Fideicomisos, FATCA, and Voluntary Disclosures: The Current Landscape of Offshore Reporting

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Fideicomisos

("Mexican Land Trusts")

Fideicomisos: Introduction

- Mexican Constitution prohibits foreign ownership of real estate in the "restricted zone"
  - 50 km from coastline
  - 100 km from inland borders
- Work-around: allow foreign persons to purchase "beneficial interests" in a *fideicomiso*, whereby a Mexican bank holds the property in its name for the foreign person
  - *Fideicomiso* means "trust" in Spanish

Disclaimer: this discussion applies only to *fideicomisos* established to allow non-Mexicans to purchase restricted-zone property

Foreign Trust
Failure-to-File Penalties & Punishments

Form #	Description	Penalty/Punishment	Cite
3520	**Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts**		
	Disclosure of Transfer to Foreign Trust	Greater of $10,000 or 35% of the gross value of the property transferred	IRC § 6677(a)
	Annual Disclosure of Ownership of Foreign Trust	5% of gross value of the trust's assets treated as owned	IRC § 6677(b)
	Disclosure of Distribution from a Foreign Trust	Greater of $10,000 or 35% of the gross value of the property distributed	IRC § 6677(a)
		Open statute of limitations until actually filed	IRC § 6501(c)(8)
3520-A	**Annual Information Return of Foreign Trust with a U.S. Owner**	5% of gross value of the trust's assets treated as owned	IRC § 6677(b)
		Open statute of limitations until actually filed	IRC § 6501(c)(8)
8938	**Statement of Foreign Financial Assets**	$10,000, up to a maximum of $50,000	IRC § 6038D(d)
		Open statute of limitations until actually filed	IRC § 6501(c)(8)
		If filed (or if not required): 6-year statute of limitations for omitting items on tax return in excess of $5,000 attributable to SFFI	IRC § 6501(e)

What is a Trust?

- Usually problematic in the foreign jurisdiction
  - May not be recognized
    - No probate avoidance
    - Creditor problems
  - May cause tax problems
    - Income
    - Inheritance

History of the Common-Law Trust

- First trusts were called "uses"
  - Originated in 13th-century England to circumvent laws forbidding certain people from owning land, to subvert the tax system, or to provide convenience for traveling noblemen
  - One person would hold the legal title of the land for the "use" of another person
- Uses were enforceable in courts of equity, not law
  - The agreement under a "use" was not legally binding under English law, and courts would find that the person with legal title over the estate was the outright owner and could do whatever he wished
  - The **Court of Chancery** began to develop in 15th-century England to provide justice when the outcome under strict rules of law would be too harsh (or "inequitable")

History of the Common-Law Trust (cont'd)

- The trustee, although the **legal owner** of the trust property, may not use it for his own benefit but must manage it for the beneficiary's benefit; and the beneficiary, though the **equitable owner**, may not manage the trust property
- Trustee: a position of loyalty and good faith (**all the work**)
- Beneficiary: a position of zero responsibility (**all the fun**)

History of the Common-Law Trust (cont'd)

- States of the U.S. inherited the English trust concept
- Law vs. Equity: now merged, but concepts remain
  - A judgment at law: declares plaintiff's rights against the defendant (e.g., damages)
  - A judgment under equity: imposes **duties** on the defendant toward the plaintiff
- Just as the English Chancery Court enforced the legal owner's duties toward the equitable owner, in the U.S., **chancery** and **probate** courts enforce trustees' **duties** toward the beneficiaries

What is a Trust Under Federal Tax Law?

- US federal tax law does not create property interests, it merely taxes them according to their classification under applicable law*
- Treasury Regulations define a "trust" for federal tax purposes as an arrangement under which a trustee takes title to property for the purpose of protecting and conserving it for the beneficiaries "**under the ordinary rules applied in chancery or probate courts**"
- In other words, only a true common-law trust arrangement will be treated as a trust

What is a *Fideicomiso*?

- Beneficiary has the right to control the property and to direct the trustee’s actions with respect to the property
- Beneficiary has the right to earnings and proceeds of the property
- Beneficiary is responsible for taxes and liabilities associated with the property
- Trustee absolves itself of responsibility to defend and maintain the property
- In short, the trustee has no fiduciary duty enforceable by the beneficiary—it’s a contractual agency arrangement

A *Fideicomiso* is an Interest in Real Estate for Federal Tax Purposes

- **Rev. Rul. 92-105**
  - Illinois Land Trust: trustee is mere agent of taxpayer; taxpayer holds direct ownership of real estate for federal tax purposes
- **PLR 201245003; Rev. Rul. 2013-14**
  - "Mexican Land Trust" is like an "Illinois Land Trust"
  - What about this comment in Rev. Rul. 2013-14?
    - If the trustee "holds legal title to any assets other than [the real estate] or is permitted or required to engage in any activity beyond holding legal title to [the real estate], the holding of this revenue ruling does not apply and the rules of [the entity-classification regs] will determine the federal tax classification of the MLT"
    - This is aimed at fiduciary duty

Is Any Aspect of the *Fideicomiso* Reportable?

