

FATCA compliance update – IRS releases Form W8-BEN-E instructions

The IRS recently released instructions to Form W8-BEN-E, which non-US benefit plans qualifying for an exemption must provide to US withholding agents to avoid FATCA's 30% withholding on income from US sources. Unfortunately, the instructions contain little guidance specifically directed at benefit plans. Nevertheless, with FATCA withholding effective July 1, 2014, multinational employers should review these instructions as part of their continued assessment of non-US benefit plan FATCA compliance obligations.

In this article: [Background](#) | [IRS releases instructions to Form W8-BEN-E](#) | [Practical compliance issues](#) | [In closing](#)

Background

Many multinational employers are by now aware that the Foreign Account Tax Compliance Act (FATCA) requires “foreign financial institutions” (FFIs) — the definition of which includes funded non-US benefit programs — to report certain information on their US taxpayer financial accounts to the IRS or face a 30% withholding on specified US source income. FATCA withholding is effective July 1, 2014.

However, FATCA regulations, as well as intergovernmental agreements (IGAs) between the US and many foreign jurisdictions, set forth a number of “exceptions” and “exemptions” applicable to non-US employee benefit plans and accounts. Plans and accounts that qualify for an *exception* under the regulations or an IGA (for example, Registered Retirement Savings Plans under the [US-Canada IGA](#)) are excluded from FATCA's definition of “financial account,” and, therefore, are not subject to FATCA compliance whatsoever. Plans or accounts that qualify for an *exemption* under the regulations or an IGA (for example, a “broad participation” retirement fund where no single beneficiary has a right to more than 5% of the fund's assets), on the other hand, are subject to FATCA but have been granted special compliance relief. For more information on relief for employee benefit plans and accounts, and

Two-year enforcement grace period

Recognizing that many FFIs are struggling with FATCA compliance implementation, the IRS has instituted a two-year grace period of light enforcement for FFIs, including benefit plans, making good faith compliance efforts. While this transitional relief is welcome, plans should not view it as a reason to sideline FATCA compliance efforts.

FATCA compliance in general, please see our [March 4, 2014 FYI In-depth](#) and our [June 12, 2014 For Your Information](#).

In April 2014, the IRS released an updated final [Form W8-BEN-E](#), the *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting*, that plans qualifying for an exemption must provide to US withholding agents associated with the plan's US-based investments to establish exempt status and avoid withholding. (See our [April 17, 2014 For Your Information](#).) The final form contains over 20 new FATCA entity classifications and certifications, and features a section entitled "Exempt Retirement Plans" that addresses benefit plan and account exceptions and exemptions.

Buck comment. Plans without any investments, or with investments entirely outside the US, are not subject to FATCA withholding, and, accordingly, need not provide Form W8-BEN-E to US withholding agents.

IRS releases instructions to Form W8-BEN-E

On June 25, 2014, the IRS released long-awaited [instructions](#) for this form that specifically address FATCA compliance but contain little guidance relevant to employee benefit plans.

The newly released instructions describe FATCA compliance generally, and explain that a withholding agent may rely on a properly completed Form W8-BEN-E to apply an exemption or exception from withholding. The form must be signed and dated by an authorized representative or officer of the beneficial owner who has the legal capacity to sign on the entity's behalf. Generally, a Form W8-BEN-E is valid for a three-year period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change of circumstances renders the information on the form incorrect and in need of updating. For example, a W8-BEN-E signed on September 30, 2014 remains valid through December 31, 2017.

In terms of timing, the instructions explain that plans should provide US withholding agents with a Form W8-BEN-E before payment is made, credited, or allocated to the plan. If the plan has more than one US-based investment, it must provide the form to each US withholding agent.

The instructions address "exempt retirement plans" only briefly, stating that "an exempt retirement plan must check the appropriate box to certify that it meets all of the requirements for this status." Additionally, in the definition of "financial account," the instructions recognize that FATCA regulations provide *exceptions* for accounts including certain tax-favored savings accounts and certain annuity contracts. They also recognize that other types of accounts may be excepted by IGAs from the definition of financial accounts.

Practical compliance issues for multinational employers

Below, we discuss some practical Form W8-BEN-E compliance questions that are relevant to non-US employee benefit programs but that the form's instructions do not address.

Must an excepted plan or account file a Form W8-BEN-E with US withholding agents?

No, but there are situations where a plan or account might wish to do so. As noted above, plans and accounts excepted from the definition of "financial account" (in contrast to those that fall under an exemption) are not subject to FATCA compliance obligations, including the requirement to file a W8-BEN-E with US withholding agents to

avoid withholding. So why, then, does the Form W8-BEN-E — specifically, Part XV, line 29e — refer to entities that are excepted from the definition of “financial account” by the FATCA regulations, and also, possibly, by IGAs?

This portion of the form appears applicable in the situation where a US withholding agent is unaware of the exceptions or cannot determine whether or not a particular entity has excepted status.

Buck comment. Line 29e for plans excepted by the regulations or IGAs is included under the heading “Exempt Retirement Plans,” which suggests that it may be difficult for US withholding agents to distinguish between exemptions, which require use of the Form, and exceptions (either regulatory or provided for by IGAs), which do not.

In such a scenario, the withholding agent may ask the excepted entity to provide a Form W8-BEN-E, and, in turn, the excepted entity can indicate its excepted status in Part XV, line 29e.

Furthermore, some excepted entities may wish to provide a US withholding agent with this form even without the withholding agent having requested it. This proactive approach may help reduce or avoid mistakes on the part of US withholding agents, all of whom are dealing with FATCA withholding obligations for the first time and who may not be up to speed on the important distinction between FATCA’s exceptions and exemptions.

What about a plan’s US holdings through collective funds?

Many non-US employee benefit plans have holdings in US-based investments through non-US collective funds (or other pooled investment arrangements akin to mutual funds). In these cases, must a benefit plan that qualifies for an exemption provide a W8-BEN-E to the withholding agent for an underlying US investment? Although there is no formal guidance on this topic, our understanding is that the plan itself need not provide the US withholding agent with a W8-BEN-E, or any other form or certification.

In these situations, the US withholding agent’s payee is the collective fund, not the plan. To avoid withholding, the collective fund must provide the US withholding agent with a different form, [W8-IMY](#), which is specifically designed for intermediaries like collective funds. The collective fund may, for its own records, ask the plan for documentation of exempt status. Although the instructions do not provide specific guidance on this issue, the plan would presumably use a W8-BEN-E for this purpose given that it is the form designed to establish exempt status.

Buck comment. It remains to be seen whether collective funds will, in practice, ask plans for this documentation.

However, in the event that the collective fund does not provide the US withholding agent with a W8-IMY, the US withholding agent may withhold 30% on payments to the fund. The fund may then reduce its accounting to the plan and other investors to take into account this cost, which would cause fiduciary and administrative problems for the plan. To avoid this scenario, an exempt plan could confirm that the collective fund has properly provided US withholding agents with a W8-IMY and/or provide the collective fund with a W8-BEN-E to reduce or eliminate any uncertainty about the plan’s exempt status.

A safety net?

Some excepted entities may wish to provide a US withholding agent with this form even without the withholding agent having requested it.

In closing

With Form W8-BEN-E instructions out and withholding in effect as of July 1, 2014, multinational employers should continue reviewing their non-US funded benefit programs to determine applicable exceptions, exemptions, and compliance obligations.

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