**IRS Publishes New Form W-8BEN-E Withholding Certificate with Expanded Treaty Benefits Claim**

*By Rupert J. Ward (**rupertward@kpmg.com**) and Seth Weber (**sethweber@kpmg.com**), KPMG LLP

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**Overview**

In April 2016, the Internal Revenue Service (IRS) released a new version of Form W-8BEN-E, the U.S. withholding certificate for non-U.S. entities. This article discusses the effective dates and new requirements in this version of the form.

Along with robust due diligence and reporting requirements for foreign financial institutions, the implementation of the Foreign Account Tax Compliance Act (FATCA) in 2014 saw the release of Form W-8BEN-E, a withholding certificate specific to foreign entities. The new form replaced the previous Form W-8BEN, a one-page certificate, with eight pages of certifications and disclosures, bewildering foreign entities, and adding new acronyms like NFFE (Non-Financial Foreign Entity), FFI (Foreign Financial Institution) and GIIN (Global Intermediary Identification Number) to tax practitioners’ daily vocabulary.

Thankfully, the latest revision of Form W-8BEN-E isn’t quite the leap that came with FATCA, but the form isn’t getting any shorter, as it now includes an expanded treaty claim that will require extra care and attention by those preparing and reviewing the new certificate.

**Effective Date**

The new Form W-8BEN-E is online and available for use currently, but does not become mandatory until November 1, 2016.[[1]](#footnote-1) If you are a U.S. withholding agent, you can continue to accept certifications on the old form until the mandatory date. Certifications provided on the old form, prior to November 1, 2016, will continue to be valid until they otherwise expire (generally, the last day of the third year after the date signed, or when circumstances change to make information on the form no longer true).[[2]](#footnote-2)

**Expanded Treaty Benefits Claim**

The form includes certain changes for FATCA that will apply to a limited number of users and an expansion of the treaty benefits certification, which will apply to any foreign entity claiming treaty benefits.

The most notable change on the new form is the addition of a more detailed certification of eligibility for treaty benefits in Part III. While the old form simply required a certification that the entity met the limitation on benefits (LOB) provision of the applicable treaty with the U.S., the new form requires the entity to specify which provision it satisfies within the LOB article. Additionally, the IRS has provided, in the W-8BEN-E instructions, a link to a table showing which LOB provisions are included in which treaties.[[3]](#footnote-3) This table may be helpful for foreign entities completing the form, but also allows U.S. withholding agents to readily identify invalid treaty benefits claims (for example, when a foreign entity claims it meets an LOB provision that doesn’t exist in the treaty between the U.S. and its country of residence).

*Foreign Entities*

Even under previous versions of Forms W-8BEN-E and W-8BEN, a foreign entity should have performed an analysis to support its claim of treaty benefits, and would thereby know which LOB provision it satisfied. However, using the old form, a foreign entity could arguably, in theory, claim that it met the LOB article without knowing which specific provision applied (or, indeed, without actually having performed any analysis). While the new form cannot completely safeguard against unsupported treaty claims, it does make it harder for a foreign entity to assert that it is eligible for treaty benefits without understanding the LOB provisions in the applicable treaty.

With the expanded treaty benefits section, foreign entities asserting treaty benefits may wish to consider more assistance from their tax advisors to properly complete the new form.

*US Withholding Agents*

Recipients of Form W-8BEN-E, in particular, those making payments of withholdable U.S. source income to a foreign entity (i.e., US withholding agents), may rely on the form and treaty claims thereon, if the withholding agent does not have actual knowledge or reason to know that the form is incorrect or unreliable.[[4]](#footnote-4) An incomplete or inconsistent form is considered “reason to know” that the form is unreliable – a U.S. withholding agent must, therefore, review each Form W-8BEN-E it receives to confirm it is complete, internally consistent and consistent with any records or knowledge it has of the foreign entity.

For U.S. withholding agents, the new LOB certification in Part III adds yet another item to review in order to rely on the form. We understand that we can expect to see more guidance setting out a U.S. withholding agent’s due diligence requirements around the new LOB certification in an upcoming release of revised instructions for requesters of Forms W-8. Since the IRS has provided a table of LOB tests that corresponds to the form, it is believed that a U.S. withholding agent may be expected to review the LOB provision claimed on Form W-8BEN-E against the IRS table, as a “reasonably prudent” person would do before relying on the certification. This means more time spent reviewing Forms W-8BEN-E and, undoubtedly, sending invalid forms back to the payees for revision.

*About the authors: Rupert Ward is a principal and Seth Weber is a senior manager with the International Tax practice of KPMG LLP, based in the firm’s Chicago office.*

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1. Treas Reg §1.1441-1T(e)(4)(viii)(C) – “*Upon the issuance by the IRS of an updated version of a withholding certificate, a withholding agent may continue to accept the prior version of the withholding certificate for six months after the revision date shown on the updated withholding certificate, unless the IRS has issued guidance that indicates otherwise, and may continue to rely upon a previously signed prior version of the withholding certificate until its period of validity expires.”* [↑](#footnote-ref-1)
2. Treas Reg §1.1441-1(e)(4)(ii)(A) [↑](#footnote-ref-2)
3. Page 10 of *Instructions for Form W-8BEN-E (Rev. 4-2016)*; https://www.irs.gov/PUP/individuals/international/Tax\_Treaty\_Table\_4.pdf [↑](#footnote-ref-3)
4. Treas Reg §1.1441-7T(b)(1) [↑](#footnote-ref-4)