

Key Points about the New W-8BEN-E Instructions

On June 24, the IRS finally released instructions to the new W-8BEN-E. Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*, was extensively revamped to handle the new FATCA status classifications and was initially released in final form without instructions on March 29.

Older version of W-8BEN can continue to be used until 2015.

On July 3, the IRS further added an alert to the W-8BEN-E which can be seen as the first page to the published W-8BEN-E in “Current Forms and Publications” on the IRS website at www.irs.gov. In the alert, the IRS has made it clear that withholding agents may continue to ask for, and entities may continue to use, the older version of Form W-8BEN (revision date February 2006) through December 31, 2014. The older W-8BEN (revision date February 2006) can be found at www.irs.gov in the Forms and Publications section, under the “Prior Year Forms” tab, by searching the cumulative list of forms posted there for the term “Form W-8”.

If the older version is provided to a withholding agent for purposes of chapter 3 of the Internal Revenue Code before January 1, 2015, it will retain its validity until it expires, usually the earlier of the last day of the third calendar year following the year in which the withholding certificate is signed or the day that a change in circumstances occurs that makes any information on the certificate incorrect.

If provided before January 1, 2015, for chapter 4 (FATCA) purposes, the older version of a W-8BEN will remain valid to the extent permitted in fairly complex FATCA regulations that apply to the use of a “pre-FATCA Form W-8” and that for the most part will require supplemental documentary evidence for most statuses as well as require a GIIN if the entity is required to be registered on the IRS FATCA registration website. GIINs will also need to be matched on the IRS website, but special rules preclude receiving and matching a Model 1 Reporting FFI’s GIIN until 2015. Remember that all accounts on your books until the end of 2014 are considered pre-existing under IRS Notice 2014-33 released May 2, 2014, and are subject to a delay in FATCA withholding until July 1, 2016, unless the account is for an undocumented prima facie FFI where withholding begins in 2015. See the instructions to line 5 of the W-8BEN-E for more on prima facie FFIs.

Recently released “*Instructions for the Requestor of Forms W-8... (Rev. July, 2014)*” allows, for purposes of both chapters 3 and 4, a withholding agent to request the prior version of a Form W-8BEN-E, W-8IMY, W-8EXP, or W-8ECI any time prior to January 1, 2015, and with respect to chapter 3 may rely on the form to the extent otherwise permitted until the form’s period of validity expires (subject to a change in circumstances). However, with respect to chapter 4 the withholding agent may rely on the form only to the extent permitted under the allowance for reliance on a pre-FATCA Form W-8.



TIP If you are facing FATCA withholding on a prima facie FFI, the easier avenue is to request the new Form W-8BEN-E, where all of the required data is solicited and the related instructions are available. Note that for a prima facie FFI to submit a W-8BEN-E, the business relationship must be on a proprietary basis with the bank, brokerage firm or other financial institution. If that is not the case, but instead the FFI is acting as an agent or intermediary for others or is merely servicing the business transaction, or is a fiscally transparent entity like a partnership that is not a hybrid entity (see more below), a Form W-8IMY will be required and not a W-8BEN-E. Refer to Cokala's paper on the new 2014 version of Form W-8IMY.

IMPORTANT For other pre-existing payees (those not considered prima facie FFIs), consider obtaining a new FATCA version of the appropriate W-8 form by July 1, 2016 (the date when FATCA withholding begins for these accounts) rather than waiting until the end of 2016 when new versions are mandated from all payees receiving FATCA withholdable income. Acquiring a new FATCA W-8 form by July 1, 2016, will let you avoid having to collect the cumbersome FATCA documentary evidence needed to support an exempt FATCA status when you only hold an old W-8BEN on file.

Remember that the pre-existing payee rules are merely transitional and will expire after December 31, 2016, at which point a new FATCA version W-8 will be necessary from all payees receiving FATCA withholdable income that have not yet provided one. Getting a new FATCA version W-8 is mandated even if you have an older version of the W-8BEN on file that has not yet expired for chapter 3 purposes.

If are not paying FATCA withholdable income, note that a W-8BEN (Rev. 2006) acquired in 2014 will not expire until December 31, 2017. Only pre-existing payees receiving FATCA withholdable income will need to have a FATCA version of a W-8 form on file by January 1, 2017.

Highlights in new W-8BEN-E official instructions.

