



December 22, 2021

Mr. John Sweeney  
Office of Associate Chief Counsel, International  
Special Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. Subin Seth  
Office of Associate Chief Counsel, International  
Senior Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. Charles Rioux  
Office of Associate Chief Counsel, International  
Attorney  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: Forms W-8 Requester Instructions Comment**

Dear Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")<sup>1</sup> would like to take this opportunity to provide comments regarding the Forms W-8 Requester Instructions.

**Claims for reduced withholding under section 1446(f)**

SIFMA recommends that the Instructions for the Requester of Forms W-8 include, with respect to claims for reduced withholding under section 1446(f) under an applicable tax treaty, the following clarifications to permit withholding agents to rely on such claims.

- (1) Notwithstanding that a foreign partner of a publicly traded partnership does not provide a U.S. TIN for itself, the withholding agent would be permitted to eliminate withholding under Internal Revenue Code section 1446(f) on an amount realized based upon the application of one or more of the exceptions to withholding under Treas. Reg. §1.1446(f)-4(b), other than a treaty claim that is made pursuant to Treas. Reg. §1.1446(f)-4(b)(5). We also recommend

---

<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

that those instructions provide that the absence of such a U.S. TIN would not necessarily affect the validity of the form for Chapter 3 purposes. For example, with respect to U.S. source dividends identified on a qualified notice, a withholding agent should be permitted to validate a treaty claim made on a Form W-8BEN or W-8BEN-E that includes a foreign TIN (but not a U.S. TIN).

The Instructions to the Form W-8BEN-E (Rev. Date October 2021) provide that persons required to complete line 15 in order to make a valid treaty claim include (*italics added*):

“Persons claiming treaty benefits on business profits not attributable to a permanent establishment or on gains arising from the alienation of property (other than real property) that does not form all or part of a permanent establishment (including gains that do not arise from the alienation of a permanent establishment). For example, a foreign partner that derives gains subject to tax under section 864(c)(8) upon the transfer of an interest in a partnership that conducts a trade or business within the United States may claim treaty benefits on this form with respect to the withholding required under section 1446(f) by stating that the gains are not attributable to a permanent establishment and by including the relevant gains article of the treaty. *Additionally, for a claim that gain or income with respect to a PTP interest is not attributable to a permanent establishment in the United States, you must identify the name of each PTP to which the claim relates.*”

SIFMA appreciates that the updated Form W-8BEN-E instructions specify the ability of a partner to claim treaty benefits with respect to section 1446(f) withholding tax on line 15. However, clarification is also needed about the due diligence, if any, required of withholding agents in reviewing a claim for treaty benefits on an amount subject to section 1446(f) withholding.

- (2) The Requester Instructions should clarify that, absent “actual knowledge” that a treaty claim is incorrect, a withholding agent may rely on a statement on line 15 or line 10 of Form W-8BEN-E or W-8BEN, respectively, that gains from a PTP are not attributable to a U.S. permanent establishment and a withholding agent should not be required to investigate whether the named PTP has a permanent establishment in the United States. Further, we request that the IRS issue guidance that provides that a withholding agent will be considered to have “actual knowledge” that a treaty claim is unreliable or incorrect only if it has in its possession a qualified notice or information that is publicly available (e.g., on the PTP’s public website) stating that such gains are attributable to a U.S. permanent establishment. In addition, the Form W-8BEN-E instructions specifically reference a treaty claim made under a gains article. SIFMA would recommend that the Requester Instructions clarify whether a withholding agent may consider a treaty claim valid if the language on line 15 references a treaty article other than the gains article, such as the business profits article. We also request that the IRS update [Table 1. Tax Rates on Income Other Than Personal Service Income Under Chapter 3, Internal Revenue Code, and Income Tax Treaties](#), or publish a new table, to include treaty article citations applicable to gains from dispositions of partnership interests.
- (3) The October 2021 Instructions to the Form W-8BEN-E specify that a beneficial owner making a treaty claim with respect to gains subject to section 1446(f) withholding “must

identify the name of each PTP to which the claim relates.” Further clarity around the acceptable means of identifying the PTP would be helpful to withholding agents. SIFMA recommends that the Requester Instructions clarify that a treaty claim is considered valid if the beneficial owner identifies the PTP in a separate attachment to the Form W-8, or provides a written statement (including an email notification) stating that the current Form W-8 on file (including the treaty claim) applies to a newly identified PTP (or PTPs). A new Form W-8 should not be required each time a new attachment or statement is provided with an updated list of applicable PTPs. Allowing a new attachment or statement without a new Form W-8 would be consistent with current rules for withholding statements to Forms W-8IMY.

