

# **Appendix C**

**IRPAC Recommendations on  
Draft Form W-8BEN-E  
and  
Draft Instructions for  
Form W-8BEN-E  
Released February 2016 and  
Corresponding Changes to  
Instructions for  
Requester of Forms W-8**



## Appendix C

### International Reporting and Withholding Subgroup Report

#### IRPAC Recommendations on Draft Form W-8BEN-E and Draft Instructions for Form W-8BEN-E Released February 2016 and Corresponding Changes to Instructions for Requester of Forms W-8

##### Recommendations on Draft Form W-8BEN-E Instructions

###### 1. "Who Must Provide Form W-8BEN-E":

Draft instructions state do not provide Form W-8BEN-E if "you are acting as an intermediary (that is, acting not for your own account, but for the account of others as an agent, nominee, or custodian), a qualified intermediary (including a qualified intermediary acting as a qualified derivatives dealer), or a qualified securities lender (QSL) with regard to a payment of U.S. source substitute dividends. Instead provide a Form W-8IMY..."

As a QSL is acting in a principal capacity, it should be required to provide a W-8BEN-E not a Form W-8IMY.

*Recommendation was not incorporated into final instructions.*

###### 2. "Change in Circumstance":

Draft instructions state, "With respect to an FFI claiming a chapter 4 status under an applicable IGA, a change in circumstances includes when the jurisdiction where the FFI is organized or resident (or the jurisdiction identified in Part II of the form) was included on the list of jurisdictions treated as having an intergovernmental agreement in effect and is removed from that list or when the FATCA status of the jurisdiction changes (e.g., from Model 2 to Model 1)."

Further clarification is needed with respect to an entity claiming a chapter 4 status of reporting or nonreporting IGA FFI in the event that the FATCA status of the jurisdiction changes from Model 2 to Model 1 (or vice versa). In such an event, the re-documentation effort by the FFI and its withholding agents and/or FIs that maintain its accounts to change the chapter 4 status would be significant. Yet such a jurisdictional change would result in no substantive changes in the manner in which the FFI is treated by its withholding agents and FIs.

IRPAC recommends the following language to be added to the instructions:

*Note: If you currently maintain a Form W-8 for a payee and there is a change in circumstance relating only to the FATCA status from Model 2 to Model 1 (or vice*

*versa) of the jurisdiction under which the payee claims a chapter 4 status, you may continue to rely on such form until it expires. If there are multiple changes in circumstances, one of which includes a change to the FATCA status of the jurisdiction, then you may not continue to rely on such a form except if you satisfy the applicable curing provision(s). [Add here or something conforming to the Form 1042-S instructions: "For the chapter 4 status code of the FFI on a Form 1042-S, you may either continue to enter the chapter 4 status on such Form W-8 or enter the chapter 4 status of the FFI under the jurisdiction's new FATCA status, e.g., chapter 4 status code 7 (Registered Deemed-Compliant FFI—Reporting Model 1 FFI) if the jurisdiction changes from Model 2 to Model 1.]*

*Recommendation not incorporated into final instructions. We recommend that the above language be added to the Instructions for Requester of Forms W-8.*

### 3. Definition of "Disregarded Entity":

Definition contains the statement "A disregarded entity with a U.S. owner may provide this form to an FFI solely for purposes of documenting itself for chapter 4 purposes." A disregarded entity with a non-U.S. owner, that cannot complete Part II of Form W-8BEN-E because it is not registered with a GIIN, may also need to provide its chapter 4 status. IRPAC recommends removing the reference to U.S. owner.

*Recommendation was incorporated into final instructions.*

### 4. Line 4, Chapter 3 Status:

Draft instructions contains the statement, "However, if you are providing Form W-8BEN-E to an FFI solely for purposes of documenting yourself for chapter 4 purposes as an account holder of an FFI (and you are not receiving a withholdable payment), you do not need to complete line 4..."

IRPAC recommends adding the phrase "an account maintained by" after the words "account holder of" and before "an FFI."

*Recommendation was incorporated into final instructions.*

Draft instructions contain the statement, "A foreign pension fund should not check the "Tax-exempt organization" box unless it qualifies as a tax-exempt organization under section 501(a)..."

IRPAC recommends reference to IRC section 501(c) or 501(d) for clarification purposes so that foreign pension funds do not erroneously conclude that they fit 501(a) as the draft language appears to indicate.

*Recommendation was incorporated into final instructions.*

## 5. Line 9a, GIIN

Draft instructions, line 9a requires a "trustee documented trust" must enter a GIIN on line 9a. IRPAC recommends that the instructions clarify that while the Form W-8BEN-E is provided for the trust, the GIIN of the trustee must appear on line 9a.

*Recommendation was incorporated into final instructions.*

## 6. Limitation on Benefits:

Regarding validation of the limitations on benefits provision indicated on a payee's Form W-8BEN-E, withholding agents generally do not have the underlying facts to determine if the payee's reason for meeting the limitation on benefits ("LOB") provision is valid. Accordingly, IRPAC recommends that the following language be added to the Instructions for Requestor of Forms W-8:

*Part III, Line 14b, (Claim of LOB Rationale):*

*The Form W-8BEN-E requests the payee's LOB code, which provides the specific reason for why the payee meets the LOB provision of the applicable treaty. The facts that support that LOB Code, however, are not generally in the withholding agent's possession. Accordingly, you may accept a form in which the LOB code is provided unless you have actual knowledge that the LOB code is incorrect. Actual knowledge does not include a withholding agent's possession of information on the IRS Limitation on Benefits Table (currently "Table 4" at [https://www.irs.gov/PUP/individuals/international/Tax\\_Treaty\\_Table\\_4.pdf](https://www.irs.gov/PUP/individuals/international/Tax_Treaty_Table_4.pdf)) that is, or appears to be, inconsistent with information, including the LOB box checked, on a Form W-8BEN-E.*

*Awaiting Instructions for Requester of Forms W-8.*

## 7. Line 15, Special Rate and Conditions:

Draft instructions contain the statement, " This line is generally not applicable to claiming treaty benefits under an interest or dividends (other than dividends subject to a preferential rate based on ownership) article of a treaty..." IRPAC recommends the phrase "or other income" be inserted after "ownership)" and before "article." Certain withholding agents are demanding a line 15 claim for other income because they are unclear whether this line is needed in this case. Adding the recommended phrase "or other income" would provide clarity to withholding agents.

