

Fact sheet on entity classification for FATCA and AEOI purposes

This fact sheet explains the classification of entities. The classification refers to the options in part 2 of the form "Self-certification for clarifying tax domicile and FATCA/AEOI status of companies". If none of the listed categories adequately describes the entity's actual business activity, please contact your tax advisor.

B1) Classification as NFFE/financial institution

Publicly traded NFFE or NFFE affiliate

Entities whose shares are regularly traded at a recognised stock exchange, and their affiliates, are classified as non-financial foreign entities (NFFE) (FATCA and AEOI). Entities are "affiliates" if one entity controls the other or if both entities are subject to the same control. In this context, control refers to the direct or indirect ownership of more than 50 percent of the equity and voting rights of the entity.

Community of condominium owners and co-owners

Communities of condominium owners established according to Article 712 (2) of the Swiss Civil Code (CC) are included in this category. A community of co-owners pursuant to Article 646 of the Swiss Civil Code (CC) is on hand if the following criteria are cumulatively met:

- -The co-ownership shares have been recorded in the land register pursuant to Article 23 of the Swiss Land Register Ordinance of 23 September 2011.
- - The co-owners have agreed rules on use and administration pursuant to Article 647 of the Swiss Civil Code (CC) that, in deviation from the statutory provisions, stipulate that the financial assets managed by the community of co-owners may only be used for expenses in connection with the co-owned property.
- - These rules of use and administration are noted in the land register pursuant to Article 649a (2) of the Swiss Civil Code (CC).

Non-profit organisation (especially charitable foundations)

Non-profit organisations that cumulatively meet the following conditions are classified as active NFFEs (FATCA and AEOI):

- The entity was established and is maintained in its country of residence exclusively for religious, charitable, scientific, artistic, cultural or educational purposes.
- It is exempt from income tax in its country of residence.
- It has no shareholders or members who have a proprietary or beneficial interest in its income or assets.
- The applicable laws of the entity's country of residence or the entity's formation documents do not permit any income or assets of the entity to be distributed to, or applied for the benefit of, a private person or non-charitable entity, unless this is related to the entity's charitable activities, involves the payment of reasonable compensation for services rendered, or payment of the fair market value of property which the entity has purchased.
- The applicable laws of the entity's country of residence or the entity's formation documents require that, upon the entity's liquidation or dissolution, all of its assets be distributed to a governmental entity or other non-profit organisation.

Swiss pension fund or other retirement planning institution

Under an applicable international FATCA agreement with the USA (and any related national regulations), certain pension funds are considered to be non-reporting financial institutions (FATCA and AEOI). For example, this applies to the following Swiss retirement planning institutions:

- -Any pension fund or other form of pension plan established in Switzerland under Articles 48 and 49 of the Swiss Federal Act on Occupational Old Age, Survivors' and Invalidity Pension Provision (OPA), Article 89a (6) of the Swiss Civil Code (CC) or Article 331 (1) of the Swiss Code of Obligations (CO)

- Vested benefits institutions (Article 4 of the Swiss Vested Benefits Act (VBA) and Article 10 of the Swiss Vested Benefits Ordinance (VBO))
- Substitute Occupational Benefit Institution (Article 60 OPA)
- Guarantee funds (Article 56-59 OPA)
- Institutions for recognised forms of pension provision under Article 82 OPA (pillar 3a)
 - Employer-financed welfare funds in the area of occupational old age, survivors' and disability insurance (Article 89a (6) CC)
- Investment foundations (Articles 53g to 53k OPA), if all of the participants in the investment foundation are pension schemes or other retirement plans

Governmental entities, international organisations or central banks

Governmental entities, international organisations, central banks or other entities that are fully controlled by one or several of these institutions are classified as active NFFE (FATCA and AEOL). From the Swiss perspective, this category includes in particular the Swiss federal government and cantons and municipalities (including parishes), as well as institutions and representations fully owned by these entities, including but not limited to all institutions, establishments or funds of the social security system at the federal, cantonal and municipal level.

Other active NFFEs

Non-financial start-up companies

Entities that do not engage in any active business and have never engaged in any active business, but that invest in assets for the purposes of engaging in business other than that of a financial institution. This exception applies for a maximum of two years from the date of foundation.

NFFE in Liquidation

In the past five years, the entity was not a financial institution or passive NFFE and is in the course of liquidating or reorganising its assets in order to continue or resume activities that do not constitute the activity of a financial institution.

Depository institution, custodial institution, specified insurance company or investment company that is commercially active on behalf of clients

The following entities are considered to be financial institutions (FATCA and AEOL):

Depository institution

The entity accepts deposits in the ordinary course of a banking or similar business. Custodial institution

The entity's business activity mainly consists of holding financial assets for the account of others.

The gross income attributable to the holding of financial assets and related financial services amounts to at least 20 per cent of the entity's gross income, either during

- i) the three-year period ending on 31 December (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or
- ii) the period during which the entity has been in existence, whichever is shorter.

Specified insurance company

The entity is an insurance company that issues or is obligated to make payments with respect to cash value insurance contracts or annuity contracts

Investment entity commercially active on behalf of clients (managing investment entity)

The entity conducts as a business one or more of the following activities for clients:

- Trading in money market instruments (cheques, bills of exchange, certificates of deposit, derivatives, etc.), foreign exchange, exchange rate, interest rate and index instruments, transferable securities, or commodity futures
- Individual and collective portfolio management
- Other forms of investment or management of financial assets or capital on behalf of third parties

The entity conducts these activities “predominantly commercially” if the gross income attributable to these activities amounts to at least 50 per cent of the entity’s gross income either during

- i) the three-year period ending on 31 December of the year prior to the year in which the determination is being made; or
- ii) the period during which the entity has been in existence, whichever is shorter.

