



Doing Business With Foreign Entities? Say Hello to Form W-8BEN-E

IRS Finally Issues Form W-8BEN-E, the Crown Jewel of FATCA Forms

While the Form W-8BEN-E has been a long time coming, the IRS's eight-page effort can seem overwhelming, especially for those that have to have their vendors and subsidiaries fill out the behemoth by July 1. This Tax Alert will provide an overview of the form, a little of the form's history, and some practical advice on how to approach the form if you are a U.S. company doing business with foreign vendors, making intercompany payments subject to withholding, or subsidiaries that are not "foreign financial institutions." For a process that began over four years ago, the new form provides some clarity as to what compliance with FATCA will look like in the future. Another Tax Alert will cover issues connected with foreign financial institutions.

The provisions commonly referred to as FATCA (short for Foreign Account Tax Compliance Act) were enacted in March 2010 as part of the 2010 Hiring Incentives to Restore Employment ("HIRE") Act. FATCA was passed to target tax noncompliance by U.S. persons with foreign bank accounts (think of the classic secret Swiss or Cayman Island bank accounts). FATCA provisions were responsible for the new Form 8938 (Statement of Specified Foreign Financial Assets) reporting requirements for U.S. individual returns starting in 2012. This new Form W-8BEN-E is an added requirement for U.S. taxpayers doing business with foreign entities or that have foreign subsidiaries. The Form W-8BEN-E documents the status of those foreign entities for U.S. income tax, treaty benefits, and FATCA purposes.

The old Form W-8BEN can be found online at <http://www.irs.gov/pub/irs-pdf/fw8ben.pdf> and the new Form W-8BEN-E can be found at <http://www.irs.gov/pub/irs-pdf/fw8bene.pdf>. While the basic purposes of the forms are similar – they both document information on a foreign individual or entity and requested treaty benefits – the Form W-8BEN-E is much longer due to information required by FATCA for foreign entities, the "E" in W-8BEN-E. The good news is that most of the new eight-page form will not have to be filled out. The trick will be determining the right sections to complete.

Who needs to complete a Form W-8BEN-E?

Any U.S. taxpayer that has nonproduct related transactions with a foreign entity (FE) must receive a completed Form W-8BEN-E from that FE to determine if the FE is subject to the default 30 percent withholding on payments to FEs or if the FE is eligible for any reduced withholdings related to an applicable treaty.

Example: USCo purchases product from ForeignCo. Since the transaction is related to the purchase of products, no Form W-8BEN-E is required. While no Form W-8BEN-E is required, information about ForeignCo is normally required for products to clear customs.

Example: USCo pays dividends to ForeignParent. Since the transaction is related to a payment subject to withholding, Form W-8BEN-E must be completed to disclose ForeignParent's status for FATCA purposes, and to provide support for treaty benefits being requested.

It should be noted that prior versions of Form W-8BEN expire on March 28, 2014, or will expire six months after that date for entities. The new Form W-8BEN-Es will have to be received from all foreign entities that you do business with. Due to the expiration of the old Form W-8BENs, we recommend that all U.S. taxpayers perform a full review of your organization and vendor files to identify all foreign entities that you do business with. This will allow you to update your files at one time and ensure that a good base for future compliance with FATCA has been set.

What does the name of the Form W-8BEN-E tell us?

Looking at the name of a form often provides good insight into the function of the form – knowing the tax nomenclature can be enlightening. For the Form W-8BEN-E, the title *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)* tells us:

- The form is for entities only. Form W-8BEN is still used for foreign individuals. In addition, Forms W-8ECI, W-8IMY, and W-8EXP still apply for businesses that have effectively connected income in the U.S., are foreign partnerships or simple/grantor trusts, or a foreign government or tax-exempt organization.
- The form is a certificate which is retained by the U.S. taxpayer until requested by the IRS to support a withholding or reporting decision. Withholding requires the determination of whether withholding applies and the correct rate. Reporting is generally done on Form 1042-S for a foreign person.
- The form is prepared by the beneficial owner of the payment. A beneficial owner is the foreign legal entity that is the beneficial owner of payments from a U.S. person. Since entities may be viewed differently for tax than for legal purposes, the form must be completed for the entity under tax rules, not necessarily under the legal rules.

What parts of Form W-8BEN-E must always be completed?

Form W-8BEN-E contains 30 parts (which use the Roman numeral system to make the numbering more interesting). While there are a number of parts, very few of them for a particular entity will need to be completed. However, all foreign beneficial owners **must** complete Parts I (Identification of Beneficial Owner) and XXIX (Certification).

Part I requires information related to:

- Entity name and country of incorporation or organization
- Chapter 3 status – This section must be completed to identify the tax status of an entity claiming treaty benefits. Entities requesting treaty benefits must also complete Part III (Claim of Tax Treaty Benefits)

- Chapter 4 status – This section must be completed to identify the FATCA status of the entity. The form lists 31 classifications and each entity will fit one – and only one – such classification. Some key terms and abbreviations include:
 - FFI – Foreign Financial Institution – if an entity is an FFI they are subject to additional requirements under FATCA. Requirements related to FFIs will not be discussed in this Tax Alert.
 - IGA – Intergovernmental Agreement – The IRS has signed IGAs with several governments that modify how FFIs are required to report information. Requirements related to IGAs will not be discussed in this Tax Alert.
 - NFFE – Non-Financial Foreign Entity – Typically, if an entity is not an FFI, it is an NFFE. Determining the correct type of NFFE is an important element of completing the Form.
- Address (permanent and mailing) of the entity
- Identification numbers related to the entity:
 - The U.S. identification number is the business number issued to U.S. or foreign businesses with operations in the U.S.
 - The GIIN is the global intermediary identification number assigned to FFIs. The GIIN is a 19-character identification string that contains (a) the FATCA ID, (b) financial institution type, (c) Category Code, and (d) country identifier with the format 123456.12345.12.123.
 - Foreign TIN is a foreign taxpayer identification number issued by the entity's home country.
 - Reference numbers are self-assigned numbers for subsidiaries of U.S. companies that do not have U.S. identification numbers. Reference numbers are assigned on Forms 5471 or 8865.

The key element of completing the form correctly is correctly identifying the Chapter 4 status and completing the designated additional part(s).

What are some guidelines for choosing the correct Chapter 4 status?

Over time more detailed tools and instructions will become available to determine the correct Chapter 4 status but for now common sense and plain reading of the form and related guidance are enough. In the short term, knowledge of details regarding your foreign subsidiary(ies) or understanding your foreign vendor's information will help in completing the form accurately or assisting your vendor in completing the form.

As noted above, this Tax Alert will not cover FFIs that will be responsible for greater compliance under FATCA. We will provide a few common examples to help in completing the form for common nonfinancial institution structures.

- An active NFFE (non-financial foreign entity) is a foreign entity that is not a financial institution whose gross income comes more than 50 percent from non-passive sources and more than 50 percent of its assets are held for the production of nonpassive income. This will be the most common choice, i.e., a normal nonfinancial foreign operating company.
- A publically traded NFFE is an NFFE that is traded on one or more established securities markets.
- An excepted territory NFFE is an NFFE organized in a possession of the U.S.
- A passive NFFE is a foreign entity that does not have substantial U.S. owners or has provided the names of the owners and does not meet any of the other NFFE categories.

While more complex examples will arise in dealing with foreign structures involving holding companies we believe that the new form, while somewhat intimidating, can be efficiently completed once the status of a foreign entity is known. Foreign subsidiaries of U.S. companies will need to be scrutinized to ensure that the proper category is chosen.

If you have any questions, please contact your tax advisor or

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