

Information Reporting and Withholding



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Presenter

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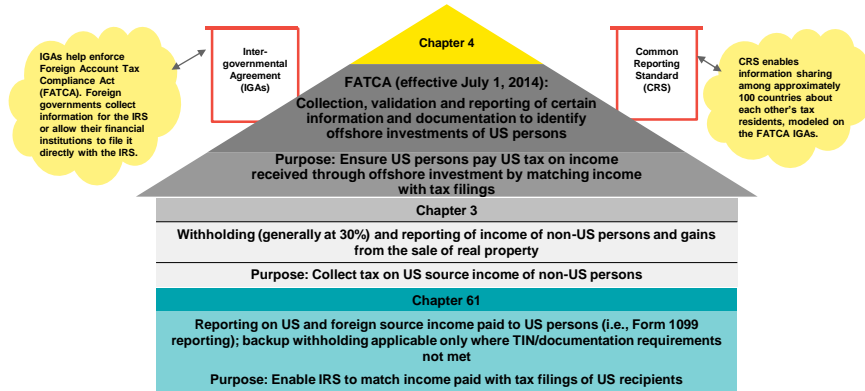


Agenda

- ▶ IRW House
- ▶ Payments to US persons (“chapter 61”)
- ▶ Payments to non-US persons (“chapters 3 and 4”)
- ▶ Six step process
- ▶ Form validation

IRW House

The IRW house



Chapter 61

“Reportable payments”

- ▶ Payors must issue Forms 1099 to report “reportable payments” to the payees and the IRS each year
- ▶ Most reportable payments made by Accounts Payable Departments are reportable on Forms 1099-MISC
- ▶ Why do we care?
 - ▶ Backup withholding liability
 - ▶ Information reporting penalties

“Reportable payments” (cont’d)

- ▶ “Reportable payments” include:
 - ▶ Payments for services rendered whether by outside firms or independent contractors (including incidental amounts for parts and materials)
 - ▶ Director fees
 - ▶ Rents
 - ▶ Royalties
 - ▶ Prizes and awards

Examples of reportable payments

- ▶ Service agreements
- ▶ Advertising
- ▶ Payments to attorneys
- ▶ Temporary agencies
- ▶ Country club dues
- ▶ Parking fees
- ▶ Hotels
- ▶ Landscaping
- ▶ Printing
- ▶ Taxis/limousines
- ▶ Couriers
- ▶ Catering

Procurement cards

- ▶ Procurement cards (or payment cards) are essentially corporate credit cards
- ▶ Payments were reportable to the vendor by the company using the card and potentially subject to backup withholding
- ▶ However, for payments made after 31 December 2010:
 - ▶ Payments made via procurement cards no longer subject to reporting by the payor
 - ▶ Payments made via procurement cards are subject to reporting by the bank or other entity that processes the payment for the merchant
 - ▶ Beware payments where the payor acts as a middleman (or “aggregator”) between the true vendor and the customer

Special rules

- ▶ Corporate exception
 - ▶ Payments to corporations are not reportable unless they are made for either legal or medical services
- ▶ Reimbursements
 - ▶ Not reportable if the payee accounts to the payor for the expenses
- ▶ \$600 minimum
- ▶ Payments for merchandise and goods are generally not subject to reporting
 - ▶ However, when the goods are furnished “incident to” the services, the entire amount paid for services and goods is reportable

Special rules (cont'd)

- ▶ Gross proceeds reporting to attorneys
 - ▶ Special “gross proceeds” reporting applies to ANY payment made to an attorney including payments made by one attorney (or law firm) to another
 - ▶ Gross proceeds are typically NOT taxable to the attorney
 - ▶ Instead they usually represent monies due to the attorney’s client
 - ▶ Attorney recipients of gross proceeds have generally not rendered services to the payor
 - ▶ Gross proceeds paid to attorneys are reportable on Forms 1099-MISC in box 14

Settlement payments

- ▶ **Threshold issues**
 - ▶ Is the payment includible in the claimant's income?
 - ▶ Excludable if they represent damages (other than punitive damages) received on account of physical injuries or physical illness
 - ▶ Is the payment “fixed or determinable income”?
 - ▶ Payments for property damages are generally not reportable
- ▶ **“Settlements” do not require an attorney**
 - ▶ Payments made to customers to “make them whole” or to “make them happy” are generally not gross proceeds, interest or dividends
 - ▶ But may be “fixed or determinable income”

Settlement payments

- ▶ **When reporting is required**
 - ▶ Generally on Form 1099-MISC, in box 3 – Other income
 - ▶ Subject to backup withholding without the payee's TIN
 - ▶ Perhaps on a Form W-2
 - ▶ To the extent the payment represents compensation for services rendered by an employee or former employee
- ▶ **Checks payable to the claimant's attorney or jointly to the claimant and their attorney**
 - ▶ Reportable to the attorney on Form 1099-MISC, in box 14
 - ▶ Perhaps also to the claimant
 - ▶ If the settlement is reportable to the claimant, report the entire amount of the settlement to the claimant, irrespective of to whom the payment is actually made

Mechanics

- ▶ Forms 1099 are due to the payee by January 31
- ▶ Forms 1099 are due to the IRS by February 28, unless the payor files their information returns electronically, in which case the due date is March 31
 - ▶ However, starting with 2016 Forms 1099-MISC, returns reporting nonemployee compensation (in box 7) are due to the IRS by January 31
- ▶ Report
 - ▶ Rents in box 1
 - ▶ Royalties in box 2
 - ▶ Other income in box 3
 - ▶ Nonemployee compensation in box 7
 - ▶ Gross proceeds in box 14

TIN Matching program

- ▶ Widespread TIN Matching program is now available
 - ▶ To filers of Forms 1099-B, DIV, INT, MISC, OID and PATR
- ▶ Payors can submit TINs and corresponding payee names for matching against the IRS' records
 - ▶ System will confirm whether a match exists
 - ▶ It will not provide correct name/TIN combinations
- ▶ Accessible through either
 - ▶ An on-line interactive session (25 TIN match requests at one time) or
 - ▶ Electronic bulk requests (100,000 requests each) processed within 24 hours
- ▶ Register on the IRS' e-service registration page
 - ▶ Located on the IRS web site (www.irs.gov)
 - ▶ Under the Tax Professionals' Section

