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# U.S. International Trust Reporting and Planning

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## I. Introduction

This article discusses the various regimes established by Congress and the Department of the Treasury to combat avoidance of U.S. income taxation through the use of foreign trusts and offshore accounts. The circumstances are outlined under which a foreign trust, be it outbound or inbound, is deemed a grantor or nongrantor trust for U.S. tax purposes, and the U.S. income tax implications with regard to each are described. An overview is also provided of the so-called "throwback rules," which prevent U.S. persons from using foreign nongrantor trusts to accumulate income without current income tax.

In addition, the U.S. reporting requirements regarding distributions to a U.S. person from a foreign trust and gifts to a U.S. person from a foreign person, and the rules governing the nature and imposition of penalties for failure to comply with the U.S. reporting requirements, are outlined. U.S. reporting requirements with regard to foreign accounts in which a U.S. person has a financial interest or signature authority, and a foreign trust in which a U.S. person has an interest, are also delineated, and the rules governing the nature and imposition of penalties for failure to comply with these U.S. reporting requirements are outlined. Finally, the reporting and withholding rules under FATCA as they relate to foreign trusts are discussed.

## II. U.S. Income Taxation of Foreign Trusts and Their U.S. Beneficiaries

A trust will be considered a U.S. person if a court within the U.S. is able to exercise primary supervision over the administration of the trust (the "court test") *and* one or more U.S. persons have the authority to control all substantial decisions of the trust (the "control test").[1] Any trust which is not a U.S. person (i.e., a trust that does not meet both the court test and the control test) is considered a foreign trust for U.S. tax purposes.[2]

*"The first rule is that if any person has the discretion to make a distribution from the trust to any person, the trust will be treated as having a beneficiary who is a U.S. person, unless the trust terms identify the class of persons to whom distributions may be made, and none of those persons is a U.S. person."*

The manner in which the income of a foreign trust is taxed for U.S. tax purposes depends upon whether the trust is a grantor trust or a nongrantor trust. Following is a discussion of these two types of trusts.

### A. Foreign Grantor Trusts with U.S. Owners

If a trust is a grantor trust, a particular person is treated as the owner of the trust, and the income, deductions, and credits against tax of the trust will be attributed to that person and, therefore, included in computing that person's taxable income and credits.[3] There are a number of sections of the tax law that result in a trust being considered a grantor trust as to a U.S. person. One such section is Code § 679. Under Code § 679, a U.S. person[4] generally is treated as the owner of a foreign trust, and such a trust is therefore considered a foreign grantor trust, if (i) the U.S. person transfers property to the foreign trust, and (ii) the trust could benefit a U.S. person.[5] (Note that it is immaterial for purposes of Code § 679 whether the trust is created for the benefit of the owner or for the benefit of a third party, as long as some U.S. person may be benefited.)

*"In essence, this provision says that even if the taxpayer complies with all of the other requirements of Code § 679, the IRS can still require that further information be submitted before it is determined that the trust does not have any U.S. beneficiaries."*

If a nonresident alien of the U.S. ("NRA") has a residency starting date within five years after directly or indirectly transferring property to a foreign trust, such person is treated as if he or she transferred to such trust on the residency starting date an amount equal to the portion of such trust attributable to the property transferred by him or her to such trust in such transfer.[6] Therefore, the trust will be treated as a grantor trust as to such individual once he or she immigrates to the U.S., thereby preventing him or her from sheltering assets from the income tax by transferring them to a foreign trust prior to his or her arrival in the U.S.

*All* foreign trusts are presumed by the IRS to benefit a U.S. person unless the transferor can establish that (i) under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a U.S. person, *and* (ii) no part of the income or corpus of such trust could be paid to or for the benefit of a U.S. person if the trust were to terminate at any time during the taxable year.[7] Pursuant

to flush language added to Code § 679(c)(1) by the Foreign Account Tax Compliance Act ("FATCA"), which was enacted on 18 March 2010 as part of the Hiring Incentives to Restore Employment ("HIRE") Act, trust income is deemed to be accumulated during the taxable year to or for the benefit of a U.S. person, even if the U.S. person's interest in the trust is merely contingent on a future event.

FATCA added three more new rules that make it more likely that a foreign trust will be deemed to have a beneficiary who is a U.S. person, therefore causing a U.S. person who transferred property to that trust to be considered the owner of the trust income under Code § 679(a).

*"A beneficiary shall not be treated as a U.S. person for the purpose of the above rules with respect to any transfer of property to a foreign trust, if such beneficiary first became a U.S. person more than five years after the date of such transfer."*

The first rule is that if any person has the discretion to make a distribution from the trust to any person, the trust will be treated as having a beneficiary who is a U.S. person, unless the trust terms identify the class of persons to whom distributions may be made, and none of those persons is a U.S. person.[8]

The second new rule enacted by FATCA is that if the U.S. person who transferred property to a foreign trust is directly or indirectly involved in any agreement (written or oral) that may result in trust assets being paid to or accumulated for the benefit of a U.S. person, such agreement will be treated as a term of the trust, making the trust a grantor trust as to the transferor under Code § 679(a).[9]

Finally, FATCA provides that if a U.S. person transfers property to a foreign trust, the trust may be treated as having a U.S. beneficiary unless the U.S. person submits information to the IRS as the IRS requires *and* demonstrates that under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a U.S. person, and no part of the income or corpus of such trust could be paid to or for the benefit of a U.S. person if the trust were to terminate at any time during the taxable year.[10] In essence, this provision says that even if the taxpayer complies with all of the other requirements of Code § 679, the IRS can still require that further information be submitted before it is determined that the trust does not have any U.S. beneficiaries.

A beneficiary shall not be treated as a U.S. person for the purpose of the above rules with respect to any transfer of property to a foreign trust, if such beneficiary first became a U.S. person more than five years after the date of such transfer.[11]

### B. Grantor Trusts with Non-U.S. Owners

In the case of trusts having a foreign grantor—so-called "inbound grantor trusts with foreign grantors"—Code § 672(f) applies special rules that make it difficult for a foreign person to be treated as the owner of a trust for income tax purposes under the grantor trust rules. This, in many instances, prevents a foreign person from creating a foreign trust for U.S. beneficiaries and taking the position that he or she is the owner of the trust for income tax purposes.

A trust, be it foreign or domestic, is treated as a grantor trust with respect to transfers after 19 August 1996, only if the person deemed to own the trust is a U.S. person or a domestic corporation.[12] This rule applies whether the trust income would be imputed to the foreign person either "directly or through 1 or more entities."[13] Prior to the enactment of Code § 672(f), a foreign grantor could use a foreign trust to convert into a tax-free distribution a gift to U.S. beneficiaries of assets—say, foreign securities—producing taxable income. This is because, if such income were taxable only to the grantor, and the grantor were a foreign grantor receiving foreign-source income, then no person would wind up being taxed in the United States on the trust's income.[14]

*"If the first or last taxable year of the trust (including the year of the grantor's death) is less than 183 days, the grantor is treated as having a power to revest if the grantor has such power for each day of such first or last taxable year."*

There are some important exceptions to the above rule that prohibits grantor trust status unless the person deemed to own the trust is a U.S. person or domestic corporation. The first exception is when an NRA funds the trust and "the power to revest absolutely in the grantor title to the trust property to which such portion is attributable is exercisable solely by the grantor without the approval or consent of any other person or with the consent of a related or subordinate party who is subservient to the grantor."[15] In such a case the NRA grantor will be deemed the owner of the trust income and the trust will be treated as a grantor trust for U.S. income tax purposes. A related or subordinate party is presumed to be subservient to the grantor unless the presumption "is rebutted by a preponderance of the evidence."[16]

The power to revest, however, must be exercisable for at least 183 days during the taxable year of the trust.[17] If the first or last taxable year of the trust (including the year of the grantor's death) is less than 183 days, the grantor is treated as having a power to revest if the grantor has such power for each day of such first or last taxable year.[18] But if the trust fails to qualify for this exception in any particular year, it may not qualify in any subsequent year, even if the requirements otherwise would be satisfied.[19]

*"Upon becoming a U.S. resident, the former NRA could claim that he or she was not the grantor of the trust."*

The second exception is when an NRA funds a trust and "the only amounts distributable from such portion (whether income or corpus) during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor."[20] Again, in such a case the non-resident alien will be treated as the owner of the trust income for U.S. income tax purposes. For purposes of Code § 672, amounts distributable from a trust in discharge of a legal obligation of the grantor or the grantor's spouse that are enforceable under the local law of the jurisdiction in which the grantor or the grantor's spouse resides are treated as distributable to the grantor or the grantor's spouse.[21]

Code § 672(f)(5) adds a further layer of protection against tax avoidance by preventing NRAs planning to adopt U.S. residency from circumventing the grantor trust rules. It provides that if an NRA would be treated as the owner of any portion of a trust (without regard to the provisions of section 672(f)), and such trust has a beneficiary who is a U.S. person, such beneficiary shall be treated as the grantor of such portion to the extent such beneficiary has made (directly or indirectly) transfers of property (other than a nongratuitous transfer or a gift that would be excluded from taxable gifts under §2503(b)) to such NRA. Before the enactment of Code § 672(f)(5), a wealthy NRA could avoid U.S. tax on his or her wealth by transferring property by gift to another NRA who could, in turn, contribute the property to a trust of which the initial NRA grantor was a discretionary income beneficiary and over which the intermediary NRA retained grantor powers over the trust. Upon becoming a U.S. resident, the former NRA could claim that he or she was not the grantor of the trust. Under Code § 672(f), the former NRA will be deemed the grantor of the trust.

