

June 29, 2007

Glenn Kirkland, IRS Reports Clearance Officer
Internal Revenue Service, Room 6512
1111 Constitution Avenue NW
Washington, DC 20224

Re: Request for Comments on Draft Form W-8BEN and
Instructions for Form W-8BEN

Dear Mr. Kirkland:

The Securities Industry and Financial Markets Association ("SIFMA")¹ appreciates the opportunity to comment on recently released drafts of Form W-8BEN and Instructions for Form W-8BEN. We respectfully request IRS consideration of the following suggested changes to the form and instructions.

Form W-8BEN

Top section entitled "Do not use this form for"

- First bullet point: It would be helpful to add in parenthesis "See Publication 515 (herein, "Pub 515) or 519 for definition of resident alien". Resident alien is not defined completely in the instructions or in Form W-9 and its instructions.
- Third and fourth bullet: Clarification is requested to explain that the first "Note" applies to both bullet points. Consideration should be given to changing the bullet points to alpha or numeric points so that the Note may be cross-referenced more easily.

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

- Second 'Note': It may be clearer to change the sentence from "See instructions for additional exceptions." to "See instructions for additional exceptions to using Form W-8BEN."

Part I- Identification of Beneficial Owner

- Line 1: We suggest adding, in parenthesis "For joint account holders, see instructions."
- Line 3: We recommended grouping entities that require a Part II certification, such as hybrid entities, and including a reference to with respect to completing Part II. This will help foreign persons complete this section properly and avoids the unnecessary rejection of forms. Attached is a prototype for your reference.
- Line 4: We recommend changing "Do not use a P.O. Box or in-care-of address" to "See instructions on P.O. Box and in-care-of address". Please refer to the Line 4 discussion in the Form W-8BEN instructions section of this letter.
- Line 5: We suggest making the mailing address optional by changing the parenthetical to read "optional, see instructions, if different from above". The regulations do not specifically require a beneficial owner to provide a mailing address on Form W-8BEN. It should be sufficient that the mailing address provided on an account is required to be reviewed by the withholding agent for consistency with the claimed status.
- Line 7:
 - o The February, 2006 version of Form W-8BEN made the foreign tax identifying number ("FTIN") optional. We feel that it is premature to make this information mandatory as indicated in the instructions.
 - o It is not clear as to what a withholding agent's responsibility is with respect to the receipt of Form W-8BEN without a FTIN. Most withholding agents are not aware of which countries issue such numbers, what qualifies as a 'good' FTIN, and how a FTIN is defined.
 - o We believe that the IRS does not intend for withholding agents to reject a Form W-8BEN for a missing FTIN. Unlike Qualified Intermediaries who are subject to the requirements of local law,

U.S. withholding agents currently lack the information and experience to differentiate between types of identification numbers issued to foreign persons. In addition, US withholding agents do not have adequate knowledge of how a foreign country's identification numbers are configured and thus may not be able to determine whether a number provided in Line 7 is acceptable.

- o In addition to the challenges facing the withholding agent, foreign persons will need additional guidance as to the correct number to write in Line 7.
- o At this time, requiring an additional piece of information on Form W-8BEN without properly vetting the issues with withholding agents will add unnecessary burden and cause confusion in processing a tax form that is already quite complex.

Part II - Claim of Tax Treaty Benefits

- Line 9b: We suggest eliminating Line 9b. It is often unclear as to whether a foreign person must check Line 9b when required to provide a TIN or if providing a TIN on Line 6 is sufficient for treaty benefit purposes. The instructions for Line 6 sufficiently cover the requirements for a TIN, and, thus, Line 9b is not useful.

Line 10: We recommend adding a parenthetical instructing a foreign person to review the instructions for Line 10. Please refer to the Form W-8BEN instructions section of this document for additional discussion

Part III- Notional Principal Contracts

- We suggest removing this section entirely.
 - o This section asks the beneficial owner to provide a statement that identifies those Notional Principal Contracts ("NPC"s) the income from which is NOT effectively connected with the conduct of a US trade or business.
 - o Treasury Regulation Section 1.1441-4(a)(3)(i) states that NPC income is not subject to 30% non-resident withholding. The only requirement for a withholding agent under this section is with respect to Form 1042-S reporting for payments that a withholding

agent must treat as effectively connected with a US trade or business.