- Direct ownership of foreign real property is not yet subject to information reporting
- Watch for beneficial interest held through a foreign entity; foreign entity may be reportable (Form 5471, 8865, or 8858)
- Sometimes, foreign property owners have accounts in the foreign jurisdiction for paying property expenses; ask to determine whether an FBAR is required (TD F 90-22.1/FinCEN Form 114)
- Is the agreement with the trustee a Specified Foreign Financial Asset under IRC § 6038D as a ". . . financial instrument or contract . . . that has an issuer or counterparty which is other than a United States person"? (Form 8938)
    - Seems to be a stretch, especially when § 6038D is aimed at "financial assets"

Will *Fideicomisos* No Longer Be Required?

- Mexican Congress is working to lift the restrictions in the Mexican Constitution against non-Mexicans owning coastal and border properties in Mexico
  - After Senate passes the proposed amendment, a majority of the Mexican states must approve it
- Constitutional amendment applies only to **residential real estate**
  - U.S. persons owning commercial properties will still need to use *fideicomisos*
    - The term "commercial properties" has not yet been defined; it is speculated that long-term residential leases may be deemed "residential," while short-term or vacation rentals may be viewed as "commercial"—stay tuned
- Although not required, they may still be desirable for probate avoidance
- People won't run out and move their property out of existing *fideicomisos*; it's expensive to do that

Report of Foreign Bank and Financial Accounts

FinCEN Form 114 (formerly, TD F 90-22.1): "FBAR"

- **Mandatory e-filing** beginning with 2013 FBARs
  - Only 750 characters allowed for explanatory statement
  - http://bsaefiling.fincen.treas.gov/
- FinCEN commentary is at: **76 FR 10234** (February 24, 2011), applicable to FBARs that were due on June 30, 2011, for accounts held during 2010 and all subsequent years
- Regulations are now located at **31 CFR § 1010.350**

FBAR Highlights: Who Must File

- Federal tax treatment of entity or trust is irrelevant
  - U.S. disregarded entity must file, even when U.S. owner files
  - U.S. trustee(s) of wholly owned grantor trust must file, even when U.S. grantor/owner files
    - But U.S. beneficiary is not required to file if U.S. trustee is filing
    - If trustee is foreign (and is thus not required to file), U.S. beneficiary must file even when the U.S. grantor/owner files
  - U.S. trustee of a foreign trust must file

FBAR Highlights: Reportable Accounts

- **Insurance policies** with cash value
  - No distinction between 953(d) and non-953(d) carriers
  - FinCEN commentary: policy holder, not beneficiary, is the filer
- **Annuity policies** with cash value
  - No distinction between 953(d) and non-953(d) carriers
  - FinCEN commentary: silent on whether owner or beneficiary is the filer (probably both)

FBAR Highlights: Reportable Accounts (cont'd)

- Shares in mutual funds or similar pooled funds
  - Only funds that are **publicly available** with **regular NAV determinations** and **regular redemptions**
  - Currently, hedge funds and private equity funds not reportable
- Foreign accounts owned by **retirement plans and IRAs** not reportable by the participant/owner
  - Reportable by the trustee

FBAR Highlights: Special Rules

- **Deadline** June 30; **No extension** available

- Remember that $10,000 filing threshold is **aggregate**, not per account

- The FBAR statute of limitations (6 years) runs regardless of whether FBAR is filed

Foreign Account Tax Compliance Act:
PFIC Disclosure Provisions

FATCA: PFIC Disclosure

- Previously, no requirement to disclose mere ownership of a passive foreign investment company
  - Form 8621 could be filed voluntarily to avoid excess-distribution regime (to make elections such as mark-to-market, qualified electing fund, etc.)
  - Form 8621 was required to be filed to report gain on disposition of PFIC stock or to report distributions from a PFIC

FATCA: PFIC Disclosure (cont'd)

- FATCA added a new subsection (f) to § 1298, which reads:

  "Except as otherwise provided by the Secretary, each United States person who is a shareholder of a passive foreign investment company shall file an annual report containing such information as the Secretary may require"

- Reaches those taxpayers who are not already required to file to report gain/distributions or who do not voluntarily file to make certain elections (mark-to-market, qualified electing fund, etc.)

