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FAHTCAweekly

Your snapshot of the week



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[Many financial institutions will use IRS Forms W-8BEN-E and W-8IMY to document their entity account holders and payees for FATCA purposes. The IRS recently released the instructions for these forms as well as the instructions for the requesters of such forms.](#)

Editor's Note on our Subsequent Publication Schedule and the Transition of the Newsletter

As a reminder, the next edition will be the final publication for the newsletter in its current format. Starting in September, we will transition to a monthly newsletter with a sharper technical focus and a more expansive scope. In aid to this transition, we ask our readers to click on the survey link at the bottom of this email and complete and submit the survey available on the Deloitte website. We will apply the information obtained from the survey results to craft a revised strategic approach to the newsletter, better-suited to the developing needs and interests of our readership. We thank you in advance for your help in this matter.

Paul Millen
Editor, FATCAweekly Newsletter

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The View from Deloitte

Dear Reader,

Due to the inception of FATCA and the consequent need to document entity account holders and payees for FATCA purposes, the IRS substantially revised Forms W-8BEN-E and W-8IMY and the instructions thereto. While the forms themselves were released earlier this year, the instructions, the main purpose of which is to guide preparers on the completion of the forms, were published towards the end of June. The IRS finished its issuance of form guidance on 18 July upon release of the Instructions for the Requester of Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, and W-8IMY (the "Requester Instructions"), which primarily concentrate on the validation of the relevant Form.

The structures of Forms W-8BEN-E and W-8IMY are similar, consisting of discrete sections, not all of which must be completed by every preparer, as follows:

- Both Forms begin with the preparer identification section (Part I) in which the filing entity provides its name, address and identification numbers and also indicates its Chapter 3 and FATCA (Chapter 4) status.
- Part II on both Forms needs to be completed only in the case of branches of an FFI and disregarded entities owned by an FFI.
- Part III on Form W-8BEN-E needs to be completed to claim treaty benefits.
 - o As an entity cannot claim treaty benefits using Form W-8IMY, there is no equivalent section. Instead, on Form W-8IMY, Parts III through VIII contain certifications regarding an entity's Chapter 3 status, which in turn is not necessary on Form W-8BEN-E.
- The remaining sections of the Forms (Parts IV through XXVIII and Part XXX on Form W-8BEN-E as well as Parts IX through XXVII on Form W-8IMY) set out the requisite certifications regarding the preparer's FATCA status.
 - o Whether the preparer must complete a FATCA certification section, and if so, which one, depends on the FATCA status claimed in Part I.
- Parts XXIX (Form W-8BEN-E) and XXVIII (Form W-8IMY) contain the penalty of perjury warning and the signature section.

Choice of the correct Form

Pre-FATCA, the general rule for choice of the correct Form directed non-U.S. intermediaries and flow-through entities (partnerships, grantor trusts and simple trusts) to submit Form W-8IMY (or W-8BEN, if claiming treaty benefits) and all other non-U.S. preparers - individual or entity - to submit Form W-8BEN (unless they qualified for a niche alternative Form, such as a Form W-8EXP or W-8ECI). In general, this rule remains valid, except that for entity preparers, the new Form W-8BEN-E replaces Form W-8BEN. However, the instructions grant additional flexibility to an entity filing a form strictly to document its FATCA status as an account holder (i.e. an entity that does not receive reportable amounts or withholdable payments), allowing submission of a Form W-8BEN-E, irrespective of the role of entity.

The superseded pre-FATCA Forms are not yet obsolete. The cover sheets to the Forms, as well as to the Requester Instructions, clarify the use of prior versions of the Forms. Such prior versions may be used until the end of the six-month period after the revision date shown on

the Form (for Chapter 3 purposes) or as allowed under the rules regarding the use of pre-FATCA Forms W-8 (for FATCA purposes). Thanks to the extension of the deadlines permitting treatment of entity accounts opened between 1 July and 31 December as pre-existing entity accounts for FATCA purposes, Forms W-8BEN and W-8IMY with revision dates of February 2006 may be accepted for both Chapter 3 and FATCA purposes, if submitted before the end of 2014. However, if a prior version of the Forms W-8 is obtained during the year 2014, an FFI may not rely on such Form in order to satisfy its FATCA account holder documentation obligations for 2015 or later, unless expressly permitted under the allowance for reliance on pre-FATCA Forms W-8.

