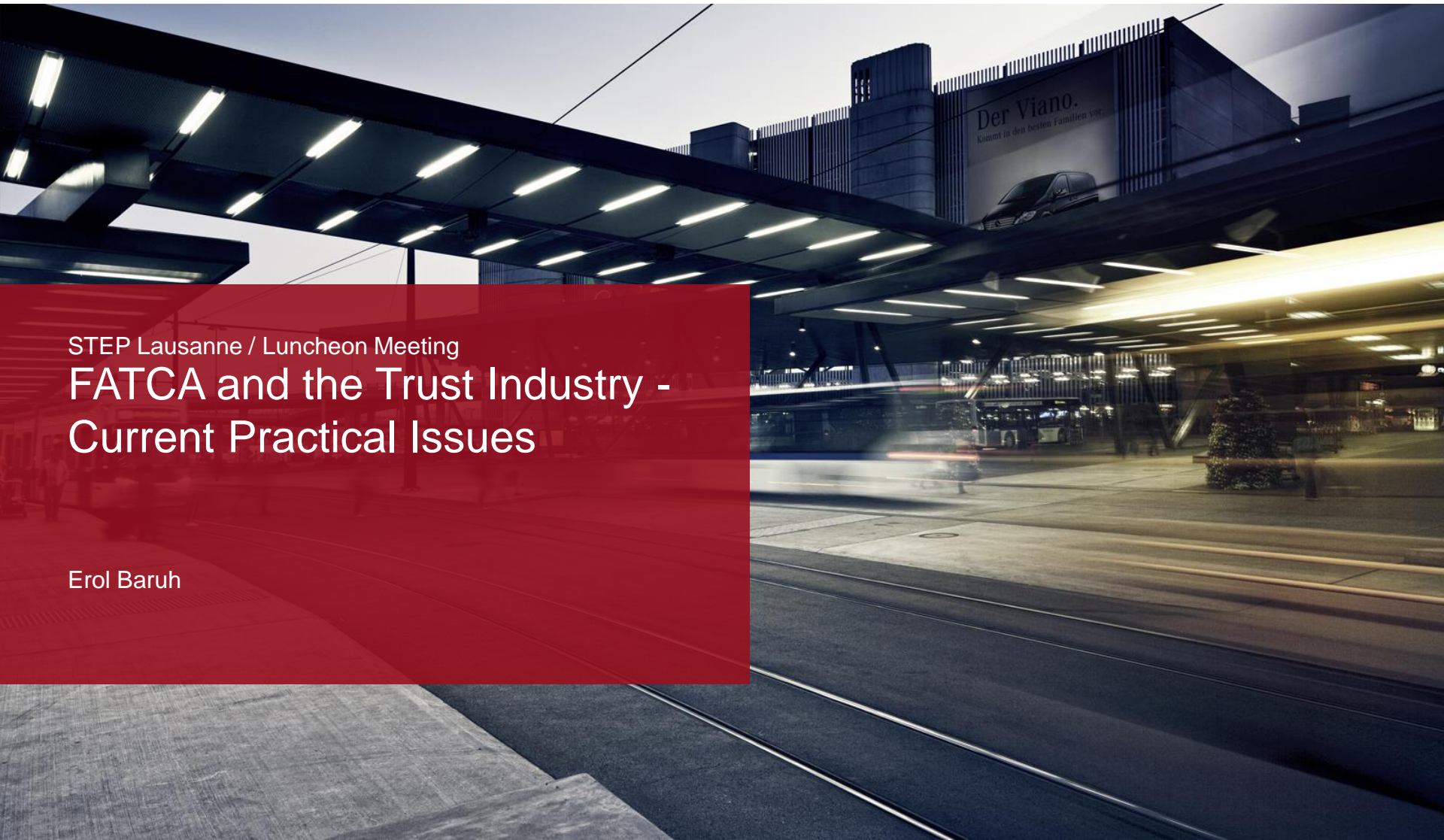


STEP Lausanne / Luncheon Meeting

# FATCA and the Trust Industry - Current Practical Issues

Erol Baruh



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2. Classification of entities (FFI vs. NFFE)
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## > **FATCA's main purpose and basic design**

- a. Enacted in 2010 for the purpose of preventing tax evasion by US persons.
- b. New chapter to the U.S. Internal Revenue Code (Chapter 4)
- c. U.S. Treasury regulations
- d. Intergovernmental agreements (IGAs):
  - > Model 1 (UK, France, Germany, Italy, Spain, Singapore,...)
  - > Model 2 (Switzerland, Japan, Hong-Kong,...)
- e. FFI Agreement (Notice 2014/13 – January 2014)
- f. New accounts vs. Preexisting accounts (legacy)
- g. Individual accounts vs. Entity accounts

# Qualified Intermediary System (2001)

## Individual accounts

An account held by a U.S. individual taxpayer with a foreign bank was not reportable to the IRS under the QI if it did not contain any U.S. securities

*"I do not authorize disclosure of my name and authorize you to sell all my U.S. assets with you in the course of the year 2000 and I am aware that you will not invest in U.S. securities on my account"*

A Swiss Bank considered an Account of that kind as blocked for investments in the U.S.