*Recommendation was incorporated into final instructions.*

## 8. Line 40a, Passive NFFE:

Draft instructions do not clarify that professionally managed entities are considered financial institutions as per Treas. Reg. §1.1471-5(e)(4). IRPAC recommends that the following clarifying language be added to the instructions:

*If you would be a passive NFFE but for the fact that you are professionally managed, you should not complete line 40a as you should be considered a financial institution and not a passive NFFE.*

*Recommendation was incorporated into final instructions.*

## **Recommendations on Draft Form W-8BEN-E**

### **1. "Do Not Use This Form For":**

Draft form states that instead of using Form W-8BEN-E, use Form W-8ECI or W-8EXP for "A foreign government... establishing foreign status for purposes of backup withholding, or documenting chapter 4 status."

IRPAC recommends the removal of the phrase "backup withholding" as it is unclear that the Form W-8ECI or Form W-8EXP would be used for establishing foreign status for purposes of backup withholding; these forms may be used for other instances than in reference to backup withholding.

*Recommendation was incorporated into final form.*

### **2. Part I, Line 5, FATCA status:**

While IRPAC has recommended the removal of box "Account that is not a financial account" on line 5 of the Draft W-8BEN-E (February 2016), we understand that there may not have been enough time to adopt this change. Therefore, IRPAC proposes the following additional paragraphs to the Instructions for Requestor of Forms W-8:

*Part I, Line 5 (Chapter 4 Status):*

*If you receive a Form W-8BEN-E from an entity payee that checks the box "Account that is not a financial account" and does not check any other chapter 4 status, but such payee has a financial account as defined under Treas. Reg. Section 1471-5(b)(1) or applicable IGA and which is indicated in your account files, you may not accept the form as such a claim is not valid. In such a case, you should request the payee to complete the applicable chapter 4 status. You may accept a Form W-8BEN-E from an entity payee that has failed to check this box if such payee does not have a financial account as defined under Treas. Reg. Section 1471-5(b)(1-2) or applicable IGA and there is no indication to the contrary in your account file. You may also accept such a form in which the entity payee has failed to check this box, does not have a financial account as indicated in your account file and has checked a chapter 4 status (such as Non-*

*Participating Foreign Financial Institution), as such status is not applicable for your purposes.*

*Recommendation was not incorporated into final form. We recommend that the above language be added to the Instructions for Requester of Forms W-8.*

### 3. Part III, Tax Treaty Claim:

While IRPAC has suggested that the blank, free form line that is part of line 15 is both confusing for the payee and withholding agent and ultimately unnecessary in light of (i) the new LOB codes and (ii) line 15 requiring the payee to enter the specific treaty article and paragraph or subparagraph and rate, we understand that the IRS may be concerned that the payee may need additional space to communicate important information. In consideration of this, IRPAC recommends the following language for the Instructions for Requestor of Forms W-8:

#### *Part III, Line 15, (Claim of Tax Treaty Benefits):*

*If you receive a Form W-8BEN-E which contains an explanation as to why the payee meets the terms of the treaty article, the explanation provided will be acceptable unless you have actual knowledge that it is incorrect. For example, a French resident payee may explain that it meets the terms of the treaty article cited on line 15 because it is a French resident as defined within the applicable treaty. Such an explanation is acceptable unless you have actual knowledge (e.g., based on documentation provided by the payee) that the payee is not a French resident and the treaty article it cites does not apply to the payee. You may apply a special treaty claim on a form which contains the applicable specific treaty article and paragraph or subparagraph, as applicable, withholding rate and income type on line 15 but does not contain an explanation as to why the payee meets the terms of the treaty article. You may apply a special treaty claim on a form in which the applicable specific treaty article and paragraph or subparagraph, as applicable, withholding rate and income type are listed as an explanation as to why the payee meets the terms of the treaty article but are not listed in the designated spaces on line 15 provided that such information is entered near such designated spaces.*

*Recommendation was not incorporated into final form. We recommend that the above language be added to the Instructions for Requester of Forms W-8.*

### 4. Part XXIV, Line 38, Excepted Territory NFFE

Form certification states, "Does not hold, as a substantial portion of its business, financial assets for the account of others, or Is not an insurance company (or the holding company of an insurance company) that issues or is obligated to make payments with respect to a financial account ..."

IRPAC recommends that the word "or" is removed and replaced with "and."

*Recommendation was not incorporated into final form.*

5. Part XXVI, Passive NFFE:

Lines 40 (b) and 40 (c) refer to U.S. substantial owners as follows:

40 (b) "I further certify that the entity identified in Part I has no substantial U.S. owners, or

40(c) "I further certify that the entity identified in Part I has provided the name, address, and TIN of each substantial U.S. owner of the NFFE ..."

As the Form W-8BEN-E may be used by Model I IGA FFI, IRPAC recommends that the phrase "controlling U.S. persons" is added in consideration of the definition of such term per the IGAs.

*Recommendation was incorporated into final form.*