Certain trusts in existence on 19 September 1995 are not subject to Code § 672(f): those treated as owned by the grantor under Code § 676 (powers to revoke and revest) or Code § 677 (income paid to or accumulated for the benefit of the grantor or the grantor's spouse[22]). Code § 672(f) will apply, however, with regard to any portion of the trust attributable to transfers to the trust made after 19 September 1995.[23]

### C. Foreign Nongrantor Trusts

While the income of a foreign grantor trust (like that of all grantor trusts) is attributed to the owner of the trust, resulting in the trust effectively being ignored for income tax purposes as a separate taxpayer, the income of a foreign nongrantor trust (like the income of a domestic nongrantor trust) is taxed to the trust, to the beneficiaries, or partly to each. Income is allocated between a foreign nongrantor trust and its beneficiaries through the concept of distributable net income ("DNI") and its limitation on the trust's distribution deduction. DNI for a foreign trust is, generally speaking, the taxable income of the trust, including capital gains (for domestic trusts, DNI does not include capital gains).[24]

*"A complex foreign nongrantor trust receives a deduction for that portion of its current income that the trust is required to distribute plus that portion of its current income that the trustee actually distributes to the beneficiaries pursuant to the governing instrument."*

A foreign nongrantor trust, like a domestic nongrantor trust, can be either a "simple trust" or a "complex trust." A foreign nongrantor trust is a simple trust if: (i) all income must be distributed currently; (ii) no amounts may be paid, permanently set aside for, or used for a charitable beneficiary; and (iii) no distributions are made other than of current income (i.e., no distributions are made of accumulated income or corpus).[25] All of the income of a foreign nongrantor trust that is classified as a simple trust will be taxed to the beneficiaries, and the trust will receive a deduction for its current income that it must pay to the beneficiaries, whether or not that income is actually distributed.[26] The amount included in the beneficiaries' gross income and the amount of the trust's deduction are both limited by the trust's DNI.[27]

A foreign nongrantor trust that is not required to distribute all of its income currently, that distributes accumulated income or principal, or that has a charitable beneficiary is a "complex" trust. A complex foreign nongrantor trust receives a deduction for that portion of its current income that the trust is required to distribute plus that portion of its current income that the trustee actually distributes to the beneficiaries pursuant to the governing instrument.[28] The trust's deduction is limited to the amount of its DNI.[29]

The beneficiaries of a complex foreign nongrantor trust include in their gross income all income that the

trust is required to distribute, and all income actually distributed to the beneficiaries pursuant to the governing instrument.[30] If and to the extent that a complex nongrantor trust does not distribute (and is not required to distribute) DNI, such DNI is taxable to the trust.

Each beneficiary must include in his or her gross income an amount equal to that beneficiary's pro-rata share of the trust's DNI.[31] A distribution in excess of the trust's DNI is treated either as a nontaxable distribution of principal or as a distribution of income accumulated from prior years taxable under the so-called "throwback rules."[32]

*"The throwback tax is determined by averaging the distributions over a number of years equal to that over which the income was earned, and by including a fraction of the income received from the trust in the beneficiary's income for each of the five preceding years, excluding the years with the highest taxable income and the lowest taxable income."*

The purpose of the throwback rules is to prevent U.S. persons from using foreign nongrantor trusts to accumulate income without current tax. Under the throwback rules, if a foreign nongrantor trust accumulates DNI in one year, the accumulation becomes undistributed net income ("UNI") for the following year. Since DNI for a foreign trust includes gains allocable to corpus, UNI will include any accumulated gains. An "accumulation distribution" is a distribution of any amount from the trust, other than income that is required to be distributed from the trust, to the extent that the amount distributed exceeds the trust's DNI for the year, reduced by income that is required to be distributed.[33] The throwback rules apply only to foreign trusts, since distributions from domestic trusts are calculated without regard to UNI.[34]

Under the throwback rules, the U.S. taxes a U.S. beneficiary of a foreign nongrantor trust that makes an accumulation distribution in the same manner that the U.S. would have taxed the beneficiary if the trust had distributed all of its income on a current basis.[35] U.S. beneficiaries who receive distributions of UNI from a foreign nongrantor trust may be subject to onerous U.S. income tax treatment on the distribution in the form of two types of penalties.[36]

First, the distribution of UNI is taxed to the U.S. beneficiary as ordinary income (taxable at marginal rates up to 39.6%), even if the UNI represents gains accumulated in a prior year (long-term capital gains are generally taxable to U.S. persons at a flat 23.8% rate, when accounting for the Medicare tax under Code Section 1411).[37] The throwback tax is determined by averaging the distributions over a number of years equal to that over which the income was earned, and by including a fraction of the income received from the trust in the beneficiary's income for each of the five preceding years, excluding the years with the highest taxable income and the lowest taxable income. The fraction of income included in the five years is based on the number of years the income was accumulated.[38]

Second, the U.S. income tax on the distribution is subject to an interest surcharge, calculated on a compounding basis, that is intended (in a rough manner) to charge the U.S. beneficiary as if he or she had owed the U.S. tax for the prior year in which the UNI was earned in the foreign nongrantor trust. The interest surcharge imposed on the throwback tax is equal to the rate of interest applicable to underpayments of tax (which is the Federal short-term rate as determined monthly, plus three percent).[39]

The combination of the above two penalties can result in a confiscatory tax as large as the distribution itself, because the longer UNI accumulates in a trust, the higher the interest charge.

In order to determine whether a distribution from a foreign nongrantor trust carries out UNI, certain ordering rules apply. To apply the ordering rules, one must understand the definitions of DNI and UNI discussed above and must understand the definition of fiduciary accounting income ("FAI"). FAI is the amount of the trust's income determined under the terms of the governing instrument and applicable local trust law. FAI can be, and often is, different in both timing and amount from DNI. To the extent there is any FAI exceeding DNI, it is not subject to U.S. tax but may be subject to local tax.

When the total distributions from a foreign nongrantor trust during the year at issue do not exceed FAI for the year, the distribution will be deemed to carry out the trust's current-year DNI. Once DNI is exhausted, FAI is carried out and no UNI is carried out, so the throwback rules will not apply.

*"With the partnership blocker solution, the foreign trust owns an interest as a ninety-nine percent partner in a partnership."*

When the total distributions from a foreign non-grantor trust during the year at issue exceed FAI for the year, the distribution will be deemed to carry out the trust's current-year DNI and once DNI is exhausted, UNI carried forward from prior years is carried out. Once all DNI and UNI have been carried out, the balance of any distributions from the trust is deemed to be trust capital.

#### 1. The Partnership Blocker Solution to the Throwback Rules for Foreign Non-Grantor Trusts

Generally speaking, if a U.S. person is a beneficiary of a foreign nongrantor trust, the solution to avoid the throwback rules is to distribute all of the income on an annual basis (either to the U.S. person beneficiary or to another non-U.S. person beneficiary). Another solution is to decant the trust assets to a domestic trust where the income can be accumulated without being subject to the throwback rules.

If annual distributions from the foreign trust or decanting to a domestic trust are not possible or are not appropriate in the given circumstances, another solution that may be useful is the so-called "partnership blocker solution." The partnership blocker solution is intended to take advantage of the ordering rules discussed above for DNI, UNI, and FAI. The partnership blocker solution's objective is to control when the trust receives FAI.

*"Because the income generated by the underlying investments passes through the partnership directly to the trust for U.S. income tax purposes as DNI, UNI will gradually accumulate in the trust."*

With the partnership blocker solution, the foreign trust owns an interest as a ninety-nine percent partner in a partnership. The other one percent partner can be a corporation, all of the stock of which is owned by the trust. The assets that would have otherwise been held by the trust are held by the partnership. The partnership is transparent for tax purposes and, therefore, the DNI/UNI of the trust will be determined by the income of the partnership and the distributions from the trust. The partnership will nevertheless serve as a *blocker* for purposes of the trust's FAI. FAI will only be provided to the trust when an actual distribution is made by the partnership to the trust.

In most cases when the partnership makes a distribution to the trust, the trust will also have a DNI amount for the current year. Under the above ordering rules, a distribution from the trust will be first treated as taxable DNI to the extent of any current year DNI and, if the distribution does not exceed the current year FAI, the remainder of the distribution should be treated as FAI, which is not subject to taxation.

The partnership blocker allows the trustee to accumulate income in the underlying partnership without triggering the adverse effects of the accumulation distribution rules once a distribution to a U.S. beneficiary is made. Because the income generated by the underlying investments passes through the partnership directly to the trust for U.S. income tax purposes as DNI, UNI will gradually accumulate in the trust. However, the UNI will not be deemed distributed out of the Trust, and thus a U.S. beneficiary will not be taxed on such UNI as long as the trust's total distributions for the year do not exceed its FAI (the distributions will likely not exceed FAI, since the distributions will equal exactly what was distributed to the trust by the partnership).

### D. Tax on Contribution of Assets to a Foreign Trust

If a U.S. citizen or U.S. resident transfers property to a foreign trust, the transfer is treated as a sale or exchange of the transferred property for an amount equal to the fair market value of the property, and the transferor recognizes gain on the excess of the fair market value of the property over its adjusted basis.[40] Such a transfer essentially is taxed at the capital gains tax rates (which is currently twenty percent plus a 3.8% Medicare surcharge, as discussed above). The tax on contribution to the foreign trust is not imposed, however, if the foreign trust is treated as a grantor trust for U.S. income tax purposes.[41] There would, however, still be IRS reporting requirements, discussed below.