By contrast, FATCA is designed to require reporting to the IRS of an account held by a U.S. taxpayer, even if this account contains no U.S. asset.

### QI-INDIV-USP-PRE

US Securities

Assets and Income

Declaration of US Persons

- Name of Account Holder(s):
- Account Number(s):

In connection with the US withholding tax and the holding of US securities or other securities through a US custodian, I, the account holder, herewith declare that I am a US person.

In connection with the new U.S. withholding and reporting regulations I have the following options:

- a) I shall provide you with a validly signed form W-9. I authorize you to deliver said form W-9 to your US custodian.

Signature ("I"):

Place and Date:

OR

- b) I do not authorize disclosure of my name and authorize you to sell all my US assets with you in the course of the year 2000 and I am aware that you will not invest in US securities on my account.

Signature ("I"):

Place and Date:

I do neither authorize you to disclose my identity nor do I authorize you to sell my assets. Thereby I confirm that you informed me on and I fully understood the consequences of my abstaining from complying with one of the options given under a) or b) above.

I am fully aware that:

- you will deduct and remit to the IRS the backup withholding tax at 31% (or the then applicable rate) on all and any income on and sales proceeds of my US securities and expressly authorize you to do so,
- in the future, i.e., from the date of my signature given below, you will not invest in US securities irrespective of any order to the contrary given either by myself or any other person mandated to operate my account with you. I expressly and without any limitation herewith waive any claims for damages in connection with your not investing in US securities any longer.

Signature ("I"):

Place and Date:

## Entity accounts

An account held by a (non-transparent) foreign entity was not reportable to the IRS, even if the entity is ultimately held or controlled by a U.S. Person.

*“For the assessment whether a client is a U.S. person or a non-U.S. person as well as for the determination as to whether a client is the beneficial owner of certain assets, a QI bank, according to the QIA, is allowed to generally assume that an IRS form (W-9, W-8BEN, W-8IMY) properly filled out by the client reflects the truth, respectively that the client data collected in accordance with the KYC-rules accepted by the IRS is correct. During the negotiations for the QIA, the IRS had (orally) confirmed that a Form A used for the assessment of the beneficial owner in accordance with Swiss anti-money laundering law was not relevant for QI purposes. For assessing the beneficial owner in accordance with U.S. tax law, the QI bank can thus generally rely on a signed IRS form or an adequate substitute in its possession. Potential discrepancies to a Form A in possession of the QI are generally irrelevant.”*

FATCA is designed to result not only in the disclosure to the IRS of accounts held directly by U.S. Person but also of accounts held by foreign structures/vehicles substantially owned or controlled by U.S. Persons.

# With th R ho be D lig en

## **FATCA Qualification Committee**

Committee led by the State Secretariat for International Financial Matters (SIF). Includes representatives of:

- > Swiss Federal Tax Administration
- > Swiss Federal Social Insurance Office
- > Swiss Bankers Association SBA
- > Swiss Association of Pension Funds ASIP
- > Swiss Insurance Association SIA
- > Swiss Funds & Asset Management Association SFAMA
- > SwissHoldings
- > Swiss Association of Asset Managers SAAM
- > SIX Group

The FATCA Qualification Committee addresses questions arising from the implementation of the Swiss IGA.

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“Entity” means a legal person or a legal arrangement such as a trust.

> **Foreign Financial Institution (FFI)**

> FFIs report information to the IRS / local tax authority.

> **Non-Financial Foreign Entity (NFFE)**

> NFFEs disclose information about their U.S. owners or controlling persons to the FFI that maintains their account.



## Foreign Financial Institution

- > Depository Institution (banks)
  - > Insurance Company
  - > Custodial Institution
  - > **Investment entity**
- 

## Investment Entity

Category primarily aimed at investment funds and their managers, but is broadly defined and includes private structures that hold investments.

- Manages portfolio or otherwise invests or administers financial assets on behalf of customers  
**Category relevant for trustees (Type A)**
- Derives income principally from investing in financial assets and is “professionally managed” (i.e. is managed by a bank or a Type A investment entity)  
**Category relevant for trusts (Type B)**

## > Investment Entity - financial income test

- > Under U.S. Treasury Regs, an Entity only qualifies as Type A Investment Entity if its gross income attributable to its financial asset management activities on behalf of customers exceeds 50% of its gross income over the last 3 years.
- > This test also applies under Swiss IGA, according to guidance issued by the Swiss Qualification Committee. This may be relevant for fiduciary companies, law firms or investment management company acting only on behalf of affiliated companies.
- > This same reasoning likely applies in connection with the provision the U.S. Treasury Regs according to which a Type B Investment Entity (i.e. a trust) qualifies as FFI only if its income is primarily (i.e. over 50%) attributable to financial assets.

## Example #1

X, an individual, establishes Trust A, a non-grantor non-U.S. trust for the benefit of X's children, Y and Z. X appoints Trustee A, an individual, to act as the trustee of Trust A. Trust A's assets consists solely of financial assets, and its income consists solely of income from those financial assets. Pursuant to the terms of the trust instrument, Trustee A manages and administers the assets of the trust. Trustee A does not hire any entity as a third-party service provider to perform any asset management activities, so manages the assets himself.