- (4) Further, the Requester Instructions should clarify that a withholding agent may apply a Form W-8 and relevant attachments retroactively to an amount subject to section 1446 withholding if the Form W-8 is furnished after the date of payment or distribution, provided it is furnished within 30 days of the date of payment or if the beneficial owner provides a signed affidavit stating that the information and representations contained on the certificate were accurate as of the time of the payment, consistent with the rules set forth in Treas. Reg. §1.1441-1(b)(7)(ii)(A). In addition, the Requester Instructions should clarify the rules applicable to withholding agent reliance on accompanying withholding statements under sections 1441 and 1471 apply in the same manner with respect to withholding tax under section 1446(f). For more details, please see the November 2021 Public Report issued by the Internal Revenue Service Advisory Council (IRSAC) (pp. 68-71).<sup>2</sup>

### **Potential impact of no U.S. TIN on forms provided by a disclosing QI**

The Requester Instructions should clarify the impact of no U.S. TIN on a Form W-8BEN or W-8BEN-E provided by a disclosing QI. Earlier comments from SIFMA proposed that a disclosing QI should generally be allowed to shift all section 1446 withholding, Form 1042-S reporting, and nominee reporting (under Treas. Reg. §1.6031(c)-1T) for PTPs, provided the Form W-8 or W-9 of the disclosed partner *includes a U.S. TIN*. SIFMA also proposed, however, that any U.S. TIN requirement on Forms W-8 should be made prospective, allowing QIs to rely on existing Forms W-8 until the end of their normal expiration period. The Requester Instructions should include similar guidelines – including a transition rule – for U.S. withholding agents that receive disclosed partner information from QIs.

### **Clarification needed regarding remittance-based treaty claims**

The Requester Instructions should clarify the role of withholding agents validating treaty claims applicable to income remitted to a treaty country with a remittance-based tax system. The Form W-8BEN instructions provide – for the first time – instructions for individuals making such claims. SIFMA members generally understand that these instructions require the individual to disclose the “amount of income” that was already received and remitted to the treaty country with respect to past payments; however, withholding agents generally apply treaty claims on a prospective basis with respect to future payments. Accordingly, SIFMA recommends that the Requester Instructions clarify that, with respect to a remittance claim, which we understand

---

<sup>2</sup> November 2021 Public Report issued by the Internal Revenue Service Advisory Council (IRSAC) available at <https://www.irs.gov/pub/irs-pdf/p5316.pdf>.

pertains to prior payments, a withholding agent may honor a valid treaty claim on line 9 with respect to all future payments unless it has actual knowledge that the beneficial owner will not remit future payments made by the withholding agent to the treaty country. SIFMA also recommends that the Requester Instructions provide that a withholding agent that has not provided treaty relief with respect to a remittance claim may, but is not required under Treasury regulations to, refund under the set-off or reimbursement procedures an amount withheld on account of a remittance claim if it should later obtain confirmation from a client that amounts were remitted to the treaty country.

If the IRS intended for remittance claims to apply with respect to future payments, the Form W-8BEN instructions should be amended to clarify the rule. Notwithstanding such a clarification, SIFMA members expect that most withholding agents would not honor a remittance claim that is based upon an “amount” of future payments entered on line 10, because withholding systems are not designed to take into account a dollar number and corresponding explanation of that dollar number entered on a free-format line on a Form W-8. For example, if an individual taxpayer entered \$10,000 of dividends on line 10 of their Form W-8BEN, withholding systems could not reasonably be expected to apply a treaty rate on only the first \$10,000 of dividends paid to that individual. In other words, withholding systems are designed to apply a single treaty rate per payee and income type, and to turn off that rate upon expiration of the pertinent Form W-8, as opposed to upon reaching a dollar threshold.

\* \* \*

We appreciate your consideration of our recommendations. As always, SIFMA member firms will continue to work diligently and in earnest to comply with all regulatory changes and requirements. If you have questions and would like to discuss this matter, please do not hesitate to contact me at [wcardon@sifma.org](mailto:wcardon@sifma.org) or 202-962-7465.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L.C.C.', is positioned above the printed name and title.

Liam Cardon  
Assistant Vice President, Federal Government Affairs