## III. Reporting Requirements for Contributions to and Distributions from a Foreign Trust and Receipts of Foreign Gifts

### A. Overview

When a U.S. person makes a contribution to a foreign trust or receives a distribution from a foreign trust, in addition to complying with any required income tax reporting requirements and payments (discussed above), he or she is required to file a report with the IRS for the year of the contribution or distribution reporting the same.[42] Contributions by U.S. persons to foreign trusts and distributions to U.S. persons from foreign trusts must be reported annually on IRS Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. If a U.S. person is an owner of a foreign trust, IRS Form 3520-A, Annual Information Return of Foreign Trust with a U.S. Owner, also must be filed.

*"The U.S. person may also be required to report the names of the trustees or other persons in control of the trust and the names of the beneficiaries thereof, and may be required to attach a copy of the trust documents and other agreements and letters of understanding that control the trust relationship."*

It should be noted that "distributions from foreign trusts" also may include distributions that are constructively received, such as the payment of the beneficiary's debts by the trust, payments to the beneficiary in ex-

change for property or services of the beneficiary if the payments exceed the fair market value of the property or the value of the services, and direct or indirect loans received by the beneficiary from the trust, unless the loan is in exchange for a so-called "qualified obligation."[43]

IRS Form 3520 must be filed by a U.S. person for each year that he or she makes a contribution to or receives a distribution from a foreign trust. The form is due on the date the U.S. person's individual income tax return, IRS Form 1040, is due (including extensions), and must be filed with the Internal Revenue Service Center, Philadelphia, PA 19255.[44]

With respect to contributions to a foreign trust, IRS Form 3520 requires the U.S. person who contributed the assets to report the name of the trust and the property contributed and value thereof. The U.S. person may also be required to report the names of the trustees or other persons in control of the trust and the names of the beneficiaries thereof, and may be required to attach a copy of the trust documents and other agreements and letters of understanding that control the trust relationship.

Among other things, IRS Form 3520 requires the U.S. beneficiary of a foreign trust to report the name of the trust and its address, the amount of the distributions received from the trust during the tax year, whether any loans were received from the trust during the tax year—and, if so, whether the loan is a "qualified obligation"—and whether the beneficiary received a Foreign Grantor Trust Beneficiary Statement or Foreign Nongrantor Trust Beneficiary Statement from the trust (discussed below).

*"Certain other reporting requirements for such a U.S. taxpayer will depend on whether he or she receives from the trust a Foreign Grantor Trust Beneficiary Statement."*

If adequate records are not provided to the IRS to determine the proper treatment of a distribution from a foreign trust, the U.S. beneficiary will be required to treat the distribution as an accumulation distribution (discussed above) includible in the income of the beneficiary. (This is so even if the trust is a grantor trust, the income of which is usually only taxable to the grantor with the distribution otherwise being treated as a gift, if adequate records are not provided to the IRS.[45]) The beneficiary will not be required to treat the entire distribution as an accumulation distribution if he or she receives from the foreign trust either a Foreign Grantor Trust Beneficiary Statement or a Foreign Nongrantor Trust Beneficiary Statement with respect to the distribution and attaches the statement to Form 3520[46] and further inquiries by the IRS are answered to its satisfaction.

If a Foreign Grantor Trust Beneficiary Statement is received from the trust, meaning that it is a grantor trust, the entire distribution to the U.S. beneficiary will be treated as a nontaxable gift. If a Foreign Nongrantor Trust Beneficiary Statement is received from the trust, meaning that the trust is not a grantor trust, the distribution will be taxed to the beneficiary under ordinary U.S. income tax rules (which may or may not result in accumulation distribution treatment, as discussed above).[47] If the U.S. beneficiary does not receive any such statement, he or she may be able to avoid treating the entire distribution as an accumulation distribution if he or she can provide certain information with respect to the distributions to the IRS (discussed below).

### B. Foreign Grantor Trust: Reporting Requirements

#### 1. Overview

As discussed above, under the grantor trust rules of Code § 679, a U.S. person generally is treated as the owner of a foreign trust, and such trust is considered a foreign grantor trust, if (i) the U.S. person transfers property to the foreign trust, and (ii) the trust could benefit a U.S. person. In addition to the income of a grantor trust being taxed to the grantor under U.S. tax law, there are specific reporting requirements with which the trust and the grantor must comply, above and beyond reporting the income on the grantor's annual income tax return.

*"If the taxpayer has received a Foreign Grantor Trust Beneficiary Statement, he or she must attach it to Form 3520 and enter from it the pertinent information regarding trust income and the nature and amount of distributions on Schedule B of Part III of IRS Form 3520."*

Part II of IRS Form 3520 covers distributions to a U.S. person from a foreign grantor trust where the U.S. person is considered the owner of any of the assets of such trust. Part II, Line 20, asks the U.S. taxpayer who has received a distribution from a foreign grantor trust to provide the name, address, country of residence, and identification number (if any) of any other owners of the trust, as well as the relevant Code section causing that person to be considered an owner under the grantor trust rules. Certain other reporting requirements for such a U.S. taxpayer will depend on whether he or she receives from the trust a Foreign Grantor Trust Beneficiary Statement. Whether or not a Foreign Grantor Trust Beneficiary Statement is received, however, the U.S. taxpayer will be asked to provide information regarding the appointment of a U.S. agent. This issue is treated below.

### 2. If the U.S. Taxpayer Receives a Foreign Grantor Trust Beneficiary Statement

Part II, Line 22, of IRS Form 3520 asks whether the U.S. taxpayer has received a Foreign Grantor Trust Beneficiary Statement. If the taxpayer has received a Foreign Grantor Trust Beneficiary Statement, he or she must attach it to Form 3520 and enter from it the pertinent information regarding trust income and the nature and amount of distributions on Schedule B of Part III of IRS Form 3520.

*"If a foreign trust does not fall within the definition of a foreign grantor trust under Code § 679, it is deemed a foreign nongrantor trust for U.S. tax purposes."*

The Foreign Grantor Trust Beneficiary Statement is found on page 4 of IRS Form 3520-A, which should be provided by the trustee to the taxpayer by March 15 of the year following the year at issue.[48] The statement must set forth the name and address of the trust, the name and address of the trustee, the name and address of the beneficiary, a description of the property distributed to the beneficiary, whether the owner of the trust is an individual, partnership, or corporation, and an explanation of the facts and law establishing that the foreign trust is treated as owned by another person, i.e., the grantor. In addition, the trustee must indicate whether the trust has appointed a U.S. agent who can provide the IRS with all relevant trust information (see below).

### 3. If the U.S. Taxpayer Does Not Receive a Foreign Grantor Trust Beneficiary Statement

As stated above, Part II, Line 22, of IRS Form 3520 asks whether the U.S. taxpayer has received a Foreign Grantor Trust Beneficiary Statement. If the taxpayer has not received a Foreign Grantor Trust Beneficiary Statement, then Part II, Line 22, of IRS Form 3520 requires that the taxpayer, to the best of his or her ability, attach for the trust in question a "substitute" IRS Form 3520-A containing the information outlined above, including that regarding the appointment of a U.S. agent. Provision by the taxpayer of the substitute IRS Form 3520-A, however, does not relieve the taxpayer of penalties (discussed below) for failure to cause the trust to file the form.[49] In addition to the substitute IRS Form 3520-A, the taxpayer is required to file with his or her tax return IRS Form 8082, Notice of Inconsistent Treatment or Administrative Adjustment Request, to inform the IRS that the owner has not received a Foreign Grantor Trust Owner Statement.[50] (IRS Form 8082 and Instructions are attached to this memorandum).

## C. Foreign Nongrantor Trust: Reporting Requirements

If a foreign trust does not fall within the definition of a foreign grantor trust under Code § 679, it is deemed a foreign nongrantor trust for U.S. tax purposes. Under U.S. tax law, distributions by a foreign nongrantor trust to a U.S. beneficiary are taxed to such beneficiary.

### 1. If the U.S. Taxpayer Receives a Foreign Nongrantor Trust Beneficiary Statement

Part III of Form 3520 covers distributions to a U.S. person from a foreign trust. Part III, Line 30, asks whether the taxpayer has received a Foreign Nongrantor Trust Beneficiary Statement with respect to any such distribution. If the taxpayer has received a Foreign Nongrantor Trust Beneficiary Statement, he or she must attach it to Form 3520 and enter the pertinent information on Schedule B of IRS Form 3520.[51]

*"The taxpayer is not asked on this schedule to provide identifying information with regard to the trust in question or to its trustee."*

The Foreign Nongrantor Trust Beneficiary Statement is not part of a return and must, therefore, be prepared independently by the trustee. Pursuant to IRS Notice 97-34 and the Instructions for IRS Form 3520, a Foreign Nongrantor Trust Beneficiary Statement should contain the following information:

- Foreign Trust Background Information, including:
  - the name, address, and EIN (if available) of the trust;
  - the name, address, and TIN (if applicable) of the trustee furnishing the statement;
  - the method of accounting used by the trust (cash or accrual);
  - the taxable year to which the statement applies; and
  - a statement identifying whether any of the grant ors are partnerships or corporations.
- U.S. Beneficiary Information, including:
  - the name, address, and TIN of the U.S. beneficiary; and
  - a description of the property (including cash) dis tributed or deemed distributed to the U.S. person, and the fair market value of said distribution.
- Sufficient information to enable the U.S. beneficiary to establish the appropriate treatment of any distribution or deemed distribution for U.S. tax

purposes. According to Notice 97-34, information similar to that presented in an IRS Form K-1 would be sufficient. The trustee has the opportunity here to report what the components of the distribution represent (e.g., interest, dividends, etc.), so that the beneficiary can report the proper information on the beneficiary's own tax return. Income, deductions, etc., need to be reported using U.S. tax concepts, which may require significant recharacterization of amounts shown on the financials of the foreign trust.

