



**October 21, 2014**

## **Treasury Regulations Implemented to Address FATCA Impact Broker-Dealers and Investment Advisers**

### **Overview**

The Foreign Account Tax Compliance Act (“FATCA”) has resulted in significant changes in the reporting and withholding requirements of financial institutions, including broker-dealers and investment advisers that represent foreign investors. One impact on all broker-dealers and investment advisers with foreign clients is the finalization of new U.S. Treasury Regulations (“Treasury Regulations”) related to reporting, certification and withholding requirements for foreign individuals and entities that are the beneficial owners of brokerage accounts in the United States.

To address the certification, reporting and withholding requirements, the Internal Revenue Service (“IRS”) has split the Form-8BEN into two separate forms, and expanded the Form W-8IMY. Form W-8BEN has been split into Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)* and Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*.

Form W-8BEN is used solely by individuals who are non-resident aliens (“Foreign Individuals”) to establish foreign status and claim treaty benefits (“Chapter 3”).

Form W-8BEN-E is used by beneficial owners of financial accounts that are foreign entities (“Foreign Entities”) to declare Chapter 3 status and also to declare an entity’s Chapter 4 status (“Chapter 4”) under FATCA.

Foreign intermediary entities, such as partnerships that are treated as flow-through entities, will use the revised Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*

Chapter 4 withholding requirements promulgated to address FATCA became effective on July 1, 2014. However, for purposes of Chapter 3 and Chapter 4 of the Internal Revenue Code, the IRS has granted a grace period on the utilization of Form W-8BEN-E. Form W-8BEN (revision date February 2006) provided to a broker-dealer or investment adviser by a foreign entity before January 1, 2015 will generally remain valid for three years from the date the form was signed, unless a change in circumstances makes any information on the form incorrect, provided documentation has been obtained to evidence the foreign status (i.e. articles of incorporation,

trust agreement, financial statement, third-party credit report, letter from a government agency, etc). After January 1, 2015, all entities requiring certification will need to use the new Form W-8BEN-E.

## Summary of Forms

The following is a brief summary of the Form W-8BEN, Form 8BEN-E and the Form W-8IMY (collectively referred to herein as “Form W-8s”)

### *Form W-8BEN*

Form W-8BEN should be used by foreign individuals to document their foreign status and claim any applicable treaty benefits for Chapter 3 purposes. This includes a Foreign Individual that is the single member of an entity that is disregarded for U.S. tax purposes.

With respect to joint ownership of an account, the account will be treated as owned by a foreign beneficial owner only if Form W-8BEN or W-8BEN-E is provided by every owner of the account.

Form W-8BEN-E should **not** be used by the following:

- **Foreign Entity:** If the entity is foreign and documenting its foreign or Chapter 4 status, or claiming treaty benefits, it should use Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities).
- **US Person:** If the person is a US Person (including US citizens, resident aliens, and entities treated as US persons, such as a corporation organized under the law of a state), then you would submit Form W-9, Request for Taxpayer Identification Number and Certification.
- **Intermediary:** Form W-8IMY would be submitted generally by a payment recipient that is not acting for its own account, but for a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Additionally, an entity treated as a flow-through entity should generally provide Form W-8IMY for Chapter 3 or Chapter 4 purposes.
- **NRA:** If the person is a nonresident, alien individual who claims exemption from withholding on compensation for independent or dependent personal services performed in the United States, the person would provide Form 8233, Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual, or Form W-4, Employee's Withholding Allowance Certificate.
- **Income Effectively Connected:** If the person is receiving income that is effectively connected with the conduct of a trade or business in the United States, unless it is allocable to such person through a partnership, would provide Form W-8ECI, Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States. If any of the income for which a Form W-8BEN was provided becomes effectively connected, this is a change in circumstances and Form

W-8BEN is no longer valid with respect to such income. Instead, Form W-8ECI will need to be filed.

For both Chapters 3 and Chapter 4, Form W-8BEN will remain valid for a period which starts on the date the form is signed and ends on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. However, under certain conditions a Form W-8BEN will remain in effect indefinitely until a change of circumstances occurs.