TIP Complex terms require a glossary and thank goodness, the new W-8BEN-E instructions provide one. As you read this short paper, having the form and the instructions handy will help.

- **W-8BEN-E is dedicated for use by entities for many purposes. (New W-8BEN for individuals must now be used by individuals. Individuals may not submit a W-8BEN-E.) Form W-8BEN-E instructions support its use in documenting:**
 - ♦ Beneficial ownership of the amounts paid. If the entity is an intermediary or agent, or is a flow-through entity such as a partnership, the entity should submit a W-8IMY. Certain partnerships may submit a W-8ECI.
 - ♦ (New purpose) Owner's status for purposes of chapter 4 (FATCA).
 - ♦ (New purpose) Foreign status of an entity holding an account in a participating or registered deemed compliant FFI for meeting the FFI's due diligence requirements.



- ♦ Owner's status for purposes of chapter 3 withholding.
 - ♦ Treaty claim to apply a reduced rate of, or exemption from, withholding.
 - ♦ Income from a notional principal contract that is not effectively connected with the conduct of a trade or business in the United States to establish the exception to reporting such income on Form 1042-S.
 - ♦ A foreign payee exception from domestic information reporting on Form 1099 and backup withholding from such income as broker gross proceeds, short-term (183 days or less) original issue discount (short-term OID), bank deposit interest, and foreign source interest, dividends, rents, royalties or other income.
- **1099-K foreign exemption claim now provided for on W-8BEN-E.** Forms 1099-K are not required with respect to payments made to payees that are foreign persons. Instructions to Form W-8BEN-E now say to provide this form to the requestor if you are a foreign entity that is a participating payee receiving payments in settlement of payment card or third party network transactions that are not effectively connected with a U.S. trade or business of the participating payee.
 - **Notably missing in the instructions is any reference to use of W-8BEN-E for claiming the portfolio interest exemption.** For the most part, interest qualifying for this chapter 3 withholding exemption would be FATCA withholdable income and a W-8BEN-E would be required for claiming FATCA exemption. Did the IRS, therefore, consider a discussion of this very important exemption superfluous? There will be cases where the W-8BEN-E will be needed to support an entity's portfolio interest exemption claim where a FATCA payee exemption on a W-8BEN-E is unnecessary. Some interest is not considered FATCA withholdable income, such as when paying interest on grandfathered obligations. There should be instructions clarifying the use of W-8BEN-E for purposes of a portfolio interest exemption under any line of reasoning, even if merely to point out that the exemption does not work for FATCA purposes. However, even following this line of reasoning, once a payee-based FATCA exemption is claimed on the W-8BEN-E, an entity would need to provide a W-8BEN-E certification under Reg. §1.871-14(c) to gain the benefit of any portfolio interest exemption under chapter 3. For more on this exemption see IRS Pub. 515.
 - **Express instructions clarify who is NOT to provide the W-8BEN-E:**
 - ♦ **Instead, W-9s are required from:**
 - Entities treated as U.S. persons;
 - (New) A foreign insurance company that has made an election under IRC §953(d) to be treated as a U.S. person (requires W-9 even if entity is considered an FFI for purposes of chapter 4).



- Disregarded entity with a single owner that is a U.S. person requires W-9 from owner. (But, can use W-8BEN-E if a hybrid entity claiming treaty benefits. See definition in instructions.)
- (New) A foreign branch of a U.S. financial institution that is an FFI under an applicable Model 1 IGA may submit Form W-9 to certify U.S. status unless the branch is a QI where a W-8IMY is required.
- ♦ **Use W-8BEN for Individuals to document a nonresident alien.**
- ♦ **Use W-8IMY** for a payee acting as an intermediary (that is, the payee is not acting for its own account, but for the account of others as an agent, nominee, or custodian), a qualified intermediary, or a qualified securities lender (QSL) with regard to a payment of U.S. source substitute dividends. Also use the W-8IMY if the payee is a flow-through entity (partnership, or simple or grantor trust) or a withholding partnership or withholding trust. ***However, if the flow-through entity is a hybrid entity, a W-8BEN-E may be used to claim treaty benefits at the entity level.***

Cokala observation: Flow-through entities that are hybrid entities may need to provide both a W-8BEN-E and a W-8IMY for the same payment stream. Where the entity is a hybrid entity (respected for tax purposes by its resident country, but treated as a partnership for U.S. tax purposes) it is to use the W-8BEN-E to claim treaty benefits on its own behalf for chapter 3 purposes. But if payments are FATCA withholdable, it must provide Form W-8IMY to establish its chapter 4 status (unless also a disregarded entity) and the chapter 4 status of each of its owners.

