

# ***IRS issues instructions for Form W-8BEN-E enabling foreign entities to comply with FATCA***

July 1, 2014

## ***In brief***

On June 25, 2014, the Internal Revenue Service (IRS) released the instructions for Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities). Form W-8BEN-E, which was issued without instructions in March 2014 (with a February 2014 revision date), is used by non-US entities to document their status as a payee under Chapter 4 and as a beneficial owner under Chapter 3 of the Internal Revenue Code (Code). In addition, Form W-8BEN-E is used by non-US entities to document their entitlement to a reduced rate of withholding pursuant to an income tax treaty. An entity that does not document its Chapter 4 status (commonly referred to as its FATCA status) may be treated as a recalcitrant account holder or nonparticipating foreign financial institution, and subject to a 30% withholding when receiving certain withholdable payments.

The instructions to Form W-8BEN-E provide clarification and relevant definitions in regard to the requirements for documenting and certifying a non-US entity's status, which is essential for compliance with FATCA and other information reporting and withholding requirements. Although a withholding agent or payer may still accept the pre-FATCA version of Form W-8BEN, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting, (i.e., the Feb. 2006 revision of Form W-8BEN) from an entity until December 31, 2014, it is expected that many payees will begin using the new Form W-8BEN-E immediately, now that the instructions to the form have been released.

## ***In detail***

### ***Exceptions to providing Form W-8BEN-E***

Generally, non-US entities receiving a withholdable payment under Chapter 4, a payment subject to Chapter 3 withholding, or maintaining an account with a foreign financial institution (FFI) must provide a Form W-8BEN-E (or other appropriate documentation) to their withholding agent or FFI.

However, the instructions provide a number of exceptions to this general rule. The following are some of the more pertinent exceptions:

- If the non-US entity is a disregarded entity with a single owner that is a US person and is not a hybrid entity claiming treaty benefits, the foreign entity should not use a Form W-

8BEN-E. Rather, the single owner should provide a Form W-9, Request for Taxpayer Identification Number and Certification.

- If the non-US entity is a disregarded entity with a single owner that is not a US person or a branch of an FFI claiming its foreign status for

FATCA purposes and is not a hybrid entity claiming treaty benefits, the foreign entity should not use a Form W-8BEN-E. Rather, the single owner should provide Form W-8BEN, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals), or Form W-8BEN-E (as appropriate) and identify the branch or provide the legal name of the disregarded entity (if required).

- An entity that is not fiscally transparent under US tax law, but that is fiscally transparent under the laws of a jurisdiction with which the United States has an income tax treaty (reverse hybrid) should use a Form W-8BEN-E only for payments for which it is not claiming treaty benefits on behalf of its owners and must provide a FATCA status when it is receiving a withholdable payment. If a reverse hybrid entity is transmitting beneficial owner documentation provided by its interest holders to claim treaty benefits on their behalf, it should not use a Form W-8BEN-E. Rather, it should provide Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting, along with a withholding statement and Form W-8BEN or Form W-8BEN-E for each of its owners claiming treaty benefits.
- The foreign branch of a US financial institution that is an FFI under an applicable Model I intergovernmental agreement (IGA) should not use a Form W-8BEN-E. Rather, for purposes of

identifying itself to its withholding agents, it may submit a Form W-9 to certify its US status.

- A foreign insurance company that made a Section 953(d) election to be treated as a US person should not use a Form W-8BEN-E. Rather, it should provide a withholding agent with a Form W-9 to certify its US status even if it is considered an FFI for FATCA purposes.

**Observation:** *The instructions to Form W-8BEN-E do a good job of explaining how certain entities such as disregarded and hybrid entities use the form. As an example, the instructions indicate that a non-US entity that is a regarded entity in its home jurisdiction but is a flow-through entity for US tax purposes and is making a claim for treaty benefits should use Form W-8BEN-E.*

**Use of Form W-8BEN-E or Form W-8IMY solely to document foreign status**

The instructions provide that a foreign flow-through entity or intermediary not receiving withholdable payments or payments subject to withholding under Chapter 3 may provide Form W-8BEN-E or Form W-8IMY to an FFI solely for purposes of documenting foreign flow-through entity or intermediary's account as part of the FFI's due diligence obligations under FATCA or an applicable IGA.

**Entities providing certifications under an applicable IGA**

According to the Form W-8BEN-E instructions, a withholding agent that is an FFI may provide a non-US entity with a Chapter 4 status certification (other than as shown on Form W-8BEN-E) in order to satisfy its due diligence requirements under an applicable IGA. In such case, the non-

US entity may attach the alternative certification to Form W-8BEN-E in lieu of completing a status on Form W-8BEN-E, provided that it determines that the certification accurately reflects its status for FATCA purposes or under an applicable IGA and the withholding agent states in writing that it has requested the certification to meet its due diligence requirements under an applicable IGA.

A non-US entity may provide an applicable IGA certification along with Form W-8BEN-E if it determines its FATCA status under the definitions provided in an applicable IGA and its certification identifies the jurisdiction that is treated as having an IGA in effect and describes its status as a nonfinancial foreign entity or FFI in accordance with the applicable IGA. However, if the non-US entity determines its status under the definitions of the IGA and can certify to a FATCA status included on Form W-8BEN-E, it does not need to provide the applicable IGA certification unless required by the withholding agent or FFI to which it is providing the form.