FATCA: PFIC Disclosure (cont'd)

- For taxpayers who are not otherwise required to file under prior law, annual reporting is suspended until the underlying Section 1298(f) Regs are published
  - Attach all prior-year suspended Forms 8621 to the next return after release of new form (Notice 2011-55)
- No specific penalty for failure to file form 8621
  - Perhaps a penalty will be contained in the Regs?

Foreign Account Tax Compliance Act:

Foreign Trust Provisions

FATCA: Foreign Grantor Trust Provisions – IRC § 679

- IRC § 679 provides that a U.S. person who creates a foreign trust **that has U.S. beneficiaries** (or that could ever have U.S. beneficiaries) will be treated as the "owner" of such trust under the grantor-trust rules, regardless of whether the grantor retains any powers over the trust
- FATCA amended IRC § 679 to clarify the situations in which **a trust will be treated as having U.S. beneficiaries**

FATCA: Foreign Grantor Trust Provisions – IRC § 679 (cont'd)

- Presumption that foreign trusts created by U.S. persons have U.S. beneficiaries
- U.S. beneficiaries whose interest is contingent on a future event
- Trustee discretion to distribute to "any person"
- Side agreements that may result in distributions to a U.S. person
- Below-market use of trust property by, and trust loans to, a U.S. person

FATCA: Foreign Non-Grantor Trust Provisions – § 643(i)

- IRC § 643(i) previously provided that a loan of **cash or marketable securities** from a foreign non-grantor trust to a related U.S. person (grantors, beneficiaries, and their relatives) will be treated as a distribution to such U.S. person
- The purpose of IRC § 643(i) is to force DNI/UNI out of a foreign non-grantor trust to prevent tax deferral
- Does not apply to fair-market loans
- Safe harbor in Notice 97-34 provides that a loan will not be treated as a distribution if it is structured as a "qualified obligation"

FATCA: Foreign Non-Grantor Trust Provisions – IRC § 643(i) (cont'd)

- FATCA amended § 643(i) to provide that **uncompensated use of trust property** will also be treated as distribution
  - The deemed distribution will force DNI/UNI out of the trust to the extent of the fair-market use of the property
- Does not apply if the trust is paid fair market value for use of the property
- NOTE: § 643(i) does not apply to grantor trusts!

FATCA: Minimum Foreign Trust Penalty – IRC § 6677

- Prior to FATCA, penalties were calculated only as a percent of the reportable amount
  - 35% of contributions/distributions (Form 3520)
  - 5% of assets treated as owned by a U.S. person (Form 3520-A)
- Now there is a **minimum penalty** of $10,000

Foreign Account Tax Compliance Act:

Specified Foreign Financial Assets

FATCA: Form 8938 Reporting Thresholds

- General
  - $50,000 on last day of taxable year
  - $75,000 at any time during the taxable year
- Married individuals filing jointly and living in the U.S.
  - $100,000 on last day
  - $150,000 at any time
- Individuals living abroad
  - Single or married filing separately
    - $200,000 on last day
    - $300,000 at any time
  - Married filing jointly
    - $400,000 on last day
    - $600,000 at any time

FATCA: Form 8938
Foreign Disregarded Entities Reportable?

- "Disregarded" used to mean "disregarded," until:
  - Form 8858 in 2004
    - authority cited: IRC §§ 6011, 6012, which are merely the sections that require a return of income
  - FBAR clarification in 2011 stating that disregarded entities must file
    - admittedly, a BSA form, not an IRC form

FATCA: Form 8938
FDEs Reportable? (cont'd)

- IRC § 6038D and Regs say:
  - any interest in a foreign entity held for investment and not in an account maintained by a financial institution, unless Treasury provides an exception (FDEs & 8858 not listed)
- Reasonable to take the position that FDEs not reportable
  - but cost of preparing the 8938 after you've already prepared the 8858 isn't high compared to the cost of being wrong
    - reasonable cause would certainly apply, however

FATCA: Form 8938
Specified Domestic Entity (Prop. Regs.)