Backup withholding liability

- ▶ Payors must backup withhold if they have not obtained a payee's TIN
 - ▶ To Obtain Form W-9 or Not to Obtain Form W-9
- ▶ B notices
 - ▶ Notify payees within 15 business days
 - ▶ Start backup withholding after 30 business days unless the payee provides a certified TIN
 - ▶ Special rules apply when a payor receives two B Notices for the same payee in a three-year period
- ▶ Remember: A payor is always liable for any tax they should have withheld but did not

Information reporting penalties

- ▶ For 2017 filings
 - ▶ \$260 for each failure to file a correct and/or timely return with the IRS, up to a maximum of \$3,218,500 per year per payor
 - ▶ \$260 for each failure to furnish a correct and/or timely return to the payee, up to a maximum of \$3,218,500,000 per year per payor
- ▶ For 2018 filings, \$270 per form up to \$3,282,500
- ▶ Notice 972-CG
 - ▶ Establishing reasonable cause
 - ▶ Significant mitigating factors or failure arose from events beyond the filer's control AND
 - ▶ Payor acted in a responsible manner
- ▶ Remember: De minimis safe harbor for incorrect dollar amounts of \$100 or less or \$25 with respect to an amount of tax withheld

Chapter 3

The IRS' ground rules

- ▶ 30% NRA withholding is generally required on US source “fixed or determinable income” paid to foreign persons (entities and individuals)
 - ▶ Reduced withholding rates are available if the payee furnishes a valid treaty claim
- ▶ There are no exempt recipients for NRA withholding and reporting purposes. All foreign persons are subject to these rules.
- ▶ We **MUST** treat payments of “fixed or determinable income” as US source where we don’t know whether a payment is US or foreign source
- ▶ A payor is responsible for any withholding tax it should have withheld but did not, *plus* penalties and interest

Chapter 4

What is FATCA?

- ▶ The Foreign Account Tax Compliance Act (FATCA) is a 2010 US tax law designed to identify US taxpayers who may be evading US taxation by investing in offshore investment vehicles or foreign accounts
- ▶ FATCA introduces new documentation standards, information reporting and compliance requirements for all entities as payors
- ▶ FATCA was generally effective on 1 July 2014, but with phased in effective dates for various specific requirements through 2017
- ▶ FFIs are required to enter into agreements with the IRS to become “participating FFIs”
- ▶ FATCA imposes a 30% withholding tax on certain US-connected payments made to entities that choose not to participate in FATCA and payees who refuse to be properly documented

FATCA fundamentals

- ▶ Expansive new reporting and withholding rules aimed at ensuring that US persons with financial assets outside the US pay their US tax
- ▶ Reporting focus is on ultimate shareholders/owners
- ▶ FATCA categorizes entities as
 - ▶ US entities – US withholding agents (USWAs)
 - ▶ Foreign entities - foreign financial institutions (FFIs) and non-financial foreign entities (NFFEs)
 - ▶ FFIs are generally required to enter into agreements with the IRS to perform substantial due diligence, information reporting and withholding on their account holders or suffer 30% withholding on payments made to them
 - ▶ NFFEs must to certify as to “substantial” US owners or suffer 30% withholding
- ▶ Phased in effective dates, began 1 July 2014

FATCA’s impact on multi-nationals

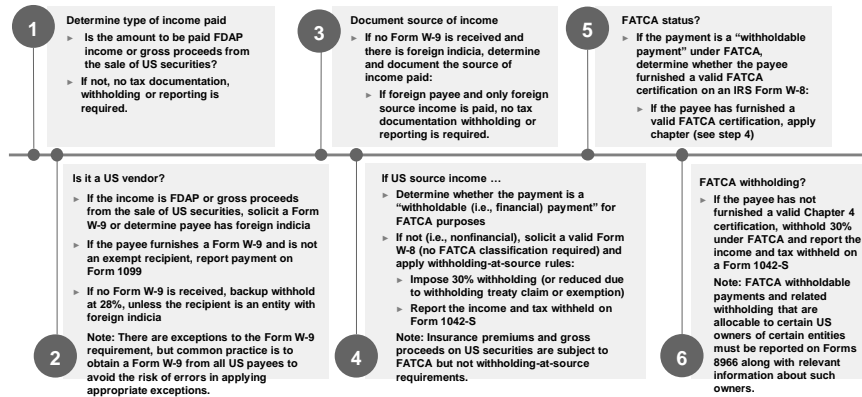
- ▶ FATCA applies to all entities, impact on each entity will vary based on footprint and business lines
- ▶ FATCA presents financial risks and operational challenges for most companies
- ▶ FATCA impacts US entities as payors and multi-national entities as both payors and payees
- ▶ 30% withholding tax applies to noncompliant organizations and recalcitrant account holders
- ▶ Failure to comply with FATCA will make it difficult to do business with compliant institutions
- ▶ FATCA impacts business operating models from vendor onboarding to operations and compliance

FATCA vs chapter 3

- ▶ FATCA is an additional reporting and withholding regime that applies before the NRA/section 1441 regime, but many of the concepts converge
- ▶ NRA vs. FATCA – generally,
 - ▶ NRA rules are aimed at withholding US tax and reporting of US source fixed or determinable, annual or periodical (FDAP) income paid to non-US persons
 - ▶ FATCA is not designed to impose a withholding tax, but rather is designed to capture information about US persons. Withholding generally only applies if there are payments to:
 - ▶ NFFEs that fail to either identify and disclose substantial US owners or certify they have no substantial US owners, OR
 - ▶ Nonparticipating (or presumed nonparticipating) FFIs

Six step process

Six-step process to IRW compliance



Step One: What is FDAP?

