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Re: Form W-8BEN-E (Rev. April 2016)

Dear Mr. Sweeney:

We are writing to share our concerns with the recently updated Form W-8BEN-E (Rev. April 2016) and to request that the IRS regard as valid the previous Form W-8BEN-E through December 31, 2016. Withholding agents are straining to obtain recertification of pre-existing accounts for FATCA purposes by July 1, 2016. A requirement to resolicit certifications with the new forms or reject "old" versions of expiring forms so soon after this deadline would significantly burden financial institutions, which are accustomed to performing this type of compliance function. It would be even more difficult for non-financial institutions, which have far less experience with these types of forms and reporting concepts. Thus, we are concerned that recent changes to Form W-8BEN-E will cause unintentional mistakes and improper certifications, resulting in unnecessary withholdings by withholding agents, all of which may be avoided with greater clarity in the form.

Tax Executives Institute

TEI is the preeminent association of in-house tax professionals worldwide. Our approximately 7,000 members represent more than 2,800 of the leading corporations in North and South America, Europe, and Asia. TEI represents a

cross-section of the business community and is dedicated to developing and effectively implementing sound tax policy, promoting the uniform and equitable enforcement of the tax laws, and reducing the cost and burden of tax administration and compliance to the benefit of taxpayers and governments alike. TEI is firmly committed to maintaining a tax system that works — one that is administrable and with which taxpayers can comply in a cost-efficient and predictable manner.

TEI, as a professional association of in-house tax executives, offers a unique perspective. Members of TEI manage the tax affairs of their companies and must contend daily with provisions of the tax law impacting business enterprises, including compliance with FATCA, both in the United States and around the world. Our members work for companies involved in a wide variety of industries. Their collective perspectives are broad-based and not tied to any particular special interest group. The diversity, background, and professional training of TEI's members place the organization in a uniquely qualified position from which to comment on these FATCA-related issues.

Form W-8BEN-E (Rev. April 2016)

Claim of Tax Treaty Benefits

This past April, the IRS released an updated Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*. This form is used by foreign entities to certify to their withholding agents or payers as to their non-U.S. statuses for purposes of Chapters 3 and 4 of the Internal Revenue Code. Form W-8BEN-E was last updated in 2014. Among other additions, Part III, Question 14.b, of the updated form requests that certifying foreign entities indicate the type of limitation-on-benefits provision that applies to their claims of treaty benefits. The form then provides ten check-box options, including “Government,” “Tax exempt pension trust or pension fund,” “Other tax exempt organization,” and other such sources of treaty benefits. The correct answer to this question often requires interpreting complex tax laws and applying the law to a multitude of facts. Personnel receiving the forms are not likely to be seasoned tax professionals. As such, we request the withholding agent be authorized to accept the certification and the form “unless they have reason to know,” that the answer provided to the question is not correct as that standard is generally understood under relevant regulations. In addition, we respectfully request that the IRS employ a light touch when verifying the “reason to know” standard in seeking to verify these listings in audits or otherwise. A light touch is necessary and appropriate in these circumstances because responses to this question are not intuitive and personnel routinely charged with completing the forms and providing them to withholding agents are not likely to be familiar with the reporting entities’ bases for claiming treaty benefits. While many financial institutions have sophisticated compliance processes in place for completing these types of forms, many non-financial institutions do not and run a good risk of incorrectly filling out the revised form without the intent to do so.

Chapter 4 Status – “Account that is not a financial account.”

We have a similar concern with the revised form’s new option in Part I, Question 5, for indicating a Chapter 4 status, which is the final checkbox listing for “Account that is not a financial account.” We are concerned that the parameters for this option are not sufficiently clear on the face of revised Form W-8BEN-E and that this option will erroneously evolve into a default option, especially for non-financial institutions, causing payors to withhold as a result. For example, a nonfinancial foreign entity (“NFFE”) will need to claim FATCA status for payments made to it by a U.S. vendor, payments that are generally withholdable under FATCA but specifically exempt from withholding because of the entity’s NFFE status. The foreign vendor may erroneously check the box “Account that is not a financial account” rather than the correct box, “Publicly traded NFFE.” If this final checkbox becomes a default option, the accounts will need to be rejected and FATCA withholding will occur. While the revised form’s instructions indicate that this option should be chosen only for non-financial accounts listed in the relevant regulations (Treas. Reg. § 1.1471-5(b)(2)), we believe this will not be clear to personnel charged with completing the form, thus resulting in numerous unintentionally improper certifications and numerous rejections by withholding agents. This in turn would result in unnecessary withholdings. TEI recommends that a parenthetical be added on the face of the form to indicate the “Account that is not a financial account” box may not be used for accounts in the United States and may only be used for accounts described in Treas. Reg. § 1.1471-5(b)(2), as such: “(Only for certain accounts listed under Treasury Regulations. Not applicable for accounts in the U.S.). See Instructions.” The proposed addition would at least give pause to an individual who might otherwise improperly regard this as a default option.

Transition Period and Extended Deadline for Form W-8BEN-E (Rev. April 2016)

The IRS treated 2014 and 2015 as “a transition period for purposes of [IRS] enforcement and administration with respect to the implementation of FATCA....” According to Notice 2014-33, during this transition period, the IRS took into account a withholding agent’s efforts to modify its account-opening practices and other FATCA-compliance requirements when deciding whether to grant relief from enforcement procedures and penalties. We respectfully request a continuation of this approach for 2016 and 2017 with regard to enforcement practices as applied to revised Form W-8BEN-E. If and when IRS personnel review such forms maintained by withholding agents and payers, we respectfully request that the IRS employ a light touch in asserting penalties if the form is found to be improperly completed. The extension of the transition period of time will give withholding agents much needed time to develop processes by which they can more effectively and efficiently solicit these forms from foreign entities.

Unless an extension of time is granted for implementation of revised Form W-8BEN-E, the old form will become invalid as of October 13, 2016. After that date, withholding agents can no longer accept as valid the previous version of the form. Most institutions are going to struggle with such a mid-year change in forms. Withholding agents will inevitably resolicit Forms W-8BEN-E before this deadline using the old form, but may not receive the completed

forms back until after the deadline. In such circumstances, the forms would technically be invalid, requiring withholding. Further, timely compliance with the revised form will be especially difficult for non-financial institutions, which generally do not have the robust reporting and withholding systems and processes typically found in financial institutions for filling out and submitting this type of form. In light of the timing difficulties and ambiguities in revised Form W-8BEN-E expressed above, we request that foreign entities be allowed to submit the previous version of the form through December 31, 2016.

* * *

TEI appreciates this opportunity to present its views on these ongoing FATCA-related matters. If you have any questions about these comments, please contact Colleen C. Brown, chair of TEI's IRS Administrative Affairs Committee, at (801) 990-3761 or ccbrown@barrick.com or John L. Schoenecker, Tax Counsel at TEI, at (202) 470-3600 or jschoenecker@tei.org.

Respectfully submitted,

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