

Foreign Entity Payees of U.S. Source Income: Learn How to Fill Out IRS Form W-8BEN-E

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In prior advisories, we have discussed the new withholding tax law commonly known as “FATCA” (standing for “Foreign Account Tax Compliance Act”). (See [“FATCA’s July 1 Effective Date Has Arrived; Last-Minute Guidance Has Been Issued”](#) and [“Last Substantial Package of FATCA Regulations Released; Deadlines Approaching”](#).) To help implement FATCA, the Internal Revenue Service (IRS) issued new, updated withholding certificates (i.e., W-9s and W-8s) so that payees of U.S. source income can provide applicable FATCA information to payors/withholding agents. This advisory walks through one of these forms, the Form W-8BEN-E ([Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting \(Entities\)](#)), and its [instructions](#).

Background. U.S. federal withholding taxes may apply to U.S. source payments made to foreign payees that consist of items such as interest, dividends, rents, royalties, premiums, annuities, compensation for services, substitute payments in a securities lending transaction, or other fixed or determinable annual or periodical gains, profits, or income.

The Form W-8BEN-E is used by foreign entities to document their status for purposes of the withholding tax laws under chapters 3 and 4 of the Internal Revenue Code (Code). FATCA is under chapter 4 of the Code. Foreign entities and individuals used to be able to use the same Form W-8BEN, but the new W-8BEN (revised as of February 2014) is just for individuals and entities are now supposed to use the W-8BEN-E.

A withholding agent that receives a properly executed Form W-8BEN-E from a payee may rely on the form to avoid having to withhold the 30% FATCA withholding tax.

Knowing Your FATCA Status. Part I, Line 5 of the Form W-8BEN-E asks the payee to check one of 31 boxes to identify its status. The box checked also determines which parts of the rest of the form the foreign entity needs to fill out. The 15-page instructions to the form explain what some of these choices are, but not all of them. While the actual definitions for these terms, provided in the FATCA regulations (including temporary regulations), are lengthy and complicated, we have provided the 31 choices below with a short description.

1. 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). *This is an FFI (i.e., a foreign financial institution, which includes certain types of depository institutions, custodial institutions, investment entities, and insurance companies) that is not exempt from FATCA and has not taken the necessary steps to comply with FATCA.*
2. Participating FFI. *This is an FFI that has agreed to comply with the terms of an FFI agreement, pursuant to which it agrees to diligence its accounts and disclose certain information about U.S. accountholders and its accounts to the IRS.*

