

IRS releases new Form W-8BEN-E and associated Instructions

Closing the distance

Global Financial Services Industry



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Three months after releasing the draft version, the IRS released a new **Form W-8BEN-E**, “Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)” and new **Instructions for Form W-8BEN-E**. As provided in the Treasury Regulations, a withholding agent may continue to accept the prior version of the Form W-8BEN-E for six months after the revision date shown on the form and may rely on it until the period of validity expires. For a Form W-8BEN-E, that validity period generally is the period starting on the date the form is signed and ending on the last day of the third succeeding calendar year absent a change in circumstances.

There are a number of updates to both the form and the instructions, including several substantial updates that should be noted. First, the form now requires a taxpayer that is claiming treaty benefits to certify that they satisfy a limitation of benefits (“LOB”) provision in the treaty under which it is claiming benefits. The form lists eight types of provisions that may be included in the tax treaty, providing additional checkboxes to certify if a favorable discretionary determination by the US competent authority was received or if another LOB provision applies, in which latter case, also providing space to identify another applicable provision. The instructions provide substantial detail on these LOB treaty provisions, outlining the applicable tests for each provision for convenience but emphasizing that the final determination must be made using the language of the treaty itself.

The second substantial update is regarding the proper completion of Part II of the form by disregarded entities. The form now provides that the section should only be completed by a disregarded entity with a Global Intermediary Identification Number (“GIIN”) or a branch of a Foreign Financial Institution (“FFI”) in a country other than the FFI’s country of residence. In general, a disregarded entity does not submit a Form W-8BEN-E to a withholding agent, leaving the owner to provide the appropriate documentation in its own name. However, if a disregarded entity is receiving a withholdable payment and either is in a jurisdiction other than the single owner’s country of organization or has its own GIIN, Part II needs to be completed to disclose the chapter 4 status of the disregarded entity receiving the payment.

Third, a number of additions to the form and instructions relate to sponsoring and sponsored entities. With the January 1, 2017, deadline for sponsored FFIs to register with the IRS and obtain GIINs,

many industry members have begun the process of registration and have some sponsored entities with their own GIINs. The updates accommodate the sponsoring relationship in such situations, allowing sponsored entities to certify themselves as such even where they have obtained a GIIN and requiring that they disclose the GIIN on Line 9a. There are now spaces for the sponsoring entity's GIIN to be listed in Part IV, Sponsored FFI, and Part XXVIII, Sponsored Direct Reporting NFFE.

Form Updates

In addition to the updates discussed above, the following are the line-by-line form updates, many of which were seen in the draft version:

- Addition of chapter 3 status (entity type) "International Organization" on line 3.
- Modification to the following chapter 4 classifications on line 5:
 - Removed language instructing entities to check one box only unless otherwise indicated. The relevant Line 5 instructions state that you are to check the one box that applies to your chapter 4 status.
 - Changed language of nonparticipating FFI parenthetical, changing "Registered Deemed Compliant FFI" to "Deemed Compliant FFI" and added "Exempt Beneficial Owner" inside the parenthetical of "Nonparticipating FFI" checkbox.
 - Changed language of parenthetical for registered deemed-compliant FFI status to exclude a nonreporting IGA FFI covered in Part XII.
 - Removed clause accompanying references to Sponsored FFIs which stated "that has not obtained GIIN."
 - Removed nonreporting IGA FFI parenthetical that previously included a FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA
 - Added chapter 4 Status of "Account that is not a financial account," which are the accounts listed under the relevant Treasury Regulations as cited in the Instructions.
- Added language "Complete only if a disregarded entity **with a GIIN** or a branch of an FFI in a country other than in the FFI's country of residence" to header instructions of Part II (bolded language is addition).
- Added the following 10 new checkboxes to line 14b that specify the types of limitation on benefits ("LOB") provisions that are generally included in an applicable tax treaty (discussed above).
- Added "US source" to language in line 14c referring to "dividends" for which the beneficial owner is claiming treaty benefits.
- Modified the language in line 15, special rates and conditions, to require the entity to "[e]xplain the additional conditions in the Article the beneficial owner meets to be eligible for the rate of withholding."
- Added line for GIIN of sponsoring entity in line 16 of Part IV and again in line 42 of Part XXVIII.
- Simplified certification language from line 17 to require only that the entity "is an investment entity," as compared to the prior language that required that the entity "is an FFI solely because it is an investment entity."
- Included a parenthetical in line 21 to note that the due diligence, withholding, and reporting responsibilities to be fulfilled by the sponsoring entity are determined as if the FFI were a participating FFI. Additionally, the requirement that a contractual relationship exist to carry out these responsibilities was removed with the instruction reference removed accordingly.
- Added new bullet to the certification in line 24a, stating that the entity "Does not have any specified US persons that own an equity interest or debt interest (other than a debt interest that is not a financial account or that has a balance or value not exceeding \$50,000) in the FFI other than those identified on the FFI owner reporting statement."