- ♦ **Use W-8ECI** if the payee is receiving income that is effectively connected with the conduct of a trade or business in the United States, unless it is income allocable through a partnership. The instructions include a great deal of information for partners of partnerships with ECI where a W-8BEN for an individual partner or W-8BEN-E for an entity partner is required to be submitted to the partnership to support withholding under IRC §1446.
- **(New clarification)** Income for which the payee has provided a Form W-8BEN-E that later becomes ECI is considered a change in circumstances and Form W-8BEN-E is no longer valid. The instructions tell the payee that it must file Form W-8ECI.
- ♦ **Use W-8EXP** if a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession. However, a Form W-8ECI is required when these entities receive effectively connected income, including income from commercial activities that is not exempt under statutory provisions governing these entities.
- **Big exceptions:** A Form W-8BEN-E is required of these entities if:
 - Claiming treaty benefits (Instructions give an example of a foreign tax-exempt entity receiving royalty income that is not exempt because it is taxable as unrelated business income but is eligible for a reduced rate of withholding under a royalty article of a tax treaty where a Form W-8BEN-E would be required.)



- Providing the form only to claim they are a foreign person exempt from backup withholding, or
 - Providing the form solely to document chapter 4 (FATCA) status.
 - ◆ **New clarification to foreign partners and other owners of flow-through entities.** Instructions provide information to a foreign partner, beneficiary, or owner of a flow-through entity that they may be required to furnish a Form W-8BEN-E with respect to their interest in the flow-through entity. Note: these instructions dovetail into instructions to the W-8IMY that require flow-through entities to passthrough owner certifications to U.S. withholding agents as part of the W-8IMY process.
- **More on disregarded entities.** If a disregarded entity has a foreign single owner, the foreign owner is to provide Form W-8BEN (if an individual) or Form W-8BEN-E (if an entity that is not a flow-through entity where a W-8IMY is required). A disregarded entity that is not a hybrid entity claiming treaty benefits may not submit a W-8BEN-E from the disregarded entity itself. Note, however, that the single entity owner may be required to identify a branch (including a disregarded entity) in Part II of the owner's Form W-8BEN-E and, in some cases, provide the legal name of the disregarded entity in Part I, line 3.
 - ◆ Instructions to Line 3 severely limit when the disregarded entity's name is to be entered in line 3, providing that the line is to be used only if the disregarded entity is receiving a FATCA withholdable payment or where the disregarded entity holds an account with an FFI requesting the form under its due diligence requirements AND in either case the disregarded entity (1) has registered with the IRS and been assigned a GIIN associated with the legal name of the disregarded entity, (2) is a reporting Model 1 FFI or reporting Model 2 FFI, and (3) is not a hybrid entity using the W-8BEN-E to claim treaty benefits. ***Otherwise the instructions say to use line 10 to notify the withholding agent that a disregarded entity is receiving a payment or maintaining an account by indicating the name of the disregarded entity on line 10.***
 - ◆ ***The FATCA status of a branch of an FFI is claimed by the FFI on its Form W-8BEN-E (if an entity that is not a flow-through entity where a W-8IMY is required). Where the branch is a foreign branch of a U.S. financial institution that is a QI or if the branch operates outside of the FFIs geographical region, a separate W-8 form may be required, but it is usually a W-8IMY.***
- **New instructions for flow-through entities in line 4 make it clear that the W-8BEN-E should only be used if the entity is a hybrid entity** (see Cokala observation above). Instructions to line 4 now say: "If you are a partnership, disregarded entity, simple trust, or grantor trust receiving a payment for which treaty benefits are being claimed by such entity, you must check the "Partnership", "Disregarded entity", "Simple trust", or "Grantor trust" box. For such a case, ***you must also check*** the "yes" box to indicate that you are a hybrid entity making a treaty claim ... ***If you are a flow-through entity that is not a hybrid entity***



claiming treaty benefits, you should check the box to indicate you are not making a treaty claim. If you check the “no” box, you may only use this form to document your chapter 4 status as an account holder of an FFI ... if you are receiving [FATCA] withholdable payments or amounts subject to withholding under chapter 3, you are required to provide Form W-8IMY and a withholding statement (if applicable) with respect to such payments.”

