatory compliance obligations e.g. KYC/AML, breach reporting, change in circumstances and colleague training. As noted above the QI's FATCA compliance status is relevant to the QI Compliance Programme.

At a minimum, a QI Compliance Programme would typically include coverage of:

- Systems and processes that are critical to ensure the QI's compliance with its documentation, withholding and reporting obligations i.e. both transaction and client based systems and associated controls
- Evidence of any other reviews undertaken of QI and FATCA compliance (outside of the periodic review requirement) and the results of those reviews
- Evidence of colleague training and technical updates to reflect technical and commercial business changes
- Appropriate two way communications channels that provide the RO with effective oversight of QI compliance processes and capability to inform downstream
- The ability for the RO to detect and disclose material failures and events of default (with respect to the QI Agreement) to the IRS
- To the extent the QI envisages it may meet the conditions to apply for a waiver that it is has the relevant processes in place to ensure QI compliance and provide relevant information to the IRS upon request
- Going forward, the approach to compliance with Section 871(m) and Qualified Derivatives Dealer ("QDD") status where applicable.

How Grant Thornton can help

We have advised many QIs since inception of the regime and have the technical and commercial expertise to support your compliance obligations, as well as managing relationships with the IRS. We can assist you in undertaking a periodic review or providing an independent view of your QI Compliance Programme in advance of the certification deadlines. We are also able to provide bespoke training and assistance with the design, implementation and testing of appropriate procedures to deliver an effective Compliance Programme. If there is anything you would like to discuss further, please contact your usual partner or any of the contacts below:



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