- Step 1: Determine whether an amount to be paid is fixed, determinable, annual, periodical (FDAP) income or gross proceeds from the sale of US securities
 - If it is not, no documentation, withholding or reporting is required

FDAP

- ▶ The term “FDAP” is merely descriptive of the character of a class of income and is broader than the term implies
 - ▶ A payment not made annually or periodically (for example a one-time payment) does not prevent it from being FDAP
 - ▶ An item of income is determinable if the amount to be paid is unknown but there is a basis of calculation by which the amount may be ascertained later
 - ▶ For example, interest is determinable even if it is contingent upon factors that are not fixed at the time of payment

FDAP (cont.)

Items of income subject to withholding include:

- ▶ Interest
- ▶ Dividends
- ▶ Rent
- ▶ Salaries
- ▶ Wages
- ▶ Premiums
- ▶ Annuities
- ▶ Compensations
- ▶ Remunerations
- ▶ Emoluments
- ▶ Certain gains, or
- ▶ Other fixed or determinable annual or periodical income (FDAP)

FDAP (cont.)

- ▶ Generally think in terms of amounts reportable on Forms 1099-MISC
 - ▶ Payments for services rendered
 - ▶ Rents
 - ▶ Royalties and licensing fees
 - ▶ Prizes and awards
- ▶ Special types of payments
 - ▶ Certain gains
 - ▶ Certain transportation activities
 - ▶ Certain communication activities

Step two: US vendors

- ▶ If the income is FDAP (or gross proceeds from the sale of US securities), solicit a valid Form W-9 from the payee or determine payee has foreign indicia
 - ▶ If the payee furnishes a Form W-9 and is not an exempt recipient, report payment on a Form 1099
 - ▶ A payee that has not furnished a Form W-9 should be backup withheld upon unless it is an "eyeball exempt recipient."
 - ▶ Note: Non-financial payments do not require a Form W-9, although a non-exempt recipient must furnish their TIN to avoid withholding and an exempt recipient that does not meet the eyeball test must provide a Form W-9 to be treated as an exempt recipient
 - ▶ Common practice is to get a Form W-9 from all US payees

Form W-9

- ▶ **Form W-9, Request for Taxpayer Identification Number and Certification**
 - ▶ To be valid requires (1) Name, (2) TIN, (3) Signature and (4) Date
 - ▶ Disregarded entities
 - ▶ Enter the owner's name on the "Name" line. The name on the "Name" line must be the name shown on the income tax return on which the income will be reported
 - ▶ Enter the owner's TIN in the taxpayer identification number box, Part I
 - ▶ Enter the disregarded entity's name on the "Business name/disregarded entity name" line
 - ▶ Can indicate status as an exempt recipient by indicating a C Corporation (or an LLC taxed like a corporation) and/or by furnishing an exempt payee code

Presumption rules currently applicable to chapters 3, 4 and 61

- ▶ The presumption rules determine the status of a payee as US or foreign in the absence of documentation
 - ▶ Undocumented individuals are presumed to be US persons
 - ▶ Certain exempt recipients ("The Bad 8") are presumed foreign payees (thus, when undocumented, nonparticipating FFIs subject to FATCA withholding)
 - ▶ Corporations; foreign governments; international organizations; foreign central banks of issue; financial institutions; nominees/custodians; brokers; and swap dealers
 - ▶ Note, this rule does not apply if the payor "classified" the payee as an exempt recipient prior to 1 July 2014
 - ▶ All other entities (including the "Good 9") are subject to the "old" indicia test – treat as foreign if indicia of foreign status is present
 - ▶ Added foreign telephone number as type of foreign indicia (for "accounts" opened on or after 1 July 2014)

Step three: US source

- ▶ If no Form W-9 received and there is foreign indicia, determine and document source of income
 - ▶ If the income is foreign source, no withholding or reporting is required

US source income

- ▶ US source income includes:
 - ▶ Payments for professional services performed in the US, and related fees, commissions, etc.
 - ▶ Examples
 - ▶ Legal or accounting services performed in the US
 - ▶ Fees paid to members of the board for attendance at meetings held in the US
 - ▶ Guest lecturers, speakers, etc.
 - ▶ Note: Services may be part of larger invoice, e.g., fees paid for installation, training & maintenance may be imbedded in a contract for the purchase of computer hardware
 - ▶ Service provider should tell us how much of any invoice is US source
 - ▶ And someone internally who “should know” should review the allocation for reasonableness

US source income (cont.)

- ▶ US source income also includes:
 - ▶ Rent paid for the use of tangible or real property used in the US
 - ▶ Royalties and licensing fees paid for the use of intangible property used in the US
 - ▶ Subscription fees for data accessed from a US server
 - ▶ Sponsorships of events held in the United States by foreign entities

US source income (cont'd)

- ▶ US source income does not include:
 - ▶ Payments for services performed outside the US, and related fees, commissions, etc.
 - ▶ Expenses reimbursed under an accountable plan
- ▶ Income partially earned in the US and partially earned outside the US
 - ▶ Withholding/reporting must be allocated between US source and foreign source
- ▶ When we don't know whether a payment is US or foreign source, we **must** treat it to be US source

Software

- ▶ Software – Four different categories of software transactions can apply
 - ▶ Transfer of a “copyright right” in a computer program
 - ▶ The provision of “know-how” relating to computer programming techniques
 - ▶ A transfer of a copy of the computer program (a “copyrighted article”)
 - ▶ The provision of services for the development or modification of a computer program

Software

- ▶ Software – Copyright right
 - ▶ A transfer of a “copyright right” in a computer program
 - ▶ A right to make copies for distribution to the public
 - ▶ Use by employees in connection with employment is not considered “made to the public”
 - ▶ The right to prepare derivative computer programs based on the copyrighted computer program
 - ▶ The right to make a public performance of the computer program, or
 - ▶ The right to publicly display the computer program
 - ▶ Transaction(s) described above are classified as either;
 - ▶ A sale or exchange (sales of copyrights are subject to withholding) if there has been a transfer of all substantial rights in the copyright, or
 - ▶ A license generating royalty income where not all substantial rights have been transferred

Software

- ▶ Software – “Know-how”
 - ▶ The provision of “know-how” relating to computer programming techniques
 - ▶ This applies where the information relates to computer programming techniques, furnished under a contract establishing conditions preventing unauthorized disclosure, and is considered property subject to trade-secret protection.
 - ▶ IRS has taken the position that payments for use of know-how are in the nature of royalty income