- o Income is effectively connected with the conduct of a US trade or business if the income is paid to a qualified business unit (QBU) of a foreign person located in the US, or if the payment is paid to a QBU of a foreign person located outside the US and the withholding agent knows, or has reason to know, that the payment is effectively connected with the conduct of a trade or business in the US.
- o The presumption under this section is that all NCP income is not ECI unless one of the above circumstances is true. Ironically, Line 11 of Form W-8BEN inverts the language of the regulation and requests a statement identifying those NPCs the income from which is NOT effectively connected with a US trade or business.
- o The industry, as allowed by regulation, presumes that all NPC transactions involving a counterparty that has provided a Form W-8BEN are NOT effectively connected with a US trade or business (unless one of the ECI exceptions exist). The request for a counterparty to provide an additional statement identifying those NPCs the income from which is not effectively connected in those cases where the counterparty has already identified itself as foreign by providing a Form W-8BEN is redundant.
- o Further, Treasury Regulation Section 1.1441-4(a)(3)(ii) provides that an ISDA payee tax representation indicating that the counterparty is foreign precludes a withholding agent from treating an NPC payment as effectively connected with a US trade or business. There is no requirement in the regulation that an ISDA payee tax representation be accompanied by a statement from the counterparty identifying those NPCs the income from which is NOT effectively connected with a US trade or business. Because a valid ISDA payee tax representation is legally effective on its own and supplants the need for a Form W-8BEN from the counterparty, parity recommends that the Line 11 requirement for a statement identifying those NPCs the income from which is NOT effectively connected with a US trade or business should be deleted.
- o It is possible that Line 11 was included on Form W-8BEN prior to the May 2000 regulations' revisions which authorized the use of ISDA payee tax representations, which would be further evidence that Line 11 should be deleted from the text of Form W-8BEN.
- o Based on industry experience, Line 11 serves no useful purpose and should be removed from Form W-8BEN.

Part IV- Certification

➤ Capacity Line

- o We strongly recommend removing the requirement for a foreign person to include their capacity in which acting. Currently, both Forms 1040NR and 1120F (tax returns filed by foreign persons) do not require a capacity from the signer of those tax returns. They are not rejected by IRS when the title of the person signing the return is not completed. Form W-8BEN should not be held at a higher standard than a tax return filed by a foreign person with the IRS.
- o The signature of a person, who signs Form W-8BEN, under penalties of perjury, is prima facia evidence that such person has the authority to sign Form W-8BEN. Treasury Regulation Section 1.1441-1(e)(4)(i) states that a Form W-8BEN may be signed by any person authorized to sign under penalties of perjury on behalf of the person listed on the W-8BEN as provided in sections 6061, 6062, and 6063, i.e.; the sections that cover who may sign tax returns. There is no indication in the 1441 regulations that withholding agents must question or validate someone's apparent authority to sign a Form W-8BEN. As such, the capacity line is not relevant. The signature alone should be the pertinent information for IRS purposes as the person signing has in effect stated under penalties of perjury that he/she is authorized to sign for the taxpayer.
- o If IRS is not able to eliminate the requirement for the capacity of the signatory, withholding agents should not be responsible for validating the authenticity of a particular capacity. The draft instructions provide a list of who may sign Form W-8BEN. However, foreign titles do not always conform to titles commonly used in the U.S. Since the signatory certifies, under penalties of perjury, in Part IV, that he/she has the authority to sign the Form W-8BEN, a withholding agent should not be required to perform additional due diligence to confirm such authority. The instructions should state that the withholding agent will accept the capacity provided by the beneficial owner, however, the beneficial owner is ultimately liable for ensuring that he/she is authorized to sign the Form W-8BEN.

