

IRS Posts Draft Revised Withholding Forms Conforming To FATCA

June 8, 2012

The U.S. Internal Revenue Service ("IRS") has posted draft versions of revised Form W-8BEN, entitled "Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding (Individual)" ("New W-8BEN"), as well as an entirely new Form W-8BEN-E, entitled "Certificate of Status of Beneficial Owner for United States Tax Withholding (Entities)" ("New W-8BEN-E", and together with the New W-8BEN, the "New Withholding Certificates")[\[1\]](#). The IRS has prepared the New Withholding Certificates in response to the new requirements imposed by the Foreign Account Taxpayer Compliance Act ("FATCA")[\[2\]](#) and the proposed regulations promulgated thereunder ("Proposed Regulations")[\[3\]](#). Although the New Withholding Certificates provide a first look at the actual new information reporting requirements that FATCA ultimately will impose on virtually all non-U.S. persons receiving passive income from U.S. sources, the IRS has not yet published draft instructions for the New Withholding Certificates. As a result, certain important implementation issues raised under the Proposed Regulations and FATCA generally remain unanswered.[\[4\]](#) Read this client alert for a summary of the New Withholding Certificates' contents.

The New Withholding Certificates have only been released by the IRS in draft form as of the date of this Client Alert, with a notional release date of December, 2012. Until the New Withholding Certificates are released in final form by the IRS, existing withholding certificates (i.e., existing IRS Form W-8BEN) should continue to be used where required under current law.

The New Withholding Certificates effectively divide the information reporting requirements between two classes of payees: nonresident alien individuals (who apparently will be required to use New Form W-8BEN) and all foreign entities other than individuals (who apparently will be required to use New W-8BEN-E). However, a wide variety of taxpayers, including all U.S. citizens and tax residents, as well as all taxpayers claiming exemption from withholding on income that is effectively connected with a U.S. trade or business or general exemption from U.S. tax under special statutory provisions (e.g., foreign governments), apparently will continue to use existing forms unless claiming the benefits of an income tax treaty.[\[5\]](#)

New W-8BEN: New W-8BEN will simplify the declarations required to be made by foreign individuals. It will only require basic identifying information, declarations with respect to treaty status (as relevant), and a general certification as to foreign status. Although New W-8BEN is a welcome simplification of the information reporting that will be required of foreign individuals, it should be noted that foreign individuals will now be required to provide a foreign tax identifying number (e.g., the United Kingdom National Insurance Number), if applicable, since not all countries presently issue such numbers.

New W-8BEN-E: New W-8BEN-E will require each foreign entity to make two distinct declarations. The first declaration will be the foreign entity's status for purposes of the U.S. outbound withholding tax regime (e.g., the 30% withholding tax generally imposed on U.S.-source dividends paid to non-U.S. persons unless reduced by an applicable income tax treaty).[\[6\]](#) This declaration will be the same as the declaration required in the current IRS Form W-8BEN, as last revised in 2006.[\[7\]](#)

The second declaration will be the FATCA-related declaration, which will require an entity to provide substantial detail by declaring its overall status for FATCA purposes from among 24 different categories (all described in detail in the Proposed Regulations, and not all of which are mutually exclusive) and in many cases making supplementary declarations in later sections of New W-8BEN-E. In addition to these declarations, New W-8BEN-E will require a foreign entity to provide its "Foreign Financial Institution Employer Identification Number" and "FATCA ID", as applicable, and each as discussed in the Proposed Regulations.

If you would like to discuss the New Withholding Certificates or FATCA-related matters generally, please contact any of the lawyers listed on this client alert or the member of the Proskauer Tax Group with whom you regularly consult on these matters.

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This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

[1] The draft forms can be found on the IRS website via the following links:

<http://www.irs.gov/pub/irs-utl/formw8benindividualexecirculation2.pdf>

[2] Sections 1471-1471 of the Internal Revenue Code of 1986, as amended ("Code"). FATCA was enacted in 2010 as part of the Hiring Incentives to Restore Employment Act.

[3] REG-121647-10

[4] Please see our previous client alert, ["IRS and Treasury Department Publish Anticipated FATCA Guidance"](#) (Feb. 9, 2012).

[5] The New Withholding Certificates on their face instruct that a U.S. entity, citizen or resident should continue to use IRS Form W-9, any foreign person claiming that income is effectively connected with the conduct of trade or business within the United States should continue to use IRS Form W-8ECI, foreign partnerships, foreign simple trusts, and foreign grantor trusts not subject to any exceptions should continue to use IRS Form W-8IMY, and foreign governments, international organization, foreign central banks, foreign tax-exempt organizations and private foundations, and governments of U.S. possessions should continue to use IRS Form W-8ECI or IRS Form W-8EXP (unless claiming treaty benefits, in which case New W-8BEN-E apparently will be required). All intermediaries apparently will continue to use IRS Form W-8IMY.

[6] A discussion of the withholding taxes imposed by Code Sections 1441 and 1442, and related taxes imposed by Code Sections 1445 and 1446, are beyond the scope of this Client Alert.

[7] Various other declarations required by the current IRS Form W-8BEN will continue to be required as well (e.g., the declarations with respect to eligibility for the benefits of an income tax treaty and the declaration with respect to payments under notional principal contracts).

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