ALERT Pages 13 and 14 of the final instructions to Form W-8BEN-E provide line-by-line instructions for hybrid entities making treaty claims and explain the need to both file a treaty claim on Form W-8BEN-E and provide FATCA information on its owners through Form W-8IMY.

- **W-8EXP versus W-8BEN-E.** Similar clarification is made in instructions to line 4 as to when the W-8BEN-E is appropriate for a “tax-exempt organization”. New instructions to line 4 expressly provide that “Only entities that are tax-exempt under IRC §501 should check the “Tax-exempt organization” box. Such organizations should use Form W-8BEN-E ***only*** if they are claiming a reduced rate of withholding under an income tax treaty or a code exception other than IRC §501 [such as the portfolio interest exemption under IRC §881]. Use Form W-8EXP to document your exemption and chapter 4 status if you are claiming an exemption from withholding under IRC §501.”
- **Line 5 covers the FATCA classifications.** Line 5 instructions make clear to “check the one box that applies” when designating chapter 4 (FATCA) status, clarifying the confusing language on the form “unless otherwise indicated.” There are 31 different FATCA classifications in line 5 of the new W-8BEN-E (6 more than on the new W-8IMY), but only 1 box is to be checked by the submitter. Most classifications require additional certifications and disclosures in other parts of the form. The part of the form requiring completion is indicated after each listed classification. New Parts IV through XXVIII relate to FATCA disclosures, starting on page 2 and ending on page 8.
- **Details on line 5 in IRS instructions:** Under the new instructions, like the new instructions to the W-8IMY, if a payee is a pre-existing entity it is not required to provide a FATCA status in Line 5 until after a certain specified time period. IRS Notice 2014-33 extended the determination period for pre-existing status from July 1, 2014, to cover payees on your books through December 31, 2014. New instructions to Line 5 now say that a payee that is a pre-existing entity is not required to provide its FATCA status prior to July 1, 2016, the date when FATCA withholding begins, unless the pre-existing payee is a prima facie FFI. For prima facie FFIs, withholding begins on January 1, 2015, so the FATCA status is required to be disclosed on Line 5 as of January 1, 2015.



ALERT This may pose some concern since the dates prior to which status does not have to be disclosed are the same as the dates when FATCA withholding begins, leaving no time for a payer to solicit the new form with a status prior to the effective date of withholding. Pre-existing accounts that have provided an older version of the W-8BEN (2006 version), and supporting documentary evidence, and where required a GIIN that is validated on the IRS website within 90 days, will not need to provide the newer version of the W-8IMY until the end of 2016 to avoid FATCA withholding.

The instructions say that an entity is only required to provide its chapter 4 status if it is the payee of a FATCA withholdable payment or it is documenting the status of an account it holds with an FFI. This is good news for those who do not pay FATCA withholdable payments, such as non-financial payments made in the ordinary course of business including non-financial service fees, rentals on office and equipment leases, and payments for the use of other property, software license fees, transportation and freight, awards, prizes, scholarships and other similar Accounts Payable disbursements.

- **Payee's permanent residence is required on line 6.** Permanent residence is defined as the address in the country where the entity claims to be a resident for purposes of that country's income tax. Special instructions say that if you are giving Form W-8BEN-E to claim a reduced rate of, or exemption from, withholding under an income tax treaty, you must determine residency in the manner required by the treaty.
 - ♦ **Acceptable addresses are limited.** The address requirements support what we have learned through the regulations about what makes up a qualified certification. A permanent foreign address is required on the form for it to be considered valid. Unless the payee is a financial institution providing its own address, using a financial institution as an address is not a valid permanent address and neither is the use of a post office box, or an address used solely for mailing purposes unless it is the only address used by the entity and such address appears in the entity's organizational documents (i.e., its registered address). Where one of these unacceptable addresses is found on the form, the form is invalid and needs to be cured before it can be honored.
- **EINs on line 8.** Instructions clarify that the use of a foreign tax ID is now allowed for certain treaty claims in lieu of a U.S. TIN. Instructions say that payees claiming benefits under an income tax treaty that have not provided a foreign TIN on line 9b, need to provide an EIN in line 8 to support a treaty claim. The new instructions do not change the present requirement that a TIN is not required to support a treaty claim on dividends and interest from stocks and debt obligations that are actively traded, dividends from mutual funds and dividends, interest and royalties from unit investment trusts as well as income from loans of such securities. ***But note below on instructions for new line 9b, that for accounts held in financial institutions, a foreign tax ID is now required.***