Instructions for Form W-8BEN

General Instructions

- Effective date:
 - o Clarification is needed with regard to the prior versions of Form W-8BEN. We suggest providing a six month transition period. We recommend that the first sentence of the instructions read as follows: "Do not use prior versions of Form W-8BEN after June 30, 2008." Prior versions that are submitted after this date will be rejected by the withholding agent."
 - o The instructions should include language that allows a withholding agent to continue to rely upon valid, prior versions that are received before 6/30/08 until their natural expiration dates.
- Giving Form W-8BEN to the withholding agent: The third paragraph outlines the rules for income owned jointly with one or more other persons. It would be helpful to include the ramifications of providing only **one** Form W-8BEN when there is more than one foreign account holder, i.e.; backup withholding applies unless you have Forms W-8BEN from all holders or at least one W-9. There is similar language in the W-9 instructions, under "Joint Foreign Payees", that may be helpful to reiterate here.
- Change in circumstances: Withholding agents need guidance on their responsibilities with respect to actual knowledge that certain events, such as a name/title change, should result in a new Form W-8BEN. It would be helpful to state that if the withholding agent has knowledge of certain changes in circumstance and that knowledge would invalidate the existing form on file, the withholding agent may begin withholding until a new Form W-8BEN is received. This section outlines the foreign person's responsibility; however, is silent as to any responsibilities the withholding agent has with respect to its actual knowledge. Including this additional information in this section alerts the foreign person that their form may be invalid and they may be subject to withholding when the withholding agent has actual knowledge that the circumstances have changed.
- Expiration of Form W-8BEN: While we understand that a change in the validity period requires a Treasury Regulation change, we feel it is important to voice the industry's concerns with the validity period. We recommend increasing the validity period to 5 years. This decreases the burden to both the taxpayer and the withholding agent.

Specific Instructions

Part I- Identification of Beneficial Owner

- Line 1
 - o Forms W-8BEN are rejected by withholding agents because the name on the form does not match the exact name listed in the withholding agent's records. Sometimes foreign persons, especially individuals who have more than one surname, leave out portions of their name or title as they complete the tax form. It would be helpful to change the instructions as follows: "Enter your full and complete name", "An entity should write the complete name of the organization as shown in its formation documents. An individual should write his or her legal name. For consistency with the withholding agent's records, your first should be shown first on Line 1 and your last or family name should be shown last". This would reduce the burden of rejecting otherwise valid forms and having to obtain new forms; possibly withholding in the meanwhile and refunding once the new form with the full name is received.
 - o Consider moving the paragraph, beginning with "Note", from Page 2 with respect to joint account holders, to this section. Foreign persons are more likely to read the line by line instructions and will make note of the requirements for joint account holders.
- Line 2
 - o Provide individuals with the option of leaving this line blank. There may be confusion as to whether a Form W-8BEN is valid if Line 2 is blank or if whether an individual must write "N/A" in this section.
- Line 3
 - o Change the sentence that begins, "If you are a partnership or disregarded entity..." to "If you are a partnership, disregarded entity, simple or grantor trust receiving a payment for which treaty benefits are being claimed, you must check the "Partnership", "Disregarded entity", "Simple Trust, or "Grantor Trust" box AND complete Part II" This information is extremely useful and avoids unnecessary communication between the foreign person and the withholding agent.

➤ Line 4

- o Notice 2001-4 allows the use of a PO Box in certain circumstances. We suggest including the language that already exists on point in Pub 515 (page 8), adjusted for these purposes, as follows:

“Until further notice, you can provide a P.O. Box as a permanent residence address provided a street address is not available in the country for which you are resident. Examples of countries where a street address is not available include Saudi Arabia and Abu Dhabi. ”

- o Withholding agents need clear guidance on how to cure in-care-of addresses, including financial institution addresses, when these are the actual permanent residence addresses for the beneficial owner. For example, for certain island countries, the use of a corporate administrator physically located in that country is common practice. The address of the administrator is generally the permanent registered address of the foreign entity.
- o IRS currently allows Qualified Intermediaries to cure in-care of address and an address at a financial institution when that is the only address available for the entity. Below is the FAQ found in "Qualified Intermediary Frequently Asked Questions," Chapter VII, FAQ # 5)

QUESTION 5: How should an external auditor treat documentation provided to establish foreign status for an account holder that is an entity where the only address that is available for the entity is an in-care-of address or an address at a financial institution?

