



TaxNewsFlash

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KPMG report: Final regulations on withholding and reporting income to foreign persons (initial impressions)

The U.S. Treasury Department and IRS on Friday afternoon, December 27, 2019, released for publication in the Federal Register final regulations (T.D. 9890) under chapter 4 (FATCA) and chapter 3 of the Internal Revenue Code.

The [final regulations](#) [PDF 329 KB] (15 pages as published in the Federal Register) adopt selected provisions from regulations proposed in December 2018, to provide burden relief under FATCA and chapter 3, but with minor modifications resulting from subsequent industry comments. In addition, the final regulations adopt certain documentation rules already in effect under prior temporary regulations.

The final regulations were published in the Federal Register on January 2, 2020. The following discussion includes initial impressions about the final regulations along with highlights and descriptions of these modifications.

Foreign tax identification numbers (FTINs) and date of birth

The final regulations adopted previously issued guidance regarding a withholding agent's obligation to collect account holders' FTINs and dates of birth when documenting a payment reportable on Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, made with respect to a financial account maintained in the United States with a withholding certificate, subject to minor revisions. This previously issued guidance includes the proposed regulations, Notice 2017-46, Notice 2018-20, and the Form W-8 instructions.

One notable change from the previously issued guidance is that the final regulations now permit a withholding agent to collect an account holder's FTIN through a written statement when the FTIN is not provided on the account holder's Form W-8, provided that the written statement clearly acknowledges that the statement is a part of the withholding certificate, the written statement is signed by the account holder, and the withholding agent associates the written statement with the

withholding certificate. Previously, withholding agents were only permitted to obtain FTINs via written statements for withholding certificates signed before January 1, 2018.

The preamble to the final regulations indicates that Treasury and the IRS have rejected requests to permit the reliance upon FTINs obtained orally with respect to withholding certificates signed on or after January 1, 2018, because oral statements do not provide the same assurances of accuracy that are provided by a written statement.

Finally, the final regulations clarify that a withholding agent may rely upon a date of birth provided on a withholding certificate unless it knows or has reason to know the date of birth is incorrect. This is the same standard of knowledge applied to FTINs.

KPMG observation

While providing FTINs on withholding certificates should remain the standard method for transmitting FTINs to withholding agents, the option for transmitting the account holder's FTIN via a written statement is a helpful alternative when the FTIN is missing from the withholding certificate, as it does not require that the withholding certificate be resubmitted or re-signed. However, due to the specific requirements of the written statement set forth in the final regulations, withholding agents need to consider preparing templates for the collection of FTINs that contain the statement acknowledging that the written statement is an integral part of the withholding certificate and identify the relevant withholding certificate.

Nonqualified intermediary (NQI) withholding statements

The final regulations adopt the rules currently in effect under temporary regulations regarding the completion of an NQI withholding statement and the option to use an alternate (i.e., abbreviated) withholding statement if the withholding statement contains a statement from the NQI attesting that the information contained in the withholding certificates associated with the withholding statement does not conflict with any information in the NQI's account files for purposes of determining the withholding rate applicable to each payee. In response to comments questioning the level of knowledge applicable to the NQI with respect to this attestation, the final regulations have clarified that the same general level of knowledge applicable to other withholding agents (i.e., knows or has reason to know) applies to NQIs when relying on payee documentation for purposes of making the representation on the alternative withholding statement.

In addition, the final regulations have modified the requirements of an NQI withholding statement to remove the requirement that an NQI withholding statement must provide a chapter 4 recipient code for each payee, provided that the withholding agent is able to determine the proper chapter 4 recipient code applicable to each payee based on the documentation provided with the withholding statement (for example, based on the chapter 4 status provided on the Form W-8).