Software

- ▶ Software – Copyrighted article
 - ▶ A transfer of a copy of the computer program (a copyrighted article)
 - ▶ This includes a copy of a computer program from which work can be perceived, reproduced, or communicated, either directly or with the aid of a machine
 - ▶ If a copy of a computer program is transferred, but none of the rights described under the “copyright right” or the conditions of “know-how”, apply, then the transfer falls under this default classification
 - ▶ A transfer of a copyrighted article is either
 - ▶ A sale or exchange of property because the benefits and burdens of ownership have been transferred (no withholding), or
 - ▶ A lease generating rental income because insufficient benefits and burdens of ownership have been transferred

Software

▶ Software - Services

- ▶ The provision of services for the development or modification of a computer program
 - ▶ Whether a transaction falls into this rubric is based on the intent of the parties as evidenced by their agreement and conduct as to which party owns the copyright rights in the program and how the risk of loss is allocated between them
 - ▶ Generally, income is service income if the foreign vendor is involved in the property's creation but never has an ownership interest in the property and is paid for development work regardless of whether the owner is satisfied with the developer's work

Step four: Chapter 3 or chapter 4

- ▶ If the income is US source, determine whether the payment is a “withholdable payment” for chapter 4 purposes
 - ▶ If the income is not a “withholdable payment” for chapter 4 purposes, solicit a valid Form W-8 (no FATCA classification required) and apply chapter 3
 - ▶ Impose 30% withholding (or reduced withholding rate if the payee furnishes a valid treaty claim or 0% if the payee certifies that the income is effectively connected with their conduct of a trade or business in the US)
 - ▶ Report the income and any tax withheld on a Form 1042-S

Note: insurance premiums and gross proceeds on US securities are subject to chapter 4, but not chapter 3 (gross proceeds become subject to chapter 4 withholding in 2017)

“Withholdable payments” under FATCA

Types of FDAP income included or excluded for FATCA purposes (i.e., chapter 4)

Note: All US source FDAP income is subject to chapter 3, unless specifically excepted

FATCA withholdable payments	Excluded from FATCA
<ul style="list-style-type: none"> ▶ Bank and brokerage fees ▶ Investment advisory fees ▶ Custodial fees (e.g., fund manager fees) ▶ Payments in connection with lending transactions ▶ Forward, futures, option or notional principal contracts ▶ Insurance premiums and annuities* ▶ Dividends on US securities ▶ Interest (with certain exceptions) ▶ OID (excluding short term) ▶ Certain dividend equivalent payments ▶ Financing leases 	<ul style="list-style-type: none"> ▶ Payments for tangible goods (non-FDAP) ▶ Fees paid for non-financial services ▶ Software licensing fees ▶ Rent for office space ▶ Lease payments on equipment ▶ Payments for use of other property (e.g., royalty or intellectual property) ▶ Freight/transportation expenses ▶ Interest on outstanding bills arising from services ▶ Interest on deferred purchases (e.g., goods purchased on credit)

* Insurance premiums are excepted from chapter 3 withholding and reporting

Documentation

- ▶ Form 8233 – Establish treaty benefit for personal services rendered by an individual
- ▶ Form W-8BEN – Establish foreign status, and treaty benefit if applicable for an individual
- ▶ Form W-8BEN-E – Establish foreign status, and treaty benefit if applicable for an entity
- ▶ Form W-8ECI – Claim foreign status and that the income is Effectively Connected Income (ECI) with the conduct of US trade or business
- ▶ Form W-8IMY – Establish foreign “intermediary” status (i.e., is acting on behalf of beneficial owner(s))
- ▶ Form W-8EXP – Claim a reduced rate of withholding or tax exempt status specified under the code (e.g., foreign government, international organization and foreign private foundation)

Form 8233

- ▶ Form 8233: Exemption from Withholding on Compensation for Independent Personal Services of a Nonresident Alien Individual
 - ▶ Foreign individuals must furnish Form 8233 to the payor to claim a treaty benefit
 - ▶ Still requires ITIN (“applied for” is acceptable)
 - ▶ Valid only for year of claim
 - ▶ Payor must file Form 8233 with the IRS within five days of receipt and should not make payments until 10 days after filing
 - ▶ Valid treaty claim will result in reporting, but no withholding

Revised Form W-8BEN

- ▶ Form W-8BEN (revised January 2017)
 - ▶ Still relying on instructions released for the old version in February 2014
- ▶ The IRS has broken the former version of the Form W-8BEN into two separate forms
 - ▶ Form W-8BEN and Form W-8BEN-E
- ▶ Form W-8BEN is used by individuals
 - ▶ The form no longer contains a question for “type” of owner since this form will only be used by individuals
 - ▶ Foreign tax identifying number is mandatory, if the individual has one
 - ▶ Date of birth is mandatory in the absence of a foreign TIN

Revised Form W-8BEN (cont.)

- ▶ Treaty benefit claims are simplified
 - ▶ Provide country of residency
 - ▶ Beneficial owner must furnish either a US or foreign TIN to receive treaty benefits on anything other than interest or dividends on actively traded securities
- ▶ A place to print out the beneficial owner's name after signing the form has been added
 - ▶ Printed name is required unless the withholding agent has documentation on file identifying the person who signed the form

Form W-8BEN-E

- ▶ Form W-8BEN-E and related instructions released April 2016
- ▶ Form W-8BEN-E will be used by foreign entities
- ▶ This is a completely new form – what was once one page is now eight pages
 - ▶ There are 31 Chapter 4 (FATCA) potential classifications from which a foreign entity must choose its status (see subsequent slide)
 - ▶ There is a separate certification section for each entity classification that contains specific FATCA certifications
 - ▶ New line 14c requires the beneficial owner to identify the applicable limitation on benefits provision when a treaty benefit is claimed
 - ▶ There is one penalties of perjury statement and signature line at the end of the form
 - ▶ Followed by a schedule to list the substantial US owners of any Passive NFFEs
 - ▶ The capacity line has been replaced by a check box indicating authorized signer
 - ▶ There is a line for the signer of the form to print their name

