

## New IRS FAQs Address Validity of Non-U.S. Approved Self-Certifications

### Closing the distance

Global Financial Services Industry



#### IRS Released FAQs on the Validity of Non-U.S. Approved Self-Certifications

We previously announced that the validity of non-U.S. approved self-certifications may be called into question because of language included in certain portions of the Intergovernmental Agreement (“IGA”) stating that the Foreign Financial Institution (“FFI”) may use a Form W-8/W-9 “or other similar agreed form” to document an account holder. The IRS has updated the FATCA General Frequently Asked Questions (“FAQs”) on its [website](#) to address this language and define what it considers to be “a similar agreed form”.

The FAQs essentially say that if a Form W-8 or W-9 is not used, the self-certification will have to conform to the requirements of a substitute Form W-8 or W-9, including the penalties of perjury language contained in the official IRS forms. However, the size and complexity of the substitute form can be significantly reduced by limiting the number of FATCA classifications listed on the form. Moreover, the substitute form may include classifications that are relevant in IGA jurisdictions that may not be included on the official IRS Form W-8 or W-9 (for example, excepted NFFEs classified as such because they are qualified intermediaries, withholding foreign partnerships, or withholding foreign trusts). Unfortunately, if the financial institution uses a substitute form, it must create instructions to accompany the form consistent with instructions provided for the official forms.

Most importantly, the FAQs seem to be limited to areas in the IGA that use the “similar agreed form” language. This suggests that the substitute form requirements only apply for self-certifications used for preexisting accounts and for new accounts held by U.S. persons. In all other cases, a self-certification would presumably be acceptable if it meets the IGA and local jurisdiction requirements. Although the local guidance on self-certifications (including self-certifications published by local

jurisdictions) may not specify that you are not able to apply the guidance in the circumstances outlined above, we recommend that financial institutions take a conservative approach in drafting self-certifications by applying the local jurisdiction guidance while also incorporating the substitute Form W-8 or W-9 requirements where required.

We will keep you informed of any additional developments.

## IRS FAQs

Annex I of the IGA provides that, **for certain purposes**, a self-certification may be made on an IRS Form W-8 or other “similar agreed form.” What would be considered a similar agreed form?

### **Substitute Withholding Certificate: In General**

A similar agreed form may include, for example, a substitute Form W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, or W-8IMY if its content is substantially similar to the IRS’s official Form W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, or W-8IMY (see the instructions to the requestor of Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, and W-8IMY), and the partner jurisdiction does not decline such treatment. You may develop and use a substitute form that is in a foreign language, provided that you make an English translation of the form and its contents available to the IRS upon request. You may combine Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, and W-8IMY into a single substitute form.

You may choose to provide a substitute form that does not include all of the chapter 4 statuses provided on the Form W-8, but the substitute form must include any chapter 4 status for which withholding may apply, such as the categories for a nonparticipating FFI or passive NFFE. See Treas. Reg. § 1.1471-3(c)(6)(v)(A). You may also provide with the form an alternative certification that reflects the requirements under an applicable IGA instead of the certification of chapter 4 status otherwise required by the form. See the Instructions for the Requester of Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP, and W-8IMY and the Instructions for Form W-8BEN-E for the requirements to use alternative certifications with respect to Form W-8BEN-E, which also apply to a substitute version of the form.

You are also required to furnish instructions for the substitute form to the extent and manner provided in the official instructions for the official form.

You may incorporate a substitute Form W-8 into other business forms you customarily use, such as account signature cards, provided the required certifications are clearly set forth. However, you may not:

1. Use a substitute form that requires the payee, by signing, to agree to provisions unrelated to the required certifications, or
2. Imply that a person may be subject to 30% withholding or backup withholding unless that person agrees to provisions on the substitute form that are unrelated to the required certifications.

A substitute Form W-8 is generally valid only if it contains the same penalties of perjury statement and certifications as the official forms and the required signature. However, if the substitute form is contained in some other business form, the words “information on this form” may be modified to refer to that portion of the business form containing the substitute form information, including any alternative certification under an applicable IGA provided with the substitute form. The design of the substitute form must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the business form.

### **Substitute Withholding Certificate: Non-IRS Form for Individuals**

A similar agreed form may also include a non-IRS form used in place of a Form W-8BEN (for individuals). The substitute form must include the information required in Treas. Reg. § 1471-3(c)(6)(v), and the form must be signed, dated, and also certified under penalties of perjury unless the form is accompanied by documentary evidence that supports the individual’s claim of foreign status. For a case in which a withholding certificate is required to be associated with a payment subject to chapter 3 withholding or reportable amount under Treas. Reg. § 1.1441-1(e)(3)(vi), however, see the requirements for a beneficial owner withholding certificate under Treas. Reg. § 1.1441-1(e)(2).

### **Documenting an Entity’s Chapter 4 Status with a Written Statement**

You may use a written statement described in Treas. Reg. § 1.1471-3(c)(4) to document an entity account holder or payee. Such a written statement is valid only to the extent that it is permitted to be used based on the requirements of Treas. Reg. § 1.1471-3(d). Also see Treas. Reg. § 1.1471-3(d) for when a written statement must be supported by documentary evidence of the payee’s foreign status. The written statement may incorporate, rather than a chapter 4 status described in Treas. Reg. § 1.1471-3(d), a certification of status as determined under the requirements of an applicable IGA.

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