- **(New rule for §871(f) exempt qualified plans)** Pursuant to the new instructions, a payee must provide a U.S. TIN to support a claim of exemption from withholding under IRC §871(f) for certain annuities received under certain qualified plans (e.g., plans that meet the 90% rule). Annuities under this requirement are rare since such plans are few in number, but this new requirement is important to note for affected plans as another necessary step to avoiding withholding on distributions from plans that meet these standards.
- **Line 9a, special rules for GIINs:** A participating FFI (including a reporting Model 2 FFI), registered deemed-compliant FFI (including a reporting Model 1 FFI), direct reporting NFFE (including a sponsored direct reporting NFFE), or a trustee of a trustee documented FFI is required to enter its GIIN (assigned with regard to the country of residence) on line 9a. For payments made prior to January 1, 2015, however, a Form W-8BEN-E provided by a reporting Model 1 FFI need not contain a GIIN. For payments made prior to January 1, 2016, a sponsored direct reporting NFFE or sponsored FFI that has not obtained a GIIN may provide the GIIN of its sponsoring entity. See page 6 of *“Instructions for Requestors of W-8... (Rev., 2014)”* for more details on GIIN requirements.
- **Line 9b, Foreign TIN.** If the payee’s country of residence for tax purposes has issued the payee a tax identifying number (TIN), it goes in line 9b. See comments about line 8 above as to the need for a U.S. TIN to support treaty benefits if no foreign tax ID has been provided where a TIN is required to support a treaty claim.

ALERT *Mandatory foreign tax ID if W-8BEN-E is provided to document a financial account held at a U.S. office of a financial institution.* New instructions mandate a foreign tax ID in line 9b if one has been issued to the payee by the jurisdiction in which the payee is a tax resident. The only exceptions to this mandate are for those that have not been issued a foreign tax ID, or where the jurisdiction does not issue TINs at all.

- **Part III Treaty Benefits:** Checking lines 14a and 14b will be required to support a valid treaty claim.
 - ♦ **Line 14b, checking the box representing compliance with the limitation on benefits clause is required.** Line 14b is where the entity represents that it derives the item of income for which the treaty benefit is claimed, and that it meets the limitation on benefits provisions contained in the treaty. Instructions provide a helpful explanation of the term “derived” but many, particularly if American English is not their primary language, will struggle with these provisions.
 - ♦ **Instructions say** “An item of income may be derived by either the entity receiving the item of income or by the interest holders in the entity or, in certain circumstances, both.



An item of income paid to an entity is considered to be derived by the entity only if the entity is not fiscally transparent under the laws of the entity's jurisdiction with respect to the item of income. An item of income paid to an entity shall be considered to be derived by the interest holder in the entity only if:

- The interest holder is not fiscally transparent in its jurisdiction with respect to the item of income, and
- The entity is considered to be fiscally transparent under the laws of the interest holder's jurisdiction with respect to the item of income.

An item of income paid directly to a type of entity specifically identified in a treaty as a resident of a treaty jurisdiction is treated as derived by a resident of that treaty jurisdiction. To determine whether an entity meets the limitation on benefits provisions of a treaty, you must consult the specific provisions or articles under the treaty. Income tax treaties are available on the IRS website at www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties--A-to-Z."

♦ **Very clear instructions on preclusion of a W-8BEN-E treaty claim on the part of a flow-through entity that is not a hybrid entity.** "If an entity is claiming treaty benefits on its own behalf, it should complete Form W-8BEN-E. If an interest holder in an entity that is considered fiscally transparent in the interest holder's jurisdiction is claiming a treaty benefit, the interest holder should complete Form W-8BEN (if an individual) or Form W-8BEN-E (if an entity) on its own behalf as the appropriate treaty resident, and the fiscally transparent entity should associate the interest holder's Form W-8BEN or Form W-8BEN-E with a Form W-8IMY completed by the fiscally transparent entity..." Reference is made to see hybrid entities under Special Instructions.

