

## IRS Released Final Form W-8BEN-E for Entities

### Closing the distance

Global Financial Services Industry



#### IRS Released Final Form W-8BEN-E for Entities (no instructions)

On March 29, 2014, the IRS announced the release of the final Form W-8BEN-E, "Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)." The updated form will be used by foreign entities to certify their status under FATCA and chapter 3, as well as their entitlement to treaty benefits. No instructions were published with the form itself. The form is eight pages long (the current final Form W-8BEN is only one page) and changes include the new chapter 4 classifications introduced in the final and temporary FATCA regulations as well as modifications to the certifications pertaining to such classifications.

Now that the Form W-8BEN-E has been finalized, withholding agents have six months to begin using it to document payees and account holders. Note that it is unclear whether withholding agents should count from the date the form was published (March 28) or from the version date of the form (February), but targeting August 1, 2014 should be a safe decision unless or until additional clarifying guidance is provided.

Non-financial withholding agents and accounts payable departments should also consider whether they should resolicit documentation from existing payees that are not receiving FATCA withholdable payments using the current Form W-8BEN (2006). Because such withholding agents generally make payments that are not subject to chapter 4 withholding, they will not need to collect the additional information for FATCA contained on the new Form W-8BEN-E. Therefore they can rely on the older Form W-8BEN (2006) until it sunsets in August. Using the older form will allow them to rely on the form until it expires (generally three years after the year it is signed) before having to collect the longer and more complicated Form W-8BEN-E. Withholding agents with FATCA withholdable payments should begin modifying any current or in process systems, processes, and procedures to accommodate the updated final form.

The following highlights modifications to the final Form W-8BEN-E compared to the May 20, 2013 draft released last year:

- Removal of the requirement to not abbreviate the country in the address fields throughout the form. This change should be welcome to many withholding agents familiar with the IRS's previous position of invalidating Form W-8s due to country abbreviations;
- Modifications to the following chapter 4 classifications on line 4:
  - Participating FFI in a Model 2 IGA jurisdiction has been changed to Reporting Model 2 FFI consistent with terminology used in the Model Intergovernmental Agreements (IGAs);
  - Added language to the parenthetical for the Nonparticipating FFI (including a limited FFI **or an FFI related to a Reporting IGA FFI other than a registered deemed-compliant FFI or participating FFI**) category (the bolded part was added). The added language is somewhat confusing but appears to refer to a related entity to a Reporting IGA that cannot comply with the requirements imposed by FATCA and is non-compliant;
  - Added the parenthetical to the Registered deemed-compliant FFI (**other than a reporting Model 1 FFI or sponsored FFI that has not obtained a GIIN**) category because Reporting Model 1 FFIs and sponsored FFIs have their own chapter 4 categories;
  - Added the parenthetical to the Nonreporting IGA FFI (**including an FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA**) category;
  - Changed the language for the publicly traded NFFE or **NFFE affiliate of a publicly traded corporation category** (bolded part was updated) including the corresponding language in the certification in Part XXIII. The prior language ("or affiliate of a publicly traded NFFE") seemed to indicate that the affiliate had to be an affiliate of a non-financial foreign entity (NFFE) which is not the case. The entity could be an affiliate of any publicly traded corporation including U.S. entities and financial institutions;
  - Removed the last classification "not receiving withholdable / passthru payment." It was never clear what this classification was for given that instructions were not issued for the draft form, but given that it has been removed, the point is moot.
- Added the following new chapter 4 classifications on line 4 along with corresponding certifications sections where indicated in bold:
  - Certified deemed-compliant investment advisors and investment managers. **Complete Part IX;**
  - Excepted inter-affiliate FFI. **Complete Part XXVII;**
  - Direct reporting NFFE;
  - Sponsored direct reporting NFFE. **Complete Part XXVIII;**
- Added a parenthetical to the permanent residence address on line 6 and line 12 ("other than a registered address") in relation to not using a P.O. Box or in care of address which seems to indicate that a P.O. Box or in care of address will be allowed if the entity uses such an address as its registered address. Without instructions it is unclear whether the beneficial owner will still need to provide evidence that the P.O. Box or in care of address is its registered address as was unofficially required in the past;
- Fixed the abbreviation on line 8 for the U.S. taxpayer identification number (TIN) (previously said "EIN");

- Split line 9 to line 9a for the GIIN and line 9b for the Foreign TIN indicating that if a legal entity has a GIIN it may also need to provide a Foreign TIN (depending on the jurisdiction). The previous version of the form seemed to only allow one identification number or the other (unclear without instructions). Additionally, in practice it may be difficult to input such identification numbers in the small space provided unless the number is typed in digitally;
- Modified the following chapter 4 classifications for a branch or disregarded entity on line 11: non-participating FFI (changed to limited branch) and Participating FFI in a Model 2 IGA jurisdiction (changed to Reporting Model 2 mirroring the change to line 4)
- Added the U.S. branch chapter 4 classification to line 11 for a branch or disregarded entity;
- Added the parenthetical “(that is not a nonparticipating FFI)” to the third bullet point on line 17 indicating that the sponsoring entity of a registered deemed-compliant sponsored FFI must not be a nonparticipating FFI;
- Added the parenthetical to the fourth bulleted certification on line 21 for certified deemed compliant sponsored loosely held investment vehicle - Twenty or fewer individuals own all of the debt and equity interests in the entity (**disregarding debt interests owned by U.S. financial institutions, participating FFIs, registered deemed-compliant FFIs, and certified deemed-compliant FFIs and equity interests owned by an entity if that entity owns 100 percent of the equity interests in the FFI and is itself a sponsored FFI**). Also removed the requirement to not “hold itself out as an investment vehicle for unrelated parties” as modified in the regulations;
- Modified the certifications for a certified deemed-compliant limited life debt investment entity to correspond with updates in the final and temporary regulations (including changing the formation deadline to January 17, 2013);
- For the owner-documented FFI certifications in Part X, removed the requirement to provide documentation for each individual, owner-documented FFI, exempt beneficial owner, and NFFE holding direct/indirect interests in the FFI and moving the remaining language regarding to the last sentence on line 24c that requires an FFI owner reporting statement for owners that are specified U.S. person(s) along with Form W-9(s) for such owner(s); and
- Added a certification to the Nonreporting IGA FFI section in Part XII (last bullet) requesting the GIIN for a nonreporting IGA FFI that is a registered deemed-compliant FFI under a Model 2 IGA. Certain nonreporting IGA FFIs must register which is a key difference compared to most Model 1 Jurisdictions but it is odd the IRS chose to use a separate GIIN field in lieu of using the GIIN field on line 9b of the form. It is also unclear without instructions whether the entity will need to also provide the GIIN on line 9b.

The attached annotated Form W-8BEN-E highlights some of the changes noted above. The official Form W-8BEN-E is also attached.

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