KPMG observation

Consistent with the proposed regulations, the final regulations confirm that a withholding statement must have all of the fields stated in the form instructions in order to be valid or must meet the requirements for an alternative withholding statement. Importantly, a withholding statement that does not contain every stated field, **must** contain the aforementioned representation from the NQI that the information in the NQI's records does not conflict with the relevant information contained in the withholding certificates associated with the withholding statement. This requirement continues to be missed on many withholding statements passed up from NQIs (and nonwithholding foreign partnerships (NWPs) and nonwithholding foreign trusts (NWTs)), and deficient withholding statements are not to be relied upon. In order to reduce the errors with respect to withholding statements, withholding agents need to consider preparing withholding statement templates that either provide all

of the requisite fields or that contain a “check box” at the bottom with language such as the following statement sufficient to meet the alternative withholding statement representation:

[] I hereby certify that the information contained on the withholding certificates associated with the persons identified on this withholding statement does not conflict with the account information maintained in my files with respect to such person.

As a reminder, NQIs are withholding agents under the FATCA and chapter 3 regulations and, accordingly, are subject to residual withholding obligations if the information passed up on a withholding statement is inaccurate. Therefore, it is important that NQIs (and NWP and NWTs) that pass up alternative withholding statements determine that there is no information in their records that would contradict the relevant information provided on the withholding certificates passed up before making the requisite representation at the bottom of the alternative withholding statement.

Electronically signed withholding certificates

As noted in the preamble, the final regulations clarify that the example provided in Reg. § 1.1441-1T(e)(4)(i)(B), illustrating when a withholding agent can determine that a withholding certificate is electronically signed, is merely intended to reflect one set of facts that would provide a withholding agent with sufficient facts to conclude that the form is signed electronically but is not intended to create a requirement that the facts set forth in the example must be met in order to reach that conclusion.

The final regulations also permit a withholding agent to rely upon, in addition to the contents of the withholding certificate, other documentation and information in the withholding agent’s records in order to determine whether the withholding certificate is electronically signed.

KPMG observation

The example addressed above indicates that a withholding agent could reasonably determine that a withholding certificate is signed electronically if the signature block contains the name of the person authorized to sign, a time and date stamp, and a statement that the form is electronically signed. These elements are typically present when utilizing a common method of signing forms electronically. However, as indicated above, the preamble to the final regulations makes it clear that it is not the intention of Treasury and the IRS to limit electronic signatures to one specific format, and a withholding agent may similarly conclude that a form is electronically signed based on other facts not present in the example.

Withholding certificates and withholding statements obtained through third-party repositories

The final regulations adopt the rules already in effect under temporary regulations regarding a withholding agent’s reliance upon withholding certificates and withholding statements furnished through third-party repositories. In addition, the final regulations add a clarification to the existing rules to confirm that the withholding agent is not required to make a separate request for the withholding certificate and obtain a separate authorization from the person providing the withholding certificate with respect to every payment made by the withholding agent. Instead, once a withholding certificate is obtained from the third-party repository, the normal rules for reliance on the withholding certificate apply, including the rules permitting a withholding agent to rely on a single withholding certificate on an obligation-by-obligation basis, or collectively for multiple obligations that are part of a single branch system, universal account system, or shared account system described in Reg. § 1.1471-3(c)(8).

KPMG observation

Pursuant to the clarification, a withholding agent that makes a request for a Form W-8 with respect to a specific account and is granted authorization by the account holder to obtain the Form W-8 through a

third-party repository may continue to rely on that Form W-8 for all payments made through that account until the Form W-8 expires or is otherwise determined to be unreliable due to a change in circumstances. In addition, the withholding agent may also rely upon that withholding certificate with respect to other accounts of the account holder if the accounts are part of a single branch system, universal account system, or shared account system (which is often the case if the accounts are electronically linked and able to share key information such as U.S. indicia).

