

Global IRW Newsbrief

Information reporting and withholding (IRW)

November 13, 2012

IRS Chief Counsel issues memorandum regarding a withholding agent's ability to rely on e-mailed or faxed Forms W-8

In brief

The IRS Office of Associate Chief Counsel (International) recently responded to a request for assistance to understand under what circumstances is a Form W-8 that is signed with a handwritten signature and electronically transmitted to a withholding agent (for example, as a PDF or facsimile) a form upon which the withholding agent may rely. The informal written guidance provided under [Generic Legal Advice Memorandum AM 2012-008](#) (hereinafter GLAM) dated August 8, 2012 describes the conditions necessary for a withholding agent to rely on a Form W-8 that is received via fax or e-mail. A GLAM may not be used or cited as precedent; consequently, it can only be viewed as a significant policy shift regarding reliance on a faxed or e-mailed Form W-8. However, withholding agents should assess the potential impact to their operations.

PwC observation: *Earlier this year, representatives from the IRS Office of Associate Chief Counsel (International) made public statements that provisions in the proposed regulations implementing the Foreign Account Tax Compliance Act (FATCA) that allow withholding agents to rely on e-mailed and faxed copies of Forms W-8 are consistent with existing regulations under IRC section 1441. As the FATCA regulations do not specifically mention e-mailed forms, many practitioners and withholding agents were skeptical that IRS examiners would agree with these statements. The fact that this informal written guidance is addressed to the*



Large Business & International (LB&I) Division manager responsible for the Qualified Intermediary and US Withholding Agent programs should alleviate these concerns.

Background

In general, withholding agents must deduct and withhold a 30 percent federal income tax from certain payments of income paid to non-US persons. This rate of withholding can be reduced or eliminated, if valid documentation (Form W-8 generally) is obtained that certifies that a lower rate applies either by operation of a provision of the Internal Revenue Code (IRC or Code) or an income tax treaty.

The documentation establishing a lower withholding rate has presented many traps for the unwary over the years because an original Form W-8 was generally required unless the form was submitted electronically in accordance with the specified procedures described in regulations under IRC section 1441.

What does the GLAM change?

The GLAM describes facts and circumstances that the IRS should consider when determining that a withholding agent properly relied on a Form W-8 that is signed with a handwritten signature, scanned into an electronic system, and then transmitted directly to the withholding agent via e-mail or fax. By providing the guidance for faxed and e-mailed Forms W-8, the GLAM represents a dramatic shift in the way IRS examination personnel can interpret the rules for electronically submitted Forms W-8.

The GLAM is good news for affected taxpayers, but policies and procedures may still need modification. For example, policies and procedures may need to be modified to validate the sender's identity.

More details

How were the regulations interpreted prior to the GLAM?

Up to now, the IRS would reject a withholding agent's reliance on Forms W-8, unless the forms contained an original pen-to-paper signature. However, a withholding agent was allowed to rely on a faxed copy of an otherwise valid Form W-8 for purposes of establishing non-US status for up to 90-days. Once the 90-day grace period expired, withholding agents were required to have obtained an original Form W-8 or be liable for under withholding that occurred due to reliance on a faxed copy of the Form W-8.

As a result, countless withholding agents were liable for 30 percent withholding tax, penalties, and interest if the withholding agent could only produce an e-mailed or faxed copy of an otherwise valid Form W-8. This GLAM should alleviate this problem because e-mail and fax may be an acceptable form of electronic submission so long as the procedures outlined in the GLAM are followed.

What are the requirements under the GLAM?

IRS examiners do not have to challenge e-mailed or faxed Forms W-8 if the transmission meets certain criteria. As described in the GLAM, a withholding agent can rely on a Form W-8 with a handwritten signature that is scanned into an electronic device and transmitted directly to the withholding agent via e-mail or fax provided the withholding agent:

- has a system to ensure that the person furnishing the form is the person named on the form,
- receives an electronic form that contains exactly the same information as a paper Form W-8,
- confirms that the penalty of perjury statement is signed to authenticate and verify submission of the form, and
- can provide a hard copy of the form to the IRS upon request.

In a nod to practicality, the guidance illustrates how a withholding agent may ensure that the person furnishing the form is the person named on the form with the following examples:

- the withholding agent could verify that the e-mail address of the sender or the e-mail correspondence accompanying the form indicates that the individual or entity sending the form is the individual or entity named on the form,
- the withholding agent could match the e-mail address of the sender to the e-mail address that it has on file, or
- the withholding agent could confirm with the person named on the form, either orally or in writing, that the form was furnished by such person and documenting the name of the individual receiving the confirmation and the date it was received.