- Domestic entities will be required to file when Regs are finalized
- Corporations and Partnerships
  - Owns a specified foreign financial asset, **AND**
  - Owned 80% by a specified individual (constructive ownership rules apply)

AND

- 50% of entity’s gross income is passive (or 50% of the assets produce passive income)

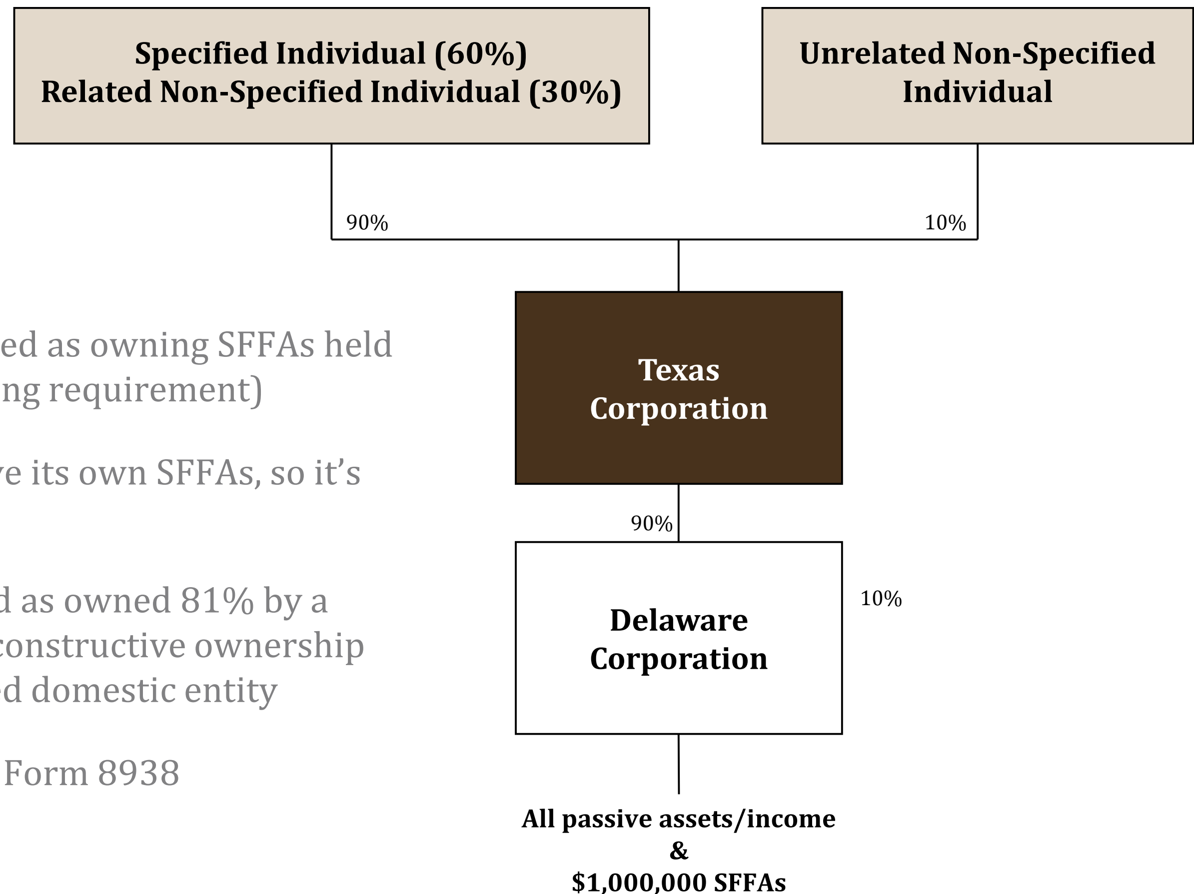
OR

- 10% of the entity’s gross income/assets is passive and the entity is formed or availed of by the specified individual with a principal purpose of avoiding the reporting obligations under § 6038D
  - Facts and circumstances

FATCA: Form 8938
Specified Domestic Entity (Prop. Regs.)