## Example #2

Same facts except that X hires Trust Company (an FFI) to act as trustee on behalf of Trust A. Trust Company manages and administers the assets of Trust A in accordance with the terms of the trust instrument for the benefit of Y and Z.

## Example #3

Same facts with Trust Company as a trustee, except that Trust A's assets consist solely of direct interests in real estate located within the United States and abroad.

## Example #4

Same facts, except that:

- a) Trust A further includes artwork, jewelry and an airplane; and
- b) the trustee of Trust A holds the assets of Trust A through an underlying company (UC).

## Example #5

Same facts except that the assets in Trust A are predominantly financial and X, the settlor, creates a private trust company (PTC) to administer the trust and act as trustee. PTC is run by family members of X.

## Example #6

An individual creates a SPV. The SPV holds exclusively financial assets. One of the SPV's director is a Swiss entity (a company limited by shares). As director, the Swiss entity has authority to manage / dispose of the SPV's bank accounts.



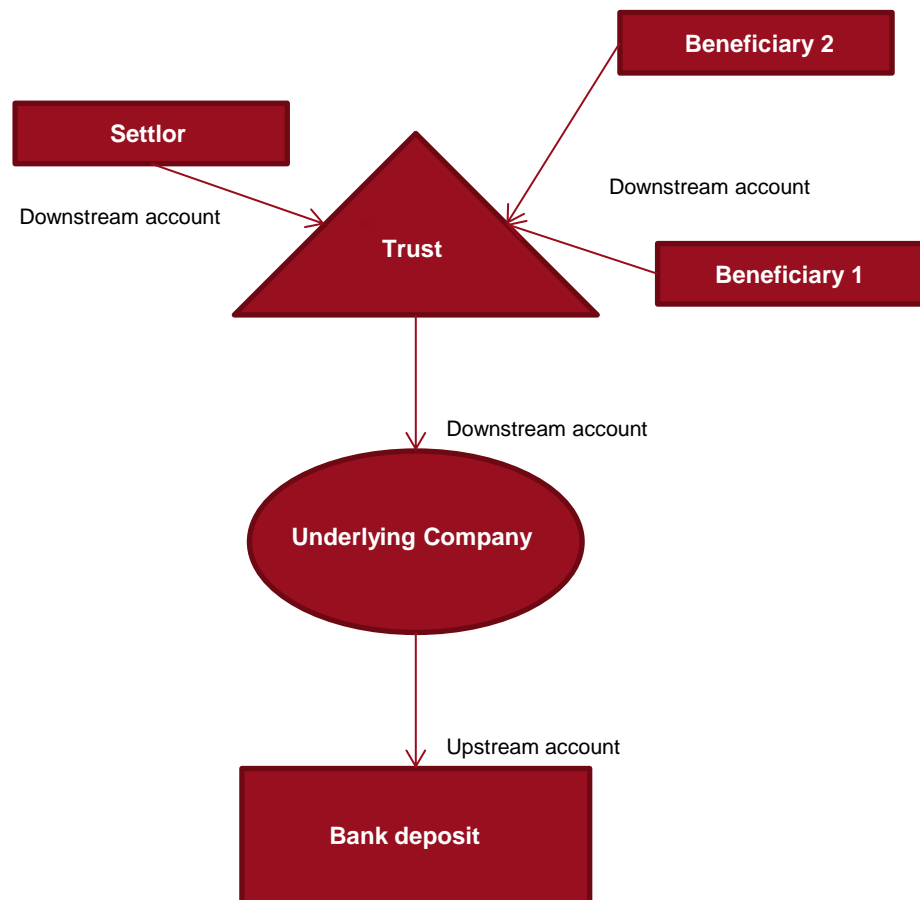
> **Financial account under FATCA means**

- a. Depositary account (upstream account)
- b. Custodial account (upstream account)
- c. Equity or interest in an Investment Entity (downstream account)

“Account Holder(s)” of a FFI Trust = owner(s) of an equity interest in the trust

> **Equity interest in a trust (U.S. tax law!)**

- > A person who is an owner of all or a portion of the trust (grantor trust)
- > A beneficiary who is entitled to a mandatory distribution from the trust
- > A beneficiary who may receive a discretionary distribution from the trust but only if such person receives a distribution in the calendar year.



## Compliance Methods

- > **Directly registering with the IRS**
  - > Participating FFI / Reporting Model 1 or 2 FFI
- > **Arranging for a third-party (trustee, sponsor or bank) to undertake FATCA responsibility**
  - > Deemed-Compliant FFI
    - > Registered (with GIIN)
      - Trustee-documented Trust
      - Sponsored investment entity
    - > Certified (without GIIN)
      - Sponsored investment entity (closely held – 20 or fewer investors)
      - Investment advisors and managers
      - Owner-documented FFIs

**FATCA Foreign Financial Institution (FFI) List Search and Download Tool**

The FFI List is updated the first day of each month. It includes all foreign financial institutions and branches that are in approved status at the time the list is compiled.

Financial Institutions in approved status as of January 26, 2015

**Search/Download FFI List** [Search Tips](#)

Search for foreign financial institutions and branches using any combination of these options. Search results may be downloaded in CSV, XML or PDF formats.