### ***Form W-8BEN-E***

A foreign entity must submit Form W-8BEN-E if it will receive a payment that is subject to withholding under FATCA, receive a payment subject to Chapter 3 withholding, or maintains an account with a Foreign Financial Intermediary (“FFI”). The W-8BEN-E must be provided by all entities that have an ownership interest in the foreign entity, or of another entity that is the beneficial owner. It should be noted that unlike the Form W-8BEN, which is a one page document, Form W-8BEN-E is 8 pages, and there are 31 choices with respect to FATCA classification of the file (Chapter 4 status).

If an account is jointly owned by more than one person, the account will be deemed to be owned by a Foreign Individual that is a beneficial owner only if Form W-8BEN or W-8BEN-E is provided by every owner of the account. If the withholding agent or financial institution receives a Form W-9 from any of the joint owners, then the payment must be treated as made to a U.S. person and the account treated as a U.S. account. Thus, if a broker-dealer or investment adviser receives a Form W-9 from any of the joint owners, the account must be treated as made to a U.S. person and the account treated as a U.S. account. An account will be treated as a U.S. account for FATCA by an FFI if any of the account holders is a specified U.S. person or a U.S.-owned foreign entity (unless the account is otherwise exempt from U.S. account status for FATCA purposes).

The Form W-8BEN-E should **not** be used by the following:

- ***Non-Resident Alien:*** A non-resident alien individual must submit Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals).
- ***US Person:*** If the person is a US Person (including US citizens, resident aliens, and entities treated as US persons, such as a corporation organized under the law of a state), then you would submit Form W-9, Request for Taxpayer Identification Number and Certification.
- ***Foreign Insurance Company:*** A foreign insurance company that has made an election under section 953(d) to be treated as a U.S. person should submit Form W-9 to certify its “U.S. status” even if it is an FFI for FATCA purposes.
- ***Disregarded Entity:*** A U.S. person that is a single owner of a disregarded entity, and that is not also a hybrid entity claiming treaty benefits, should provide Form W-9. If the single owner is not a U.S. person, is not a branch of an FFI that is claiming FATCA status, and is not a hybrid entity claiming treaty benefits, it should provide either a Form

W-8BEN or Form W-8BEN-E as appropriate.

- **Intermediary:** Form W-8IMY would be submitted generally by a payment recipient that is not acting for its own account, but for a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Additionally, an entity treated as a flow-through entity should generally provide Form W-8IMY for Chapter 3 or Chapter 4 purposes.

The Form W-8BEN-E will remain valid for purposes of both Chapters 3 and Chapter 4 for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. However, under certain conditions a Form W-8BEN-E will remain in effect indefinitely until a change of circumstances occurs.

### ***Form W-8IMY***

The IRS released new Form W-8IMY in April 2014, which formally replaced the 2006 version of the W-8IMY. The Form W-8IMY is generally submitted by an entity when receiving a reportable amount or withholdable payment on behalf of another person (an “Intermediary”) or as a flow-through entity. Such intermediary can be a U.S. branch, a qualified intermediary, a non-qualified intermediary, foreign partnership, foreign grantor or a foreign simple trust. Form W-8IMY requires a tax identification number. The instructions for the new Form W-8IMY is 16 pages long and the actual form is 8 pages in length with 28 parts, which is a substantially expanded version from the seven-part, 2006 predecessor form.

The following persons and entities are specifically subject to the filing requirements of W-8IMY:

- **A foreign intermediary or flow-through entity not receiving withholdable payments or reportable amounts that is holding an account with a participating FFI or registered deemed-compliant FFI**, for purposes of documenting the Chapter 4 status of the account holder. However, no withholding statement is required to be provided along with Form W-8IMY, if it is being provided by an FFI solely to document such an account when no withholdable payments or reportable amounts are made to the account. ***Note that the entity may instead provide Form W-8BEN-E when it is not receiving withholdable payments or reportable amounts to document its status as an account holder.***
- **A flow-through entity (including a foreign reverse hybrid entity) transmitting withholding certificates and/or other documentary evidence to claim treaty benefits on behalf of its owners**, to certify its Chapter 4 status (if required), and to certify that it has provided, or will provide, a withholding statement, as required.
- **A foreign partnership or a foreign simple or grantor trust to establish that it is a nonwithholding foreign partnership or nonwithholding foreign simple or grantor trust** for purposes of sections 1441 and 1442, to certify to its Chapter 4 status (if required), and to represent that the income is not effectively connected with a U.S. trade or business, that the form is being used to transmit withholding certificates and/or documentary evidence, and that it has provided or will provide a withholding statement as required.