Revised Form W-8ECI

- ▶ Form W-8ECI and related instructions released as a final version dated February 2014
- ▶ This form is used by foreign persons claiming that their income is effectively connected with the conduct of a trade or business in the United States
- ▶ Changes to the form:
 - ▶ Line 3 is a new line for the name of a disregarded entity receiving the payment (if any)
 - ▶ Line 4 removed disregarded entity as a choice for type of entity
 - ▶ Explicit language prohibits use of an in-care-of address
 - ▶ It is possible for an entity with a foreign business address to be deriving effectively connected income
 - ▶ A place to print out the signer's name after signing the Form has been added
 - ▶ Removed line for capacity and added a check box stating "I certify that I have the capacity to sign for the person identified on line 11 of this form"

Revised Form W-8IMY

- ▶ Form W-8IMY and related instructions released as a final version dated September 2016
- ▶ This form is used by foreign intermediaries, foreign flow-through entities, or certain U.S. branches
 - ▶ Line 3 is a new line for the name of the disregarded entity receiving the payment (if any)
 - ▶ Must select one of nine classifications for chapter 3 purposes
 - ▶ There is a separate certification section for each chapter 3 classification, which is the same as on the old form
 - ▶ Chapter 3 status line added an additional status for Territory Financial Institution
 - ▶ Additional line to provide chapter 4 status
 - ▶ Must select one of twenty-five classifications for FATCA purpose
 - ▶ There is a separate certification section for each entity classification that contains specific FATCA certifications

Revised Form W-8EXP

- ▶ Form W-8EXP revised September 2016
 - ▶ Still relying on instructions released for the old version in April 2014
- ▶ This form is used by foreign governments and other foreign organizations
 - ▶ Additional line to provide chapter 4 status
 - ▶ Chapter 4 qualification section
 - ▶ Explicit instruction not to use an in-care-of address on line 4 (permanent address line)
 - ▶ An additional line to provide a GIIN
 - ▶ An additional sentence has been added to the certifications agreeing to submit a new form if any certification made on the form becomes incorrect
 - ▶ Capacity line replaced by a check box indicating authorized signer
 - ▶ A place to print out the signer's name after signing the form has been added

General documentation rules

- ▶ Faxed or emailed Forms W-8
 - ▶ Effective 6 March 2014, withholding agents may rely on fax or pdf versions of valid withholding certificates (Forms W-8)
 - ▶ Unless the withholding agent knows the sender transmitted the document without the authority of the person who signed the form
- ▶ “Evergreen” Forms W-8
 - ▶ Valid Forms W-8 furnished after 30 June 2014 may be treated as “evergreen” if:
 - ▶ No US indicia (individuals only),
 - ▶ The Form W-8 is completed in full, and no changes in circumstance have occurred, and
 - ▶ Documentary evidence furnished with the Form W-8
 - ▶ Treaty claims cannot be “evergreen”

Documentation (continued)

- ▶ Treaty claims on Forms W-8
 - ▶ Prior law: a valid treaty claim required a US TIN, unless the claim related to a payment of interest or dividends on actively traded securities
 - ▶ Effective 6 March 2014, a valid treaty claim can provide either a US TIN or a foreign TIN (from the country whose treaty benefits are being claimed)
 - ▶ Except no TIN is required for treaty benefits on interest and dividends from actively traded securities remains,
 - ▶ A US TIN is still required on Forms 8233 for claims by individuals with respect to personal services

Documentation (continued)

- ▶ Substitute Forms W-8
 - ▶ May omit FATCA status on substitute form when not relevant to withholding agent (e.g., traditional vendor payments)
- ▶ Use of affidavits for retroactive Forms W-8
 - ▶ Affidavit required when withholding certificate is received more than 30 days after the payment was made
 - ▶ Documentary evidence also required when received more than one year after the payment was made

Electronic signatures on Forms W-8

- ▶ Electronic signatures are acceptable on Forms W-8 under certain conditions:
 - ▶ The electronic signature must indicate that the form was electronically signed by someone authorized to do so (e.g., a time and date stamp, and a statement that the form has been electronically signed)
- ▶ Generally, a withholding agent can rely on an electronic signature even if the withholding agent has not developed and does not maintain its own electronic collection system (e.g., DocuSign)
 - ▶ The current IRS revision (July 2017) includes a digital signature button embedded in the signature line
 - ▶ The instructions specify that merely typing a name into the signature line is not an electronic signature
 - ▶ The act of the electronic signature must be effected by the person whose name is on the electronic Form W-8 as signer, that the signature "authenticate" and "verify" the form, and that the electronic signature must be the "final entry" on the form

Step five: Chapter 4 status

- ▶ Step 5: If the payment is a "withholdable payment" for chapter 4 purposes, determine whether the payee furnished valid chapter 4 certifications on a Form W-8
 - ▶ If the payee has furnished valid chapter 4 certifications, apply chapter 3 (see step 4)

Step six: Chapter 4 status

- ▶ Step 6: If the payee has not furnished valid chapter 4 certifications, withhold 30% under FATCA and report the income and tax withheld on a Form 1042-S

Form validation

2017 Form W-8BEN validation elements

- ▶ Line 1: Name of individual beneficial owner matches your records
 - ▶ The individual's first given name and family surname are listed in full with no abbreviations
 - ▶ Joint account – each owner must submit a separate form, unless one of them is a US person and has submitted a valid Form W-9
- ▶ Line 2: Country of citizenship is not the United States
 - ▶ If the country is abbreviated, a valid government issued ID must be on file evidencing citizenship in a country that reasonably matches the abbreviation
- ▶ Line 3: Permanent residence address
 - ▶ Complete address that includes (1) a building name/house number and street name; (2) city or town, state or province; and (3) country
 - ▶ If the country is abbreviated, a valid government issued ID must be on file evidencing residence in a country that reasonably matches the abbreviation
 - ▶ May not contain:
 - ▶ P.O. Box
 - ▶ An "in-care-of" address [Beware of 3rd party names]
 - ▶ An address of a financial institution (including your own) in which the beneficial owner maintains an account (e.g., a "hold mail" address)
 - ▶ Permanent residence address provided on Line 3 is consistent with your records
- ▶ Line 5: USTIN required in limited situations (e.g. submitting the form to a partnership that conducts a trade or business in the United States)