GIIN:

Financial Institution Name:

Country of FFI or Branch:  Selected:

**Search Results** [Download: CSV | XML | PDF](#)

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GIIN	Financial Institution Name	Country of FFI or Branch
4ET72M.99999.SL.756	Aberdeen Swiss Funds Glob Pharma Eq Fund	Switzerland
4EVKH5.99999.SL.756	UBS CH Suisse - 25 CHF	Switzerland

## **NFFE Trusts as U.S. Account Holders**

- > Accounts that are held by Passive NFFEs with one or more Controlling Persons who are U.S. citizens or residents shall be treated as U.S. Accounts.

## **U.S. Controlling persons**

- > For trusts, Controlling Person means the settlor, the trustee, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust.
- > According to Qualification Committee, the concept of Controlling Person shall be interpreted the same way as the concept of beneficial owner under Swiss Anti-Money Laundering Act / Swiss Bank's code of conduct on the exercise of Due Diligence (CDB).
- > Swiss FFI have to identify Controlling Persons behind the trust and obtain appropriate documentation from them. If the trust has a U.S. Controlling Person, the (upstream) account is considered as U.S. and is reported to the IRS.

# NFFE Trusts

Form **W-8BEN-E**  
(February 2014)  
Department of the Treasury  
Internal Revenue Service

**Certificate of Status of Beneficial Owner for  
United States Tax Withholding and Reporting (Entities)**

OMB No. 1545-1021

For use by entities. Individuals must use Form W-8BEN. Section references are to the Internal Revenue Code.  
Information about Form W-8BEN-E and its separate instructions is at [www.irs.gov/formw8bene](http://www.irs.gov/formw8bene).  
Give this form to the withholding agent or payer. Do not send to the IRS.

**Do NOT use this form for:**

- U.S. entity or U.S. citizen or resident . . . . . W-9
- A foreign individual . . . . . W-8BEN (Individual)
- A foreign individual or entity claiming that income is effectively connected with the conduct of trade or business within the U.S. (unless claiming treaty benefits). . . . . W-8ECI
- A foreign partnership, a foreign simple trust, or a foreign grantor trust (unless claiming treaty benefits) (see instructions for exceptions) . . . . . W-8IMY
- A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming that income is effectively connected U.S. income or that is claiming the applicability of section(s) 115(2), 501(c), 892, 895, or 1443(b) (unless claiming treaty benefits) (see instructions) . . . . . W-8ECI or W-8EXP
- Any person acting as an intermediary . . . . . W-8IMY

**Part I Identification of Beneficial Owner**

1 Name of organization that is the beneficial owner

2 Country of incorporation or organization

3 Name of disregarded entity receiving the payment (if applicable)

4 Chapter 3 Status (entity type) (Must check one box only):

☐ Simple trust ☐ Grantor trust ☐ Disregarded entity ☐ Partnership

☐ Central Bank of Issue ☐ Tax-exempt organization ☐ Private foundation ☐ Estate ☐ Government

If you entered disregarded entity, partnership, simple trust, or grantor trust above, is the entity a hybrid making a treaty claim? If "Yes" complete Part III. ☐ Yes ☐ No

5 Chapter 4 Status (FATCA status) (Must check one box only unless otherwise indicated). (See instructions for details and complete the certification below for the entity's applicable status).

☐ 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).

☐ Participating FFI.

☐ Reporting Model 1 FFI.

☐ Reporting Model 2 FFI.

☐ Registered deemed-compliant FFI (other than a reporting Model 1 FFI or sponsored FFI that has not obtained a GILIN).

☐ Sponsored FFI that has not obtained a GILIN. Complete Part IV.

☐ Certified deemed-compliant nonregistering local bank. Complete Part V.

☐ Certified deemed-compliant FFI with only low-value accounts. Complete Part VI.

☐ Certified deemed-compliant sponsored, closely held investment vehicle. Complete Part VII.

☐ Certified deemed-compliant limited life debt investment entity. Complete Part VIII.

☐ Certified deemed-compliant investment advisors and investment managers. Complete Part IX.

☐ Owner-documented FFI. Complete Part X.

☐ Restricted distributor. Complete Part XI.

☐ Nonreporting IGA FFI (including an FFI treated as a registered deemed-compliant FFI under an applicable Model 2 IGA). Complete Part XII.

☐ Foreign government, government of a U.S. possession, or foreign central bank of issue. Complete Part XIII.

☐ International organization. Complete Part XIV.

☐ Exempt retirement plans. Complete Part XV.

☐ Entity wholly owned by exempt beneficial owners. Complete Part XVI.

☐ Territory financial institution. Complete Part XVII.

☐ Nonfinancial group entity. Complete Part XVIII.

☐ Excepted nonfinancial start-up company. Complete Part XIX.

☐ Excepted nonfinancial entity in liquidation or bankruptcy. Complete Part XX.

☐ 501(c) organization. Complete Part XXI.

☐ Nonprofit organization. Complete Part XXII.

☐ Publicly traded NFFE or NFFE affiliate of a publicly traded corporation. Complete Part XXIII.

☐ Excepted territory NFFE. Complete Part XXIV.

