



# IRS issues Final and Temporary FATCA Coordination Regulations under Chapters 3 and 61 and Section 3406

## Closing the distance

On December 30, 2016, the IRS issued [final and temporary regulations](#) (“Final Coordination Regulations”) under chapters 3 and 61 and sections 871, 3406, and 6042 of the Internal Revenue Code of 1986 (“Code”) regarding withholding of tax on certain US source income paid to foreign persons, information reporting and backup withholding with respect to payments made to certain US persons, and portfolio interest paid to nonresident alien individuals and foreign corporations. The Final Coordination Regulations finalize certain proposed regulations, withdraw corresponding temporary regulations and contain new temporary regulations which provide additional rules under chapter 3.

These regulations were issued simultaneously with five other sets of IRS guidance: (1) [final and temporary regulations](#) under chapter 4; (2) [proposed regulations](#) under chapter 3; (3) [proposed regulations](#) under chapter 4; (4) a final foreign financial institution agreement (“FFI Agreement”) under [Rev. Proc. 2017-16](#); and (5) a final qualified intermediary agreement (“QI Agreement”) under [Rev. Proc. 2017-15](#). Detailed analyses of each package is available in separate summary documents.

The following sections highlight the regulation changes and their impact:

### **Determination of Classification / Residency**

#### **US branch treated as a US person**

The regulations no longer require a US branch acting as an intermediary to be a branch of a participating FFI, registered deemed compliant FFI or nonfinancial foreign entity (“NFFE”) in order to elect to be treated as a US person. The *Instructions for Form W-8IMY* currently define the phrase “US branch treated as a US person” to mean a US branch of a participating FFI, registered deemed-compliant FFI, or NFFE that is treated as a US person under Regulations section 1.1441-1(b)(2)(iv)(A). As a result of the change in the regulations, such US branches are no longer required to specify a chapter 4 status or provide a Global Intermediary Identification Number (“GIIN”) on a Form W-8IMY.

## **Nonresident alien individuals and dual residents**

The regulations clarify when a dual resident taxpayer will be considered a nonresident alien individual for purposes of chapters 3 and 4. A dual resident taxpayer is an individual who is considered a resident of the US and also a resident of a treaty country. If the alien individual determines that he or she is resident in, and claims treaty benefits of, a foreign country to reduce US income tax liability, then the individual is treated as a nonresident alien for purposes of chapter 3 and 4.

## **US Tax Documentation Requirements**

### **Expansion of Format Acceptable for Documentation Received**

#### **Prior versions of forms acceptable until end of calendar year in which new forms issued**

When the IRS periodically releases updated versions of withholding certificates, withholding agents generally have a six-month window to continue to accept the prior version of the form before they are required to collect the new version. With these regulations, the IRS has extended this window to the later of six months or the end of the calendar year in which the revised version was issued.

#### **Electronic documentation now acceptable to remediate exposure for payments before March 6, 2014**

When the 2014 regulations were released, the IRS removed the requirement that Forms W-8 collected by withholding agents be original paper forms (or "hard copies"), giving the alternative to receive documentation electronically by facsimile or e-mail instead. While this change was welcomed by the industry, the 2014 regulations only permitted electronic documentation for payments made after March 6, 2014. Meanwhile, numerous withholding agents have been engaged in remediation efforts to collect documentation to associate with prior-year payments, prompting them to continue to require hard copies of the Forms W-8. In these regulations, the IRS has modified the effective date, so that an otherwise valid Form W-8 received by facsimile or scanned and received electronically is valid for all a taxpayer's open tax years, including tax years currently under examination by the IRS.

#### **Electronic documentation acceptable so long as no actual knowledge the form was transmitted by unauthorized personnel**

In these regulations, the IRS further specifies that documentation received electronically is acceptable unless the withholding agent has actual knowledge that the form was transmitted by a person not authorized to do so by the person required to execute the form. As a result, withholding agents are not obligated to collect authorization letters or other forms of documentary evidence to establish the identity of the transmitter.

#### **Electronic signature acceptable on a withholding certificate if it meets a minimum standard**

Withholding agents, regardless of whether the withholding agent has established an electronic system, are now permitted to accept electronic signatures on withholding certificates, so long as the circumstances reasonably demonstrate that the withholding certificate was signed by the person identified on the form or by a person authorized by such person to sign the form. The IRS has stated that a typed name on the signature line will not suffice, but that a "signature block" would be acceptable (e.g., a time and date stamp, a statement that the certificate has been electronically signed, and the name of the person authorized to sign the form).