Foreign TIN (FTIN) and date of birth per Notice 2017-46

- ▶ Only applies to financial accounts maintained at a withholding agent's US office or US branch
 - ▶ Not applicable to non-US funds even if the managerial functions are performed in the US
- ▶ Required on Forms W-8BEN, BEN-E, EXP and ECI for direct investors
 - ▶ Indirect investors (i.e., beneficial owners/payees of an intermediary (Form W-8IMY)) are not required to have an FTIN or date of birth

2017 Form W-8BEN validation elements (cont'd)

▶ Part III: Certifications

- ▶ No alterations to the certifications that need to be signed under penalties of perjury
- ▶ Form is signed in correct place and dated
 - ▶ Note: If there is no date, you may date stamp the form with the date on which it was received. Do not write in the date by hand
- ▶ The print name of the signatory is the same as the name on Line 1
 - ▶ If the printed name is not provided, you must have a document on file identifying the person who signed the form to be the same person whose name is on Line 1
- ▶ If the Form is signed by an agent with legal authority the capacity line must reflect that and a power of attorney form must be provided
 - ▶ If the printed name is not provided or not the same as the name on Line 1, you must have appropriate documentation on file supporting the signer's authority to represent the beneficial owner

2017 Form W-8BEN validation elements (cont'd)

- ▶ Line 9: Treaty claim [does not affect validity of the form]
 - ▶ Note: Treaty claim is not required for payment of bank deposit interest
 - ▶ Full name of a treaty country is provided on Line 9 and is the same as the country on Line 3
 - ▶ If the country is abbreviated, a valid government issued ID must be on file evidencing residence in a country that reasonably matches the abbreviation
 - ▶ Treaty Eligibility – the treaty country on Line 9 must be consistent with the permanent residence and mailing address on the form and in your records, and current standing instruction (if any) to make payment to an account or address is in the treaty country
 - ▶ If this cannot be confirmed, the following documentation must be on file to cure the individual's treaty claim
 - ▶ Written statement from the individual explaining the discrepancy between the countries; or
 - ▶ Documentary evidence that establishes residency in the treaty country
 - ▶ A US or foreign TIN may be required to make a valid claim for treaty benefits
 - ▶ Except for certain payments – e.g., Dividends and interest from stocks and debt obligations that are actively traded
 - ▶ **Note:** a US or foreign TIN must be provided on the form to make a valid treaty claim
 - ▶ Tax Treaty exemption on pension and annuity payments
 - ▶ In the absence of a statutory or treaty exemption, withholding is required at the statutory rate of 30% on the taxable portion of the distribution that is from sources within the United States.

2017 Form W-8BEN validation elements (cont'd)

- ▶ Line 10: Special rates and conditions [does not affect validity of the form]
 - ▶ Line 10 must be used only if you are claiming treaty benefits that require that you meet conditions not covered by the representations you make on line 9 and Part III.
 - ▶ For example, persons claiming treaty benefits on royalties must complete this line if the treaty contains different withholding rates for different types of royalties
 - ▶ This line is generally not applicable to treaty benefits under an interest or dividends (other than dividends subject to a preferential rate based on ownership) article of a treaty

Table 1. Withholding Tax Rates on Income Other Than Personal Service Income Under Chapter 3, Internal Revenue Code, and Income Tax Treaties

▶ Taxpayers must meet the limitation on benefits provisions in the treaty, if any, to qualify for reduced withholding rates.
 ▶ In most cases, the Business Profits article, rather than a reduced withholding tax rate, applies if the income is attributable to a permanent establishment of the taxpayer in the United States.

Income Code Number		1	6	7	14
		Interest	Dividends		
Name	Code	Paid by U.S. Obligors—General	Paid by U.S. Corporations—General	Qualifying for Direct Dividend Rate ^{a,b}	Pensions and Annuities ^c
Australia	AS	10 g,h,m	15 mm	5 mm,00	0
Austria	AU	0 g,j	15 w	5 w	0
Bangladesh	BG	10 g,h,j	15 mm	10 mm	0 l,q
Barbados	BB	5	15 w	5 w	0 f
Belgium	BE	0 g,j	15 dd,mm	5 dd,mm,00	0 f
Bulgaria	BU	5 g,dd,j,mm	10 dd,mm	5 dd,mm	0 f
Canada	CA	0 g,j	15 mm	5 mm	15
China, People's Rep. of	CH		10	10	0 f
Comm. of Independent States ^d	0 n	30	30	30	30

Income Code Number		10	11			12
		Royalties				
Name	Code	Industrial Equipment	Know-How/Other Industrial Royalties	Patents	Film & TV	Copyrights
Australia	AS	30 u	5	5	5	5
Austria	AU	30 u	0	0	10	0
Bangladesh	BG	30 u	10	10	10	10
Barbados	BB	30 u	5	5	5	5
Belgium	BE	30 u	0	0	0	0

Form W-8BEN-E: Lines 1-10 and Signature Certification

Form W-8BEN-E
 Rev. July 2017
 Department of the Treasury
 Internal Revenue Service

Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)

OMB No. 1545-1021

▶ For use by entities. Individuals must use Form W-8BEN. ▶ Section references are to the Internal Revenue Code.
 ▶ Go to www.irs.gov/FormW8BEN-E for instructions and the latest information.
 ▶ Give this form to the withholding agent or payer. Do not send to the IRS.