☐ Active NFFE. Complete Part XXV.

☐ Passive NFFE. Complete Part XXVI.

☐ Excepted inter-affiliate FFI. Complete Part XXVII.

☐ Direct reporting NFFE.

☐ Sponsored direct reporting NFFE. Complete Part XXVIII.

## W-8BEN-E

**Part XXX Substantial U.S. Owners of Passive NFFE**

As required by Part XXVI, provide the name, address, and TIN of each substantial U.S. owner of the NFFE. Please see instructions for definition of substantial U.S. owner.

Name	Address	TIN

## SBA - Option A

### db) Does the Passive NFFE have Controlling Persons that are Specified U.S. Persons?

The term *Controlling Persons* means one or several natural persons who exercise control over an entity.

A natural person is a *Specified U.S. Person* if he is U.S. citizen or U.S. resident. The term *U.S. resident* means a natural person that is in possession of a U.S. *Green Card* (irrespective of expiry date), that meets the *substantial presence test*, or that is a *U.S. resident because of any other reason*.

[ ] Yes → Please enter the full name, address, and TIN of each Controlling Person that is a Specified U.S. Person in the list below. Further, please proceed with section 3 and provide a completed and signed IRS Form W-9 from each such person as well as an applicable disclosure waiver.

	Name	Address	TIN
1			
2			
3			

## SBA - Option B

### db) Please list the Controlling Persons of the Passive NFFE.

The term *Controlling Persons* means one or several natural persons who exercise control over an entity.

	Name	Date of Birth
1		
2		
3		
4		

## ➤ **Active and otherwise exempted NFFE**

- a. Active trade of business (manufacturing, construction, retail, utilities,...)
  - > Less than 50% of its income are passive income (dividends, interests,...)
  - > Less than 50% of its assets generate passive income
- b. Holding companies and treasury centers (of a non-financial group)
- c. Non-profit organization
  - > Established for religious, charitable, scientific, artistic purposes
  - > Exempt from tax in its country of residence

Active NFFE accounts are deemed not to be U.S. Accounts. No reporting and no withholding is required. Accounts do not need to be considered when applying procedures to identify U.S. Persons.

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## U.S. Indicia

1. U.S. citizen or resident;
2. U.S. place of birth;
3. U.S. mailing or residence address (including a U.S. PO box or “in-care-of”);
4. U.S. telephone number;
5. Standing instructions to transfer funds to an account maintained in the U.S.;
6. Currently effective power of attorney or signatory authority granted to a person with a U.S. address; or
7. An “in-care-of” or “hold mail” address that is the sole address on file

## Curative documents

1. Self-certification; and/or
2. Documentary evidence; and/or
3. Additional documents (e.g. certificate of loss of nationality, evidence that a person is not a beneficial owner); and/or
4. Reasonable written explanation supporting claim of foreign status

**An FFI may not rely on a self-certification or documentary evidence if the FFI knows or has reason to know that the self-certification or documentary evidence is incorrect or unreliable**

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## Withholding certificates

- U.S. Person
  - W-9
- Non-U.S. Person
  - W-8BEN (Individual)
  - W-8BEN-E (Entity)
  - W-8IMY (QI-related)
- Instructions
- French / German Translations
- Signature by proxy
- Validity
- Electronic transmission

Formulaire  
**W-8BEN-E**  
(février 2014)  
Département du Trésor  
Internal Revenue Service

**Attestation de statut de bénéficiaire effectif («beneficial owner») aux fins de l'impôt à la source et du reporting aux Etats-Unis (entreprises («entities»))**  
► Formulaire réservé aux entreprises («entities»). Les personnes physiques doivent utiliser le formulaire W-8BEN. ► Les références des sections renvoient à l'Internal Revenue Code.  
► Informations sur le formulaire W-8BEN-E et instructions y relatives disponibles sur [www.irs.gov/formw8bene](http://www.irs.gov/formw8bene). ► Remettez ce formulaire à l'agent tenu de retenir l'impôt à la source ou à l'agent payeur. Ne l'envoyez pas à l'IRS.

OMB n° 1545-1621

Utilisez PAS ce formulaire si vous appartenez à l'une des catégories suivantes: Utilisez alors le formulaire:  
• Entreprise américaine («U.S. entity») ou citoyen ou résident américain ..... W-9  
• Personne physique étrangère ..... W-8BEN (personnes physiques)  
• Personne physique ou entreprise («entity») étrangère faisant valoir que ses revenus sont effectivement liés à une activité commerciale ou à l'exploitation d'une entreprise aux Etats-Unis (sauf si des avantages en vertu d'une convention sont requis) ..... W-8ECI  
• Société de personnes étrangère, «Simple Trust» étranger ou «Grantor Trust» étranger (sauf si des avantages en vertu d'une convention sont requis) (voir instructions pour les exceptions) ..... W-8IMY  
• Gouvernement étranger, organisation internationale, banque centrale émettrice étrangère, organisation étrangère exemptée fiscalement, fondation privée étrangère ou gouvernement d'une possession des Etats-Unis invoquant que les revenus sont effectivement liés aux Etats-Unis ou l'application des sections 115(2), 501(c), 892, 895 ou 1443(b) (sauf si des avantages en vertu d'une convention sont requis) (voir les instructions) ..... W-8ECI ou W-8EXP  
• Toute personne agissant en qualité d'intermédiaire ..... W-8IMY