- Added new bullet to the certification in line 24b, stating that the entity "Has provided, or will provide, valid documentation meeting the requirements of §1.1471-3(d)(6)(iii) for each person identified in the FFI owner reporting statement."
- Expanded line 26, adding two check boxes to specify the applicable IGA, including "treasury regulations" when specifying the justification for FFI treatment, and adding a new bullet regarding trustee documented trusts and sponsored entities.
- Expanded language in second bullet of line 28 regarding International Organizations, including entities that have in effect a headquarters agreement with a foreign government.
- Swapped Part XXIX and Part XXX so that Part XXIX is now "Substantial US Owners of Passive NFFE" and XXX is now "Certification."
- Added language to revised Part XXIX allowing an NFFE to list its controlling persons under an applicable IGA when providing the form to an FFI treated as a reporting Model 1 FFI or reporting Model 2 FFI.

Instruction updates

The following updates were made to the Instructions for Form W-8BEN-E to correspond with the form updates and to clarify previously unclear sections:

- LOB for treaty claims—as highlighted in the “What’s New” section on page one, the instructions note that, in order for an entity to claim treaty benefits, it must be a resident of the treaty country, be the beneficial owner of the income, and satisfy the LOB article of the treaty under which it is claiming benefits. One of the LOB checkboxes in Part III, discussed above, must be checked to certify that the taxpayer has either met one of the LOB tests or obtained a favorable discretionary determination from the US competent authority regarding its qualification for treaty benefits. These tests are outlined on pages 10 and 11 of the instructions, but taxpayers are warned that a box may only be checked if the associated test is included in the treaty under which they are claiming benefits.
- Nonreporting IGA FFIs—also highlighted in the “What’s New” section, the instructions for nonreporting IGA FFIs to properly complete the form have been revised to coordinate the IGAs with the chapter 4 Treasury Regulations. As further discussed on page 8, a nonreporting IGA FFI that qualifies as nonreporting under an IGA should check “nonreporting IGA FFI” even if it meets the qualifications for deemed-compliant status or are an exempt beneficial owner under Chapter 4.
- Added a new paragraph to "Purpose of Form" Section, noting that the form may also be used to claim exemption from withholding for portfolio interest pursuant to section 881(c).
- Expanded the section identifying persons that should not use the form, instructing a nonresident alien individual to use Form W-8BEN or Form 8233; clarifying the proper use of the form for disregarded entities, branches, or flow-through entities; and adding a parenthetical to include a qualified intermediary (“QI”) acting as a qualified derivatives dealer as a type of intermediary that should use a Form W-8IMY.
- Added a "caution" paragraph to "change in circumstances" subsection, highlighting that a change in circumstances includes when the jurisdiction where the FFI is organized or resident was included on the list of jurisdictions treated as having an intergovernmental agreement in effect and is removed from that list or when the FATCA status of the jurisdiction changes.
- Incorporated the definition of “qualified derivatives dealer” in the definition of “QI.”
- Expanded the definition of “disregarded entity” to note that a disregarded entity with its own GIIN must have its foreign owner complete Part II of the form. Where it “is not otherwise able to fill out Part II (i.e. because it is in the same country as its single owner and does not have a GIIN),” it may provide the form for chapter 4 purposes, should complete Part I as if it were a beneficial owner, and should leave line 3 blank.