ANSWER 5: For purposes of Section 10.03(A)(5) of the Audit Guidance, the external auditor should report such cases as undocumented. The external auditor's report should footnote instances where the account holder's file contains organizational documents for the entity supporting the claim of foreign status. The external auditor need not select for the Phase 1 Spot Check, under section 10.04.7 of the Audit Guidance, any account that has been so footnoted.

Note: Although the external auditor of a Qualified Intermediary is required to footnote Forms W-8BEN with these addresses as undocumented, there is no withholding liability to the withholding agent.

- o We recommend clarifying that US withholding agents may rely on an organizational document to cure such addresses. Doing so would decrease rejection of otherwise proper forms.
 - o We also recommend that the instructions clarify that a permanent residence address shown on Line 4 that includes both a street address and a P.O. Box is acceptable and does not require withholding agent to invalidate the Form W-8BEN.
- Line 5
- o In keeping with our suggested change to Form W-8BEN, include a sentence in the instructions that the mailing address is optional.
 - o Because some foreign persons may chose to include a mailing address, it would be helpful to outline the additional documentation requirements needed to support a claim of foreign status when there is a U.S. mailing address or a claim for treaty benefits when there is a mailing address outside the treaty country. The instructions should specifically state what type(s) of additional documentation (e.g. formation document, government issued identification card, and/or explanatory letter) needs to be provided to a U.S. withholding agent to support the claim.
 - o For both US addresses and addresses that conflict with the treaty country in Part II, Publication 515 (pages 12 and 13), outlines the requirements for curing these discrepancies. It would be extremely helpful to either refer the foreign person to Pub 515 or to include the cures, as written in Pub 515, in this section of the instructions. This is needed in the instructions to the Form W-8BEN to inform the beneficial owner of his/her responsibilities for providing additional documentation to U.S. withholding agents when required.
- Line 6
- o The instructions for this section begin by saying that an individual is generally required to enter his/her social security number (SSN) on Line 6 of Form W-8BEN. To the contrary, most non-resident aliens do not have an SSN and are not required to provide any type of U.S. taxpayer identification number ("TIN") on a Form W-8BEN. The instructions should instead start with the general rule that a TIN is not required to obtain a reduced rate or exemption from US withholding. Then the instructions should explain when a TIN is required and how to obtain one. Otherwise, foreign investors would likely get the impression that a TIN is required.

- Line 7
 - o In prior versions of the instructions, Line 7 was optional. The instructions state that the foreign persons 'must' include this number. It is not clear what the withholding agent's responsibility, if any, is when it receives a W-8BEN without a foreign identifying number. See Line 7 comments to Form W-8BEN above for more details.

Part II- Claim for Treaty Benefits

- An instruction should be added at the outset to inform the filer that he/she must check or mark each box that applies to indicate that the filer is making the representation associated with the line number. At a minimum, an individual that is eligible for treaty benefits must complete line 9a and an entity that is eligible for treaty benefits must complete lines 9a and c.
- Lines 9b
 - o Changes should be made in keeping with the suggestions to the Form W-8BEN above.
- Line 10
 - o Currently, Line 10 requires the article number, the rate of withholding and the type of income. It would be helpful for foreign persons (except for students and researchers) to understand what they should provide as a reason they meet the terms of the treaty.
 - o In addition, it is unclear as to whether the withholding agent has any obligation to evaluate the reasons provided by the foreign person. We recommend that IRS make it clear that the withholding agent, unless it has actual knowledge to the contrary, accept the reason provided by the foreign person in Line 10.
- Line 11
 - o Remove instruction in keeping with our suggestion to remove this line from Form W-8BEN.
- Part IV- Certification
 - o We suggest including a sentence that Form W-8BEN must be signed with a wet signature or via an approved electronic method. It would be helpful to point out that copies or faxes are not allowed unless provided by an indirect accountholder to an intermediary.

