



Completing US tax forms: comments on new Form W-8BEN-E and some practical tips

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Introduction

In October 2021, the Internal Revenue Service (IRS) released an updated version of Form W-8BEN-E. Non-US entities should use this new form when requested to certify their status for US withholding tax purposes and under the Foreign Account Tax Compliance Act (FATCA). Form W-8BEN-E is provided to requesting financial institutions for due diligence purposes and is not filed with the IRS. Through to April 2022, requesters can accept the prior version of Form W-8BEN-E (which was released in July 2017). If accepted prior to May 2022, the prior version remains valid for the period from the date that the form is signed until the last day of the third succeeding calendar year, unless a change in circumstances requires submission of an updated form.

In general, changes to Form W-8BEN-E and its instructions do not significantly affect foreign trusts and companies commonly used in family succession planning structures.

Part I, line 4, chapter 3 – withholding tax status

Line 4, chapter 3 status (entity type) now has two "Foreign Government" boxes: an entity that is an integral part of a foreign government and an entity that is controlled by a foreign government.

Foreign non-grantor trusts will continue to tick the box for "complex trust" on line 4 of the updated form, to indicate their chapter 3 withholding tax status. Foreign grantor trusts should continue to use Form W-8IMY, which was also updated in October 2021, and not Form W-8BEN-E. The new Form W-8BEN-E will also be used by non-US companies, which should tick the box for "corporation" or "disregarded entity", depending on whether they have made an entity classification election for US tax purposes (for further details please see "FATCA documentation for disregarded entities").

Part I, line 5, chapter 4 – FATCA status

The options remain the same on the new Form W-8BEN-E as regards certifying the entity's FATCA status on line 5.

Most offshore trusts with professional trust company trustees will continue to tick the box for "Nonreporting IGA FFI" because they can qualify as a trustee-documented trust under the relevant FATCA intergovernmental agreement (IGA). Foreign trusts with US-based trust company trustees will have a classification under the FATCA regulations, such as "Certified deemed-compliant sponsored, closely held investment vehicle" or "owner-documented FFI". As the regulations do not provide for a trustee-documented trust option, US-based foreign trusts often have a FATCA sponsoring entity agreement in place with their FATCA registered trust company.⁽¹⁾

Likewise, non-US companies will often have a FATCA status of "Nonreporting IGA FFI" as a sponsored investment entity or sponsored closely held investment vehicle under the relevant IGA.

Part I, line 9 – GIIN and foreign TIN

New box, "c", has been added to line 9, which should be checked if the entity's foreign tax identification number (TIN) is not legally required. Previously, the words "not legally required" were to be written in line 9b (ie, "foreign TIN").

The July 2017 revision to the W-8BEN-E instructions added the requirement that the entity must provide a foreign TIN if the form is being provided to a US financial institution with regard to an account that pays reportable US-source income. US financial institutions are required to ensure that the form either includes the foreign TIN, or the new box is ticked.

It continues to be important to know when the entity is required to have a global intermediary identification number (GIIN) that must be included on line 9a. In the case of a trust or company that has a FATCA status of "Nonreporting IGA FFI", a GIIN is required only when that entity is treated as registered deemed-compliant under an applicable Model 2 IGA or under the FATCA regulations. A sponsored closely held investment vehicle is never registered by its FATCA sponsor and so has no GIIN. A sponsored investment entity established in a jurisdiction with a Model 1 IGA need not be registered for a GIIN until a US reportable account is identified (for further details please see "Revised Forms W-8 clarify some FATCA issues – but not all").

Part III – claim of treaty benefits

Since the trust and underlying companies of a family succession planning structure will often not be tax resident in a jurisdiction with a US tax treaty, the entity completing Form W-8BEN-E is generally not eligible to claim treaty benefits on that form. For those entities that are eligible, a new box has been added to line 14 where the entity can indicate that the income tax treaty with the United States under which they are claiming treaty benefits does not include a limitation on benefits article. The instructions for line 15, special rates and conditions, have been revised to require further explanation by entities claiming treaty benefits on business profits or gains not attributable to a permanent establishment.

Practical tips

Below are a few practical tips for completing Form W-8BEN-E:

- Even if the entity has made an entity classification election to be disregarded for US tax purposes, the entity's name is to be provided on line 1 of Part I, not line 3. The instructions for line 3 clearly state that line 3 is appropriate only if the disregarded entity:
 - has registered with the IRS and been assigned a GIIN;
 - is a reporting entity under an IGA; and
 - is not a hybrid entity using the form to claim treaty benefits.
- An entity that is disregarded for US tax purposes uses Form W-8BEN-E, not Form W-8IMY. The name of the entity goes on line 1, as noted above, and the chapter 3 status of "disregarded" is ticked on line 4. Use line 10 (ie, "Reference number", which is now found at the top of page two of the revised Form W-8BEN-E) to indicate the owner of the disregarded entity. The foreign owner of a disregarded entity can then provide its own Form W-8BEN-E, indicating on line 10 that the account being documented is in the name of the disregarded entity. Again, the instructions support completing the form in this manner.
- If "disregarded" is ticked on line 4, do not forget to tick the box to indicate whether the entity is making a treaty claim.
- If completing Part XII, line 26, for a sponsored investment entity or sponsored closely held investment vehicle, entities do not have to tick either box where it says: "The trustee is: US or Foreign".
- In the case of a passive non-financial foreign entity, it must be determined whether the entity has a "substantial US owner" and is, thus, required to provide details in Part XXIX. The reference to "controlling US persons under an applicable IGA" does not mean a US individual who happens to be just an officer or director of the entity.
- Do not forget to tick the box (which is now above the signature line on page 8, rather than below it) to indicate that the person signing has the capacity to do so.

Comment

Form W-8BEN-E has been updated three times since being reissued in 2014, with all the latest FATCA details and ballooning to eight pages. It continues to be a difficult form to complete and one that compliance

officers will often question or refuse to accept if not completed properly. Advisers to international families should consider providing a template Form W-8BEN-E for each entity in the succession planning structure as an aid to the family office.

For further information on this topic please contact Jennie Cherry at Kozusko Harris Duncan by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com). Please note that the author is unable to provide legal advice to non-clients. The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

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Endnotes

(1) For further details on the sponsoring programme, please see "FATCA: trustee-documented trusts are not sponsored entities" and "FATCA documentation for US-based trusts".