**Partie I Identification du bénéficiaire effectif («Identification of Beneficial Owner»)**

1 Nom de l'organisation qui est le bénéficiaire effectif («beneficial owner»)	2 Pays de constitution ou d'administration («organization»)
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3 Nom de l'entreprise transparente («disregarded entity») recevant le paiement (le cas échéant)

4 Statut selon le chapitre 3 (type d'entreprise) (cocher une case seulement):  
☐ Société de capitaux ☐ Entreprise transparente ☐ Société de personnes  
☐ «Simple trust» ☐ «Grantor trust» ☐ «Complex trust» ☐ Succession ☐ Gouvernement  
☐ Banque centrale émettrice ☐ Organisation exemptée d'impôt ☐ Fondation privée  
 Si vous avez coché «Entreprise transparente», «Société de personnes», «Simple trust», ou «Grantor trust» ci-dessus, s'agit-il d'une entreprise hybride («hybrid entity») requérant l'application d'une convention? Si «Oui», compléter la Partie III. ☐ Oui ☐ Non

5 Statut selon le chapitre 4 (statut FATCA) (cocher une seule case sauf indication contraire). (Voir les instructions pour les détails et compléter l'attestation ci-dessous concernant le statut applicable).

<input type="checkbox"/> FFI non participante (y compris une «limited» FFI ou une FFI liée à une FFI rapportant de type IGA autre qu'une FFI enregistrée réputée conforme ou une FFI participante). <input type="checkbox"/> FFI participante. <input type="checkbox"/> FFI rapportant selon le modèle 1. <input type="checkbox"/> FFI rapportant selon le modèle 2. <input type="checkbox"/> FFI enregistrée réputée conforme (autre qu'une FFI rapportant selon le modèle 1 ou FFI sponsorisée n'ayant pas obtenu de GIN). <input type="checkbox"/> FFI sponsorisée n'ayant pas obtenu de GIN. Compléter la Partie IV. <input type="checkbox"/> Banque locale certifiée réputée conforme non assujettie à l'enregistrement. Compléter la Partie V. <input type="checkbox"/> FFI certifiée réputée conforme détenant uniquement des comptes de faible valeur. Compléter la Partie VI. <input type="checkbox"/> «Closely Held Investment Vehicle», sponsorisé, certifié réputé conforme. Compléter la Partie VII. <input type="checkbox"/> «Debt Investment Entity» à durée limitée certifiée réputée conforme. Compléter la Partie VIII. <input type="checkbox"/> Conseillers en placement et gestionnaires de placements certifiés réputés conformes. Compléter la Partie IX. <input type="checkbox"/> FFI documentée par le bénéficiaire («owner-identified FFI»). Compléter la Partie X. <input type="checkbox"/> Distributeur soumis à restrictions. Compléter la Partie XI. <input type="checkbox"/> FFI non rapportant de type IGA (y compris FFI considérée comme FFI enregistrée réputée conforme selon un IGA de modèle 2). Compléter la Partie XII. <input type="checkbox"/> Gouvernement étranger, gouvernement d'une possession des Etats-Unis ou banque centrale émettrice étrangère. Compléter la Partie XIII.	<input type="checkbox"/> Organisation internationale. Compléter la Partie XIV. <input type="checkbox"/> Institutions de prévoyance exemptées. Compléter la Partie XV. <input type="checkbox"/> Entreprise entièrement détenue par des bénéficiaires effectifs («beneficial owners») exemptés. Compléter la Partie XVI. <input type="checkbox"/> Etablissement financier régi selon les lois territoriales U.S. Compléter la Partie XVII. <input type="checkbox"/> Entreprise d'un groupe non financier. Compléter la Partie XVIII. <input type="checkbox"/> Start-up non financière, objet d'une exception. Compléter la Partie XIX. <input type="checkbox"/> Entreprise non financière en liquidation ou en faillite, objet d'une exception. Compléter la Partie XX. <input type="checkbox"/> Organisation au sens de la section 501(c). Compléter la Partie XXI. <input type="checkbox"/> Organisation à but non lucratif. Compléter la Partie XXII. <input type="checkbox"/> NFFE cotée en bourse ou NFFE affiliée à une société de capitaux cotée en bourse. Compléter la Partie XXIII. <input type="checkbox"/> NFFE située sur un territoire U.S., objet d'une exception. Compléter la Partie XXIV. <input type="checkbox"/> NFFE active. Compléter la Partie XXV. <input type="checkbox"/> NFFE passive. Compléter la Partie XXVI. <input type="checkbox"/> FFI affiliée («inter-affiliate»), objet d'une exception. Compléter la Partie XXVII. <input type="checkbox"/> NFFE rapportant directement. <input type="checkbox"/> NFFE sponsorisée rapportant directement. Compléter la Partie XXVIII.
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## Self-certification - U.S. tax status declaration