3. Reporting Model 1 FFI. *In order to assist FATCA implementation, many jurisdictions have entered into intergovernmental agreements (IGAs) with the U.S. to assist in the exchange of information and applicable reporting. These IGAs have their own diligence and reporting requirements that may differ from those in the U.S. regulations, so foreign entities must check to see if their jurisdiction has an IGA with the U.S. and read their applicable IGA. There are two “models” of an IGA that are used—Model 1 and Model 2. An FFI in a Model 1 IGA jurisdiction that performs account reporting to the jurisdiction’s government is a reporting Model 1 FFI. Click [here](#) to see the jurisdictions that have entered into a Model 1 IGA.*
4. Reporting Model 2 FFI. *An FFI in a Model 2 IGA jurisdiction that has entered into an FFI agreement is a participating FFI, but may be referred to as a reporting Model 2 FFI. Click [here](#) to see the jurisdictions that have entered into a Model 2 IGA.*
5. Registered deemed-compliant FFI (other than a reporting Model 1 FFI or sponsored FFI that has not obtained a GIIN). *Certain FFIs are deemed to comply with the FATCA regulations without the need to enter into an FFI agreement with the IRS. However, certain deemed-compliant FFIs are required to register with the IRS and obtain a Global Intermediary Identification Number (GIIN). These FFIs are registered deemed-compliant FFIs. FFIs eligible for this category include certain (a) “local” FFIs that are regulated in their jurisdiction and generally do not do business outside their jurisdiction, (b) FFIs that are members of a participating FFI group that move their accounts to the participating members of the group, (c) regulated investment vehicles whose interests are held by FATCA-compliant or FATCA-exempt investors, (d) regulated investment entities where interests issued by the fund are redeemed/transferred by the fund rather than on a secondary market and other interests are sold only through distributors that are FATCA-compliant or FATCA-exempt, (e) credit card issuers, and (f) investment entities or controlled foreign corporations with a sponsoring entity (i.e., an entity that agrees to act on and perform the applicable FATCA diligence, withholding, and reporting on behalf of the FFI, and has registered with the IRS).*
6. Sponsored FFI that has not obtained a GIIN. *This is an investment entity, controlled foreign corporation, or closely held investment vehicle with a sponsoring entity (i.e., an entity that agrees to act on and perform the applicable FATCA diligence, withholding, and reporting on behalf of the FFI, and has registered with the IRS) that has not obtained its GIIN from the IRS.*
7. Certified deemed-compliant nonregistering local bank. *A certified deemed-compliant FFI is not required to register with the IRS (this applies to the other certified deemed-compliant entities below as well). An eligible nonregistering local bank is a bank, or a credit union operated without profit, that does not have a place of business outside its jurisdiction, does not solicit customers outside its jurisdiction, and does not have more than \$175 million in assets (and its expanded affiliated group does not have more than \$500 million in total assets). Each member of the expanded affiliated group must be in the same country.*
8. Certified deemed-compliant FFI with only low-value accounts. *This cannot be an investment entity. This FFI cannot have accounts with a balance or value in excess of \$50,000, and cannot have more than \$50 million in assets on its balance sheet as of the end of its most recent accounting year.*
9. Certified deemed-compliant sponsored, closely held investment vehicle. *This type of FFI cannot be a qualified intermediary, withholding foreign partnership or withholding foreign trust, and it must be an FFI solely because it is an investment entity. It must have a contractual arrangement with a sponsoring entity that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution, twenty or fewer individuals must own all of the FFI’s debt and equity interests, and the sponsoring entity needs to have registered with the IRS and agreed to perform the applicable diligence, withholding, verification, and reporting for the FFI.*
10. Certified deemed-compliant limited life debt investment entity. *This is an FFI in existence as of Jan. 17, 2013, that has issued one or more classes of debt or equity interests to investors pursuant to a trust indenture or similar agreement on or before Jan. 17, 2013. The trust indenture or similar agreement must require the FFI to pay to substantial investors, on set dates, the amounts such investors are entitled to receive from the FFI, and the payments must be through a clearing organization/custodial institution/transfer agent that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution. This type of FFI is formed for the purpose of acquiring specific types of debt and holding those assets subject to reinvestment only under prescribed circumstances to maturity.*
11. Certified deemed-compliant investment advisors and investment managers. *This FFI is a financial institution solely because it is an investment entity but it does not maintain financial accounts.*

