

IRS releases draft Form W-8BEN-E and Instructions

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Global Financial Services Industry



IRS Releases a draft Form W-8BEN-E and Instructions

On January 15, 2016, the IRS released a **draft Form W-8BEN-E, "Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities),"** and accompanying **Instructions**. Although the updates are by no means an overhaul, there are several material updates to highlight compared to the June 2014 version of the form, as provided below:

Form W-8BEN-E modifications

- Addition of chapter 3 status (entity type) "International Organization" on line 3.
- Modification to the following chapter 4 classifications on line 5:
 - Removed language limiting chapter 4 Status selection to one checkbox. However, the relevant Line 5 instructions state that you are to check the one box that applies to your chapter 4 status.
 - Changed parenthetical title of FATCA status "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; added a parenthetical to Nonreporting IGA FFI, stating "including an FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA." The Instructions clarify that, if you are treated as a registered deemed-compliant FFI under an applicable IGA, you should check "Nonreporting IGA FFI" rather than "registered deemed-compliant FFI." When providing the specific category of FFI in this section, the instructions request that you use the specific language from Annex II of the IGA or the specific regulation citation, where applicable.
 - Removed clause accompanying references to Sponsored FFIs which stated "that has not obtained GIIN."

- 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. The instructions note that, if you check "Account that is not a financial account" on line 5, the requester of the form will evaluate whether you must certify to another chapter 4 status.
- Added language "Complete only if a disregarded entity **with a GIIN**" to header instructions of Part II. (Bolded language is addition.) The Instructions clarify that Part II is to be completed by a disregarded entity with GIIN or by a branch of an FFI in a country other than the FFI's country of residence whether or not the branch has a GIIN. Additionally, the Instructions note that a "disregarded entity with a US owner may provide this form to an FFI solely for purposes of documenting itself for chapter 4 purposes. In such a case, the disregarded entity should complete Part I as if it were a beneficial owner and should not complete line 3."
- 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: Government, Tax exempt pension trust or pension fund, Other tax exempt organization, Subsidiary of a publicly traded corporation, Company that meets the ownership and base erosion test, Company that meets the derivative benefits test, Company with an item of income that meets active trade or business test, Favorable discretionary determination by the US competent authority received, and Other, 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.
- Added "US sourced" to language in line 14c referring to "dividends" for which the beneficial owner is claiming treaty benefits.
- Added line for GIIN of sponsoring entity in line 16 and again in line 42 of part XXVIII. The instructions further note that a sponsored FFI is not required to have obtained its own GIIN before the date specified in published guidance. However, a sponsored entity that has obtained a GIIN must provide it on line 9a.
- Simplified certification language from line 17. It now reads "is an investment entity". Previously it read "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 "reporting Model 1 FFI" to the notes section of Part X listing the entity types to which a form can be given with the Owner-Documented FFI status provided.
- 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."

In addition to the updates highlighted above, the following material updates were made to the Form W-8BEN-E Instructions:

- 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, Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services and adding a parenthetical to include a qualified intermediary acting as a qualified derivatives dealer as a type of intermediary that should use a Form W-8IMY.
- Added "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 a qualified derivatives dealer in the definition of Qualified Intermediary (QI).
- Expanded the line 15 instructions to require the provision of the specific treaty article and paragraph or subparagraph and an explanation of the requirements.
- Added a "Note" regarding line 26, 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."

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, "If 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." (Bolded part is addition.)

As a result of these numerous changes and additions, the IRS included a cautionary cover letter emphasizing that these revisions are in draft form and changes are expected. Additionally, the cover letter notes that comments are welcomed and will be carefully considered.

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