- > Aims at determining whether a person is subject to U.S. tax on worldwide income:
  - > U.S. citizen (including dual citizens)
  - > U.S. resident (green card, substantial presence test)
  - > Subject to U.S. tax for other reasons
- > Includes identification details on the person reviewed
  - > Place of birth / Citizenship(s) / Date of birth
- > Includes client's certification of non U.S. / U.S. status
- > Includes undertaking to inform the FFI in case of change of circumstances
  
- > *The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding."*
  
- > Specific form for certification of NFFE (Swiss equivalent of W-8BEN-E)

## Consent to report

- > Swiss specific document (linked with Model II setup)
- > Standard Content
  1. Reasons for reporting
  2. Description of potential recipients
  3. Description of covered information
  4. Release of applicable obligation of confidentiality
    - a. Contractual or legal
    - b. Swiss or foreign
  5. Warning that information becomes subject to the laws of the US
  6. Automatically renewed until revoked in writing

## Consent to report – FTA letter

- > Swiss FFIs have been required to inform the Account Holder through a letter of the Swiss Federal Tax Administration (FTA) that, if the U.S. TIN and such consent are not given, (1) aggregate information about the account shall be reported to the IRS, (2) information about the account may give rise to a group request by the IRS for specific information about the account, (3) in such case, the account information shall be transmitted to the FTA, and (4) the FTA may exchange this information with the IRS in accordance with the IGA.
- > Swiss FFI will be required to obtain similar consent and send similar FTA letter to nonparticipating FFIs:
  - > that exist as of December 31, 2013; and
  - > in connection with which Swiss FFI expects to pay a Foreign Reportable Amount.
- > Foreign Reportable Amount means a payment of fixed or determinable annual or periodical income that would be a withholdable payment if it were from sources within the United States.

# FATCA documentation

Bern, April 3, 2014

## Information letter attached to the Bank's Waiver Request, with regard to the implementation of the Foreign Account Tax Compliance Act (FATCA)

Dear Sir or Madam,

In accordance with the implementation of the FATCA Agreement<sup>1</sup> your bank is required to disclose information to the US Internal Revenue Service (IRS), particularly concerning US accounts.

In this context and in accordance with Article 3 Paragraph 1 letter b of the FATCA Agreement your bank sent you a declaration of consent to which this letter for the transmission of your account information to the IRS is attached to.

By returning the validly signed declaration of consent to your bank, you authorize your bank to communicate your account information to the IRS directly. This consent is irrevocable for the present calendar year and unless expressly revoked it will extend to each following year automatically.

Please note, that if the bank does not receive your declaration of consent by the mentioned date, or if you do not submit your US TIN by the same date, your account will be considered a "Non-Consenting US Account". The bank will be legally obliged to report the quantity of the accounts and the total amount on all "Non-Consenting US Accounts" by the end of January 2015, without mentioning the identity of the clients concerned.

Based upon this information and in accordance with Article 5 of the FATCA Agreement, the IRS has the possibility to submit a group request for administrative assistance regarding "Non-Consenting US Accounts" to the Swiss competent authority. Such requests are based on Article 26 of the Convention for the Avoidance of Double Taxation (the "Convention") between Switzerland and the United States of America, as was amended through the Protocol of September 23, 2009. Such a request may be made once the amendments have entered into force.

<sup>1</sup> FATCA Agreement between Switzerland and the United States of America, signed on February 14, 2013 ([www.news.admin.ch/NSBSubscriber/message/attachments/29633.pdf](http://www.news.admin.ch/NSBSubscriber/message/attachments/29633.pdf)) was based on the FACTA-Timeline as of January 1, 2014 and therefore needed an adjustment to the new timeline. The FATCA-Timeline was amended in September 2013 in accordance with the exchange of notes (<http://www.news.admin.ch/NSBSubscriber/message/attachments/32201.pdf>). Swiss financial institutions have to apply FATCA now from July 1, 2014 instead of from January 1, 2014.

In view of the mentioned information, we would like to inform you below of the procedure under Article 12 of the Federal Act of September 27, 2013 on the application of the FATCA Agreement between Switzerland and the United States of America (FATCA Law) for such group requests:

The receipt of a group request will be published in the Swiss Federal Gazette as well as on our website [www.estv.admin.ch](http://www.estv.admin.ch). At the same time of the publication we will request the bank to provide us with all the relevant documents of all the "Non-Consenting US Accounts". You have the possibility to request a copy of the documents from the bank at any time, from which it concluded that you qualify as a US person and submit counter arguments. Within the set time limit you will also have the opportunity to submit a **statement regarding the transmission of your account information** to the IRS. We will take into account the possible submitted statement when drafting the final decision, which will take place approximately two to three months after receipt of the group request.

The final decision will be published anonymously in the Federal Gazette as well as on our website. The persons concerned have the possibility to obtain the final decision concerning themselves from the FTA.

The FTA's final decisions can be appealed to the Swiss Federal Administrative Court (FAC) **within 30 days** of the publication. A copy of the appeal must be sent to us at the same time.

If we conclude that an appeal is justified, we will reconsider the final decision and not transmit the information. If, however, we conclude that an appeal is unfounded, we will submit a motion to dismiss to the FAC. The FAC will then decide on the granting of administrative assistance and with it on the transmission of the information. The decision of the FAC is final.