Withholding agents are routinely questioned by clients with respect to accepting copies or faxed W-8s. While the regulations allow for a 90 day grace period for accepting documents in this fashion, many withholding agents historically have not utilized this grace period because it is burdensome operationally. When a client asks for a regulation cite or an instruction that clearly says these forms are not to be copied, a withholding agent often must explain the 90 grace period and refer clients to a cumbersome section of the regulations.

- o Should the capacity line remain in the form (see comments above on capacity), the instructions state that if an agent signs the Form W-8BEN, the form must be accompanied by a power of attorney in **proper** form. It further states that a Form 2848 is acceptable. There is much debate between foreign persons and withholding agents as to the elements of a proper power of attorney when a Form 2848 is not utilized for these purposes. It would be extremely beneficial to include the requirements of an acceptable power of attorney. We suggest a section on a 'Substitute power of attorney' similar to the section on Substitute W-9s in the Instructions for Requestor of Form W-9.
- o In addition, the last sentence in this section includes the requirements for a foreign **individual** who authorizes an agent to sign Form W-8BEN on his behalf. In order to avoid confusion, we suggest adding the requirements for foreign corporations that authorize an agent to sign their W-8BEN. Treasury Regulation Section 1.1441-1(e)(4)(i) states that a W-8BEN may be signed by any person authorized to sign a tax return, under IRC Section 6062, on behalf of the person whose name is on the W-8BEN. Treasury Regulation Section 1.6062-1(a)(3) states that an agent may sign a return provided it meets the requirements in 1.6012-2(g).
- o The draft instructions provide that a parent or guardian may sign a Form W-8BEN for a minor child. This instruction should clarify that the parent or guardian should sign his/her own name. In addition, in the case of an account established under the uniform gift/transfer to minors act, the instructions should permit the custodial adult, even if that adult is not a parent or a guardian, to sign the Form W-8BEN because that is the individual that has authority over the account.
- o The draft instructions state that an individual may authorize an agent to sign Form W-8BEN only in the case of disease or injury or if the IRS has granted permission to the agent for good cause. As

a practical matter, individuals may be incapacitated and not be able to grant a power of attorney to an agent when the need to sign a Form W-8BEN arises. We recommend that IRS use its authority and grant general permission to the spouse of an incapacitated, dying or deceased individual to sign the Form W-8BEN even if a power of attorney is lacking. There should be no need for a spouse to apply to the IRS for permission on a case-by-case basis since it creates an unnecessary burden on both the spouse and the IRS.

Miscellaneous Comments

- IRS should consider adding a paragraph on the withholding agent's liability for the payment of tax, penalties etc, if the Form W-8BEN is not valid. It would be useful for those completing the form to understand why withholding agents are specific as to the information they will accept on a Form W-8BEN. It may be helpful to use the same language in Publication 515-pg 3, which, adjusted for these purposes, reads as follows:

“The withholding agent is liable for any tax required to be withheld. This liability is independent of the tax liability of the foreign person to whom the payment is made. If the withholding agent fails to withhold and the foreign person fails to satisfy its US tax liability, then both the withholding agent and the foreign person are liable for the tax..... Thus, it is important for you to review these instructions and complete the applicable sections of Form W-8BEN in order to ensure proper withholding”
- While we appreciate the removal of the language prohibiting abbreviations on Form W-8BEN, we would like IRS to allow abbreviations on Forms W-8BEN received prior to 2008.

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Thank you for your consideration of our views. We are available at your convenience to discuss any of the above points. Please feel free to call me (at

202-216-2031) or Carmela Lawrence, the Chair of SIFMA's Committee on Tax Compliance and Administration (at 347-643-1672).

Sincerely,

Patti McClanahan
Managing Director, SIFMA

cc: Carl Cooper
Todd Larsen
Tom Chillemi
Bob Erickson

Example of Proposed Line 3 of Form W-8BEN

3. Type of beneficial owner				Hybrids claiming treaty benefits(must complete Part II)	
☐ Individual	☐ Corporation	☐ Complex trust	☐ Private foundation	☐ Partnership	☐ Grantor trust
☐ Estate	☐ Government	☐ Central bank of issue		☐ Simple trust	☐ Disregarded entity
☐ International Organization	☐ Tax-exempt organization				