- A statement that, upon request, the trust will permit either the IRS or the beneficiary to inspect and copy the trust's permanent books of account, records, and such other documents that are necessary to establish the appropriate treatment of any distribution. This statement is not necessary if the trust has appointed a U.S. agent.[52]
- The name, address, and EIN of the trust's U.S. agent, if applicable.

#### 2. If the U.S. Taxpayer Does Not Receive a Foreign Nongrantor Trust Beneficiary Statement

Part III, Line 30, of IRS Form 3520 also provides for the case in which the taxpayer does not receive a Foreign Nongrantor Trust Beneficiary Statement from a foreign trust with respect to distributions received. In such a case, the taxpayer is asked to complete Schedule A of Part III of Form 3520. This schedule requires only that the taxpayer inform the IRS of the amounts received from the foreign trust and the number of years the trust has been a foreign trust. The taxpayer is not asked on this schedule to provide identifying information with regard to the trust in question or to its trustee.

*"The fraction of income included in the five years is based on the number of years the income was accumulated."*

The disadvantage to the taxpayer of not procuring a Foreign Nongrantor Trust Beneficiary Statement is that the IRS, pursuant to IRS Notice 97-34, may deem (unless a U.S. agent is appointed[53]) the entire distribution made by any foreign nongrantor trust an accumulation distribution, which would subject the amount of the distribution to unfavorable tax treatment and the imposition of the interest charge under the throwback rules. If a U.S. beneficiary cannot obtain a Foreign Nongrantor Trust Beneficiary Statement, however, Schedule A of Part III of Form 3520 allows the U.S. beneficiary to avoid treating the entire amount as an accumulation distribution if the U.S. beneficiary can provide certain information regarding actual distributions from the trust for the prior three years. Under this "default treatment," the U.S. beneficiary is allowed to treat a portion of the distribution as a distribution of current income based on the average of distributions from the prior three years, with only the excess amount of the distribution treated as an accumulation distribution. In making the calculation, the prior three years' distributions are added together. The total is then multiplied by a factor of 1.25. This amount is then divided by three, with only the excess amount of the distribution treated as an accumulation distribution. This formula, in effect, assumes that current income increases by twenty-five percent each year before the excess is treated as an accumulation distribution.

The information needed in order to qualify for default treatment is as follows:

- the number of years the trust has been a foreign trust (with any portion of a year to be considered a complete year[54]);
- the total distributions received from the foreign trust during the current year, including loans from a "related foreign trust" (a "related foreign trust" is a trust of which the U.S. taxpayer is a grantor or beneficiary of which a "related person" is a grantor or beneficiary; a "related person" is (i) a sibling of the whole or half blood, an ancestor, a lineal descendant, or a spouse of the U.S. taxpayer or of any related person, or (ii) a corporation of which the U.S. taxpayer owns directly or indirectly more than fifty percent in value of the outstanding stock); and
- the total distributions received from the foreign trust during the preceding three years.[55]

#### 3. Reporting of Accumulation Distributions Under the Throwback Rules

Once the amount of an accumulation distribution is determined on Schedule A or B of Part III of IRS Form 3520, the throwback tax on the accumulation distribution must be calculated using IRS Form 4970, Tax on Accumulation Distribution of Trusts (a copy of which is attached). As discussed above, the tax is determined by averaging the distributions over a number of years equal to that over which the income was earned and by including a fraction of the income received from the trust in the beneficiary's income for each of the five preceding years, excluding the years with the highest taxable income and the lowest taxable income. The fraction of income included in the five years is based on the number of years the income was accumulated.[56] The interest surcharge imposed on the throwback tax is entered on Line 52 of Schedule C of Part III of IRS Form 3520.

### D. Appointment of U.S. Agent

Any foreign trust (grantor or nongrantor) may appoint a limited agent (a "U.S. Agent") for purposes of responding to (i) IRS requests to examine records or produce testimony with respect to any items included on IRS Form 3520 or 3520-A or (ii) an IRS summons regarding

such records or testimony. A U.S. Agent is a U.S. person (including a U.S. grantor, a U.S. beneficiary, or a domestic corporation controlled by the grantor) that has a binding contract with a foreign trust that allows such person to act as the trust's authorized U.S. agent for the purposes mentioned above.[57] The format of the contract is contained in the IRS Form 3520-A Instructions.[58]

*"This notification must contain the name, address and taxpayer identification number of the new U.S. agent (if any)."*

If a foreign *grantor* trust does not choose to appoint a U.S. agent, then the IRS can determine unilaterally the amounts to be included in income by the owner of the foreign trust.[59] Also, if no agent is appointed, various attachments must be filed along with IRS Form 3520-A, including (i) a summary of the terms of the trust and all written and oral agreements and understandings with the trustee that are related to the trust (whether or not legally enforceable) and (ii) copies of all trust documents, including the trust agreement and amendments, memoranda or letters of wishes, and the like.[60]

If the U.S. agent of a foreign grantor trust resigns or liquidates, or the U.S. agent's responsibility as an agent of the foreign grantor trust is terminated, the U.S. owner of the foreign trust must ensure that the foreign trust notifies the Commissioner of Internal Revenue within ninety days of such event by filing an amended IRS Form 3520-A.[61] This notification must contain the name, address and taxpayer identification number of the new U.S. agent (if any).[62]

If a foreign *nongrantor* trust does not choose to appoint a U.S. agent, then the IRS can determine unilaterally the amounts to be included in income by the beneficiary of the foreign trust, unless "adequate records" are provided to the IRS.[63] Presumably this means that it would be enough to complete Schedule A of Part III of Form 3520 as outlined above.

*"Foreign gifts are reported on IRS Form 3520, which is the same form used for reporting transactions with foreign trusts."*

Even if a U.S. agent of a foreign trust—be it nongrantor or grantor—is identified on IRS Form 3520 or 3520-A, the U.S. beneficiary or owner of the foreign trust may be treated as providing incorrect information and thus may be subject to the penalty described in Code § 6677 (see below) if either the U.S. agent or the foreign trust does not comply with its obligations under the agency agreement (e.g., if the foreign trust fails to produce records requested by the IRS in reliance on the bank secrecy laws of the country where the trust's bank accounts are located).[64] This is the case even if the U.S. beneficiary has attached to the IRS Form 3520 a Foreign Grantor Trust Beneficiary Statement or a Foreign Nongrantor Trust Beneficiary Statement.[65]

### E. Receipts of Foreign Gifts

If the value of the aggregate "foreign gifts" received by a U.S. citizen or resident during any taxable year exceeds $10,000, the recipient must provide such information as the IRS prescribes.[66] The term "foreign gift" is any amount received from a person other than a U.S. citizen or resident that the recipient treats as a gift or bequest.[67]

A U.S. citizen or resident is required to report the receipt of a foreign gift only if the aggregate amount of gifts from a particular foreign person or estate exceeds $100,000 during the taxable year, and is required to report the receipt of a gift from a foreign corporation or partnership if the aggregate amount of gifts from all such entities exceeds $10,000 during the taxable year.[68] For purposes of determining these thresholds, the gifts from related persons are aggregated.[69]

Note that gifts made by foreign persons (whether to U.S. persons or non-U.S. persons) are not subject to the U.S. gift tax, unless the gift is of U.S. situs real or tangible property.[70] Nevertheless, the gifts may be reportable if received by a U.S. person under the above rules.

Foreign gifts are reported on IRS Form 3520, which is the same form used for reporting transactions with foreign trusts.

### F. Penalties

#### 1. IRS Forms 3520 and 3520-A

Significant penalties are associated with the failure to file a complete and accurate IRS Form 3520 or Form 3520-A. Under Code § 6677(a), penalties are imposed for:

- failure to file in a timely manner;
- failure to include all the information requested; or
- failure to include accurate information.

For failure to file IRS Form 3520 to report a transaction with a foreign trust, Code § 6677(a) imposes a penalty of thirty-five percent of the gross reportable amount (as defined in Code § 6677(c)), i.e., thirty-five percent of the gross value of the property transferred to the foreign trust or thirty-five percent of the distribution(s) made from the foreign trust. The penalty is imposed on the individual who was required to file the IRS Form 3520.

The penalty for failure to file IRS Form 3520-A will be imposed directly on the U.S. owner of the foreign trust. The penalty is equal to five percent of the value of the trust assets treated as owned by the U.S. person.[71]

If failure to comply with the reporting requirements continues, the IRS is authorized to impose additional penalties of up to $10,000 for each thirty-day period during which the failure continues after the IRS mails a notice of failure to comply with the required reporting, not to exceed the value of the gross reportable amount.[72]

*"Some practitioners have found that the IRS has shown considerable leniency in abating penalties."*

Code § 6039F imposes a penalty of five percent of the amount of a foreign gift received by a U.S. person which was required to be reported on IRS Form 3520. This five percent is imposed monthly until the amount is reported, not to exceed twenty-five percent of the foreign gift. The penalty is imposed on the recipient of the gift, and not the donor.