For further information concerning this procedure, please contact us under the following address: Federal Tax Administration FTA, Service for Exchange of Information in Tax Matters SEI, Eigerstrasse 65, CH-3003 Bern, or via e-mail at [sei@estv.admin.ch](mailto:sei@estv.admin.ch).

Yours sincerely,

Service for Exchange of Information in Tax Matters



Alexandre Dumas  
Head SEI

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- Aggregate Reporting vs. Individual Reporting
- **31 January, each year**  
Obligation to report aggregate data on:
  - Non-Consenting U.S. Accounts
  - Non-Participating Financial Institution (only for 2015 and 2016)
- **31 March, each year**  
Obligation to report individualized data on other U.S. Accounts
- International Data Exchange Service (IDES)
- Postponement of first aggregate reporting from 31/01/2015 to 31/03/2015 (IDES available only since 12/01/2015)

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In the context of FATCA implementation, the U.S. Competent Authority may make group requests to the Swiss Competent Authority, based on the aggregate information reported to the IRS for all the information about Non-Consenting U.S. Accounts and Foreign Reportable Amounts paid to non-consenting Nonparticipating Financial Institutions.

Swiss Federal Tax Administration to issue guidelines for the documentation, which has to be transferred to the FTA within 10 days from receipt of the demand in connection with group requests (by mid February 2015).

## Information from the FTA concerning group requests in accordance with the FATCA agreement:

### Requirements on the delivery of the data respectively the documentation

The agreement between Switzerland and the United States of America (US) on the cooperation to simplify the implementation of FATCA entered into force on 2 June 2014. The corresponding implementation Act entered into force on 30 June 2014.

In connection with the implementation of FATCA the US-competent authority can, in accordance with the information reported in aggregated form as set out by Article 3 paragraph 1(b)(iii) and paragraph 2(a)(ii) of FATCA agreement, request by way of group requests to the Swiss competent authority all the information on US-accounts without a declaration of consent and on non-consenting nonparticipating financial institutions to which foreign reportable amounts were paid, which the reporting Swiss financial institution should have reported according to a FFI contract, had it received a relevant declaration of consent. Such group requests are made in accordance with Article 26 of the double taxation agreement in the version, which was amended by the Protocol of 23 September 2009. Therefore such requests will not be made before the entry into force of the Protocol and are applicable to information, which covers the time period from the entry into force of the FATCA agreement (Article 5 paragraph 1 of the FATCA agreement).

When the FTA as the competent Swiss authority receives such a group request, it will request the information holding finance institute to identify the account holders or the nonparticipating financial institutions concerned and provide the FAT within the deadline of 10 days with the information set out in Article 3 paragraph 1 of the FATCA agreement (Article 5 paragraph 3 letter a FATCA agreement).

In addition to the reportable data in electronic form (FATCA-XML) the FTA will request the reporting Swiss financial institution to provide the FTA within the same deadline with **separate documents enabling the FTA to verify whether it is in fact a reportable account** (Article 12 paragraph 2 of the Federal Act of 27 September 2013 on the implementation of the FATCA agreement between Switzerland and the United States of America [FATCA law, SR 0.672.933.6]). The FTA will define the requirements of the documents, which will be provided by the reporting Swiss financial institution in order for the FTA to verify whether it is a reportable account.

Summing up the FTA is to be provided with the following documents:

1. FATCA-XML;
2. So called SEI-XML (additional information which the FTA is to be provided with); and
3. Additional documents which the FTA is to be provided with in form of a PDF file.

Upon request the FTA will provide the reporting Swiss financial institution with a draft of the document requirements. It is estimated that the reporting Swiss financial institutions will be provided with a definite version of these requirements at the end of January 2015.

The request is to be made to the following address:

[amtshilfe.usa@estv.admin.ch](mailto:amtshilfe.usa@estv.admin.ch)

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# Responsible officer certifications

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- > A participating FFI must appoint a responsible officer.
- > A participating FFI is required to adopt a compliance program under the authority of the responsible officer, including policies, procedures, and processes sufficient for the participating FFI to satisfy the due diligence, reporting, and withholding requirements of the FFI Agreement.
- > No later than 60 days following the date that is two years after the effective date of this agreement, the responsible officer must:
  - > certify completion of the due diligence procedures for preexisting accounts;
  - > certify the absence of any formal or informal practices or procedures to assist account holders in the avoidance of FATCA.

- > OECD Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information (“**MCAA**”)
- > Common standard on reporting and due diligence for financial account information (“Common Reporting Standard”- “**CRS**”)
- > Federal Act on the International Automatic Exchange of Information in Tax Matters (AEOI Act) governs the implementation of the AEOI standard and contains provisions on the organisation, the procedure, judicial channels and the applicable criminal provisions
- > Controlling Person / Investment Entity under AEI framework

Thank you for your attention.

**Erol Baruh**

Erol.Baruh@swlegal.ch

Schellenberg Wittmer Ltd / Attorneys at Law

15bis, rue des Alpes / P.O. Box 2088 / 1211 Geneva 1 / Switzerland

T +41 22 707 8000 / F +41 22 707 8001

[www.swlegal.ch](http://www.swlegal.ch)

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