Do NOT use this form for:

- U.S. entity or U.S. citizen or resident
- A foreign individual
- A foreign individual or entity claiming that income is effectively connected with the conduct of trade or business within the U.S. (unless claiming treaty benefits)
- A foreign partnership, a foreign simple trust, or a foreign grantor trust (unless claiming treaty benefits) (see instructions for exceptions)
- A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming that income is effectively connected U.S. income or that is claiming the applicability of sections 115(c), 501(c), 892, 895, or 1443(b) (unless claiming treaty benefits) (see instructions for other exceptions)
- Any person acting as an intermediary (including a qualified intermediary acting as a qualified derivatives dealer)

Instead use Form:

- U.S. entity or U.S. citizen or resident W-9
- A foreign individual W-8BEN (Individual) or Form 6233
- A foreign individual or entity claiming that income is effectively connected with the conduct of trade or business within the U.S. (unless claiming treaty benefits) W-8ECI
- A foreign partnership, a foreign simple trust, or a foreign grantor trust (unless claiming treaty benefits) (see instructions for exceptions) W-8IMY
- A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming that income is effectively connected U.S. income or that is claiming the applicability of sections 115(c), 501(c), 892, 895, or 1443(b) (unless claiming treaty benefits) (see instructions for other exceptions) W-8ECI or W-8EXP
- Any person acting as an intermediary (including a qualified intermediary acting as a qualified derivatives dealer) W-8IMY

- ▶ Ensure no certifications have been crossed out on any part of the form, or any markings have been made to alter the form

- ▶ Confirm that the signature on the form is an original ink to paper form, or the form has been provided to you electronically via email or fax

Form W-8BEN-E: Lines 1-10 and Signature Certification (cont'd)

- ▶ **Line 1** – Name listed should match the name of the account holder of record. If the name does not match, review Line 3 or Line 10 to determine if account holder's name is listed
- ▶ **Line 2** – Country should match country in your records for the account holder.
- ▶ The United States cannot be listed as a country
- ▶ If the country is abbreviated, the abbreviation cannot be ambiguous

Part I Identification of Beneficial Owner	
1 Name of organization that is the beneficial owner ABC Company	2 Country of incorporation or organization Cayman Islands
3 Name of disregarded entity receiving the payment (if applicable, see instructions)	
4 Chapter 3 Status (entity type) (Must check one box only):	
<input type="checkbox"/> Simple trust <input type="checkbox"/> Grantor trust <input checked="" type="checkbox"/> Corporation <input type="checkbox"/> Disregarded entity <input type="checkbox"/> Partnership <input type="checkbox"/> Central Bank of Issue <input type="checkbox"/> Tax-exempt organization <input type="checkbox"/> Complex trust <input type="checkbox"/> Estate <input type="checkbox"/> Government <input type="checkbox"/> Private foundation <input type="checkbox"/> International organization	
If you entered disregarded entity, partnership, simple trust, or grantor trust above, is the entity a hybrid making a treaty claim? If "Yes" complete Part III. <input type="checkbox"/> Yes <input type="checkbox"/> No	

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Form W-8BEN-E: Lines 1-10 and Signature Certification (cont'd)

- ▶ **Line 4** – One box should be checked. If the entity type selected is Partnership, Simple Trust, or Grantor Trust, request the account holder provide a Form W-8IMY. **Note:** A partnership that is a hybrid claiming treaty benefits can provide a W-8BEN-E but must also provide a W-8IMY
- ▶ If no box or more than one box is checked, form is invalid
- ▶ **Line 5** – One box should be checked..
- ▶ If no box or more than one box is checked, form is invalid

4 Chapter 3 Status (entity type) (Must check one box only):	<input checked="" type="checkbox"/> Corporation	<input type="checkbox"/> Disregarded entity	<input type="checkbox"/> Partnership
	<input type="checkbox"/> Simple trust	<input type="checkbox"/> Complex trust	<input type="checkbox"/> Estate
	<input type="checkbox"/> Grantor trust	<input type="checkbox"/> Private foundation	<input type="checkbox"/> International organization
	<input type="checkbox"/> Central Bank of Issue	<input type="checkbox"/> Tax-exempt organization	<input type="checkbox"/> Foreign government, government of a U.S. possession, or foreign central bank of issue. Complete Part XIII.
	<input type="checkbox"/> Nonparticipating FFI (including an FFI related to a Reporting IGA FFI other than a deemed-compliant FFI, participating FFI, or exempt beneficial owner).	<input type="checkbox"/> Participating FFI	<input type="checkbox"/> International organization. Complete Part XIV.
	<input checked="" type="checkbox"/> Reporting Model 1 FFI	<input type="checkbox"/> Reporting Model 2 FFI	<input type="checkbox"/> Exempt retirement plans. Complete Part XV.
	<input type="checkbox"/> Registered deemed-compliant FFI (other than a reporting Model 1 FFI, sponsored FFI, or nonreporting IGA FFI covered in Part XIII). See instructions.	<input type="checkbox"/> Sponsored FFI. Complete Part IV.	<input type="checkbox"/> Entity wholly owned by exempt beneficial owners. Complete Part XVI.
	<input type="checkbox"/> Certified deemed-compliant nonregistering local bank. Complete Part V.	<input type="checkbox"/> Certified deemed-compliant FFI with only low-value accounts. Complete Part VI.	<input type="checkbox"/> Territory financial institution. Complete Part XVII.
	<input type="checkbox"/> Certified deemed-compliant sponsored, closely held investment vehicle. Complete Part VII.	<input type="checkbox"/> Certified deemed-compliant limited life debt investment entity. Complete Part VIII.	<input type="checkbox"/> Excepted nonfinancial group entity. Complete Part XVIII.
	<input type="checkbox"/> Certain investment entities that do not maintain financial accounts. Complete Part IX.	<input type="checkbox"/> Owner-documented FFI. Complete Part X.	<input type="checkbox"/> Excepted nonfinancial start-up company. Complete Part XIX.
	<input type="checkbox"/> Restricted distributor. Complete Part XI.	<input type="checkbox"/> Restricted distributor. Complete Part XI.	<input type="checkbox"/> Excepted nonfinancial entity in liquidation or bankruptcy. Complete Part XX.
		<input type="checkbox"/> 501(c) organization. Complete Part XXI.	<input type="checkbox"/> Nonprofit organization. Complete Part XXII.
		<input type="checkbox"/> Publicly traded NFFE or NFFE affiliate of a publicly traded corporation. Complete Part XXIII.	<input type="checkbox"/> Excepted territory NFFE. Complete Part XXIV.
		<input type="checkbox"/> Active NFFE. Complete Part XXV.	<input type="checkbox"/> Passive NFFE. Complete Part XXVI.
		<input type="checkbox"/> Excepted inter-affiliate FFI. Complete Part XXVII.	<input type="checkbox"/> Direct reporting NFFE.
		<input type="checkbox"/> Sponsored direct reporting NFFE. Complete Part XXVIII.	<input type="checkbox"/> Account that is not a financial account.