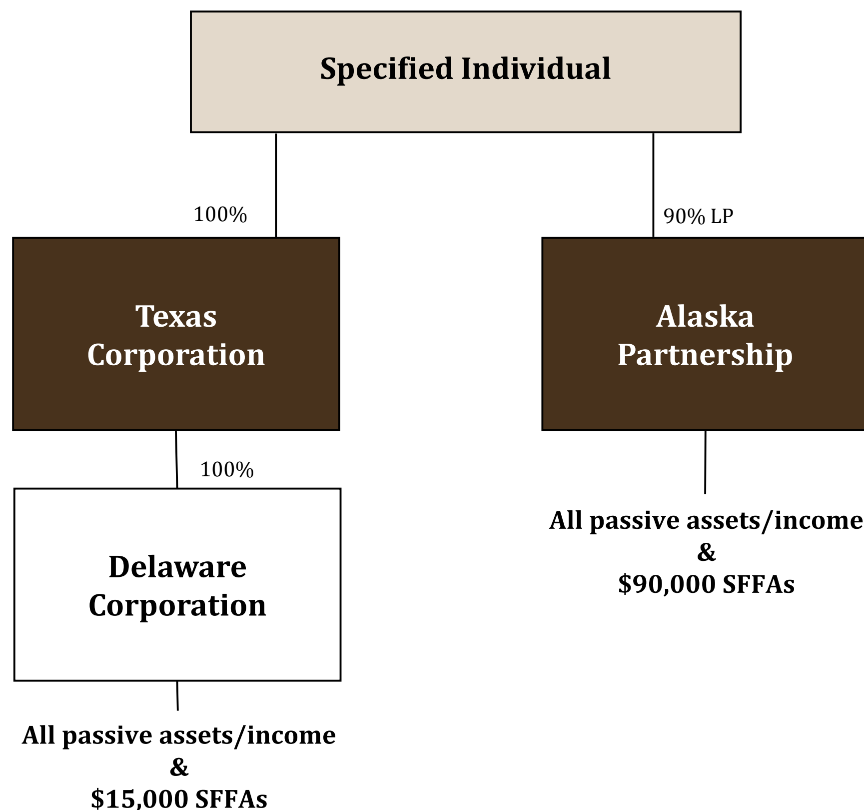
- Related corporations and partnerships
    - Corporations/partnerships owned 80% by the same specified individual **and** that own SFFAs are treated as a single entity for purposes of determining filing threshold

FATCA: Form 8938
Related Corporations and Partnerships (Prop. Regs.)



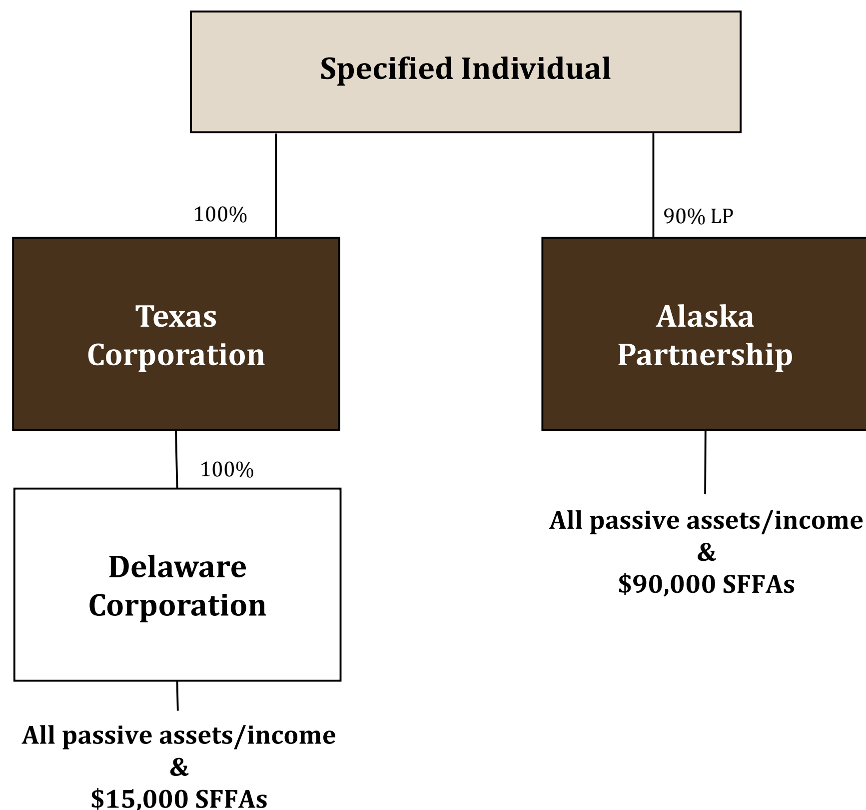
- Specified individual is not treated as owning SFFAs held in corporations (for his own filing requirement)
- Texas corporation does not have its own SFFAs, so it's not a specified domestic entity
- Delaware corporation is treated as owned 81% by a specified individual under the constructive ownership rules and is therefore a specified domestic entity
- *Delaware corporation* must file Form 8938

FATCA: Form 8938
Related Corporations and Partnerships (Prop. Regs.)



- Specified individual is not treated as owning SFFAs held in corporations and partnerships (for his own filing requirement)
- Texas corporation does not have its own SFFAs, so it's not a specified domestic entity
- Alaska partnership and Delaware corporation are each treated as owning the other's SFFAs; therefore, they both meet the filing threshold and are treated as specified domestic entities
- *Alaska partnership* and *Delaware corporation* must each file Form 8938 (to report their own SFFAs)

FATCA: Form 8938
Related Corporations and Partnerships (Prop. Regs.)