Both Code § 6677 and Code § 6039F make an exception from the imposition of penalties if it can be shown that the failure to file was due to "reasonable cause and not due to willful neglect."[73] The Internal Revenue Manual states that reasonable cause "is generally granted when the taxpayer exercises ordinary business care and prudence in determining their tax obligations but nevertheless is unable to comply with those obligations."[74] Some factors that the IRS may consider in determining whether the taxpayer exercised ordinary business care and prudence include: the taxpayer's reason and whether it corresponds to the events on which penalties are assessed; whether the taxpayer's compliance history shows a pattern of noncompliance or if this is a first-time failure; the length of time between the noncompliance and when the taxpayer subsequently complied with the reporting requirements; and whether there were circumstances beyond the taxpayer's control.[75]

Some practitioners have found that the IRS has shown considerable leniency in abating penalties.[76] In particular, the IRS has been sympathetic where the failure has occurred in the first year in which a formerly non-U.S. taxpayer became a U.S. resident, or where the taxpayer complied as soon as possible after finding out about the requirement.[77]

Initially, the IRS generated automatic notices imposing penalties amounting to millions of dollars for late-filed IRS Forms 3520 and 3520-A.[78] This prompted taxpayers to scramble to have those penalties abated. Now, rather than imposing the penalty automatically, the IRS has been generating notices to taxpayers asking for an explanation for the late filing.[79]

Code § 6677(d) states that reasonable cause for the failure to comply does not exist merely because a foreign country would impose a civil or criminal penalty for disclosing the information required to be reported on the forms. Furthermore, refusal on the part of a foreign trustee to provide information needed to meet the reporting requirements, whether due to difficulty in producing the required information or because provisions in the trust instrument prevent disclosure of required information (e.g., in the case of a blind trust), is not considered reasonable cause.[80]

The Code § 6677 penalties apply only to the extent that the transaction is not reported or is not reported accurately. For example, if a U.S. person receives a distribution from a foreign trust of $1,000,000 but only reports $400,000 of the amount received, the penalties may be imposed only on the amount that was unreported (in this case $600,000).[81]

#### 2. IRS Form 8082

Failure to file IRS Form 8082 may subject the taxpayer to the accuracy-related penalty under Code § 6662 or the fraud penalty under Code § 6663.[82] Code § 6662 imposes a single accuracy-related penalty equal to twenty percent of the portion of underpayment of tax attributable to, *inter alia*, (i) negligence or disregard of rules and regulations, or (ii) any substantial underpayment of tax. An underpayment of tax is considered "substantial" if the underpayment exceeds the greater of ten percent of the tax required to be shown on the return or $5,000.[83]

*"On the FBAR, the United States person is required to report all foreign bank accounts and foreign financial accounts in which he or she has a financial interest, signatory authority, or other authority during the previous year, if the aggregate value of these accounts during the previous year is more than $10,000."*

Under Code § 6663, if any part of any underpayment of tax required to be shown on a return is due to fraud, a penalty is assessed in an amount equal to seventy-five percent of the portion of the underpayment attributable to the fraud. The initial burden of proving fraud on the part of the taxpayer rests with the IRS.[84] Proof of fraud requires a showing that the taxpayer engaged in intentional wrongdoing with the specific intent to avoid a tax known or believed to be owed.[85]

## IV. Reporting Requirements for Foreign Accounts in Which a U.S. Person Has a Financial Interest or Signature Authority

### A. Overview

31 U.S.C § 5314, enacted as part of the Bank Secrecy Act on 26 October 1970, as amended, provides as follows:

Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship,

(2) the legal capacity in which a participant is acting,

(3) the identity of real parties in interest, and

(4) a description of the transaction.

In order to comply with the above statute, a "United States person" must file annually with the U.S. Department of the Treasury a "Report of Foreign Bank and Financial Accounts" (commonly referred to as an "FBAR").[86] On the FBAR, the United States person is required to report all foreign bank accounts and foreign financial accounts in which her or she has a financial interest, signatory authority, or other authority during the previous year, if the aggregate value of these accounts during the previous year is more than $10,000.[87]

*"Under the Obama Administration, there has been heightened enforcement of the provisions of 31 U.S.C § 5314 and the filing of FBARs by the Financial Crimes Enforcement Network, an agency of the Treasury Department."*

For FBARs due for reporting years prior to 2013, the report was completed by filing Form TD F 90-22.1 with the Treasury Department.[88] On 30 September 2013, FinCEN posted a notice on their website announcing a new FBAR form, FinCEN Report 114, "Report of Foreign Bank and Financial Accounts." FinCEN Report 114 supersedes the Form TD F 90-22.1 and is only available online through the BSA E-Filing System website. The e-filing system allows the filer to enter the calendar year reported, including past years, on the online FinCEN Report 114.

On 29 July 2013, FinCEN posted a notice on their website introducing a new report for filers who submit FBARs jointly with spouses or who wish to have a third party preparer file their FBARs on their behalf. The new FinCEN Report 114a, "Record of Authorization to Electronically File FBARs," is not submitted when filing an FBAR but, instead, is kept in FBAR records maintained by the filer and the account owner, and must be made available to FinCEN or IRS upon request.

For FBARs due for reporting years prior to 2015, the deadline for the report to be filed with the Treasury Department was June 30 of the following year, with no extensions.[89] For FBARs due for reporting years 2015 and later, the deadline for the report to be filed with the Treasury Department is April 15 of the following year, and the due date may be extended to October 15 of that year.[90] For U.S. citizens or residents whose tax homes are outside of the U.S. and Puerto Rico, the initial due date is June 15 of the year following the year for which the FBAR is filed, if a statement is attached to the report stating that the person for whom it is filed qualifies for the later due date.[91] Such taxpayers may also extend the due date to October 15 of the same year.

*"A non-U.S. citizen is considered a resident of the U.S. for purposes of the FBAR regulations if the person is a resident for income tax purposes under Code § 7701(b)."*

Under the Obama Administration, there has been heightened enforcement of the provisions of 31 U.S.C § 5314 and the filing of FBARs by the Financial Crimes Enforcement Network, an agency of the Treasury Department. Part of this heightened enforcement has come in the form of amended regulations with respect to 31 U.S.C § 5314, found at 31 CFR § 1010.350 and which are effective as of 28 March 2011 (the "FBAR Regulations"). The heightened enforcement has also come in the form of three recent voluntary disclosure programs by the criminal enforcement division of the IRS, one which ended in October of 2009, a second which ended on 9 September 2011, and a third which began in 2012 and is still in effect.

Under the FBAR Regulations, a United States person is defined as a U.S. citizen, a non-citizen of the U.S. who is a resident of the U.S., and an entity, such as a corporation, partnership, trust, or limited liability company, organized or formed under the laws of the U.S. (referred to herein as a "U.S. person").[92] As noted above, a U.S. person who has a financial interest in or signature or other authority over a foreign account in a particular year must file an FBAR for that year if the aggregate value of all such accounts exceeds $10,000.

A non-U.S. citizen is considered a resident of the U.S. for purposes of the FBAR regulations if the person is a resident for income tax purposes under Code § 7701(b). A non-citizen of the U.S. is a resident under this statute if

the person is a lawful permanent resident of the U.S. at any time during the calendar year through the issuance of a so-called "green card" or by satisfying the "substantial presence test." The substantial presence test is satisfied with respect to any calendar year if the individual was present in the United States on at least thirty-one days during the calendar year, and the sum of the number of days on which such individual was present in the U.S. during the current year, one-third of the days such individual was present in the preceding calendar year, and one-sixth of the days such individual was present in the second preceding calendar year equal or exceeds 183 days.[93] An individual is not be treated as meeting the substantial presence test if the such individual is present in the U.S. on fewer than 183 days during the current year and it is established that for the current year such individual has a tax home (as defined in Code § 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the U.S. [94]

A "financial account" includes "any bank, securities, or other financial account in a foreign country. . . ."[95] The supplementary information to the FBAR Regulations states that an account is not a foreign account if it is maintained with a financial institution located in the U.S. Therefore, securities of a foreign company held in a brokerage account located in the U.S. are not considered to be held in a foreign account.[96]

*"A U.S. person also must report a foreign account on the person's annual FBAR if the person has signature authority or other authority over the account, even if the person does not have a financial interest in the account."*

A United States person has a "financial interest" in a foreign financial account if the person is the owner of record of the account or has legal title to the account, regardless of whether the account is maintained for such person's own benefit or for another's benefit, *e.g.*, as a trustee, custodian, guardian, etc.[97] A U.S. person also has a financial interest in a foreign financial account if: (1) the record owner of the account is a person acting as agent for the U.S. person; (2) the record owner is a corporation (or any other entity) in which the U.S. person owns directly or indirectly more than fifty percent of the voting power or total value of shares of stock; (3) the record owner is a partnership (or any other entity) in which the U.S. person owns directly or indirectly more than fifty percent of the interest in the profits or capital; (4) the record owner is a trust of which the U.S. person is the grantor and of which the person is treated as the owner under Code §§ 671 to 679; or (5) the record owner is a trust in which the U.S. person either has a present beneficial interest in more than fifty percent of the assets or from which such person receives more than fifty percent of the current income.[98] It is important to note, however, that a beneficiary of a trust who either has a present beneficial interest in more than fifty percent of the trust assets or who receives more than fifty percent of the current income, is excused from reporting the trust's foreign accounts on a FBAR if the trust, trustee of the trust, or agent of the trust is a U.S. person who files a FBAR setting forth the trust's foreign accounts.[99] In any event, it would behoove the beneficiary to report the foreign accounts on the beneficiary's own FBAR, in case the trustee should fail to do so.

