IRS issues instructions to Form W-8BEN-E

In anticipation of the 1 July 2014, initial effective date of FATCA, the IRS has issued a flurry of new information, including the instructions to the Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities). The IRS also has released:

- Instructions to the Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain US Branches for United States Tax Withholding and Reporting
- 2014 Instructions for Form 1042-S, Foreign Person’s US source Income Subject to Withholding
- 2014 Instructions for Form 8966, FATCA Report
- Revenue Procedure 2014-38, FFI Agreement for Participating FFI and Reporting Model 2 FFI
- Revenue Procedure 2014-39, Application Procedures and Overview of Requirements for Qualified Intermediary Status Under Chapters 3, 4 and 61 and Section 3406; Final Qualified Intermediary Agreement
- New Frequently Asked Questions (and answers) with respect to withholding foreign partnerships and withholding foreign trusts
- Technical corrections to the FATCA and chapter 3 and 61 temporary and proposed regulations published in February 2014

While each of these documents merits review and analysis by the many foreign persons and withholding agents to which they apply, the Instructions to the Form W-8BEN-E will have the broadest impact.
Implications: Unfortunately, we are still waiting for the Instructions for the Requester of Forms W-8, which will be critical to the withholding agents who have already begun to receive Forms W-8BEN-E (which was finalized by the IRS in April 2014). Therefore, while a foreign person now has the instructions it needs to complete any of the Forms W-8 revised for FATCA purposes, withholding agents do not have the instructions they need to validate and rely on those forms. Because the IRS has indicated that there will be numerous “tips” and “cautions” in those instructions, their release as soon as possible is critical to the implementation of FATCA.

Specific items to note in the Form W-8BEN-E instructions:

- The IRS included several pages of definitions in the Form W-8BEN-E instructions that will be very useful to anyone who has not read the voluminous FATCA and Section 1441 regulations.

- Disregarded entities must pay particular attention to the form’s directions as the form must be completed differently depending on the facts and circumstances. For instance, a disregarded entity should generally not complete the Form W-8BEN-E in its own name unless they are hybrid entities claiming treaty benefits. Instead, their single owners should provide Forms W-8BEN, W-8BEN-E or W-9, as appropriate. However, the name of a disregarded entity may be appropriate in Part I, line 3 or line 10, or in Part II depending on whether the disregarded entity has obtained a GIIN in its own name or is located in a jurisdiction other than that of its single owner.

- The instructions to line 5 state that a foreign entity is not required to provide their Chapter 4 status with respect to a pre-existing entity account before 1 July 2016 (or if they are a prima facie FFI before 1 January 2015).

The instructions also clarify that a payee is only required to provide their Chapter 4 status if they receive withholdable payments for FATCA purposes or have been requested to provide their status by a FFI. Therefore, if a payee is receiving income that is not subject to FATCA withholding, such as interest on a grandfathered obligation or a non-financial payment, the payee does not need to provide the Chapter 4 status.

Implications: These instructions create operational and system challenges for withholding agents. While a form received without a Chapter 4 status during a preexisting account’s due diligence period is valid, Chapter 4 withholding is required as soon as the due diligence period expires. For those preexisting accounts whose due diligence period expires 30 June 2016 and that are receiving withholdable payments, this rule creates, in effect, a mid-year 2016 form expiration and an early 2016 tax form solicitation process. The instruction also creates challenges from a customer service perspective in that it will most likely lead to unnecessary FATCA withholding to the extent payees follow the instruction and do not provide their chapter 4 statuses on a timely basis.

- According to the instructions, if a payee’s country of residence for tax purposes has issued a tax identifying number (TIN) to the payee, they should provide their TIN on line 9b. If the form is provided to a US office of a financial institution, the payee must provide a TIN unless they have not been issued one or the jurisdiction in which they are resident for tax purposes does not issue them.
Implications: It is unclear the extent to which a withholding agent will be expected to determine whether a payee has a TIN, whether the jurisdiction in which the foreign person resides for tax purposes does not issue TINs, or whether the TIN that was provided is correct in terms of format and length.

- The instructions clarify that a non-financial foreign entity (NFFE) that is a member of the same group as a publicly traded US or foreign entity can qualify for the publicly-traded NFFE exception.

- Whoever signs a Form W-8BEN-E must be authorized to do so, and must check the box under their signature to certify they have the legal capacity to sign the form on behalf of the entity.

- The instructions specify that a foreign branch of a US financial institution that is not a qualified intermediary under a Model 1 Intergovernmental Agreement (IGA) cannot use a Form W-8BEN-E and instead the instructions direct that a Form W-9 should be furnished to withholding agents.

- Despite its fifteen pages, there is no explanation in the instructions that while a US person is generally considered a “substantial US owner” if they own more than 10% of an entity, if the entity is an investment entity, that ownership threshold drops to anything greater than 0%.

- The instructions clearly provide that qualified securities lenders should not provide Forms W-8BEN-E, but rather must provide Forms W-8IMY to payors.

Implications: Brokers and custodians will have to remediate any written certifications that they have on file for qualified security lenders and replace them with Forms W-8IMY.

Implications: Thanks to the transition relief granted by the IRS in Notice 2014-33, withholding agents have time to wait for the Requester’s Instructions to Forms W-8 to be issued to begin validating Forms W-8BEN-E.
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