With respect to a form furnished on behalf of an entity, the guidance provides that a withholding agent may establish that the individual furnishing the form is an owner or employee of the entity named on Line 1 of the form, but need not establish that such individual was necessarily the same individual who signed the form.

***PwC observation:** The IRS has taken steps to increase its enforcement of information reporting and withholding. New lengthy and more complex Forms W-8 are being developed to accommodate FATCA. As a result, many companies have been exploring electronic Form W-8 software to ease the burden on their compliance functions and payees. These companies will need to consider the ability to rely on e-mailed or faxed forms as part of the evaluation of such systems. For example, electronic Form W-8 software also apply rule sets to validate the form.*

The GLAM is good news, but how may policies and procedures need modification?

Accounts Payable

Over the years, accounts payable (AP) functions have often found it challenging to obtain and retain original Forms W-8. Non-US service providers dealing with procurement departments through e-mail and other electronic means were frustrated by the requirement that they provide original forms. For these reasons, the GLAM should be welcome news. However, to rely on an e-mailed or faxed copy of a Form W-8, companies should adopt procedures that conform to the requirements in the GLAM.

While the GLAM provides examples of how to determine and document the person who sent a copy Form W-8, AP units should evaluate existing processes and procedures to determine the best approach to collecting Forms W-8.

PwC observation: *The GLAM's ultimate conclusion is that facts and circumstances determine whether or not accepting a faxed or e-mailed copy of Form W-8 is appropriate. Companies will also need to verify that their record retention systems are able to accommodate the additional documentation required to satisfy the requirements in the GLAM. Any changes allowing AP to accept e-mailed or faxed copies of Forms W-8 should be incorporated into existing policies and procedures with appropriate controls to ensure compliance.*

Asset Managers

Asset managers often faced the dual challenge of having to provide Forms W-8 to others, as well as having to collect Forms W-8 from non-US investors. With the effective date of FATCA implementation quickly approaching, the documentation challenges faced by asset managers have never been more acute. Obtaining and providing Forms W-8 with original signatures, particularly in a global environment that primarily relies on electronic means of communication, has been costly.

The GLAM offers much needed relief in this area. However, to rely on an e-mailed or faxed copy of Forms W-8, asset managers must adopt procedures that conform to the GLAM. While the examples in the GLAM describe some options, asset managers must determine the best method for their business. Asset managers will need to work with their investor relations units to develop the best approach to taking advantage of the process described in the GLAM.

PwC observation: *With the issuance of the GLAM, it also appears that the facilitation of Forms W-8 may become more efficient. Going forward, an asset manager may be able to have an authorized individual sign a single Form W-8 one time and e-mail that form to multiple withholding agents until the form expires. The frequent changes of investments and the limited access to individuals who are authorized to sign Forms W-8 for the investing entity make it difficult for asset managers to provide their brokers and custodians with forms with original signatures timely. Asset management personnel, particularly those that provide services to multiple funds, should develop procedures so that the withholding agent can ensure that the e-mail or fax transmission of Form W-8 conforms to the GLAM. Conversely, the procedures may prove difficult with respect to Forms W-8 issued by funds that do not have employees or owners who are individuals. In those instances, a withholding agent may not be able to establish that the individual furnishing the Form W-8 is an owner or employee of the fund.*

Banking Institutions

While banks and other financial institutions have been working for years to perfect the receipt and retention of Forms W-8 with original signatures, most in the industry have robust policies and procedures in place to ensure that original Forms W-8 are obtained and retained or that withholding occurs. Some institutions have deployed substantial technology to manage the Form W-8 documentation requirements. Now with the increased diligence requirements imposed by FATCA, implementation of electronic Forms W-8 systems has become more imperative for both US and foreign financial institutions.

PwC observations - Much like asset managers, foreign financial institutions can use this GLAM to improve their delivery of Forms W-8 when required.

Some actions to think about

A GLAM is not an official ruling or position of the Service and may not be used or cited as precedent. However, the GLAM does provide welcomed guidance to AP functions, asset managers, banking institutions, and other withholding agents that e-mailed and faxed copies may now be recognized as valid electronic copies of Forms W-8. However, the guidance stipulates that withholding agents must ensure the identity of the person furnishing the form, the consistency of copy and paper forms, the authenticity of the penalty of perjury statement, and that a paper copy of the form is available to the IRS upon request. These steps may require modification to a withholding agent's policies and procedures in order to help ensure that its electronic forms are accepted by the IRS upon examination. Stakeholders should review their current AP systems, their FATCA compliance plans, and their historic audit challenges, and analyze what extra steps should be taken and how to maximize the benefit of this approach going forward.

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