The supplementary information to the FBAR Regulations clarify a number of questionable issues with respect to determining whether a person has a financial interest in a trust. First, the question had been raised as to whether a trust that has an interest in a foreign account should itself have to file an FBAR if the U.S. trustee of the trust would have an obligation to file an FBAR under the above rules. The supplementary information acknowledges that in this case the U.S. trustee would have an FBAR filing obligation, but states that it has nevertheless been decided to retain the term "trust" under the definition of U.S. person.[100]

Second, the supplementary information to the FBAR regulations addresses the issue of the reporting requirements of a U.S. person who is a discretionary beneficiary of a trust. The supplemental information acknowledges that determining whether a discretionary beneficiary of a trust has a present beneficial interest in more than fifty percent of the assets of the trust is difficult, and states that it is not intended for a beneficiary of a discretionary trust to be deemed to have a financial interest in a foreign account simply because such person is a discretionary beneficiary.[101] Therefore, if a beneficiary is only a discretionary beneficiary of a trust with foreign accounts, and the beneficiary has no other powers over or interests in the trust, the beneficiary should not have to report any foreign accounts of the trust on the beneficiary's FBAR, even if the beneficiary is the only current beneficiary of the trust.

*"Beginning 22 October 2004, nonwillful violations without reasonable cause result in a penalty of up to $10,000."*

A U.S. person also must report a foreign account on the person's annual FBAR if the person has signature authority or other authority over the account, even if the person does not have a financial interest in the account. "Signature authority" or "other authority" is defined by the FBAR Regulations as ". . . the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in

a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained."[102] The supplemental information to the FBAR Regulations states that the test to ascertain whether someone has signature or other authority over a foreign account is whether the foreign financial institution will act upon a communication from the person regarding the account.[103]

**For Each Reportable Foreign Financial Account, the Following Information Must Be Supplied on the FBAR:**

(5) the maximum value of the account during the calendar year in question;

(6) the type of account (bank, securities, etc.);

(7) the name of the financial institution in which the account is held;

(8) the account number or other designation; and

(9) the mailing address of the financial institution in which the account is held.

A U.S. person with a financial interest in over 25 foreign bank accounts, however, need only indicate this fact on the FBAR and need not list the information for all the accounts, as long as information for the accounts is made available to the Treasury Department upon request.[104]

### B. FBAR Penalties

The penalty for failure to file the FBAR, if due to a willful violation, is the greater of $100,000 or fifty percent of the balance in the account at the time of the violation in the case of failure to report the existence of the account or any identifying information.[105] If a U.S. person learns that he or she was required to file FBARs for earlier years, the U.S. person should file the delinquent FBARs and attach a statement explaining why the reports are being filed late.[106] No penalty will be asserted if the IRS determines that the late filings were due to reasonable cause (discussed above).[107] Beginning 22 October 2004, nonwillful violations without reasonable cause result in a penalty of up to $10,000.[108]

*"Note that the filing threshold under Code § 6038D is higher than the $10,000 filing threshold for the FBAR."*

Note that FBAR is not an IRS form and is not filed with the IRS. Rather the FBAR is filed with the U.S. Department of the Treasury, P.O. Box 32621, Detroit, MI 48232-0621.[109] The due date of the FBAR (June 30) is not tied to the filer's income tax return (*e.g.*, Form 1040), and there is no extension of time available for filing the FBAR.

According to the IRS website,[110] if there is insufficient information available to file the FBAR by the due date, the form should be filed with such information as is available, and an amended form should be filed later when information becomes available.

### C. Code § 6038D

31 U.S.C § 5314, which imposes the FBAR reporting requirements, is not an Internal Revenue Code provision, and the FBAR is not filed with the IRS, but is filed with the Department of Treasury. Therefore, the information reported on the FBAR is not readily available to the IRS for purposes of enforcement. Recognizing the inability to readily access this information, Congress enacted Section 511 of FATCA, entitled "Disclosure of Information with Respect to Foreign Financial Assets." This section of FATCA provides for Code § 6038D, entitled "Information with Respect to Foreign Financial Assets." Temporary regulations were issued under Code § 6038D on 14 December 2011, and were effective for tax years beginning after 19 December 2011, and expired on 12 December 2014.[111] Final regulations were issued under Code § 6038D on 12 December 2014 and are effective for tax years beginning after 19 December 2011.[112]

*"Note that this definition is broader than the definition of foreign accounts under the FBAR Regulations, since, unlike the FBAR Regulations, this definition includes a foreign security held in a brokerage account located in the U.S."*

Code § 6038D applies to tax years beginning after 2010 (therefore, 2011 was the first year for which the requirements of this section were applicable).[113] Code § 6038D and the regulations thereunder provide that any "specified person" who has any "interest" in a "specified foreign financial asset" ("SFFA") must attach to his or her income tax return certain information with respect to that asset if the aggregate value of all such assets exceeds $50,000 on the last day of the taxable year or $75,000 at any time during the year.[114] For married specified persons filing a joint return the thresholds are $100,000 and $150,000, respectively (with respect to aggregate value of all SFFAs in which either spouse has an interest); for individual persons living abroad the thresholds are $200,000 and $300,000, respectively; and for married specified persons filing a joint return where one of the spouses lives abroad, the thresholds are $400,000 and $600,000, respectively (with respect to aggregate value of all SFFAs in which either spouse has an interest).[115] As noted above, the form that is used to meet the filing requirements under Code § 6038D is IRS Form 8938.

A specified person is a "specified individual" or "specified domestic entity." A "specified individual" includes a U.S. citizen and a resident alien of the U.S.[116]

Under the regulations, a specified individual is not required to report SFFA's on Form 8938 for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer pursuant to a provision of a treaty and who is treated as a nonresident alien pursuant to the treaty for purposes of computing his or her U.S. tax liability with respect to the portion of the taxable year the individual is considered a dual resident taxpayer.[117]

*"Such a person would not have a filing obligation under the FBAR Regulations, as discussed above."*

Note that the filing threshold under Code § 6038D is higher than the $10,000 filing threshold for the FBAR. Therefore, while many individuals with foreign accounts may have to file both an FBAR and the Form 8938, some may only have to file the FBAR. If the requirements for filing both the FBAR and Form 8938 are satisfied, then both forms must be filed.[118]

In addressing comments regarding the perceived duplicative nature of the FBAR reporting requirements of 31 U.S.C § 5314 and the requirements to file IRS Form 8938 under 26 U.S.C § 6038D, the preamble to the final regulations under § 6038D notes the following:

> Congress enacted both the Title 31 and the Title 26 provisions regarding the reporting requirements of the FBAR and Form 8938. Reporting on the FBAR is required for law enforcement purposes under the Bank Secrecy Act, as well as for purposes of tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These different policies are reflected in the different categories of persons required to file Form 8938 and the FBAR, the different filing thresholds for Form 8938 and FBAR reporting, and the different assets (and accompanying information) required to be reported on each form. Although certain information may be reported on both Form 8938 and the FBAR, the information required by the forms is not identical in all cases, and reflects the different rules, key definitions (for example, "financial account"), and reporting requirements applicable to Form 8938 and FBAR reporting.[119]

Based on the above position of the preamble, it appears that the dual reporting requirements of the FBAR and Form 8938 are here to stay.

A "specified foreign financial asset" is defined by Code § 6038D(b) as any financial account maintained by a foreign financial institution, any stock or security not issued by a U.S. person, any financial instrument or contract held for investment that has an issuer which is other than a U.S. person, and any interest in a foreign entity. Note that this definition is broader than the definition of foreign accounts under the FBAR Regulations, since, unlike the FBAR Regulations, this definition includes a foreign security held in a brokerage account located in the U.S. Also, the term "foreign entity" includes an interest in a foreign trust. This makes the reach of Code § 6038Ds reporting requirement broader than those of 31 U.S.C § 5314 and the FBAR Regulations, since an individual who is the discretionary beneficiary of a trust with foreign accounts, or who just has a very small current interest in a trust that has a foreign account, could have an SFFA and therefore a filing obligation under Code § 6038D. Such a person would not have a filing obligation under the FBAR Regulations, as discussed above.

A specified person has an "interest" in an SFFA if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the SFFA are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return.[120] A specified person has an interest in an SFFA even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the SFFA for the taxable year.[121]

*"Receipt of a distribution from the foreign trust is considered actual knowledge."*

The regulations clarify when an interest in a foreign trust or a foreign entity and assets held by a foreign trust or foreign entity are considered SFFAs with respect to a particular specified person. A specified person is not treated as having an interest in any SFFAs held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity (as is the case with FATCA in many instances, a trust is treated as an "entity" even though it is not an entity for common law purposes).[122] If a trust is a grantor trust for U.S. tax purposes under Code §§ 671 to 679, the beneficiary will be treated as the owner of the SFFAs held by the trust, regardless of whether the trust itself is a foreign trust.[123]

With respect to a beneficial interest of a specified person in a foreign trust, the interest is not considered an SFFA that must be reported on Form 8938 unless the person knows or has reason to know based on readily accessible information of the interest.[124] Receipt of a distribution from the foreign trust is considered actual knowledge.[125]

If a specified person owns a foreign or domestic entity that is disregarded as an entity separate from its owner as described under the "check the box regulations" of Treas. Reg. § 301.7701-2, the specified person is treated as having an interest in any SFFAs held by the disregarded entity.[126] Consequently, such a specified person must report the SFFAs held by the disregarded entity on his or her annual Form 8938.

