

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: AM2012-008

Release Date: 8/17/2012

CC:INTL:B02:DNishida
PRENO-133984-12

UILC: 1441.00-00

date: August 08, 2012

to: Theodore D. Setzer
Program Manager
(Large Business & International)

from: Steven A. Musher
Associate Chief Counsel
(International)

subject: Electronic submissions of Forms W-8

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

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 pursuant to Treas. Reg. §1.1441-1(e)(4)(iv)?

CONCLUSION

Whether a withholding agent may accept a Form W-8 that is transmitted to the withholding agent electronically will depend on the facts and circumstances. A Form W-8 that is signed with a handwritten signature, scanned into an electronic system, and then transmitted directly to a withholding agent through that electronic system (for example, as a PDF or facsimile), would meet the electronic submission requirements of Treas. Reg. § 1.1441-1(e)(4)(iv) in the facts and circumstances set forth within this memorandum.

LAW AND ANALYSIS

Questions frequently arise whether the regulations under I.R.C. § 1441 require a withholding agent to obtain an original withholding certificate from the payee. See, e.g., TD 8734 (1997) (stating that “the final regulations allow a withholding agent to rely on a faxed form only for purposes of presuming foreign status in order to reduce the rate of withholding during a 90-day grace period”); Treas. Reg. § 1.1441-1(b)(3)(iv) (providing a 90 day grace period during which a withholding agent may rely upon a withholding certification “that is otherwise valid within the meaning of the applicable provisions except for the fact that it is transmitted by facsimile”); Treas. Reg. § 1.6049-5(d)(2)(ii). These provisions allow only limited period reliance on electronically transmitted forms in the absence of an established system ensuring identification of the sender with the information transmitted.

Treas. Reg. § 1.1441-1(e)(4)(iv) does, however, provide authority for a withholding agent to rely upon a withholding certificate that is submitted electronically in accordance with certain specified procedures, i.e., without limitation by the grace period rules. Such electronic submission procedures subject a withholding certificate to a degree of due diligence regarding the transmission of the form than might not otherwise be applied to an electronic transmission. Accordingly, a Form W-8 that is signed with a handwritten signature, scanned into an electronic system, and then transmitted directly to a withholding agent through that electronic system (for example, as a PDF or facsimile), may be relied upon by a withholding agent pursuant to Treas. Reg. § 1.1441-1(e)(4)(iv) if the requirements set forth under that section are satisfied in the manner described below.¹

1. General requirements

Treas. Reg. § 1.1441-1(e)(4)(iv)(B)(1) provides that a withholding agent may rely upon a form submitted electronically provided the withholding agent’s electronic system ensures that the information received is the information sent and documents all occasions of user access that result in the submission, renewal, or modification of the form. Further, the system design and operation, including access thereto, must make it reasonably certain that the person furnishing the form is the person named on the form.

A withholding agent could meet this requirement, for example, by ensuring that the e-mail address of the sender or the e-mail correspondence accompanying the electronically transmitted form indicates that the individual or entity sending the form is the individual or entity named on the form. Alternately, a withholding agent could be reasonably certain that the person furnishing the form is the person named on the form by matching the e-mail address of the sender to the e-mail address that the withholding agent has on file for the individual or entity named on the form. Finally, a withholding agent may also establish that the individual or entity furnishing the form is the person named on the form by confirming with the person named on the form, either orally or in

¹ Compare Prop. Reg. § 1.1471-3(c)(6)(iv) (regarding acceptability of electronic transmissions for chapter 4 purposes).

writing, that the form was furnished by such person and documenting the name of the individual receiving the confirmation and the date that such confirmation was received. With respect to a form furnished on behalf of an entity, the withholding agent may establish that the individual furnishing the form is an owner or employee of the entity that is named on line 1 of the form, but need not establish that such individual was necessarily the same individual who signed the form.

2. Requirement to provide same information as paper form

Treas. Reg. § 1.1441-1(e)(4)(iv)(B)(2) requires that the certificate submitted electronically provide the withholding agent with exactly the same information as the paper Form W-8.

As an electronically scanned version of a Form W-8 will contain the same information as the original hardcopy of that form, this requirement will be met provided that the electronically transmitted form is complete and legible.

3. Perjury statement and signature requirements

Treas. Reg. § 1.1441-1(e)(4)(iv)(B)(3) provides that the electronic transmission must contain an electronic signature by the person whose name is on the Form W-8 (or by a person authorized to sign for the person named on the form) and such signature must be made subject to the penalties of perjury statement that appears on the paper form. The electronic signature must be the final entry in the person's Form W-8 submission, immediately following the person's penalties of perjury and certifying statements, and must authenticate and verify the submission of the form. The regulations indicate that the electronic signature can be in any form that satisfies the foregoing requirements.

The provision in the regulations permitting the electronic signature to occur in any manner that authenticates and verifies the submission affords flexibility with respect to the form in which an electronic signature can be furnished. Generally, an electronic signature refers to an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7006 (2000). When an individual signs a form with a handwritten signature and scans that form into an electronic device for purposes of transmission, those actions constitute a process associated with the form that reflects that the form is executed or adopted by a person with the intent to sign the record.

4. Requirements upon IRS examination

Treas. Reg. § 1.1441-1(e)(4)(iv)(B)(4) requires that upon the 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.

As a form that is transmitted via a PDF sent by e-mail, or a form sent by facsimile, results in an exact image of the paper form, the electronically transmitted form may be stored electronically, or otherwise, in a format that would enable the withholding agent to produce a hard copy of the form upon examination.

Please call (202) 622-3840 if you have any further questions.