- Added a “tip” paragraph to the instructions on line 1 stating that an account holder providing a form for purposes of documentation as an account holder only—and not receiving a withholdable payment or reportable amount—“should complete Part I by substituting the references to ‘beneficial owner’ with ‘account holder.’”
- Also added a “caution” paragraph to the instructions on line 1 warning that the holder of an account is not always treated as the account holder for chapter 4 purposes and advising that the entity providing the form should verify that it meets the definition under the Treasury Regulations or applicable IGA or consult with the FFI requesting the form.
- Added a “caution” paragraph to the instructions on line 5 noting that a withholding agent may request a chapter 4 status from an account holder in advance of the July 1, 2016, preexisting entity account remediation deadline for system processing purposes.
- Clarified the instructions on line 9a to state that a GIIN is not required on line 9a for a branch required to be identified on Part II unless such branch is a US branch or a limited branch and added a line instructing sponsored entities that have obtained GIINs to provide the GIIN.
- Added a “tip” paragraph after the instructions on line 9b stating that the lines should be large enough to fit the GIIN or foreign TIN, as appropriate. However, if the GIIN or TIN cannot fit, smaller font may be used, or it may be clearly identified elsewhere on the form or on an attached sheet as long as it is clearly provided. “For example, a handwritten GIIN located just outside of line 9a with a corresponding arrow pointing to line 9a is a properly provided GIIN for this purpose.”
- Added a “tip” paragraph under Part II instructing a disregarded entity receiving a withholdable payment that has its own GIIN should complete Part II regardless of whether it is in the same country as the single owner identified in Part I.
- Expanded the line 15 instructions to require the provision of the specific treaty article and paragraph or subparagraph and an explanation of the requirements.
- Included the instruction to enter the GIIN of the sponsoring entity in line 16 and modified the “note” regarding sponsored FFI GIINs to clarify that they are not required to obtain GIINs until January 1, 2017, but must provide it on line 9a if it has already been obtained.
- Expanded the instructions on line 24b to note that an owner-documented FFI that checks the box must provide both the FFI owner reporting statement and the valid documentation for each person identified on the FFI owner reporting statement.
- Changed the instructions on line 26 to require Nonreporting IGA FFIs, in providing the nonreporting category, to use the language from the IGA that describes the status; included an instruction for owner-documented FFIs to certify as such and complete Part X; and added a “note” stating, “If you are a nonreporting IGA FFI and you have registered and received a GIIN and have not provided it in line 9a because your trustee’s or sponsor’s GIIN is in line 9, you should provide it here.”
- Added a “note” paragraph after the instructions on line 40c stating that Part XXIX may be used to disclose controlling US persons to a reporting Model 1 or 2 FFI and highlighting the fact that the term “controlling U.S. persons” applies only if the form is provided to a reporting Model 1 or 2 FFI. A similar instruction is included in Part XXIX—Substantial US Owners of Passive NFFE.
- Included the instruction to provide the GIIN of the sponsoring entity on line 42.
- Switched the instructions for Part XXIX and Part XXX for the form updates noted above.
- Modified the language of the Special Instructions section to allow an alternative certification to be provided by an NFFE, such as an active NFFE, as defined in an applicable IGA. Additionally, the instructions provide that, “[i]f you cannot provide the certifications in Parts IV through XXVIII, or if you are a nonprofit entity that meets the definition of ‘active NFFE’ under the applicable IGA, do not check a box in line 5.”

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