



# Revised Forms W-8 clarify some FATCA issues – but not all



November 30 2017 | Contributed by Kozusko Harris Duncan

Private Client & Offshore Services, USA

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## Introduction

The Internal Revenue Service (IRS) has released an updated Form W-8BEN-E (Rev 2017) and Form W-8IMY (Rev June 2017). Non-US entities should use these new forms when requested to certify their status under the Foreign Account Tax Compliance Act (FATCA). The new forms clarify confusion over which global intermediary identification number (GIIN) should be reported for the trustee of a trustee-documented trust. They also reflect the requirement that certain sponsored entities must now have their own GIIN, but unfortunately do not clarify which sponsored entities report the GIIN of their sponsoring entity. US financial institutions will begin requiring non-US tax identification numbers on the forms.

## Registered trustees' GIIN to be provided on W-8 of trustee-documented trust

Both updated forms clarify that when the Form W-8 is being completed to certify the FATCA status of a trustee-documented trust, the trustee should provide the GIIN that it received when it registered as a participating foreign financial institution (FFI), which includes a reporting Model 2 FFI, or as a reporting Model 1 FFI, not the sponsoring entity GIIN that may have also been issued to the trustee.

Trustee-documented trusts classified as non-grantor trusts for US tax purposes use Form W-8BEN-E and those classified as grantor trusts use Form W-8IMY. In both cases, where the trust is a 'trustee-documented trust' under a FATCA intergovernmental agreement (IGA), the trust's FATCA status is 'non-reporting IGA FFI'. The reason the trust qualifies for such status is because its trustee is a reporting US financial institution, reporting Model 1 FFI or participating FFI (which includes a reporting Model 2 FFI). In each case, the trustee has registered with the IRS and been issued a GIIN (for further details see "FATCA: trustee-documented trusts are not sponsored entities").

Confusion arose over whether the trustee's sponsoring entity GIIN should be used on Form W-8, instead of its own GIIN. To certify its FATCA status properly, the Form W-8 should include the GIIN of the trust's trustee, thereby allowing the requester to confirm the status of the trustee by looking up the GIIN using the IRS online FFI list. Conversely, a

sponsoring entity GIIN is used by the trustee when filing a FATCA report. The trustee-documented trust itself need not register and obtain a GIIN, so when a trustee files a FATCA report for a trust, it does so using its sponsoring entity GIIN and the filer Category Code 09 (trustee of a trustee-documented trust).

The IRS website regularly includes answers to frequently asked questions (FAQs) on various topics. The IRS issued a FATCA FAQ detailing how trustees should complete registration in the same manner as a sponsoring entity. Financial institutions began using this FAQ to require trusts to include their trustee's sponsoring entity GIIN on the W-8 certification. In cases where no amount of explanation would change the mind of the compliance officer, trusts were advised to include both GIINs so that the status of their trustee could be properly verified.

The updated Forms W-8BEN-E and W-8IMY now clarify that a trust certifying as a non-reporting IGA FFI under FATCA must include the GIIN that was issued to its trustee when the trustee registered with the IRS as a participating FFI (including Model 2 FFI) or reporting Model 1 FFI.

### **Non-reporting IGA FFI must certify to applicable IGA**

When a trust is classified as a non-reporting IGA FFI, Form W-8BEN-E, Part XII, Line 26 requires certification that the trust meets the requirements to be considered a non-reporting financial institution pursuant to the applicable IGA. The trustee must indicate the relevant country that has an agreement with the United States and whether that IGA is a Model 1 or Model 2 IGA. The trustee must also include its name and whether the trustee is from the United States or foreign.

A trustee-documented trust is defined in a country's IGA as a trust established under the laws of that country to the extent that the trustee of the trust is a reporting US financial institution, reporting Model 1 FFI or participating FFI. Often a trust will be established under the laws of, for example, Bermuda and its trustee will be a Bermuda trust company and thus a participating FFI. Part I, Line 2 of Form W-8BEN-E will indicate Bermuda as the country of incorporation or organisation and Part XII, Line 26 will indicate that the trust is a trustee-documented trust under the Bermuda IGA. However, where that same Bermuda trust company acts as trustee for a trust established and administered in accordance with the laws of Jersey, Part I, Line 2 will indicate Jersey as the country of incorporation or organisation and Part XII, Line 26, will indicate that the trust is a trustee-documented trust under the definition in the Jersey IGA.