#### **Documentation furnished through a third-party repository acceptable under certain conditions**

In these regulations, the IRS has added a subsection permitting withholding agents to accept withholding certificates furnished through a third-party repository under the following conditions: (i) the withholding certificate was uploaded or provided to the third-party repository; (ii) there are processes in place to ensure that the withholding certificate can be reliably associated with a specific request from the withholding agent and a specific authorization from the person providing the certificate; and (iii) each request and authorization must be associated with a specific payment (or a specific obligation).

Furthermore, the IRS will permit withholding agents to accept intermediary withholding statements furnished through a third-party repository, if: (i) the intermediary providing the documentation will provide an updated withholding statement in the event of any change in circumstances (including a change in allocation percentages); and (ii) the repository has a process in place to update withholding agents when there is a new withholding statement.

#### **Electronic system for Form 8233**

The IRS has expanded the permitted use of electronic systems for receiving forms ("e-form systems") to include *Form 8233: Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a*

*Nonresident Alien Individual.* However, the e-form system must meet all of the same standards for receipt of Form 8233 as it would for the Form W-8 series.

#### **Standard of knowledge for documentation received from an intermediary using an electronic system**

The IRS has elected not to modify the standards of knowledge for payments to intermediary and flow-through entities that use an e-form system, since the IRS has promulgated regulations that permit the acceptance of electronic signatures on the forms. In doing so, the IRS has indicated its intent to permit reliance on documentation received through an e-form system with an electronic signature that is then provided by the intermediary or flow-through entity (including a nonqualified intermediary, nonwithholding foreign partnership or nonwithholding foreign trust) to the withholding agent.

#### **Documentary Evidence**

##### **Hold mail instruction**

Generally, an address subject to hold mail instructions is not considered a permanent residence address. However, the IRS has modified the definition of "permanent residence address" to add that an address subject to hold mail instructions can be relied upon as a permanent residence address if the person provides documentary evidence establishing the person's residence in the country where they are claiming to be a resident. Conversely, a hold mail instruction provided after a withholding certificate is received will now be considered a change in circumstances requiring additional documentary evidence to cure.

#### **Intermediary Documentation and Withholding Statements**

##### **Revisions to nonqualified intermediary withholding statement for US payee pool**

A withholding statement provided by a nonqualified intermediary ("NQI") may include an allocation of a payment to a chapter 4 withholding rate pool of US payees ("US payee pool") when certain requirements are satisfied. The US payee pool is defined in the regulations as either:

1. Account holders of a US payor receiving payments not subject to withholding under chapter 3 or 4 or under section 3406 that are either:
  - o Holders of non-consenting US accounts maintained by a reporting Model 2 FFI; or
  - o Holders of accounts with US indicia maintained by a reporting Model 1 FFI for which appropriate documentation sufficient to treat the account holders as other than US persons has not been provided to the FFI.
2. Account holders of a non-US payor (that is an FFI) that are account holders not subject to withholding under chapter 3 or chapter 4 or under section 3406 and that are also:
  - o Holders of US accounts that the FFI reports as US accounts under FATCA for the year in which the payment is made;
  - o Holders of US accounts that the FFI reports pursuant to the conditions of its applicable deemed-compliant status for the year in which the payment is made; or
  - o Holders of US accounts that a reporting Model 1 FFI reports as reportable US accounts pursuant to an applicable Model 1 IGA, and which includes the US taxpayer identification numbers ("TINs") of such account holders, for the year in which the payment is made.

Under the 2014 regulations, an allocation of a payment to a US payee pool of a US payor (group 1 above) is not permitted for a payment subject to chapter 3 withholding, but no such limitation applies to a US payee pool for a non-US payor (group 2 above) for a payment that is allocable to US accounts (or reportable U.S accounts). As a result of the distinction between the treatment of group 1 and 2, the final regulations do not permit a withholding agent to treat as valid an allocation of a payment subject to chapter 3 withholding to a withholding rate pool of US payees unless the NQI identifies the pool as group 2 by citing Treasury Regulation section 1.1471-3(c)(3)(iii)(B)(2)(iii) or describing them as set forth above. This requirement will apply to payments starting on or after April 1, 2017.