- Specified individual is not treated as owning SFFAs held in corporations and partnerships (for his own filing requirement)
- Assume Texas corporation and Delaware corporation not formed to avoid reporting obligations
- Texas corporation does not have its own SFFAs, so it's not a specified domestic entity
- Alaska partnership and Delaware corporation are each treated as owning the other's SFFAs, but Delaware corporation does not meet passive asset/income test; therefore, Delaware corporation is not a specified domestic entity
- Alaska partnership, on the other hand, is a specified domestic entity
- *Alaska partnership* must file Form 8938

Foreign Account Tax Compliance Act:
Withholding (Trusts)

FATCA Withholding Provisions – Background: Prior Withholding Tax System

- Payments of U.S.-source "fixed or determinable annual or periodical" ("FDAP") income that are made to foreign persons are subject to a 30% withholding tax
  - FDAP income generally includes all U.S.-source investment-type income (dividends, royalties, certain types of interest, etc.)
  - Capital gains (other than gains on the sale of U.S.-situs real property or gains effectively connected with a U.S. trade or business) are **not** subject to withholding tax
- The U.S. person making a withholdable payment to a foreign person is called a "withholding agent"

FATCA Withholding Provisions – Background: Prior Withholding Tax System (cont'd)

- The beneficial owner of the payment is eligible for an exemption from withholding or a reduced rate of withholding if the beneficial owner is:
  - a U.S. person, or
  - a foreign person entitled to benefits under an income tax treaty

FATCA Withholding Provisions – Background: Prior Withholding Tax System (cont'd)

- The **withholding agent can establish** the beneficial owner's eligibility for an exemption or reduced rate of withholding by obtaining one of the following **certifications** from the beneficial owner:
    - Form W-9 (U.S. person)
    - Form W-8BEN (foreign person with non-effectively connected income)
    - Form W-8ECI (foreign person with effectively connected income)
    - Form W-8EXP (foreign exempt organization or foreign government)
    - Form W-8CE (covered expatriate)
    - Form W-8IMY (foreign intermediary, such as a nominee or a grantor trust); must be backed up by beneficial owner's Form W-9 or W-8

FATCA Withholding Provisions – Background: Prior Withholding Tax System (cont'd)

- A U.S. beneficial owner of U.S.-source investment income is generally not subject to withholding if a Form W-9 (or a Form W-8IMY/Form W-9 combination) is provided to the withholding agent
    - In this case, the withholding agent files a Form 1099 with the IRS reporting the income and the U.S. payee's name, address, and tax ID number

FATCA Withholding Provisions – Background: Qualified Intermediary Program

- A Qualified Intermediary ("QI") is a foreign financial institution or foreign clearing organization that has contracted with the IRS to:
  - collect identifying information from its customers
  - file withholding tax and information returns
  - submit to periodic audits by an IRS-approved auditor

FATCA Withholding Provisions – Background: QI Program (cont'd)

- QIs are not required to assume primary non-resident withholding responsibility
    - In this case, the QI is required to provide withholding agents with a Form W-8IMY and withholding rate pool information as to the portion of each payment that qualifies for an exemption or a reduced withholding rate

FATCA Withholding Provisions – Background: QI Program (cont'd)

- QIs are not required to assume primary Form 1099 or backup withholding responsibility
  - In this case, the QI must provide withholding agents with a Form W-9 for each of its U.S. account holders

FATCA Withholding Provisions – Purpose is to Beef Up QI Program

- FATCA added a new Chapter 4 to the Internal Revenue Code, entitled "Taxes to Enforce Reporting on Certain Foreign Accounts," and is intended to remedy perceived deficiencies in the QI program (such as bank secrecy rules that prevent disclosure of the identity of U.S. account holders to the IRS)
  - IRS Commissioner Douglas Shulman described it as "Strengthening the QI reporting regime"[1]
  - One commentator referred to the new withholding regime as "QI 2.0"[2]

[1] IR-2006-116, Dec. 10, 2009.

[2] "Proposed Legislation Focused on Offshore Tax Evasion," Cleary, Gottlieb, Steen & Hamilton LLP, Tax Notes, Nov. 23, 2009.

FATCA Withholding Provisions – In a nutshell

- Stephen Shay, Treasury deputy assistant secretary for international tax affairs called FATCA's new withholding regime an exchange of "zero withholding for 100% reporting"*

* 22nd Annual Institute on Current Issues in International Taxation, The George Washington University Law School, Dec. 11, 2009.

FATCA Withholding Provisions – Summary of New "Withholdable Payments"

- Withholding agents paying FDAP income (including original issue discount) to a Foreign Financial Institution ("FFI") must withhold 30% tax, **unless they can verify payee's status under new Chapter 4**

- **Capital gains** on the sale of U.S. securities (which are generally not taxable to foreign persons) paid to an FFI are subject to the new 30% withholding tax—on gross proceeds!