12. Owner-documented FFI. *This entity is an FFI solely because it is an investment entity, it cannot be in an expanded affiliated group with any non-investment entity FFI, and it cannot maintain accounts for nonparticipating FFIs. It may only receive payments from and hold accounts with a designated withholding agent, which is a U.S. financial institution, participating FFI, or reporting Model 1 FFI that agrees to undertake certain additional due diligence and reporting obligations.*
13. Restricted distributor. *This type of distributor holds debt or equity interests in a restricted fund as a nominee. The distributor must provide investment services to at least 30 unrelated customers, less than half of its customers can be related to each other, it must perform AML (i.e., anti-money laundering or similar requirements) due diligence procedures under its country's laws, it must operate solely in its country, its affiliates must be in the same country, it cannot solicit customers or account holders outside its country, and it cannot have more than \$175 million in assets under management and cannot have more than \$7 million in revenue for its most recent accounting year (and its group cannot have more than \$500 million in assets or more than \$20 million in revenue). The distributor cannot distribute securities to specified U.S. persons, passive NFFEs that have one or more substantial U.S. owners, and nonparticipating FFIs.*
14. Nonreporting IGA FFI (including an FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA). *An FFI that is identified as a nonreporting financial institution pursuant to a Model 1 IGA or Model 2 IGA that is not a registered deemed-compliant FFI, and an FFI that is in a Model 1 or Model 2 IGA jurisdiction that meets the requirements for certified deemed-compliant FFI status.*
15. Foreign government, government of a U.S. possession, or foreign central bank of issue. *A foreign central bank of issue is an institution that is by law or government sanction the principal authority, other than the government, issuing currency. It may be an instrumentality that is separate from a foreign government, whether or not owned in whole or in part by a foreign government.*
16. International organization. *This is a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act. The term also includes any intergovernmental or supranational organization that is comprised primarily of foreign governments, that is recognized as an intergovernmental or supranational organization under a similar foreign law or that has in effect a headquarters agreement with a foreign government, and whose income does not inure to the benefit of private persons.*
17. Exempt retirement plans. *These are retirement plans that fall into one of 6 categories: (1) funds established in a country with which the U.S. has an income tax treaty where the fund is entitled to benefits under such treaty, and are operated to administer/provide pension or retirement benefits, (2) funds to provide retirement, disability, or death benefits to employees, provided that the fund does not have a beneficiary with a right to more than 5% of the fund's assets, is subject to government regulation and provides annual information reporting, receives at least 50% of its contributions from retirement and pension accounts described in an applicable Model 1 or Model 2 IGA, distributions or withdrawals from the fund are allowed only upon the occurrence of specified events, and contributions by employees to the fund are capped, (3) funds to provide retirement, disability, or death benefits to employees, provided that the fund has fewer than 50 participants, the fund is sponsored by an employer that is not an investment entity or passive NFFE, contributions to the fund are limited, participants that are not residents of the fund's country are not entitled to more than 20% of the fund's assets, and the fund is subject to government regulation and provides annual information reporting, (4) pension plan funds that would meet the requirements of Code section 401(a), other than the requirement that the plan be funded by a U.S. trust, (5) funds established exclusively to earn income for retirement funds described in (1) through (5) or in an applicable Model 1 or Model 2 IGA, and (6) pension funds of an exempt beneficial owner (i.e., foreign governments, international organizations, foreign central banks of issue, and governments of U.S. territories).*
18. Entity wholly owned by exempt beneficial owners. *This entity is an FFI solely because it is an investment entity, where each equity interest holder is an exempt beneficial owner (i.e., foreign government, international organization, foreign central bank of issue, government of U.S. territory, exempt retirement fund, and entity owned by exempt beneficial owners, or an exempt beneficial owner described in an applicable Model 1 or Model 2 IGA), and each debt interest holder is either a depository institution or an exempt beneficial owner.*
19. Territory financial institution. *This is a financial institution that is incorporated or organized under the laws of any U.S. territory, not including a territory entity that is an investment entity but that is not a depository institution, custodial institution, or specified insurance company.*
20. Nonfinancial group entity. *This is a foreign entity that is a member of a nonfinancial group if it is also a holding*

company, treasury center, or captive finance company with certain enumerated functions, and does not hold itself out as a private equity fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle. Its expanded affiliated group is a nonfinancial group if for the last three years no more than 25% of its gross income is passive, no more than 5% of the group's gross income is derived by FFIs, and no more than 25% of the value of the group's assets are passive assets. Any FFIs in the group must be a participating FFI or deemed-compliant FFI.