##### **Alternative (simplified) NQI withholding statement permissible**

Under the 2014 regulations, an NQI withholding statement is required to include the name, address, TIN (if any), and type of documentation received by the NQI for each payee. However, since NQIs transmit the underlying tax documentation for each payee, much of this information is not essential for the withholding agent to appropriately withhold and report. Therefore, the IRS has modified this regulation to permit an alternative withholding statement for NQIs, to the extent that the NQI provides the withholding agent with beneficial owner withholding certificates (and not

only with documentary evidence). The alternative withholding statement is not required to include information that is also included on the withholding certificates and is not required to specify the rate of withholding applicable to each payee, as long as the withholding agent can determine the appropriate rate from the information on the withholding certificates. The withholding statement must contain a representation from the NQI that the information on the withholding certificates is not inconsistent with any other account information the NQI has for the beneficial owners for determining the rate of withholding with respect to each payee.

#### **Revisions related to qualified intermediaries**

These regulations clarify that when a qualified intermediary ("QI") is a participating FFI or a registered deemed-compliant FFI for purposes of chapter 4, it may represent that it assumes chapter 61 reporting responsibilities (and reports accordingly) when it reports its US accounts in accordance with its FATCA filings (under the coordination rules of § 1.6049-4(c)(4)). This representation is made in Part III of the Form W-8IMY (Rev. September 2016).

These regulations also clarify that, in certain cases, for allocating payments to US non-exempt recipients on withholding statements, QIs may include a chapter 4 withholding rate pool of US payees in the same zero-rate pool as non-US persons that are exempt from chapter 3 withholding.

Lastly, these regulations remove from the list of prospective QIs the specific category of foreign corporations presenting treaty benefit claims on behalf of their shareholders.

#### **Form W-8ECI**

##### **Updated language for retroactive affidavit for Form W-8ECI**

The IRS prescribes the format for the retroactive affidavit (or affidavit of unchanged status) for Form W-8ECI. In order to apply to payments before the signature date, the Form W-8ECI must be associated with a signed affidavit that states that the information and representations contained on the certificate were accurate as of the time of the payment and either: (i) the beneficial owner has included the income on its US tax income tax return for the taxable year in which the income must be reported; or (ii) the beneficial owner will include the income on its US income tax return for the taxable year in which the income must be reported and the due date for filing the return (including any applicable extensions) is after the date on which the affidavit is signed.

##### **Indicia of US status acceptable on Form W-8ECI**

Since account holders providing Form W-8ECI are likely to have a US address as well as other US indicia, the IRS has modified the regulations to clarify that the existence of US indicia on a Form W-8ECI will not invalidate the form.

#### **TIN Requirements**

##### **Form 8233 US TIN requirement has not changed**

The IRS has declined to modify the requirement that a US TIN be included on the *Form 8233: Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual*. All Forms 8233 will still require a US TIN in order for a nonresident alien individual to claim treaty benefits for reduced withholding.

##### **Increased requirement for financial institutions to collect foreign TIN and date of birth**

Starting January 1, 2017, for accounts maintained at a US office or branch, financial institutions will have to collect the account holder's foreign TIN and date of birth (individuals only) on the withholding certificate.<sup>1</sup> Furthermore, for withholding certificates associated with payments made on or after January 1, 2018, if an account holder does not have a foreign TIN, the account holder is required to provide a reasonable explanation for its absence (e.g., the country of residence does not provide TINs) in order for the withholding certificate not to be considered invalid.

Although the IRS has intensified the foreign TIN collection requirements, the regulations did not extend back the date that foreign TINs can be used to substantiate treaty claims. Unfortunately, foreign TINs are still only effective for treaty claims for payments made on or after July 1, 2014. For remediation of exposure for payments made before July 1, 2014, withholding agents will still be required to collect a US TIN on the withholding certificate (with a retroactive affidavit).

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<sup>1</sup> The IRS will not consider a withholding certificate without a date of birth invalid if the financial institution has this information otherwise in its files.

## **Indefinite Validity Period for Withholding Certificates**

### **Increased flexibility in timing of receipt of documentary evidence to acquire indefinite validity (foreign status only)**

In 2014, the IRS introduced an indefinite validity period for withholding certificates provided to establish foreign status if documentary evidence is provided at the same time as the withholding certificate. In practice, the withholding certificate and documentary evidence are often not provided at the same time. Therefore, the IRS has modified the timing requirement for receipt of documentary evidence. For individuals, the IRS will treat the withholding certificate and documentary evidence as "provided together" if they are received within 30 days of one another, regardless of which is received first. For entities, the IRS has removed the "provided together" requirement from the regulation and instead requires that the withholding agent receives both before either the withholding certificate or the documentary evidence would otherwise expire.