- **A foreign partnership or foreign grantor trust to establish that it is an upper-tier foreign partnership or foreign grantor trust** for purposes of section 1446 and to represent that the form is being used to transmit withholding certificates and/or documentary evidence and that it has provided, or will provide, a withholding statement, as required.
- **A foreign partnership or a foreign simple or grantor trust to establish that it is a withholding foreign partnership or withholding foreign trust** under the regulations for sections 1441 and 1442 and to certify its Chapter 4 status (if required).
- **A nonparticipating FFI acting as an intermediary or that is a flow-through entity** using this form to transmit a withholding statement and withholding certificates or other documentation for exempt beneficial owners described in Regulations section 1.1471-6.
- **A QSL certifying to a withholding agent that it is acting as a QSL** with respect to U.S. source substitute dividends received from the withholding agent pursuant to a securities lending transaction (as described in Notice 2010-46).
- **A foreign person, or a foreign branch of a U.S. person, to establish that it is a qualified intermediary that is not acting for its own account**, to represent that it has provided or will provide a withholding statement, as required, or, if applicable, to represent that it has assumed primary withholding responsibility under Chapters 3 and 4 of the Code and/or primary Form 1099 reporting and backup withholding responsibility.
- **A foreign person to establish that it is a nonqualified intermediary** that is not acting for its own account, to certify its Chapter 4 status (if required), to certify whether it reports U.S. accounts under Chapter 4 (if required), and to indicate, if applicable, that it is using the form to transmit withholding certificates and/or other documentary evidence and has provided, or will provide, a withholding statement, as required. A U.S. person cannot be a nonqualified intermediary.
- **A U.S. branch that is acting as an intermediary to represent that the income it receives is not effectively connected with the conduct of a trade or business within the United States** and either that it is using the form: (a) to evidence it is treated as a U.S. person under Regulations section 1.1441-1(b)(2)(iv)(A) with respect to any payments associated with the Form W-8IMY, or (b) to certify to its Chapter 4 status and to transmit the documentation of the persons for whom it receives a payment and has provided, or will provide, a withholding statement, as required.
- **A financial institution incorporated or organized under the laws of a U.S. territory that is acting as an intermediary or is a flow-through entity** to represent that it is a financial institution (other than an investment entity that is not also a depository institution, custodial institution, or specified insurance company) and either that it is using the form: (a) to evidence it is treated as a U.S. person under Regulations section 1.1441-1(b)(2)(iv)(A) with respect to any payments associated with the Form W-8IMY, or (b) to certify that it is transmitting documentation of the persons for whom it receives a payment and has provided, or will provide, a withholding statement, as required.

With respect to partnership allocations, Form W-8IMY may be submitted and accepted to satisfy documentation requirements for purposes of withholding on certain partnership allocations to foreign partners under section 1446. Section 1446 generally requires withholding when a partnership is conducting a trade or business in the United States and allocates income effectively connected with that trade or business (ECI) to foreign persons that are partners in the partnership. Section 1446 can also apply when certain income is treated as effectively connected income of the partnership and is so allocated.

In general, intermediaries and flow-through entities receiving reportable amounts will be required to provide both their Chapter 3 status and the Chapter 4 status of persons for whom they receive such payments. Additionally, an intermediary or flow-through entity receiving a withholdable payment will also be required to provide their Chapter 4 status and the Chapter 4 status of persons for whom it receives a withholdable payment when required for Chapter 4 purposes.