Any certifications provided under an applicable IGA remain subject to the penalty of perjury statement and other certifications made on Form W-8BEN-E.

**Observation:** *Historically, the IRS has published the Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP and W-8IMY. This publication provides helpful definitions and insights about how to evaluate withholding certificates. The IRS has not stated publicly when this document will be updated, but it will be helpful to withholding agents and others who need to evaluate the validity of the forms.*

### **Entities providing alternate certifications under regulations**

If a non-US entity qualifies for a FATCA status that is not shown on Form W-8BEN-E, it may attach applicable certifications for such status from any other Form W-8 on which the relevant certifications appear. If the applicable certifications do not appear on any Form W-8 (e.g., new regulations provide a new FATCA status and Form W-8BEN-E has not been updated to reflect the new status), then the non-US entity may provide an attachment certifying that it qualifies for the applicable status described in the particular US Department of the Treasury (Treasury) regulations section in lieu of checking a box on Form W-8BEN-E and providing any FATCA status certifications included on the form. Any such attached certification becomes part of the Form W-8BEN-E and is subject to the penalty of perjury statement and other certifications made on the form.

**Observation:** *Non-US payees that are not receiving a withholdable payment are not required to provide a FATCA classification on Form W-8BEN-E. This rule is very appealing for those wanting to simplify FATCA compliance. It also presents a trap for the unwary. Organizations that have payment systems (vendor files, etc.) that manage information for all types of payees may find it difficult to have an onboarding process for different recipients based on the type of payments being made. Careful consideration should be given when implementing this simplifying measure.*

### **Use of sponsoring entities GIINs**

A sponsored entity is not required to furnish its own global intermediary identification number (GIIN) before January 1, 2016. Accordingly, the instructions provide that a sponsored

entity must provide its sponsored entity's GIIN before that time.

### **Disregarded Entities and Branches**

The instructions provide that a branch of an FFI identified as a beneficial owner on a Form W-8BEN-E receiving a withholdable payment as an intermediary (including a branch that is a disregarded entity) and operating in a jurisdiction other than the FFI's country of residence is not required to complete its own Form W-8BEN-E. Rather, it should complete Part II of the FFI's Form W-8BEN-E.

### **Certification by authorized representative or officer**

The instructions provide that Form W-8BEN-E must be signed and dated by an authorized representative or officer of the beneficial owner, participating payee, or account holder of an FFI requesting the form. An authorized representative or officer must check the box to certify legal capacity to sign the form. If Form W-8BEN-E is completed by an agent acting under a duly authorized power of attorney, the form must be accompanied by the power of attorney. The agent, as well as the beneficial owner, payee, or account holder, may be liable for penalties for an erroneous, false, or fraudulent form. In addition, by signing Form W-8BEN-E, the authorized representative, officer, or agent of the entity agrees to provide a new form within 30 days following a change in circumstances affecting the correctness of the form.

### **Expiration of Form W-8BEN-E**

Generally, a Form W-8BEN-E will remain valid for purposes of both Chapters 3 and 4 for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. For

example, a Form W-8BEN-E signed on September 30, 2014, remains valid through December 31, 2017. See our [\*Insight: With only four months to go, do you know the impact of the latest FATCA guidance?\*](#) for a discussion of the indefinite validity of Forms W-8.

However, under certain conditions a Form W-8BEN-E will remain in effect indefinitely until a change of circumstances occurs. To determine the period of validity for Form W-8BEN-E for purposes of Chapter 4, the Form W-8BEN-E instructions refer the reader to Treasury Regulations Section 1.1471-3(c)(6)(ii) and to Treasury Regulations Section 1.1441-1(e)(4)(ii) for purposes of Chapter 3

### **The takeaway**

The IRS has provided the long awaited instructions to Form W-8BEN-E. Though there were not many surprises in the instructions, experience over time with different scenarios will likely expose unanticipated issues. The Form W-8 series has been difficult to manage in the past and will continue to be difficult to manage in the future. This fact requires withholding agents to develop strong processes to decrease the likelihood that an invalid form will be relied upon erroneously allowing a lower rate of withholding to be applied. In addition, payers now have the information necessary to consider whether they would want to use substitute forms or find alternative methods of documenting payees.

Notice 2014-33 and recent IRS official public statements suggest that the old version of Form W-8BEN can continue to be accepted through the end of 2014. Withholding agents should take this additional time to develop the proper procedures for accepting the W-8BEN-E before implementing its use in its payment processes.

### ***Let's talk***

For more information on how FATCA might impact your MNC, please contact a member of the PwC's Global Information Reporting Network. To view contacts for over 70 countries worldwide, click [here](#).

### ***Additional information***

To download the PwC formatted version of the FATCA temporary and final regulations, please [click here](#).

For other information regarding FATCA guidance and implementation, please click [here](#) for the *Global Information Reporting* thought leadership archive.

© 2014 PricewaterhouseCoopers LLP, a Delaware limited liability partnership. All rights reserved. PwC refers to the United States member firm, and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see [www.pwc.com/structure](http://www.pwc.com/structure) for further details.

SOLICITATION

This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.