- U.S.-sourced **portfolio interest** (which is generally not taxable to foreign persons) paid to an FFI is subject to the new 30% withholding tax

FATCA Withholding: Treatment of Trusts

- A foreign trust is considered to be a foreign "entity"
- A trust is an "investment entity" if the trust has primarily investment income & is managed by a corporate trustee
- Equity interests in an investment entity are "financial accounts"
- A foreign trust will be considered to be a U.S.-owned entity if "specified U.S. persons" own or are treated as owning the requisite percentage interest in the trust

FATCA Withholding: Trust as FFI or NFFE

- A trust can be either a foreign financial institution (“FFI”) or a nonfinancial foreign entity (“NFFE”)
  - Will have to sort through new Forms W-8IMY and W-8BEN-E (instructions still forthcoming)
  - Draft Form W-8IMY: 28 “Chapter 4 categories”
  - Draft Form W-8BEN-E: 24 “Chapter 4 categories”
- An FFI has a heavier compliance burden under FATCA regulations than an NFFE

FATCA Withholding:
Avoiding withholding – Trust as NFFE

- Certify no substantial U.S. owners, or identify substantial U.S. owners
- NFFEs that are engaged in an active trade or business or whose equity interests are publicly traded are exempt from withholding

FATCA Withholding:
Avoiding withholding – Trust as FFI

- Participating FFI
- Registered deemed-compliant FFI
  - Sponsored FFI
- Certified deemed-compliant FFI
  - Sponsored closely-held investment vehicle
- Owner-documented FFI

IRS Offshore Voluntary Disclosure Programs

IRS Offshore Voluntary Disclosure Programs

- 2003 – Offshore Voluntary Compliance Initiative
- 2003 – Last Chance Compliance Initiative
- 2009 – Offshore Voluntary Disclosure Program
- 2011 – Offshore Voluntary Disclosure Initiative
- **2012 – Offshore Voluntary Disclosure Program**

2012 Offshore Voluntary Disclosure Program "OVDP"

- IRS reports that under the 2009 and 2011 Voluntary Disclosure Programs, each of which was open for a six-month period, 35,000 taxpayers have come forward, and Treasury has collected $5 billion
- IRS reopened the program on January 9, 2012
- Similar to the 2011 program, but with a few significant differences:
  - Open for an indefinite period of time until otherwise announced; terms of OVDP could change at any time
  - Requires individuals to pay an FBAR penalty of 27.5% (compared to 25% in the 2011 program and 20% in the 2009 program), may be reduced to 12.5% or 5% in certain circumstances
  - 8-year "rolling" look-back period, with exclusion of compliant years

2012 OVDP Penalty: 27.5 Percent

- Values of foreign accounts and other foreign assets are aggregated for each year and the penalty is calculated based upon highest year's aggregate value during the OVDP period
- Composition of penalty base:
    - Applies to all of the taxpayer's offshore holdings that are related in any way to tax non-compliance, including bank accounts, tangible assets such as real estate or art, and intangible assets such as patents or stock, or other interests in a U.S. or foreign business
    - Tax noncompliance includes failure to report income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset

2012 OVDP Penalty: 12.5 Percent

- Taxpayer whose highest aggregate account balance (including the fair market value of assets in undisclosed offshore entities and the fair market value of any foreign assets that were either acquired with improperly untaxed funds or produced improperly untaxed income) in each of the years covered by OVDP is less than $75,000

2012 OVDP Penalty: 5 Percent

- Taxpayer who (a) did not open or cause the account to be opened; (b) has exercised minimal, infrequent contact with the account; (c) has, except for a withdrawal closing the account and transferring the funds to an account in the United States, not withdrawn more than $1,000 from the account in any year for which the taxpayer was non-compliant; and (d) can establish that all applicable U.S. taxes have been paid on funds deposited to the account (only account earnings have escaped U.S. taxation)
- Taxpayer who is a foreign resident and was unaware he or she was a U.S. citizen
- Taxpayer who (a) resides in a foreign country; (b) has made a good-faith showing that he or she has timely complied with all tax reporting and payment requirements in the country of residence; and (c) has $10,000 or less of U.S.-source income each year

Taxpayers Residing Abroad

- "Streamlined Procedure" effective date September 2, 2012
- IRS Commissioner Shulman: "Today we are announcing a series of common-sense steps to help U.S. citizens abroad get current with their tax obligations and resolve pension issues"
- Must file 3 years of tax returns and 6 years of FBARs
- Scrutiny by IRS will depend upon assessment of "compliance risk"
- Penalty relief for "reasonable cause" is available
- Relief for certain foreign pensions and retirement plans (including Canadian RRSPs) is available
- But, no protection from criminal prosecution