Cokala observation: For many years, we have seen W-8BEN forms, and now already W-8BEN-E forms, submitted to support a treaty benefit at the entity level where the type of entity box is checked for "partnership." Many times the entity is a limited liability company. On a few occasions, we have concluded that the claim might be justified as on further research we were unable to rebut the claim that the entity was taxed on the income by its resident country instead of its partners or members being taxed. For many, our research indicated that the entity was in fact fiscally transparent and the claim invalid on its face. As withholding agents, we are deemed to know what is publicly available. Where the entity does not bear the tax burden directly, it is probably fiscally transparent and a treaty claim must then be sustained by its partners. A W-8IMY is required from a transparent entity and W-8BEN or W-8BEN-E must come from each partner, and the partnership must provide a withholding statement that allocates the share of each payment to each partner. Withholding and 1042-S reporting are performed at the partner level.

Looking at the strength of the language in the new instructions, it seems the IRS means business in this area and we will need to harken to our responsibilities in this area. If a doubt arises, it is the payee that needs to provide a statement that supports the resident status under terms of the treaty and the meeting of terms of any limitation clause. This is



what line 15 (old line 10) is all about since it is required to be completed when further information is necessary to explain the qualifications that are otherwise unclear.

New regulations say if the form has a conflict on its face or a conflict exists between the claim and known information, you must cure the conflict before you honor the claim. If it is common knowledge that the partnership or other entity type indicated in line 4 does not pay taxes at the entity level in its country of residence, but that its owners do, then that information is in conflict with a checks in lines 14a and 14b. The conflict will need to be resolved before the claim may be honored.

On the other hand, the regulations also allow a withholding agent to honor a form at face value using the standards of a reasonably prudent person in the position of the withholding agent. See Reg. §1.1441-7T (b)(2). Do we as withholding agents need to validate that the treaty's residence and limitation on benefit clauses support application expressly for the type of entity disclosed on the form or in its legal title?

Reg. §1.1441-6T(b)(1) says "Absent actual knowledge or reason to know otherwise, a withholding agent may rely on a claim that a beneficial owner is entitled to a reduced rate of withholding based upon an income tax treaty if, prior to the payment, the withholding agent can reliably associate the payment with a beneficial owner withholding certificate, as described in §1.1441-1(e)(2), that contains the information necessary to support the claim...For purposes of this paragraph (b)(1), a beneficial owner withholding certificate described in §1.1441-1(e)(2)(i) contains information necessary to support the claim for a treaty benefit only if it includes ... the representations that the beneficial owner derives the income under section 894 and the regulations under section 894, if required, and meets the limitation on benefits provisions of the treaty, if any...Absent actual knowledge or reason to know that the claims are incorrect (applying the standards of knowledge in §1.1441-7(b)), a withholding agent may rely on the claims made on a withholding certificate ..."

Reg. §1.1441-6T(b)(2) says, "Payment to fiscally transparent entity(i) In general.— If the person claiming a reduced rate of withholding under an income tax treaty is an interest holder of an entity that is considered to be fiscally transparent (as defined in the regulations under section 894) by the interest holder's jurisdiction with respect to an item of income, then, with respect to such income derived by that person through the entity, the entity shall be treated as a flow-through entity and may provide a flow-through withholding certificate with which the withholding certificate or other documentary evidence of the interest holder that supports the claim for treaty benefits is associated...."

In an example under these regulations, the IRS says, "Absent actual knowledge or reason to know otherwise, W may rely on the representations made by E to apply a reduced rate of withholding." Just what is "reason to know otherwise" and just how far must we go to assure a valid claim in this context are unanswered at this point. We do wish the IRS would provide bright lines in this area. For countries where the U.S. is currently working through



IGAs the IRS should have access to lists of entities that are fiscally transparent in those countries. Such information should be made available in much the same manner that regulations currently list other red flags that give rise to doubt the certifications.

If an entity is listed in the “per se” regulation that allows corporate treatment, unless you know the entity is not acting for its own account, a treaty claim is probably warranted. Elsewhere we are on our own and may be assuming audit risk by accepting a treaty claim that is later seen as unwarranted where the box for partnership is checked in line 4 and a treaty claim is made in Part III and there is no clear indication that the entity is respected as a resident under terms of the treaty.

