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# Tax Alert

## IRS Issues Revised Form W-8BEN-E Partially Addressing Industry Concerns



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In April 2016, the Internal Revenue Service released an updated version of Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)* and its corresponding instructions. Form W-8BEN-E is used by non-U.S. entities to document their U.S. income tax status to U.S. withholding agents for purposes of both the Foreign Account Tax Compliance Act (“FATCA”) and U.S. income tax withholding on certain U.S. fixed and determinable annual or periodic income (“FDAP”). Among the myriad of changes implemented in the April version of Form W-8BEN-E are three major modifications:

1. Limitation on benefits (“LOB”) for treaty claims:

2014 Version: In order to claim treaty benefits on the February 2014 version of Form W-8BEN-E, an entity needed to check Box 14a, enter its treaty country on Line 14a, and check Box 14b.

2016 Version: On the revised form, Box 14b has been drastically modified to require an entity to specify the legal basis under which its treaty benefits derive. An entity will only be afforded treaty benefits if it meets one of the following LOB conditions:



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- Government entity
  - Other tax-exempt organization
  - Ownership and base erosion test
  - Active trade or business test
  - Other Provision
  - Tax-exempt pension trust or fund
  - Publicly traded corporation (or subsidiary)
  - Derivative benefits test
  - Favorable discretionary determination

Notably, the additional LOB information will be reportable on Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, beginning in 2016.

*WeiserMazars LLP Observation: While the misapplication of treaty benefits is a common cause for over/under withholding, an error that can be difficult to rectify if not corrected in the first year, the new LOB requirement places a substantial additional burden on withholding agents. Withholding agents, already struggling to cope with new validation procedures will be required to perform enhanced due diligence on LOB claims, adding a technical component to the already burdensome onboarding process.*

*A future Tax Alert will focus on the new LOB provisions.*

## 2. Non-financial accounts:

2014 Version: Form W-8BEN-E did not permit an entity to indicate that the form was being used for non-financial account purposes.

2016 Version: An entity may check "Not a Financial Account" in Part I, Line 5 indicating that the Form is being used to document a non-financial account such as certain savings and retirement accounts, certain tax-favored accounts, certain term life insurance contracts, accounts held by an estate, certain escrow accounts, certain annuity contracts and accounts or products excluded under an Intergovernmental Agreement ("IGA").

*WeiserMazars LLP Observation: The addition of a Non-Financial Account option for Chapter 4 Status purposes makes it easier for Foreign Financial Institutions when identifying reportable accounts, as well as eases the burden on account holders previously required to classify themselves unnecessarily for a non-Chapter 4 purpose. Ultimately, however, non-financial accounts that are not subject to Chapter 4 reporting still must navigate an 8 page form, despite only the first page having relevance.*

## 3. Passive Non-Financial Foreign Entity's ("NFFE") Controlling U.S. Persons:

2014 Version: The prior version of Form W-8BEN-E provided for "substantial U.S. owners" of a Passive NFFE, generally defined to include shareholders with a 10% interest or greater.

2016 Version: The updated Form expands Part XXIX to include the concept of "controlling persons", the IGA equivalent of "substantial owners". Notably, the "controlling persons" concept is broader than that of the "substantial U.S. owner" and may be construed to include non-equity stakeholders such as Officers.

*WeiserMazars Observation: This is a welcome addition to the Form, giving comfort to entities under an applicable IGA that previously were required to certify under penalties of perjury as to a concept not contained within the IGA. It would have been helpful, however, for the new Form instructions to include the definition of "controlling persons", a concept that is relatively underdeveloped for FATCA.*

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Financial institutions and other U.S. withholding agents have 6 months from the date of release to require new or undocumented account holders to provide the revised Form. Through October, foreign entities should continue to use the 2014 version of the Form, which if provided prior to October 31, 2016 will continue to be valid for the standard 3 year period from the end of the year in which it was signed. From November 1, 2016 all new accounts must be documented with the revised April, 2016 version of Form W-8BEN-E.

Taxpayers should be aware that revised versions of additional forms such as the W-8 IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*, are anticipated in the near future, as well as a new version of the Requester instructions.

*WeiserMazars LLP Final Thoughts: While making several useful improvements, the new version of Form W-8BEN-E fails to address a number of issues. For example, failing to provide for alternative Active Non-Financial Foreign Entity certifications present in the Treasury Regulations and IGAs leaves unnecessary confusion for those entities intended to be exempt from the rules.*

If you have any questions regarding requests for tax documentation, or validation of tax documentation that you may have received from counter-parties, please reach out to your WeiserMazars LLP advisor.

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