Depending on the relationship of the Person submitting the Form W-8 to the recipient (i.e. account holder or payee), the type of obligation concerned (i.e. pre-existing or new), and whether the person receives relevant payments, a Form W-8 may not be necessary and, instead, a written statement or another self-certification may suffice.

FATCA statuses, respective certifications and GIIN validation

Perhaps, the most eye-catching aspect of the new Forms is their length. The new Forms W-8BEN-E and W-8IMY run for considerably more pages than the previous versions due to the inclusion of the FATCA statuses and the corresponding certifications. However, despite the expansion of the Forms and the consequent expansion of the instructions, some topics remain undeveloped. From an IGA perspective, the NFFE categories do not adequately display the definitions from the Annex I of an applicable IGA. Instead of incorporating these statuses in full on the Forms themselves, the IRS opted to provide entities subject to an IGA with an alternative approach first introduced in the instructions. An IGA FFI may provide its entity account holders with a FATCA status certification template that meets the requirements under an applicable IGA, in case a preparer cannot satisfy the conditions of certification for its chapter 4 status as set out on Form. The preparer then completes and attaches this certification to the submitted Form W-8. Consequently, the preparer is neither required to check a box on line 5 (Part I) of the Forms nor to make a certification in Parts IV through XXVIII or Parts IX through XXVII on the Forms W-8BEN-E and W-8IMY, respectively.

Further, the Forms W-8 do not display all “nonreporting IGA FFI” subcategories mentioned in the Annexes II of the IGAs but instead summarize them in one single certification basket. As all other certifications on the Forms are based on the definitions in the Treasury Regulations, the instructions direct any entity invoking an exemption under the Annex II of the applicable IGA to certify its status as a “nonreporting IGA FFI”.

Depending on the FATCA status claimed, the preparer may need to provide on the Form W-8, and the requester may need to verify, the Global Intermediary Identification Number (GIIN). While the different sets of guidance yield some ambiguity in this regard, we expect in practice requesters to insist upon a GIIN whenever they have reason to know that the preparer, or its sponsoring entity (including the trustee of a trustee-documented trust), ought to have obtained one, in order to enable the requester to verify the GIIN against the official IRS list (available [here](#)).

Durational validity of the new Forms

In most cases, a Form W-8IMY is valid indefinitely, whereas a Form W-8BEN-E expires on the last day of the third calendar year succeeding the signature date. Depending on the preparer’s FATCA status, the Form W-8BEN-E may also have an indefinite validity period so long as the preparer will not claim treaty benefits from U.S. source income payments documented via the Form.

However, both Forms cease to be valid if there is a change in circumstances causing the requester to know, or have reason to know, that the Form is unreliable or incorrect. In general, one has reason to know that a Form is unreliable or incorrect, if the Form W-8 is incomplete with respect to a relevant item or the Form contains inconsistent information. Further, the instructions state that a withholding agent should not rely on Form W-8BEN-E if specified U.S. indicia (e.g. a U.S. residence or mailing address) appear in other documents collected from the preparer. In such cases, a new Form or additional curative documentation should be obtained (unless already on file) in order to substantiate the claim on the Form. Nevertheless, the requester may generally treat a Form W-8 as valid if it contains an error or omission that is inconsequential, at least if there is sufficient documentation on file to supplement the missing information. The Requester Instructions set out representative examples of inconsequential errors, including situations where the Form is not dated or where the printed name of the signer is absent.

Substitute Forms W-8

The Requester Instructions provide detailed guidance on the requirements for the use of substitute Forms W-8. While the content of a substitute Form W-8 needs to remain substantially similar to the official IRS Form, one may, for example, draft such substitute form in a language other than English or structure it in a format different from the current one for internal operational reasons. A substitute Form W-8 does not need to display all possible FATCA statuses, so long as the categories for nonparticipating FFIs and passive NFFEs are included. In the IGA context, a form that meets all the requirements for a substitute Form W-8, may be treated as a similar agreed form for purposes of an applicable Model 1 IGA, unless the partner jurisdiction declines such treatment.

Although the instructions clarified the bulk of the topics on the submission and validation of Forms W-8, several outstanding questions remain, particularly in respect of the proper documentation of entities subject to an IGA.

Regards,

[Brandi Caruso](#)

FATCA Leader, Switzerland

[Thomas Schwab](#)

[Robin King](#)

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