*"FATCA reporting and withholding is intended to prevent U.S. persons from avoiding U.S. tax on unreported income or assets held in or paid to accounts outside of the United States."*

Code § 6038D(c) provides that the information that must be reported is the name and address of the financial institution or issuer, the account number, such information needed to identify the class or issue of a security or needed to identify such other instrument that is owned by the taxpayer, and the maximum value of the asset during the year. If the taxpayer fails to provide this information, a penalty of $10,000 will be imposed, and if the failure continues for ninety days after the day that the IRS mails a notice of such failure, and additional $10,000 penalty will be imposed for each thirty day period that the failure continues after the expiration of the ninety day period, up to a maximum penalty of $50,000.[127] No penalty will be imposed if the failure to provide this information is due to reasonable cause and not to willful neglect.[128]

If a specified person is a beneficiary of a foreign trust, the maximum value of the specified person's interest in the trust is the sum of: (i) the fair market value determined as of the last day of the year of all of the currency and other property distributed from the trust during the year to the beneficiary; and (ii) the value as of the last day of the year of the specified person's right as a beneficiary to receive distributions from the foreign trust as determined under Code § 7520.[129] For purposes of determining the Code § 6038D reporting threshold for a specified person with an interest in a foreign trust, if the person does not know or have reason to know, based upon readily accessible information, the fair market value of his or her interest in the trust, the value to be included in determining the aggregate value of the SFFAs of the person is the same as the maximum value, discussed above.[130]

Therefore, in the case of a foreign trust, for a year in which the beneficiary does not know, or have reason to know based on readily accessible information, the fair market value of the beneficiary's interest and the beneficiary does not receive a distribution, the value of the beneficiary's interest in the trust is considered to be zero. Consequently, if a specified person is a completely discretionary beneficiary of a foreign trust, and he or she has not received any distributions from the trust during the tax year and has no other SFFAs, the interest in the trust would not be reportable on Form 8938. If the same person has other SFFAs that put him or her over the Code § 6038D reporting threshold discussed above, then the person would have to include the interest in the foreign trust on his or her Form 8938, even if it has a value of zero under the above valuation rules.

## V. Reporting Requirements of Trustees of Foreign Trusts under FATCA

### 1. General Background

FATCA reporting and withholding is intended to prevent U.S. persons from avoiding U.S. tax on unreported income or assets held in or paid to accounts outside of the United States. FATCA provides the IRS with additional sources of information regarding accounts maintained by non-U.S. financial institutions for U.S. persons. FATCA imposes a thirty percent withholding tax on withholdable payments to a foreign financial institution ("FFI").[131] An FFI may avoid such withholding if it enters an FFI Agreement with the IRS, after which it is considered to be a Participating Foreign Financial Institution ("PFFI").[132]

*"A Trustee's FATCA classification will determine its duties under FATCA."*

To address conflicts that FFIs may face between following FATCA and following conflicting local law in the FFI's own jurisdiction, many non-U.S. governments have entered so-called Inter-governmental Agreements.[133] Under an intergovernmental agreement ("IGA"), the non-U.S. government (a "FATCA Partner") agrees to require the FFIs in its jurisdiction to comply with FATCA or local laws implementing FATCA. The U.S. Treasury Department has issued two model IGAs that are the starting point for negotiations with FATCA Partners.

Under the Model 1 IGA, the non-U.S. government agrees to enact its own laws that implement FATCA or a similar regime that requires financial institutions in its jurisdiction to report to that non-U.S. government (as opposed to the IRS) on U.S. accounts holders.[134] Under the Model 2 IGA, the non-U.S. government agrees to enact laws that will allow financial institutions in its jurisdiction to comply with FATCA and report on U.S. account holders directly to the IRS under an FFI agreement.[135]

### 2. Classification of Trusts and Trustees

A Trustee's FATCA classification will determine its duties under FATCA. Under FATCA a trust is considered an entity, even though it may not be considered an entity under common law.[136] The trustee of a non-U.S. trust will therefore need to determine the FATCA classification of the trust. If the trust holds a private investment company ("PIC") formed outside of the United States that has not

elected to be treated as a U.S. company for U.S. federal income tax purpose, the PIC will also be considered a non-U.S. entity that will need to determine its FATCA classification. In a common offshore trust structure, one PIC would hold a bank account, another PIC may hold financial investments, and another may hold real property or tangible personal property.

*"Neither the FATCA Regulations nor the IGAs specifically require a trustee to carry out the FATCA obligations for the trust."*

In this typical trust scenario, FATCA rules may apply at different levels. For example, assume the trust is a settlor-directed irrevocable non-U.S. that is in a jurisdiction that has entered into a Model 1 IGA that owns one hundred percent of the shares of a non-U.S. PIC which has not made any elections under U.S. tax law. Assume that the PIC owns marketable securities held at a non-U.S. bank in a jurisdiction that has entered into a Model 2 IGA. The bank will apply the Model 2 IGA to determine the FATCA status of the PIC. If the PIC is nothing more than a holding company, then it will probably be an FFI that must report on its owner directly to IRS. At the level of the non-U.S. Trust, the trustee will need to consider the Model 1 IGA and local implementing legislation to determine Trust's FATCA status. In such case, the non-U.S. trust will likely need to report on its beneficiaries to the non-U.S. jurisdiction where it was formed. Finally, if the trust has a non-U.S. trustee, the trustee is likely to be an FFI under FATCA or the IGA applicable in the trustee's jurisdiction and will need to report on the trust accordingly. FATCA uses the Form W-8BEN-E (or substitute form) to provide the FATCA classification for the entity providing the form to the party requesting the form.

As a non-U.S. trust company, the trustee should be considered an FFI because it is an "investment entity." An "investment entity" is an entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities for or on behalf of a customer:

a) trading in money market instruments (e.g., cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange, exchange, interest rate and index instruments, transferable securities, or commodity futures trading;

b) individual and collective portfolio management; or

c) otherwise investing, administering, or managing funds or money on behalf of other persons ("Investment Management Activities").[137]

Non-U.S. trust companies are likely to be considered investment entities under the last category of otherwise investing, administering, or managing funds or money on behalf of other persons. This would be considered a type 1 classification. If trusts or PICs have mostly passive income from financial assets they should qualify as investment entity FFIs.[138]

A type 1 classification is an FFI that engages in Investment Management Activities. A type 2 classification is an FFI that is managed by a person who engages in Investment Management Activities on behalf of the entity. As noted above, a non-U.S. trust company will qualify as type 1 investment entity. The trusts for which such trustees serve will qualify as type 2 investment entities. A type 2 investment entity is "managed" by an FFI that performs Investment Management Activities on behalf of the entity and fifty percent or more of the managed entity's gross income must be attributable to investing in financial assets.[139]

Neither the FATCA Regulations nor the IGAs specifically require a trustee to carry out the FATCA obligations for the trust. However, since most jurisdictions do not recognize trusts as separate legal entities, the trustee is the legal person that must act for the trust. As such, the trustee will need to comply with FATCA or the IGA for itself, if it is a non-U.S. trust company, and for the trust.

*"A beneficiary who is entitled to a mandatory distribution from the trust is considered an account holder of the trust."*

Under the FATCA regulations, the following persons may be considered account holders of a trust that is an investment entity FFI: (1) any person treated as the owner of all or a portion of the trust under the grantor trust rules; (2) a beneficiary who is entitled to a mandatory distribution from the trust; and (3) a beneficiary who may receive a discretionary distribution[140] from the trust, but only if such person receives a distribution in the calendar year.[141]

If the settlor of a foreign trust that is treated as a grantor trust dies, the trust will convert from a foreign grantor trust to a foreign non-grantor trust. This should not change the trust's FATCA classification. However, this conversion does change the identity of trust's account holders for FATCA purposes. For example, the settlor is no longer an account holder at his or her death. A beneficiary may become an account holder of the trust if the beneficiary was not already an account holder.

A beneficiary who is entitled to a mandatory distribution from the trust is considered an account holder of the trust. Such a beneficiary should be considered an account holder of the trust whether or not the settlor is alive and whether or not the settlor retains powers over the trust. A person is a mandatory beneficiary if the person has the right to receive directly or indirectly a mandatory dis-

tribution from the trust. A mandatory distribution is a distribution that is required to be made pursuant to the terms of the trust document.

A trust settled by a non-U.S. person may be treated as a grantor trust, provided that the settlor retains a right to revest the trust assets in himself or herself by way of a power of revocation. A revocable grantor trust may nonetheless make a distribution to a beneficiary who is a U.S. person. A discretionary beneficiary of a revocable grantor trust is treated for U.S. federal income tax purposes of the beneficiary to be receiving a gift from the grantor rather than a distribution from the trust. Such a gift received is subject to reporting by the beneficiary but generally is not subject to tax in the beneficiary's hands. Notwithstanding that there is generally no tax on the distribution, the trustee should obtain the FATCA documentation for the grantor and should obtain the FATCA documentation for the beneficiary to the extent a distribution is paid to the beneficiary during the calendar year.