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Form W-8BEN-E: Lines 1-10 and Signature Certification (cont'd)

- ▶ **Line 6**– Address line should not contain 1) the name of a financial institution, 2) a P.O. Box, "In-Care-Of" address or address used solely for mailing purposes.

6 Permanent residence address (street, apt. or suite no., or rural route). Do not use a P.O. box or in-care-of address (other than a registered address).	
123 Euclid Street	
City or town, state or province. Include postal code where appropriate.	Country
George Town, Grand Cayman	Cayman Islands

- ▶ If P.O. Box is provided, request that the account holder provide articles of incorporation to support that the P.O. Box is the registered address
- ▶ Country cannot be an ambiguous abbreviation
- ▶ If US address is provided on the form or if there is a US permanent address in the account file, additional cure documentation is required, (e.g. certificate of incorporation).

Form W-8BEN-E: Lines 1-10 and Signature Certification (cont'd)

- ▶ **Line 7**–A P.O. Box or "In-Care-Of" address may be used in this line

7 Mailing address (if different from above)	
345 Antilles Road	
City or town, state or province. Include postal code where appropriate.	Country
George Town, Grand Cayman	Cayman Islands

- ▶ Country cannot be an ambiguous abbreviation
- ▶ If US address is provided or if there is a US mailing address in the account file, additional cure documentation is required (e.g. certificate of incorporation)
- ▶ If the country is abbreviated and the abbreviation is not ambiguous then this requirement is satisfied
- ▶ If the country is abbreviated and the abbreviation is ambiguous, confirm the account file has government issued identification and the country on the identification reasonably matches the abbreviation

Form W-BEN-E: Lines 1-10 and Signature Certification (cont'd)

- ▶ **Line 8**—If provided, ensure it does not look obviously incorrect
- ▶ **Line 9a**—If provided, ensure it does not look obviously incorrect
- ▶ GIIN number must follow the **19 CHARACTER** Format:

Example:
ABCDEF.00000.ME.123

- ▶ GIIN needs to be validated against the IRS FFI list within 90 days of receiving the Form W-8BEN-E and annually thereafter.
- ▶ Alternatively, the entity may state "Applied For" and the account holder will need to provide the GIIN to you in 90 days.
- ▶ Some entities may be required to provide the GIIN of the Sponsoring FFI, please see Chapter 4 matrix

8 U.S. taxpayer identification number (TIN), if required	9a GIIN	b Foreign TIN
98-1234567	ABCDEF.00000.ME.123	

Form W-8BEN-E: Lines 1-10 and Signature Certification (cont'd)

- ▶ **Line 9b**—Does not need to be validated. May rely on TIN provided.

8 U.S. taxpayer identification number (TIN), if required	9a GIIN	b Foreign TIN
98-1234567	ABCDEF.00000.ME.123	1122334
10 Reference number(s) (see instructions)		
ABC Company		

- ▶ **Line 10**—Name of account holder may be included in this Line if account holder is disregarded entity

- ▶ **Part XXX** – Ensure **signature, printed name and date** are entered **AND certification box** is clearly checked
- ▶ If there is an indication that the form has been signed by an agent or third party request a power of attorney (e.g. Authorized signatory or Attorney-in-fact written underneath name) from the account holder
- ▶ If the account holder does not provide a date, you may date stamp the Form W-8

Part XXX Certification

Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

- The entity identified on line 1 of this form is the beneficial owner of all the income to which this form relates, is using this form to certify its status for chapter 4 purposes, or is a merchant submitting this form for purposes of section 6050W;
- The entity identified on line 1 of this form is not a U.S. person;
- The income to which this form relates is: (a) not effectively connected with the conduct of a trade or business in the United States, (b) effectively connected but is not subject to tax under an income tax treaty, or (c) the partner's share of a partnership's effectively connected income; and
- For broker transactions or barter exchanges, the beneficial owner is an exempt foreign person as defined in the instructions.

Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income of which the entity on line 1 is the beneficial owner or any withholding agent that can disburse or make payments of the income of which the entity on line 1 is the beneficial owner.

I agree that I will submit a new form within 30 days if any certification on this form becomes incorrect.

Sign Here	<input checked="" type="checkbox"/> I certify that I have the capacity to sign for the entity identified on line 1 of this form.
Signature of individual authorized to sign for beneficial owner	Print Name
John Doe	9/21/17
	Date (MM-DD-YYYY)

Treaty claims: Individuals for services performed

- ▶ Foreign individuals must furnish Form 8233 to the payor to claim a treaty benefit
- ▶ Requires ITIN (“applied for” acceptable)
- ▶ Valid only for year of claim
- ▶ Payor must file Form 8233 with the IRS within five days of receipt and should not make payments until 10 days after filing
- ▶ Valid treaty claim will result in reporting, but no withholding

Form 8233 – Treaty claims by individuals performing services in the US

- ▶ Calendar year for which the claim is made
- ▶ Line 1: Name (mandatory)
- ▶ Line 2 US ITIN (mandatory): “Applied for” is acceptable if Form W-7 is attached
- ▶ Line 4: Permanent address (mandatory): P.O. box or in-care-of address is not acceptable
- ▶ Line 5 US Business address:
 - ▶ Not required
 - ▶ P.O. box is not acceptable

Form 8233 (cont'd)

- ▶ Line 6 – 9b: Visa and passport information
- ▶ Line 11a: Description of personal services to be provided
- ▶ Line 11b: Expected compensation for these services for the year
- ▶ Line 12a: Tax treaty and treaty article on which claim is based
- ▶ Line 12b: Expected compensation exempt under treaty
- ▶ Line 12c: Country of permanent residence
- ▶ Line 14: Justification for exemption claimed
- ▶ Part III: Certification -- Signature and date
- ▶ Part IV: Completed by withholding agent