

Global IRW Newsbrief

Information reporting and withholding (IRW)

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New draft Forms W-8EXP and W-8ECI may resolve conflicts over the "capacity" of a signer

The Internal Revenue Service (IRS) recently released two new official drafts in the Form W-8 series -- two of several that have been released over the past few months. The first is **Form W-8EXP**, *Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding* and the second is **Form W-8ECI**, *Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States*. Click [here](#) for the draft Form W-8EXP and [here](#) for the draft Form W-8ECI. Like with previously released drafts these forms have a revision date of December 2012. This indicates the IRS intends to issue final forms in December 2012.

The draft Forms W-8EXP and W-8ECI are intended to replace the current Forms W-8EXP and W-8ECI to accommodate changes brought about by the Foreign Account Tax Compliance Act (FATCA). The IRS has not released draft instructions for either form. This is consistent with other recently released draft forms in the Form W-8 series. It is expected that instructions will be forthcoming after the final FATCA regulations have been released.

Currently, Form W-8EXP is provided by foreign governments and other foreign organizations, such as international organizations, foreign central banks, and foreign tax-exempt organizations, to establish their exemption from withholding tax under Chapter 3 of the Internal Revenue Code (IRC). Form W-8EXP will continue to serve as documentation for the same types of entities. These classifications are relevant for



FATCA purposes; however unlike the draft Form W-8IMY and preliminary draft Form W-8BEN-E this form does not have a separate line to delineate Chapter 3 and Chapter 4 status separately. Rather it simply has an entity type line consistent with the current version of the form.

Form W-8ECI is currently used by foreign persons to certify that they are the beneficial owner of U.S. source income that is effectively connected with a U.S. trade or business (so-called effectively connected income or "ECI"). Effectively connected income is not subject to withholding under FATCA or Chapter 3 of the IRC. Consequently, this form has not been significantly modified.

Do the draft forms modify the information requested?

Yes. The draft Forms W-8EXP and W-8 ECI retain all of the information requested on the current forms with one exception. Currently there is a requirement that each form be signed by the beneficial owner of the income (if an individual) or a person with authority to bind the beneficial owner. The current forms gather this information by requesting the signor's capacity (e.g., CEO, Treasurer or other appropriate title). However, the new draft forms eliminate this requirement and simply require the authorized official to certify that he or she has the capacity to sign by checking a box.

PwC Observation: *Historically, the IRS and taxpayers have disagreed about the "capacity" a signer is required to enter on a Form W-8 to indicate their authority to sign. Eliminating the "capacity" requirement on the draft forms could serve as a forecast for what future forms will require and reduce the uncertainty that withholding agents currently encounter.*

The draft Form W-8ECI also contains other minor changes that provide further clarification on information requested. For example, in Part I, line 9, the IRS requests that in addition to listing each item of ECI, the filer must also list any payments of gross proceeds from the sale of property that can produce U.S. source FDAP income that is ECI. This same language is mirrored in the certification at the end of the form.

PwC Observation: *Under FATCA a withholdable payment includes gross proceeds from the sale of property that produces U.S. source interest or dividends. It is not clear why the specific income description and certification requires disclosure of gross proceeds from the sale of property that produces any type of U.S. source FDAP, and not just U.S. source interest and dividends. The instructions to the form may provide clarity and meaning to this new statement.*

What other draft Form W-8s have been issued?

Various other Form W-8s have been issued either in official draft status or as a preliminary draft. Specifically, the IRS released two other preliminary drafts on June 6, 2012 -- the Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding (Individuals)*, and Form W-8BEN-E, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding (Entities)*. The IRS subsequently released an official draft Form W-8BEN for individuals on July 18th. Click [here](#) for the W-8BEN and [here](#) for the W-8BEN-E.

In addition, the IRS released one other official draft on August 15, 2012 -- the Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding*. Click [here](#) for the Form W-8IMY as well as [here](#) for a previous IRW Newsbrief on this topic.

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