Investment entity whose assets are managed by a financial institution

The entity’s gross income is mainly attributable to the investment or reinvestment of financial assets or trading in financial assets, and the entity is managed by a financial institution. The gross income attributable to the respective activities must amount to at least 50 per cent of the entity’s gross income, either during

- i) the three-year period ending on 31 December of the year prior to the year in which the determination is being made; or
- ii) the period during which the entity has been in existence, whichever is shorter.

An entity is professionally managed if the managing entity exercises one or more of the following activities for the entity, either directly or via a third party:

- - Trading in money market instruments (cheques, bills of exchange, certificates of deposit, derivatives, etc.), foreign exchange, exchange rate, interest rate and index instruments, transferable securities, or commodity futures
- - Individual and collective portfolio management
- - Other forms of investment or management of financial assets or capital on behalf of third parties

However, an entity is not professionally managed if the managing entity does not have any discretionary decision-making powers concerning the management of the entity’s assets (or parts thereof). If the management of an entity’s assets is spread over several financial institutions, non-financial institutions and/or natural persons, the entity is deemed to be managed by a financial institution.

B2) Active entities

Active, operating entity or active association (or similar union of persons)

For AEOI/FATCA purposes, an entity (regardless of the legal form) is considered to be active especially if the following two criteria are cumulatively met:

1. Less than 50 per cent of its gross income for the preceding calendar year or other appropriate reporting period is passive income and
2. less than 50 per cent of the assets held by the entity during the preceding calendar year or other appropriate reporting period are assets that produce or are held for the production of passive income.

The term “passive income” normally includes the following parts of the gross income:

- Dividends, interest, income equivalent to interest (e.g. substitute interest)
- Rent and royalties other than rent and royalties derived in the active conduct of a trade or business at least in part by employees of an NFFE
- Annuities
- Net gains (gains less losses) from the sale of and trade in financial assets that generates the passive income described above
- Net gains from transactions (including exchange-traded and non-exchange-traded futures, options and similar transactions) in financial assets
- Net gains from foreign currency transactions
- Net income from swaps
- Amounts received under cash value insurance contracts

Other categories of active NFFE include the following entities: Real estate companies

The entity’s activity mainly consists of the management of real estate with its own employees. Usually, the members of the Board of Directors do not count as employees. Typical real estate companies that merely hold real estate and are managed by a Board of Directors are usually passive entities.

Holding companies that are part of a group of NFFEs

The entity's business activity mainly comprises the holding of equities of one or more subsidiaries that engage in transactions outside the field of activity of financial institutions or the financing of these subsidiaries or the provision of services for them. In this context, "mainly" means at least 80 per cent of the entity's gross income. Entities that operate as investment funds (or that externally appear as such), e.g. as private equity funds, venture capital funds, leverage buyout funds or other investment instruments whose purpose is to acquire or finance entities and then hold interests in such entities as assets for investment purposes are not considered to be such entities.

Treasury centre that is part of a group with NFFEs

The entity's activity mainly consists of the financing and hedging of transactions with or for affiliates that are not financial institutions and the NFFE does not provide any financing or hedging services for entities that are not affiliates, insofar as the group of such affiliates mainly engages in business outside the field of activity of financial institutions.

B3) Classification as a passive NFFE

Passive entity

If none of the classifications according to B1 or B2 applies, the NFFE is deemed to be passive. A passive NFFE is an entity that meets one of the following two criteria:

1. 50 per cent or more of its gross income is passive income; or
2. 50 per cent or more of its assets generate passive income or are held to generate passive income. Professionally managed investment entities in non-participating countries are also deemed to be passive entities.

Passive entities must provide further information on the controlling persons on page 4 of the form. The term "controlling persons" refers to natural persons who control an entity. In the case of a trust, this term refers to the settlor(s), the trustee(s), any protector(s), the beneficiaries or natural persons that belong to a beneficiary category, as well as any other natural persons who actually control the trust. In the case of a legal entity that is not a trust, this term refers to persons in equivalent or similar positions. The term "controlling persons" must be interpreted in a manner consistent with the recommendations of the Financial Action Task Force (FATF) or, in the case of banking relationships in Switzerland, with the Agreement on the banks' code of conduct with regard to the exercise of due diligence (CDB 16). In this context, the persons listed in forms A, S (or K, if applicable) and T are generally relevant.

Further information and legal notice

Further information about FATCA and AEOI is available on the following webpages:

- Organisation for Economic Co-operation and Development (OECD):
<http://www.oecd.org/tax/automatic-exchange/>
- Internal Revenue Service (IRS):
<http://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca>
- Swiss Bankers Association (SBA):
https://www.swissbanking.org/en/topics/tax/the-automatic-exchange-of-information/aeoi?set_language=en
https://www.swissbanking.org/en/topics/tax/fatca-foreign-account-tax-compliance-act/fatca?set_language=en
- State Secretariat for International Finance (SIF):
https://www.sif.admin.ch/sif/en/home/multilateral/steuer_informationsaust/automatischer-informationsaustausch/automatischer-informationsaustausch1.html
<https://www.sif.admin.ch/sif/en/home/bilateral/lander/vereinigen-staaten-von-amerika-usa/fatca-abkommen.html>

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