21. *Excepted nonfinancial start-up company. A foreign entity that is investing capital in assets with the intent to operate a new business or line of business other than that of a financial institution or passive NFFE for 2 years from its initial organization or from the date the new line of business is approved, provided that the entity qualified as an active NFFE for the 2 years preceding the date of approval. This category does not include investment funds.*
22. *Excepted nonfinancial entity in liquidation or bankruptcy. A foreign entity that was not a financial institution or passive NFFE at any time during the past 5 years and that is in the process of liquidating its assets or reorganizing with the intent to continue or recommence operations as a nonfinancial entity.*
23. *501(c) organization. Various tax-exempt organizations under the Code.*
24. *Nonprofit organization. A foreign entity that is established and maintained in its country of residence exclusively for religious, charitable, scientific, artistic, cultural or educational purposes if it is tax-exempt in its country, it has no shareholders or members who have a proprietary or beneficial interest in its income or assets, the distribution of its income and assets are limited to maintain the entity's charitable activities, and upon its liquidation its assets are distributed to a foreign government or another nonprofit organization.*
25. *Publicly traded NFFE or NFFE affiliate of a publicly traded corporation. An NFFE is a non-financial foreign entity. An NFFE is publicly traded if its stock is regularly traded on one or more established securities markets for the calendar year.*
26. *Excepted territory NFFE. This is a territory NFFE that is directly or indirectly wholly owned by one or more bona fide residents of the U.S. territory under the laws of which the entity is organized.*
27. *Active NFFE. This is an NFFE where less than 50% of its gross income for the preceding taxable year is passive and less than 50% of the weighted average percentage of its assets (tested quarterly) produce or are held for the production of passive income. Passive income, with certain exceptions, consists of, e.g., dividends, interest, rents and royalties, annuities, certain gains from sales of passive assets and hedging transactions, certain foreign currency gains, net income from notional principal contracts, amounts received under cash value insurance contracts, and amounts earned by an insurance company in connection with its reserves for insurance and annuity contracts.*
28. *Passive NFFE. This is an NFFE that is not an excepted NFFE. An excepted NFFE means a payee that is a qualified intermediary, withholding foreign partnership or withholding foreign trust. The term excepted NFFE also means a publicly traded NFFE or affiliate (see 25 above), excepted territory NFFE (see 26 above), or active NFFE (see 27 above). A passive NFFE must identify and provide the name, address, and taxpayer identification number of each of its substantial U.S. owners in Part XXX of the Form W-8BEN-E.*
29. *Excepted inter-affiliate FFI. This is an FFI that is a member of a participating FFI group if the FFI does not maintain financial accounts (other than for the members in its group), does not hold an account with or receive payments from any withholding agent other than a member of its expanded affiliated group, does not make withholdable payments to any person other than to members of its expanded affiliated group that are not limited FFIs or limited branches, and has not agreed to report or otherwise act as an agent for FATCA purposes on behalf of any financial institution, including a member of its expanded affiliated group.*
30. *Direct reporting NFFE. This is an NFFE that elects to report information about its direct or indirect substantial U.S. owners to the IRS. It must register with the IRS to obtain a GIIN, get certifications from its substantial U.S. owners, and report to the IRS each year about each of its substantial U.S. owners, payments made to each substantial U.S. owner, and the value of each substantial U.S. owner's equity interest in the NFFE.*
31. *Sponsored direct reporting NFFE. This is a direct reporting NFFE where another entity, other than a nonparticipating FFI, has agreed to act as its sponsoring entity (i.e., it will register with the IRS and agrees to perform, on behalf of the NFFE, all due diligence, reporting, and other requirements that the NFFE would have been required to perform as a direct reporting NFFE).*

The IRS continues to update and modify the various forms and their instructions, including [a recent update for users of the W-8BEN-E](#). The above constitutes a brief and general summary of the listed terms to assist readers in determining which part of Part I, Line 5 of the Form W-8BEN-E may be most applicable to them. You are encouraged to read the full definitions to determine how to fill out the form in accordance with your particular circumstances.

Click [here](#) for more information on FATCA.

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