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Analysis of IRS Notice 2016-8: FATCA Extensions and Reliance Upon Electronic W8 / W9s

William Byrnes (Texas A&M University Law) · Monday, February 1st, 2016

The IRS issued [Notice 16-08](#) announcing that it will extend timelines or modify four elements of FATCA –

- (1) modify the date for submitting to the IRS the preexisting account certifications required of certain foreign financial institutions (FFIs);
- (2) specify the period and date for submitting to the IRS the periodic certification of compliance for a registered deemed compliant FFI;
- (3) modify the transitional information reporting rules for accounts of nonparticipating FFIs to eliminate the requirement to report on gross proceeds for the 2015 year; and
- (4) specify the circumstances under which a withholding agent may rely on electronically furnished Forms W-8 and W-9 collected by intermediaries and flow-through entities.

(1) modify the date for submitting to the IRS the preexisting account certifications

Under current rules, the preexisting account certification must be made no later than 60 days following the date that is two years after the effective date of the FFI agreement. For example, a participating FFI or reporting Model 2 FFI that has an FFI agreement with an effective date of June 30, 2014, must submit a preexisting account certification to the IRS **by August 29, 2016**. A participating FFI or reporting Model 2 FFI also is required under the Chapter 4 regulations and the FFI agreement to periodically certify to the IRS that it has complied with the terms of the FFI agreement (“periodic certification of compliance”). If a participating FFI or reporting Model 2 FFI has an FFI agreement with an effective date of June 30, 2014, the first certification period for the FFI ends on December 31, 2017, and the *FFI’s first periodic certification of compliance must be made on or before July 1, 2018*.

The amended rules will allow preexisting account certification to be submitted at the same time that the participating FFI or reporting Model 2 FFI is required to submit its first periodic certification of compliance.

Therefore, **the preexisting account certification will be due to the IRS by July 1, 2018**, for a participating FFI or reporting Model 2 FFI that has an FFI agreement with an effective date of June 30, 2014, instead of by August 29, 2016. However, the extension does not apply to preexisting account certification deadlines for a participating FFI or reporting Model 2 FFI to *complete the due diligence procedures* for preexisting accounts, and FFIs will therefore be required to certify to the completion of those procedures within the time required.

(2) specify the period and date for submitting to the IRS the periodic certification of compliance for a registered deemed compliant FFI

Local FFIs and restricted funds will be allowed to submit their one-time certifications regarding preexisting accounts at the same time that they submit the first periodic certification of registered deemed-compliant FFI status. Subsequent certification periods will continue to be the three-calendar-year period following the previous certification period. For example, a registered deemed-compliant FFI that is a local FFI and that has such status on June 30, 2014, will be required to make its one-time certification regarding preexisting accounts and its first periodic certification of registered deemed-compliant FFI status *on or before July 1, 2018*.

(3) modify the transitional information reporting rules for accounts of nonparticipating FFIs to eliminate the requirement to report on gross proceeds for the 2015 year

With respect to calendar year 2015, a participating FFI, reporting Model 2 FFI, or registered deemed-compliant FFI is not required to report gross proceeds paid to or with respect to an account held by a nonparticipating FFI.

(4) specify the circumstances under which a withholding agent may rely on electronically furnished Forms W-8 and W-9 collected by intermediaries and flow-through entities

Under the provisions for ‘standards of knowledge’, a withholding agent may rely on a Form W-8 or W-9 that has been collected from the beneficial owner or payee of the payment through an electronic system maintained by an NQI, NWP, or NWT and furnished to the withholding agent by such NQI, NWP, or NWT, provided that the NQI, NWP, or NWT is a direct or indirect account holder of the withholding agent and the withholding agent obtains from the NQI, NWP, or NWT a written statement confirming that the electronic documentation was generated from a system that meets the regulatory requirements as applicable, and the withholding agent does not have actual knowledge that such statement is incorrect.

- The electronic system must ensure that the information received is the information sent, and must document all occasions of user access that result in the submission renewal, or modification of a Form W-8. In addition, the design and operation of the electronic system, including access procedures, must make it reasonably certain that the person accessing the system and furnishing Form W-8 is the person named in the Form.
- **Same information as paper Form W-8.** The electronic transmission must provide the withholding agent or payor with exactly the same information as the paper Form W-8.
- **Perjury statement and signature requirements.** The electronic transmission must contain an electronic signature by the person whose name is on the Form W-8 and the signature must be under penalties of perjury.
- **Perjury statement.** The perjury statement must contain the language that appears on the paper Form W-8. The electronic system must inform the person whose name is on the Form W-8 that the person must make the declaration contained in the perjury statement and that the declaration is made by signing the Form W-8. The instructions and the language of the perjury statement must immediately follow the person’s certifying statements and immediately precede the person’s electronic signature.
- **Electronic signature.** The act of the electronic signature must be effected by the person whose name is on the electronic Form W-8. The signature must also authenticate and verify the submission. For this purpose, the terms *authenticate* and *verify* have the same meanings as they do when applied to a written signature on a paper Form W-8. An electronic signature can be in any form that satisfies the foregoing requirements. The electronic signature must be the final entry in the person’s Form W-8 submission.
- **Requests for electronic Form W-8 data.** Upon request by the Internal Revenue Service during an examination, the withholding agent must supply a hard copy of the electronic Form W-8 and a statement that, to the best of the withholding agent’s knowledge, the electronic Form W-8 was filed by the person whose name is on the form. The hard copy of the electronic Form W-8 must provide exactly the same information as, but need not be identical to, the paper Form W-8.

Prof. William Byrnes is the author of [Guide to FATCA Compliance](#) – 2016 Edition

IRS FATCA Notice 16-08

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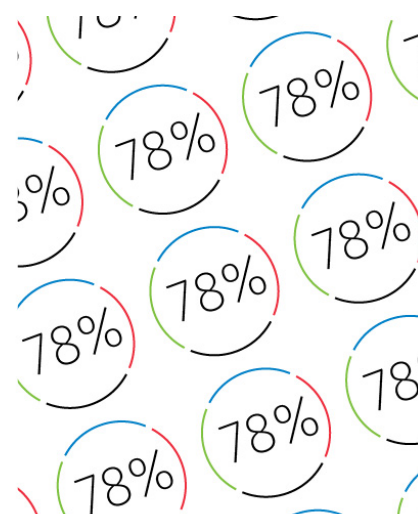
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