2012 OVDP: "Opt Out"

- An opt out is an election made by a taxpayer who has already entered the OVDP to have his or her case handled under the standard audit process
- IRS recognizes that in certain cases, the opting out of the OVDP may be the preferred approach—instances in which the results under the voluntary disclosure program appear too severe given the facts of the case
- Full-scope examination will occur upon opt out
- If issues are found upon a full-scope examination that were not disclosed by the taxpayer, those issues may be the subject of review by IRS Criminal Investigation

2012 OVDP: "Opt Out" (cont'd)

- Favorable scenarios for opting out (FAQ 51.1):
  - Example 1 - unreported income but no tax deficiency
  - Example 2 - unreported income and failure to file FBAR
  - Example 3 - unreported controlled foreign corporation
  - Examples 4/5 - dual citizen residing abroad with no U.S. income and fully compliant with foreign tax laws
- Unfavorable scenarios for opting out (FAQ 51.2):
  - Example 6 - large unreported gain
  - Example 7 - civil fraud penalty warranted

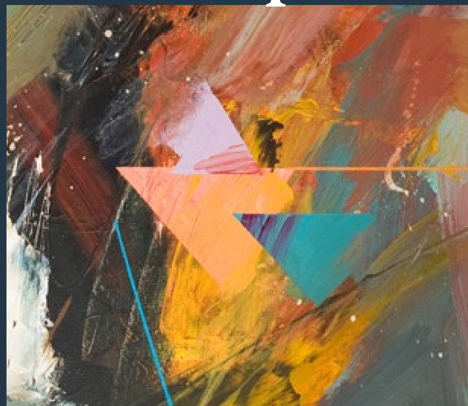
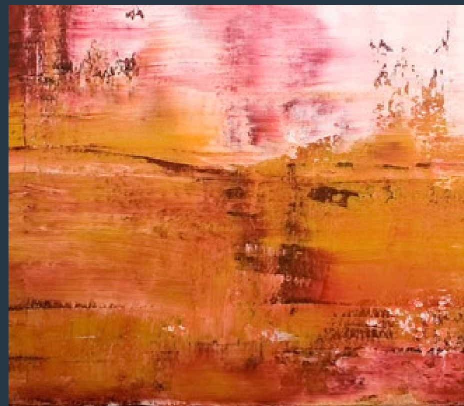
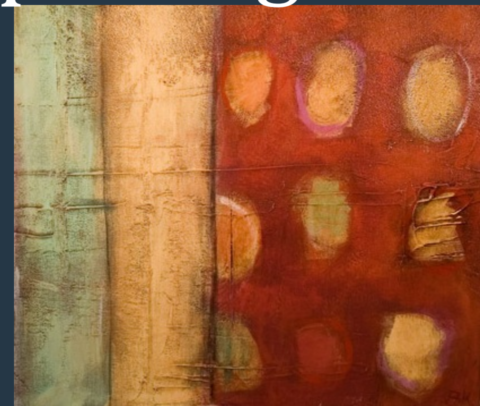
2012 OVDP: To Participate or Not to Participate?

- **For those with criminal exposure**
  - Excellent opportunity to come into compliance
- **For those without criminal exposure**
  - No reasonable-cause relief
    - Imposes accuracy-related penalty
    - Imposes civil penalty (27.5%) on highest value of foreign accounts/entities during 8-year period
  - Can opt out of 27.5% civil penalty and argue reasonable cause
    - Still pay accuracy-related penalty
  - Difficult to see the benefit for clients with no criminal exposure

Risks of "Quiet Disclosure"

- FAQ 15: "Taxpayers are strongly encouraged to come forward under the OVDP to make timely, accurate, and complete disclosures. Those taxpayers making 'quiet' disclosures should be aware of the risk of being examined and potentially criminally prosecuted for all applicable years."
- FAQ 16: "The IRS is reviewing amended returns and could select any amended return for examination. The IRS has identified, and will continue to identify, amended tax returns reporting increases in income. The IRS will closely review these returns to determine whether enforcement action is appropriate. If a return is selected for examination, the 27.5 percent offshore penalty would not be available. When criminal behavior is evident and the disclosure does not meet the requirements of a voluntary disclosure under IRM 9.5.11.9, the IRS may recommend criminal prosecution to the Department of Justice."

Fideicomisos, FATCA, and Voluntary Disclosures: The Current Landscape of Offshore Reporting

Sioux Falls Estate Planning Council
Sioux Falls, South Dakota
December 12, 2013

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