### **Revocation of indefinite validity for documentation furnished to claim treaty benefits**

Under the 2014 regulations, a treaty statement provided on a Form W-8BEN-E expires on the last of the third calendar year following the date the form was signed. On the other hand, a treaty statements provided with documentary evidence to claim a reduced rate of withholding under a tax treaty is valid indefinitely. In these regulations (as well as on the most recent version of the Form W-8BEN-E), the IRS has introduced more explicit requirements with respect to satisfying the limitation on benefits requirements for claiming a treaty rate. In part to enhance the reliability of treaty claims, and to have a consistent validity period regardless of how the treaty statement is provided, the IRS has elected to retract the indefinite validity provisions for treaty statements provided with documentary evidence. Instead, treaty statement regarding limitation on benefit that is associated with documentary evidence will expire on the last day of the third calendar year following the year in which the statement was provided to the withholding agent. Any existing accounts documented with documentary evidence before the publication of the regulations will expire on January 1, 2019.

## **Presumption Rules and US Indicia Rules**

### **Allowance for presumption of foreign status for certain entities with designation "corporation" or "company"**

If an undocumented entity is a type of entity that is on the per se list of foreign corporations but also contains the designation "corporation" or "company," then the withholding agent can only presume the entity to be a non-US person if it can obtain a document that reasonably demonstrates that the entity is incorporated in the relevant non-US jurisdiction. An entity also will continue to be presumed foreign under the section 1441 regulations if, among other circumstances, the withholding agent's communications are mailed to a foreign address.

### **No presumption of foreign status of an entity based on documentary evidence or GIIN**

The IRS will not permit a withholding agent to presume that an exempt entity is a non-US person simply based on documentary evidence such as a certificate of incorporation. Similarly, the IRS will not permit a withholding agent to presume that an entity is a non-US person simply because it has a GIIN on file (since US persons can also obtain GIINs). Correspondingly, withholding agents will not be permitted to cure US indicia by confirming that the entity has a GIIN on the current published FFI list.

### **Exemption from US indicia review extended to preexisting obligation before January 1, 2015**

In the 2014 regulations, the IRS advised that withholding agents generally do not have to take additional US indicia into account for a preexisting obligation of a direct account holder if the foreign status of the account holder was documented by the withholding agent for purposes of chapter 3 or chapter 61 before July 1, 2014. An example of this additional US indicia is a current telephone number for the account holder in the US and there is no other current telephone number outside the US on file for the account holder. These regulations extend this standard of knowledge to preexisting obligations established between July 1, 2014 and January 1, 2015.

### **Presumption rules for bank deposit interest**

These regulations add "US source bank deposit interest not subject to chapter 4 withholding" to the types of payments, including short-term interest and OID, subject to special presumption rules when paid to a foreign intermediary or flow-through entity. It was inadvertently left out of the temporary regulations. This presumption rule permits a participating FFI (including a reporting Model 2 FFI) or registered deemed compliant FFI (including a reporting Model 1 FFI) to allocate a payment of US source bank deposit interest to a chapter 4 withholding rate pool of US payees on its withholding statement rather than allocate to each US non-exempt recipient, so long as the payment is not subject to chapter 4 withholding.

## US Tax Withholding

### Tax Treaty Claims and the Limitation on Benefits

#### Limitation on benefits regulations modified to be consistent with the 2016 Form W-8BEN-E and Instructions

The IRS modified the chapter 3 regulations pertaining to the limitation on benefits requirement to be consistent with the revised April 2016 Form W-8BEN-E and instructions. These modified regulations require that the taxpayer identify the specific limitation on benefits provision for which they are claiming treaty benefits.

An additional reporting field for the specific limitation on benefits provision has been added to the 2016 Form 1042-S. However, the instructions to the 2016 Form 1042-S indicate that this field is only applicable when the withholding agent receives new documentation with the limitation on benefits provision.

#### Reliance permitted unless actual knowledge limitation on benefits provision is unreliable or incorrect

The IRS clarified that withholding agents are permitted to rely on a taxpayer's limitation on benefits information unless it has actual knowledge that the information provided with respect to the limitation on benefits is unreliable or incorrect.