Similar to the confusion over GIINs, the certification on Form W-8 is to the specific legal definition in the IGA. The requester, when reviewing the W-8, will want to see the same country reported on Lines 2 and 26. The trust is a trust established under the laws of the named country and it is governed under those laws. These facts are not changed when the trust company is located in a different jurisdiction. However, when the time comes to file a FATCA report, a trust established in Jersey that has a Bermuda trustee will not file as a Jersey resident trust using the Jersey reporting portal. Instead, its Bermuda trustee will file the FATCA report with the IRS. This result fits with the Bermuda trust company's FFI agreement with the IRS, according to which a participating FFI that is the trustee of a trustee-documented trust (as defined in an applicable Model 1 or Model 2 IGA) must report each US account maintained by the trust as if the participating FFI maintained the account. Unfortunately, when it released the revised FFI agreement, the IRS removed the reference to a Model 1 IGA saying that it was because the participating FFI would report such trust to the applicable Model 1 jurisdiction. However, this is not the case under the guidance notes of those Model 1 jurisdictions, which define 'resident trusts' for purposes of due diligence and reporting under the IGA as those with a local trustee. The guidance notes do not change the definition of 'trustee-documented trust'. It is not yet clear how or even if this confusion will be addressed by the IRS.

### **Not all sponsored entities must have GIIN**

Instructions to the revised Forms W-8 have been updated to reflect the requirement that certain sponsored entities are required to have their own GIIN. Unfortunately, confusion remains regarding the various types of sponsored entity.

Financial institutions requesting the form will sometimes ask for the GIIN of an entity account holder with a FATCA status of non-reporting IGA FFI as a deemed compliant sponsored entity. The entity account holder is told that the form must include a GIIN for the entity itself and not the GIIN of its sponsoring entity. In many cases this is incorrect.

If a sponsoring entity is required to register the entity it sponsors, that sponsored entity will be issued its own GIIN, best described as a sub-GIIN because its first six characters are the same as the GIIN of its sponsoring entity. That sub-GIIN is then included on the appropriate Form W-8 and can be verified on the IRS FFI List. If the sponsoring entity is not required to register the entity that it sponsors, that sponsored entity has no sub-GIIN and only the GIIN of its sponsoring entity is included on the Form W-8.

In short, one type of entity never has a sub-GIIN, another type sometimes has a sub-GIIN and a third type always has a sub-GIIN:

- A sponsored closely held investment vehicle is never registered by its sponsoring entity.
- A sponsored investment entity established in a jurisdiction with a Model 1 IGA (eg, the British Virgin Islands, the Bahamas, Cayman Islands or Panama) need not be registered until a US reportable account is identified.
- A sponsored investment entity established in a jurisdiction with a Model 2 IGA (eg, Switzerland, Bermuda or Belize) or in a jurisdiction with no IGA so that the FATCA regulations apply, is always registered by its sponsoring entity so that it has a sub-GIIN, the first six characters of which are the same as its sponsor's GIIN.

Sometimes the requester will quote IRS Notice 2015-66 in support of its insistence that the sponsored entity account holder must be registered. That notice never mentions, however, that not all sponsored entities must be registered. The notice describes sponsoring entities that have agreed to perform the due diligence, withholding and reporting obligations of one or more sponsored entities pursuant to Treasury Regulation §1.1471-5(f)(1)(i)(F). If the sponsored company is established in a jurisdiction with no IGA, such as Belize, then the sponsoring entity is acting in accordance with the FATCA regulations and the company must be registered and have its own sub-GIIN. However, sponsoring entities for companies established in a Model 1 IGA jurisdiction are not performing their duties pursuant to the Treasury regulations – they are performing their duties as sponsoring entities pursuant to the FATCA Model 1 IGA, Annex II.

Annex II of the Model I IGA governs FATCA compliance for entities established under the laws of the Model 1 jurisdictions (unless the entity elects to apply the regulations). Annex II sets out the criteria to be met if an entity wants to be FATCA compliant with a status of sponsored investment entity or sponsored closely held investment vehicle. That criteria specifies that, with regard to sponsored investment entities, the sponsoring entity agrees to register the entity when a US reportable account is identified. Once identified, the sponsoring entity registers the sponsored entity pursuant to applicable registration requirements on the IRS FATCA registration website on or before the date that is 90 days after such US reportable account is first identified. There is no requirement in the IGA for registration before the identification of a US reportable account.