- **Line 15, like old line 10 on the 2006 version of the W-8BEN, is expressly required for:**
 - ♦ Exempt organizations claiming treaty benefits under the exempt organization articles of the treaties with Canada, Mexico, Germany, and the Netherlands.
 - ♦ Foreign corporations that are claiming a preferential rate applicable to dividends based on ownership of a specific percentage of stock in the entity paying the dividend.
 - ♦ Persons claiming treaty benefits on royalties if the treaty contains different withholding rates for different types of royalties.
 - ♦ Persons claiming treaty benefits under an “other income” treaty article.
 - ♦ Claiming treaty benefits that require the payee to meet conditions not covered by the representations made in lines 14a-c.

- **Signature:** For the form to be valid, an authorized representative or officer must check the box to certify that she or he has the legal capacity to sign for the entity identified on line 1 that is the beneficial owner of the income.

Important Points from “Instructions for the Requestor of Form W-8.. (Rev. 2014)”

- **Due diligence requirements.** Payers are responsible for ensuring that all information relating to the type of income for which Form W-8 is submitted is complete and appears to be accurate and, for an entity providing the form, includes a chapter 4 status when required. In general, you may rely on the information and certifications provided on the form (including the status of the beneficial owner as an individual, corporation, etc.) unless you have actual knowledge or reason to know that the information is unreliable or incorrect. You are considered to have reason to know that the information is unreliable or incorrect if you have knowledge of relevant facts or statements contained in the withholding certificate or other documentation that would cause a reasonably prudent person in your position to question the claims made. For example, if you have information in your records that contradicts information provided on the form, you may



not rely on the form. If you know or have reason to know that any information is unreliable or incorrect, you must obtain a new Form W-8 or other appropriate documentation. See Cokala's FATCA Update paper on "red flags" to look for, curing requirements and a checklist for reviewing W-8 forms.

- **Added instructions for verifying Form W-8BEN-E.** Critical coverage in such a validity review will need to include:
 - Part I, Line 4 (Chapter 3 Status). If you receive a Form W-8BEN-E from an entity that indicates that the entity is a disregarded entity, partnership, simple trust, or grantor trust, and the entity has checked "No" in Part I, line 4, of the Form W-8BEN-E, then you should **not accept** the Form W-8BEN-E if the form is used with respect to payments that are subject to chapter 3 withholding. In such a case, you should request the entity complete a Form W-8IMY, if the entity is a partnership, simple trust, or grantor trust, or have the owner of a disregarded entity complete the appropriate Form W-8 based on the owner's characteristics if the entity is a disregarded entity.
 - Part I, Line 5 (Chapter 4 Status). If you receive a Form W-8BEN-E from an entity that is a certified deemed-compliant FFI, a deemed-compliant FFI under an applicable IGA, or an exempt beneficial owner, the entity should not check the box in Part I, line 5, of Form W-8BEN-E for Nonparticipating FFI (including a limited FFI or an FFI related to a Reporting IGA FFI other than a registered deemed-compliant FFI or participating FFI). Instead, it should check the appropriate box for its status as a certified deemed-compliant FFI, non-reporting IGA FFI, or exempt beneficial owner.
 - Part I, Line 9 (Foreign TIN). You should request the entity payee's foreign TIN to be completed on line 9b of the Form W-8BEN-E if you are a financial institution maintaining the payee's obligation at your U.S. office. If the foreign TIN is not provided, you may not treat the Form W-8BEN-E as valid if you know that the entity payee has a foreign TIN that it has not provided, unless you have record of the TIN in your account files that you are able to report on Form 1042-S.
 - Part X, Line 24 (Owner-Documented FFI). You may accept a Form W-8BEN-E from an entity claiming status as an owner-documented FFI that you agree to treat as an owner-documented FFI where you are the designated withholding agent even if the entity does not check box 24d in Part X and regardless of whether you know that the entity is a trust that has one or more contingent beneficiaries.
- Request a new Form W-8: The instructions clarify when forms are to be requested, including:
 - Before the expiration of the validity period of an existing Form W-8;
 - If the existing form does not support a claim of reduced rate for a type of income that the submitter of the form has not previously received or is incomplete with respect to any claim made on the form; or



- If you know or have reason to know of a change in circumstances that makes any information on the current form unreliable or incorrect for purposes of chapter 3 or 4 (to the extent applicable based on the claims made on the form).
- Instructions also cover the content requirements of a substitute W-8BEN-E.