Generally, a Form W-8IMY remains valid until the status of the person whose name is on the certificate is changed in a way relevant to the certificate or there is a change in circumstances that makes the information on the certificate no longer correct. The indefinite validity period does not extend to any other withholding certificates, documentary evidence, or withholding statements associated with the certificate.

### **Customer Scenarios for Broker-Dealers and Investment Advisers**

To assist in your analysis of the utilization of the forms discussed herein, the following briefly sets out a number of customer account ownership scenarios and a discussion of the forms required for compliance with the new Treasury Regulations.

**Foreign Entity – Single Foreign Individual Owner.** If the account is owned by a Foreign Entity that is, owned by one Foreign Individual, the account will be deemed to be owned by a Foreign Individual if a Form W-8BEN-E is provided for the Foreign Entity and a Form W-8BEN is provided by the individual owner.

**Foreign Entity –Single Foreign Entity Owner.** If the account is owned by a Foreign Entity that is owned by one foreign entity (“Owner Entity”), the account will be deemed to be owned by a Foreign Individual if a Form W-8BEN-E is provided for both the Foreign Entity and the Owner Entity and a Form W-8BEN is provided by all individual beneficial owners of the Owner Entity.

**Foreign Entity – Multiple Foreign Individual Owners.** If the account is jointly owned by more than one Foreign Individual, the account will be deemed to be owned by a Foreign Individual if a Form W-8BEN-E is provided for the Foreign Entity and Form W-8BEN is provided by *every* Foreign Individual owner of the account, and to the extent an entity is the owner, a Form W-8BEN-E for the entity and a Form W-8BEN for the individual beneficial owners of that entity.

**Foreign Entity – Multiple Owner Entity & Foreign Individual Owners.** If the account is jointly owned by more than one Foreign Individual and or an Owner Entity, the account will be deemed to be owned by a Foreign Individual if a Form W-8BEN-E is provided for the Foreign Entity and all Owner Entities and a Form W-8BEN is provided by *every* Foreign Individual

owner of the account and every beneficial owner of the Owner Entity, and to the extent an entity is the owner of the Owner Entity, a Form W-8BEN-E for that entity and a Form W-8BEN for the individual beneficial owners of that entity.

**Foreign pass through with foreign entity owner.** If an account is not receiving withholdable payments or reportable amounts to document its status as an account holder, the entity may instead provide Form W-8BEN-E and W-8BEN on all beneficial owners; however, to the extent it is receiving withholdable payments or reportable amounts to document its status, it would provide a Form W-8IMY.

**Foreign Financial Institution – Non-Intermediary.** An FFI that is not an intermediary would provide Form-8BEN-E.

**Foreign Financial Institution – Acting as Intermediary.** An FFI that acts as an intermediary would provide Form-8IMY.

### **Action Items**

In order to be in compliance with the Treasury Regulations and new and updated Form W-8s, both broker-dealers and investment advisers that have Foreign Individuals and or Foreign Entities as clients, should consider the following:

- Contact your clearing firm and or custodian to determine if they will require any additional documentation related to the Form W-8s during the on-boarding process and when they will require you transition to the Form W-8BEN-E for Foreign Entities.
- Procedures related to the on-boarding of new foreign clients should be reviewed and revised to address the utilization of the Form W-8BEN, Form W-8BEN-E and the Form W-8IMY.
- The Foreign Entities that are currently clients should review documentary evidence related to their beneficial ownership. To the extent it is unclear as to the ultimate beneficial ownership of the Foreign Entity, the accounts should be reperapered with current Form W-8s to assure compliance with FATCA and the Treasury Regulations.
- Staff should be trained with respect to the impact on customer on-boarding process and on the reperapering process with respect to the Form W-8BEN-E.

We hope that this information has been helpful to you. Should you have any additional questions or concerns, please feel free to contact Daniel E. LeGaye or Michael Schaps by [e-mail](#) or phone, at 281-367-2454, or consult with your legal counsel or compliance consultant. This legal update has been provided to you courtesy of The LeGaye Law Firm, P.C., 2002 Timberloch Drive, Suite 200, The Woodlands, Texas 77380. Visit our web site at [www.legayelaw.com](http://www.legayelaw.com).

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