

US Treasury and IRS issue final FATCA and chapter 3 regulations

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Executive summary

The United States (US) Treasury and the Internal Revenue Service (IRS) have issued final regulations (TD 9890) under the *Foreign Account Tax Compliance Act* (FATCA) and chapter 3 of the Internal Revenue Code (IRC), finalizing some of the provisions included in the proposed regulations published in December 2018. Specifically, the final regulations address:

1. Collection of a Foreign Taxpayer Identification Number (TIN) and date of birth (DOB) on a beneficial owner withholding certificate
2. Nonqualified intermediary withholding statements
3. Electronic signatures for chapter 3 and 4 purposes
4. Withholding certificates and withholding statements furnished through a third-party repository for purposes of chapters 3 and 4
5. Limitations on benefits for treaty claims on withholding certificates and treaty statements provided with documentary evidence
6. Hold-mail instructions

Treasury and the IRS intend to finalize the remaining provisions in the 2018 proposed regulations "at a future date."

These final regulations are very consistent with the proposed regulations and other guidance previously published by the Government.

Detailed discussion

Background

FATCA is found in chapter 4 of the IRC (Sections 1471 - 1474). Generally, FATCA requires US and non-US withholding agents (including foreign financial institutions (FFIs)) to identify who their payees are and the FATCA status of those payees. For FATCA purposes, US withholding agents must withhold tax on certain payments to FFIs that do not agree to report certain information to the US about their US accounts (non-participating FFIs (NPFIs)) and on certain payments to non-financial foreign entities (NFFE) that do not provide information about their substantial US owners to withholding agents. The US has entered into numerous Intergovernmental Agreements (IGAs) to minimize the impact of FATCA on a foreign partner jurisdiction's financial institutions (FIs).

Chapter 3 of the IRC (Sections 1441 - 1446) generally requires withholding at a rate of 30% on US-source fixed or determinable, annual or periodic income paid to nonresident aliens.

The proposed regulations issued in December 2018 were generally quite taxpayer-favorable. Highlights in the proposed regulations package that are not included in this package include:

- ▶ Removing FATCA withholding on payments of gross proceeds from the regulations
- ▶ Deferring withholding on foreign pass-through payments
- ▶ Eliminating the so-called lag method under which a partnership or trust reports tax required to be withheld on undistributed income in the year after it was earned
- ▶ Changing the reimbursement/set-off rules for overwithholding adjustments
- ▶ Clarifying that investing in a mutual fund does not per se make an entity a managed investment entity
- ▶ Adding non-cash value insurance premiums to excluded nonfinancial payments
- ▶ Allowing nonqualified intermediaries (NQIs) that are compliant FFIs and receive Forms 1042-S with chapter 4 withholding for an unknown recipient to report the income on a Form 1042-S reflecting chapter 3 withholding

Collection of a foreign TIN and DOB on a beneficial owner withholding certificate

Consistent with prior guidance, the final regulations allow a withholding agent to rely on a withholding certificate obtained before 1 January 2018, for payments made on or before 1 January 2020, even if the form does not reflect the beneficial owner's foreign TIN. If the withholding agent obtains the account holder's foreign TIN on a written statement or otherwise has it in the withholding agent's files, the withholding agent may rely on the form until it expires.

Under these final regulations, additional relief has been provided. A withholding agent may rely on a withholding certificate signed after 31 December 2017, without the beneficial owner's foreign TIN, if the withholding agent obtains the account holder's foreign TIN in a signed written statement. The statement must acknowledge that: (i) it is a part of the withholding certificate; and (ii) the withholding agent associates the statement with the account holder's withholding certificate.

This allows a withholding agent to cure an incomplete withholding certificate by obtaining a separate signed statement rather than having to obtain a new withholding certificate. Also, while a missing foreign TIN on a pre-2018 form can be cured with an unsigned statement, a statement to provide a missing foreign TIN for a post-2017 form requires a signature.

Nonqualified intermediary withholding statements

In addition to a Form W-8IMY, an NQI generally must furnish a withholding agent with a withholding statement containing a significant amount of information about each of its underlying payees. As long as the required information is included on payee documentation associated with the withholding statement, however, an NQI need not repeat such information on the withholding statement. Instead, the NQI can represent that the information on the withholding certificates furnished to the withholding agent is not inconsistent with any other account information the NQI has on file. The final regulations clarify that the general standards of knowledge that apply to withholding agents apply to an NQI for reliance on payee documentation for purposes of making such a representation.