### ***Entities owned by trusts classified as financial institutions***

Companies wholly owned by non-US trusts with a FATCA status of non-reporting IGA FFI will not have US reportable accounts. Such companies often have a FATCA status of sponsored investment entity with the trust company trustee acting as the sponsoring entity. These companies maintain investment and other financial accounts. When a bank or brokerage firm requests the sponsored entity's GIIN, the company should explain that it is governed by a Model 1 IGA and is not required to have its own GIIN.

### ***Registering certain sponsored investment entities***

Sponsoring entities acting for companies established in jurisdictions without a FATCA IGA or in a jurisdiction with a Model 2 IGA should first confirm that the company is classified as an investment entity and is not properly classified as a sponsored closely held investment vehicle. The sponsor of such an investment entity should then login to its FATCA account (at <https://sa.www4.irs.gov/fatca-rup/>) using its six digit FATCA ID. Once logged in, the sponsor should follow the links for "Manage Sponsored Entities" on the lower right-hand side, then "Add an individual Sponsored Entity" on the upper left-hand side. The sponsored company's name and jurisdiction is then submitted. The IRS will approve and assign a GIIN (the previously described "sub-GIIN"). It is also possible to upload a file reflecting multiple sponsored entities.

### **Requirement to include non-US tax identification number**

Non-US persons will begin to receive requests to include on their Form W-8 the tax identification number issued to them by the jurisdiction in which they are tax resident. Forms collected on or after January 1 2018 will be required to include a foreign tax identification number or a reasonable explanation for its absence. This number is, however, only required in certain circumstances. US financial institutions that pay US-source income to non-US account holders are required to remit the 30% withholding tax to the IRS and file Form 1042-S. The IRS agreed in its reciprocal FATCA agreements to provide the partner country with the collected information pertaining to a taxpayer of that other country. By requiring US financial institutions to collect the foreign tax identification number and include it on the Form 1042-S, the IRS will be able to include that identifying information on its report to the partner country. The instructions to Forms W-8BEN-E, W-8IMY and W-8BEN have been revised to require the non-US entity or individual to include a foreign tax identification number if the form is being provided to a US financial institution with regard to an account that pays US-source income reportable on Form 1042-S.

### **Which form to use**

A non-US trust classified as a grantor trust for US income tax purposes will use Form W-8IMY and provide the necessary tax certification for its grantor. A non-US trust classified as a non-grantor trust for US income tax purposes will use Form W-8BEN-E.

In the case of a non-US company that has not made a US entity classification election to be disregarded for US tax purposes (commonly called a check-the-box election), that company is classified as a corporation for US withholding tax purposes and certifies its FATCA status by using Form W-8BEN-E.

A non-US company with a single owner that is disregarded for US tax purposes will provide the requester with the appropriate Form W-8 or W-9 for its beneficial owner. The company itself can certify its FATCA status using Form W-8BEN-E. On that form, the company's withholding status is shown as a disregarded entity and the appropriate box ticked for its FATCA status. The instructions specifically provide that Form W-8BEN-E may be used by a disregarded entity to document its FATCA status when requested by a financial institution where the entity has an account.

### **Comment**

The Forms W-8 have been revised three times since the introduction of FATCA and are eight pages long. Confusion abounds on how they should be completed. Financial institutions regularly ask for account holders to re-certify their FATCA status. Generally, a Form W-8 is valid from the date signed until the last day of the third succeeding calendar year. In certain circumstances, a Form W-8 will have an indefinite validity period, unless there has been a change in circumstances. Regardless, the individual authorised to sign the form on behalf of the entity agrees to submit a new form within 30 days if any certification on the form becomes incorrect. Further, if the financial institution wants an updated form, then one will have to be provided or the entity risks account closure.

*For further information on this topic please contact Jennie Cherry at Kozusko Harris Duncan's New York office by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com). Alternatively, contact George N Harris Jr at Kozusko Harris Duncan's Washington DC office by telephone (+1 202 457 7200) or email (gharris@kozlaw.com). The Kozusko Harris Duncan website can be accessed at [www.kozlaw.com](http://www.kozlaw.com).*

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Jennie Cherry



George N Harris Jr