Limitation on benefits requirement for treaty claims

The final regulations adopt the rules already in effect under temporary regulations that apply an actual knowledge standard to a withholding agent's review of the limitation on benefits (LOB) certification made as part of a treaty claim. The final regulations also adopt the one-year extension permitted under the proposed regulations for a withholding agent to obtain new treaty statements with LOB certifications with respect to preexisting accounts. Therefore, consistent with the proposed regulations, withholding agents that are relying on existing valid treaty statements associated with documentary evidence for offshore accounts will continue to have until January 1, 2020, to obtain a new treaty statement containing a specific LOB certification.

In addition, the final regulations adopt the exceptions contained in the proposed regulations that permit withholding agents to rely upon treaty statements with LOB certifications from tax-exempt organizations (other than pension trusts and pension funds), governments, and publicly traded corporations indefinitely, absent a change in circumstances. With respect to a treaty statement from a publicly traded corporation, the final regulations do make one modification to the LOB rules set forth in the proposed regulations by removing the record retention requirement that previously applied to those treaty claims. Instead, a withholding agent may continue to rely on a treaty statement from a publicly traded corporation as long as it is able to determine, based on publicly available information at each time the existing treaty statement would have otherwise been renewed, that the entity remains publicly traded.

Permanent residence address subject to hold mail instructions

The final regulations adopt the updates to the rules regarding the curing of a permanent address that is subject to hold mail instructions contained in the proposed regulations without change.

KPMG observation

As a reminder, the proposed regulations provide that the curative documentation required for an account holder whose only address is subject to a hold mail instruction and who is not claiming a treaty benefit is any documentary evidence that supports the person's claim of foreign status. For persons making treaty claims, however, the documentary evidence provided must support the person's claim of residence in the specific country for which the treaty benefits are being claimed. The proposed regulations also provided that the documentary evidence required for curing hold mail instructions need not contain a permanent residence address. Finally, the proposed regulations clarified that mere instructions to receive correspondence electronically do not constitute a hold mail instruction.

Technical corrections and conforming changes

The final regulations contain several minor updates to make technical and conforming changes to the existing chapter 3 and FATCA regulations. For example, prior regulation updates included a provision under the section 1461 regulations permitting a withholding agent to furnish a recipient copy of Form 1042-S electronically. The final regulations make a conforming update to Reg. § 1.6049-6(e)(4) to permit a payor to furnish a recipient copy of Form 1042-S electronically to a nonresident alien individual receiving deposit interest reportable under Reg. § 1.6049-4(b)(5). The final regulations also make minor revisions to the regulations discussing changes in circumstances to make it clear that the 90-day grace

period generally permitted when a change in circumstances occurs will also apply when a jurisdiction is treated as no longer having an Intergovernmental Agreement (IGA) in effect.

Updates do not apply to Forms W-9

Despite multiple requests that the updates applicable to Forms W-8 in the FATCA and the chapter 3 regulations be expanded to apply to Forms W-9, *Request for Taxpayer Identification Number and Certification*, the preamble to the final regulations states that the Form W-9 is out the scope of the FATCA and chapter 3 regulations. As the rules relevant to Forms W-9 are contained in other guidance, such as the regulations under section 3406 and the "requestor instructions" to Form W-9, Treasury and the IRS clarified that updates for Forms W-9 cannot be included in these final regulations.

KPMG observation

Note that while the updates related to Forms W-8 were not specifically adopted for Forms W-9, the Form W-9 rules in many circumstances do not contain the same limitations that are present in the rules applicable to Forms W-8. In addition, many of the allowances adopted with respect to the Forms W-8 are merely clarifications of rules previously in effect. Therefore, the fact that a specific allowance is not formally adopted with respect to the Form W-9 does not necessarily preclude that allowance from applying under the rules applicable to the Form W-9.

For more information, contact a tax professional with KPMG's Washington National Tax practice:

Laurie Hatten-Boyd | +1 (206) 213-4001 | lhattenboyd@kpmg.com

Danielle Nishida | +1 (212) 954-2774 | daniellenishida@kpmg.com

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