The final regulations also provide that regular withholding statements may omit the chapter 4 recipient codes, provided the codes can be derived from the documentation with the withholding statement or other information in the withholding agent's records.

Withholding agents should consider updating their procedures for validating regular withholding statements to allow the omission of chapter 4 codes if the withholding agent can derive those codes from the underlying tax form provided with the Form W-8IMY.

Electronic signatures

The regulations allow withholding agents to rely on withholding certificates that reasonably demonstrate that they have been electronically signed. The final regulations permit a withholding agent to consider, in addition to the withholding certificate itself, other documentation or information the withholding agent has supporting that a withholding certificate was electronically signed.

While a commentator requested that the final regulations also allow reliance on an electronically signed Form W-9, the Preamble makes clear that these regulations do not apply to Forms W-9, and refers the reader to “separate guidance, such as the Requestor Instructions to Form W-9.”

The proposed regulations contain one example of a good electronic signature (name, time/date stamp and a statement that the form was electronically signed in the signature block) and one example of a bad electronic signature (only a typed name in the signature block). The Preamble clarifies that the “good” example in the regulations of a valid electronic signature is “simply an example of one set of facts that satisfies the rule,” rather than a minimum standard.

Withholding certificates and withholding statements furnished through a third-party repository for purposes of chapters 3 and 4

The regulations allow a withholding agent, under certain circumstances, to receive a withholding certificate from a third-party repository, rather than directly from the person whose name is on the certificate. In those circumstances, a withholding agent must be able to associate a withholding certificate received from a third-party repository with a specific request for the withholding certificate and a specific authorization from the person providing the certificate. The final regulations clarify that a separate request and authorization to obtain a withholding certificate from a third-party repository is not required for each payment made by a withholding agent when the withholding agent would otherwise be permitted to rely on a single withholding certificate from the person named thereon.

Once again, a commentator requested that the final regulations include Forms W-9 by allowing a withholding agent to rely on a Form W-9 obtained from a third-party repository. The Preamble, however, states that IRC section 3406 would have to provide for such a provision, not chapter 3 or 4.

Limitations on benefits for treaty claims on withholding certificates and treaty statements provided with documentary evidence

Like the proposed regulations, the final regulations maintain that a withholding agent has reason to know that a beneficial owner has an unreliable or incorrect claim to a reduced withholding rate under an income tax treaty when (i) the beneficial owner claims benefits under an income tax treaty that does not exist or is not in force, and (ii) the withholding agent may determine whether a tax treaty exists or is in force by checking a list maintained on the IRS website. The regulations also permit a withholding agent to rely on a beneficial owner’s claim regarding its reliance on a specific limitation-on-treaty-benefits provision absent actual knowledge that the claim is unreliable or incorrect.

Hold-mail instructions

Like the proposed regulations, the final regulations treat an address subject to a hold-mail instruction as a permanent residence address when documentary evidence establishes residence in the country in which a person claims to be a resident for tax purposes. The final regulations also clarify that “hold mail” does not include a request to receive all correspondence electronically.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, Information Reporting and Withholding Group

- ▶ Deborah Pflieger, *New York* deborah.pflieger@ey.com
- ▶ Tara Ferris, *Hoboken* tara.ferris@ey.com
- ▶ Maria Murphy, *Washington, DC* maria.murphy@ey.com
- ▶ Justin O'Brien, *Hoboken* justin.obrien@ey.com
- ▶ Jonathan Jackel, *Washington, DC* jonathan.jackel@ey.com
- ▶ George Fox, *Washington, DC* george.fox@ey.com

Ernst & Young LLP, International Tax and Transaction Services

- ▶ Julia Tonkovich, *Washington, DC* julia.m.tonkovich@ey.com

International Tax and Transaction Services

Global ITTS Leader, **Jeffrey Michalak**, *Detroit*

ITTS Director, Americas, **Craig Hillier**, *Boston*

ITTS Markets Leader, Americas, **Laynie Pavio**, *San Jose, CA*

ITTS NTD Leader, **Jose Murillo**, *Washington, DC*

ITTS Regional Contacts, Ernst & Young LLP (US)

West
Sadler Nelson, *San Jose*

East
Colleen O'Neill, *New York*

Central
Aaron Topol, *Atlanta*

Financial Services
Chris J Housman, *New York*

Canada - Ernst & Young LLP (Canada)
Warren Pashkowich, *Calgary*

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