#### Withholding agents charged with reason to know if a treaty is in force

The IRS has clarified in the regulations that the withholding agent is deemed to have reason to know that a treaty claim is unreliable or incorrect when the income tax treaty that the taxpayer is referencing on its withholding certificate either does not exist or is not in force. As a result, withholding agents will be held liable for failure to apply 30% withholding on payments where the treaty claim should have been denied because the treaty either did not exist or was not in force.

### Adjustments/Clarifications of Appropriate Withholding Rates

#### Withholding on US Source Gross Transportation Income ("USSGTI")

Section 887(a) imposes a 4% tax on US source gross transportation income ("USSGTI") derived by a foreign person, which includes income from use of a vessel/aircraft or the performance of services directly related to the use of a vessel/aircraft. If USSGTI paid is effectively connected with a trade or business in the United States, then the amount is not subject to the 4% tax. As an amount of US source income paid to a nonresident alien, it was unclear if amounts of USSGTI are subject to withholding at 30% under chapter 3. These regulations clarify that amounts of USSGTI are not included in the definition of "amounts subject to withholding" under chapter 3, and therefore, not subject to withholding under sections 1441 or 1442. From a withholding agent's perspective, guidance on the type of substantiation to be relied upon to apply this exclusion are not clearly spelled out in the Code or the regulations. Acknowledging this lack of guidance, the IRS requests comments regarding documentation requirements for applying this exception.

#### Increase to 15% withholding for distributions from qualified investment entities and US real property holding companies

As part of the enactment of the Protecting Americans from Tax Hikes Act of 2015 ("PATH Act"), the withholding rate for dispositions of US real property interests by non-US persons increased from 10% to 15% for dispositions occurring after February 16, 2016 (with certain exceptions for acquisitions of residences). The regulations in section 1.1441-3 include provisions coordinating the withholding rules under section 1441 with those under section 1445 for distributions from qualified investment entities and US real property holding companies. Therefore, these regulations update the applicable withholding rate in the section 1441 regulations to 15% to incorporate the PATH Act rate change for these distributions.

## US Tax Information Reporting

### Form 1099 Reporting

#### PFIC certification requirement for Form 1099-DIV exception

In the 2014 regulations, the IRS introduced an exception to Form 1099-DIV reporting for payments made by a paying agent on behalf of a passive foreign investment company ("PFIC"). This exception was conditioned on the paying agent obtaining an annual written certification signed by an officer of the PFIC that states that the PFIC meets the definitions in section 1297(a) for each calendar year during which the exception is to be applied and the paying agent has no reason to know that the written certification is unreliable or incorrect. In these regulations, the IRS has opted to maintain that the certification must be reissued annually, but has granted greater leniency in the signature authority requirement so that any person that has authority can sign the certification on behalf of the PFIC.



### **No decision to modify definition of “paid and received outside the United States”**

The IRS indicated that it has not made a decision as to whether to modify the definition of “paid and received outside the United States,” but that they will continue to consider this issue. The decision to modify this definition would impact the range of payments treated as reportable payments for non-US payors and non-US middlemen.

### **Form 1042 and 1042-S Reporting**

#### **Electronic furnishing of recipient statements of Form 1042-S**

Starting in calendar year 2017 (for payments made in 2016), withholding agents are permitted to furnish recipient statements of the Form 1042-S electronically under the same conditions applicable to recipients of other forms (including Forms 1099). The eligibility requirements cross-reference the rules under Treas. Reg. § 1.6050W-2, which require affirmative consent by the recipient to receive the Form 1042-S electronically, as well as that the withholding agent have appropriate hardware or software sufficient to furnish the statements to the recipients. The benefits of this change include reduced printing, packaging and postage costs to physically mail the Forms 1042-S, as well as improved accuracy of delivery for recipients that have changed address without providing notice.

#### **Truncation of foreign TINs on recipient copies of Form 1042-S**

For scenarios where a foreign TIN is included on the Form 1042-S, the IRS will permit the withholding agent to truncate the foreign TIN on the recipient copy consistent with the truncation of the US TIN. This change will be reflected in updated Instructions to Form 1042-S.

#### **Authorized agents and Form 8655**

Under the 2014 regulations, a withholding agent was required to file *Form 8655: Reporting Agent Authorization* with the IRS if the withholding agent appointed an agent to act as its reporting agent for filing Form 1042 or making deposits on its behalf. The IRS has modified those regulations to provide that the withholding agent is only required to file a Form 8655 if its agent files a Form 1042 on behalf of the withholding agent and the agent identifies itself (instead of the withholding agent) as the filer on the Form 1042.

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