A discretionary beneficiary of an irrevocable foreign grantor trust should not be treated as an account holder until the year in which the trust makes a distribution to the beneficiary. As explained above, in order to qualify as an irrevocable foreign grantor trust, the only amounts distributable from the trust during the lifetime of the settlor may be distributed only to the settlor and the settlor's spouse. Because the beneficiaries of an irrevocable grantor trust are limited to the settlor and the settlor's spouse during the settlor's lifetime, the trust may not make distributions to U.S. persons other than the settlor's spouse.

If a non-U.S. person settlor's U.S. person spouse is permitted to benefit from the trust during the settlor's lifetime and such spouse receives a distribution, the trustee should treat the U.S. person spouse as an account holder of the trust. Notwithstanding that there is generally no tax on the distribution (since the trust is a grantor trust), the trustee should obtain the FATCA documentation for the grantor and should obtain the FATCA documentation for the spouse to the extent a distribution is paid to the beneficiary during the calendar year.

A foreign trust from its inception may be a foreign non-grantor trust. Even a properly structured grantor trust becomes a non-grantor trust upon the death of the non-U.S. grantor. If a trustee of a foreign non-grantor trust makes a distribution to a U.S. person beneficiary, the trustee will be required to treat such U.S. person beneficiary as an account holder of the trust for FATCA purposes. Such a distribution is subject to reporting by the trustee under FATCA. The value of the "account" to be reported for a discretionary beneficiary should be the value of the distribution made during the year.

A PFFI is required to deduct and withhold thirty percent of any withholdable payment made by the PFFI to an account held by a recalcitrant account holder or to an NPFFI. These withholding obligations of a PFFI with respect to a recalcitrant account holder do not apply to accounts maintained by a reporting FATCA Partner financial institution under an IGA.

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## Endnotes

1. Internal Revenue Code § 7701(a)(30)(E); Treas. Reg. § 301.7701-7(a)(1). Except where otherwise indicated, all references in this article to the "Code" shall be construed to mean the U.S. Internal Revenue Code of 1986, as amended. Furthermore, except where otherwise indicated, all references in this memorandum to the "Treasury Regulations," the "Regulations," and "Treas. Reg." shall be construed to mean the pertinent regulations promulgated by the U.S. Secretary of the Treasury.
2. Code § 7701(a)(31)(B).
3. Code § 671.
4. *See* discussion under Section D below for the definition of a "U.S. person."
5. IRS Notice 97-34, 1997-1 C.B. 422, Section III.A.
6. Code § 679(a)(4).
7. Code § 679(c)(1), (d).
8. Code § 679(c)(4).
9. Code § 679(c)(5).
10. Code § 679(d).
11. Code § 679(c)(3).
12. Code § 672(f)(1).
13. *Id.*
14. *See, e.g.*, Rev. Rul. 69-70, 1969-1 C.B. 182.
15. Code § 672(f)(2)(A)(i).
16. Treas. Reg. § 1.672(f)-3(a)(1).
17. Treas. Reg. § 1.672(f)-3(a)(2).
18. *Id.*
19. Treas. Reg. § 1.672(f)-3(a)(1).
20. Code § 672(f)(2)(A)(ii).
21. Treas. Reg. § 1.672(f)-3(b)(2)(i).
22. Not including, however, those treated as owned by the grantor under Code §677(a)(3) because of the application of trust income to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse. Treas. Reg. § 1.672(f)-3(d).
23. *Id.*
24. Code § 643(a)(6).
25. Code § 651(a); Treas. Reg. § 1.651(a)-1.
26. Code §§ 651(a), 652.
27. I.R.C §§ 651(b), 652(a).
28. Code § 661(a); Treas. Reg. § 1.661(a)-1.
29. Code § 661(a).
30. Code § 662(a).
31. Code § 662(a)(2).
32. Code §§ 662(a)(2), 665–668.
33. Code § 665(b).

34. Code § 665(c).
35. Code § 667(a).
36. Code § 667(b).
37. Code §§ 1(h)(11) and 1411.
38. Code § 667(b)(1); *see* IRS Form 4970 and Instructions.
39. Code §§ 667(a)(3), 668(a), 6621(a).
40. Code § 684(a).
41. Code § 684(b)(1).
42. Code §§ 6048(a) and (c).
43. IRS Notice 97-34, 1997-1 C.B. 422, Section V; Code § 643(i); Treas. Reg. § 1.643(h)-1.
44. Note that this may be a different address from that at which the beneficiary files his or her U.S. income tax return.
45. Code § 6048(c)(2).
46. IRS Notice 97-34, 1997-1 C.B. 422, Section V.B.
47. *Id.*
48. The trustee should file IRS Form 3520-A with the Internal Revenue Service Center, P.O. Box 409101, Ogden, UT 84409, by the same date.
49. *See* IRS Form 3520 Instructions (2008) (Line 22).
50. *See* IRS Form 3520 Instructions (Line 23). Filing IRS Form 8082 does not relive the taxpayer of penalties for failure to cause the trust to file IRS Form 3520-A. *See id.*
51. The information may be entered instead on Schedule A of IRS Form 3520, but generally it is more beneficial to complete Schedule B, which calculates the portion of the distribution that should be treated as current or accumulated income based on actual facts. To complete Schedule B, the trustee must characterize the income on the Foreign Nongrantor Trust Beneficiary Statement so as to distinguish between ordinary income, accumulation distribution, capital gains, and distribution of corpus
52. IRS Form 3520 Instructions (Line 30).
53. *See* Code § 6048(c)(2)(A) and Part III.D. of this article, below.
54. IRS Form 3520 Instructions (Line 32).
55. IRS Form 3520 Part III and Instructions.
56. Code § 667(b)(1); *see* IRS Form 4970 (2008) and Instructions.
57. *See* IRS Form 3520-A Instructions, "U.S. Agent," p. 2.
58. *See also* IRS Notice 97-34, 1997-1 C.B. 422, Section IV.B.
59. *See* Code § 6048(b)(2)(A).
60. *See* IRS Form 3520-A Instructions, "U.S. Agent," p. 2; Section 6048(b)(1)(A).
61. *See* IRS Notice 97-34, 1997-1 C.B. 422, Section IV.B. IRS Notice 97-34 does not mention IRS Form 3520 in this context. On one hand, as IRS Form 3520-A only applies to foreign grantor trusts, as IRS Notice 97-34 was issued prior to revision of IRS Form 3520, and as information on the U.S. agent is requested on Line 3 of IRS Form 3520, one could argue that an amended IRS Form 3520 should be filed in the case of a change of U.S. agent for a foreign nongrantor trust. On the other hand, it also seems reasonable to assume that the IRS would place a heavier informational burden on an owner-beneficiary than on a nonowner-beneficiary.
62. *Id.*
63. *See* Code § 6048(c)(2)(A).
64. *See* IRS Notice 97-34, 1997-1 C.B. 422, Section IV.B; IRS Form 3520 Instructions (Lines 29 and 30). The appointment of a U.S. agent in and of itself should have no effect on the trust's U.S. tax liabilities: under Section 6048(b), a foreign trust appointing a U.S. agent will not be considered to have an office or a permanent establishment in the United States, or to be engaged in a trade or business in the United States, solely because of the activities of such agent. Furthermore, the appointment of a U.S. agent will not subject such agent or records to legal process for any purpose other than determining the correct tax treatment of distributions. *See* Code § 6048(b).
65. *See* IRS Form 3520 Instructions (Lines 29 and 30).
66. Code § 6039F(a); Notice 97-34, 1997-1 C.B. 422, Section VI.
67. Code § 6039F(b); Notice 97-34, 1997-1 C.B. 422, Section VI.
68. Notice 97-34, 1997-1 C.B. 422, Section VI.B.1 and 2.
69. *Id.* at Section VI.B.3; see Code § 643(i)(2)(B) for aggregation rules.
70. Code §§ 2501(a)(2) and 2511(a).
71. Code § 6677(b).
72. *See* Code § 6677(a).
73. Code §§ 6677(d), 6039F(c)(2).
74. Internal Revenue Manual 20.1.1.3.1(2).
75. Internal Revenue Manual 20.1.1.3.1.2(2)(A) through (D).
76. *See, e.g.*, Evelyn M. Capassakis, Reporting International Trust and Gift Transactions and Penalties for Failure to Report, Fourth International Estate Planning Institute (27 May 2008).
77. *Id.*
78. *Id.*
79. *Id.*
80. IRS Notice 97-34, 1997-1 C.B. 422, Section VII.
81. *Id.*
82. IRS Form 8082 Instructions, "Penalties."
83. Code § 6662(d)(1).
84. *See* Code § 7454(a).
85. *See Stoltzfus v. U.S.*, 398 F.2d 1002 (3d Cir. 1968).
86. 31 C.F.R § 1010.306(c) and 31 C.F.R. § 1010.350(a). If such is the case, U.S. persons also must answer in the affirmative the question on Form 1040, Schedule B, about their ownership or signatory authority over a foreign account.
87. *Id.*
88. *Id.*
89. *See* FinCEN Report 114 for years prior to 2015, at http://bsaefiling.fincen.treas.gov
90. *See* Section 52105(b)(10) of the DRIVE Act.
91. *See* Section 52105(b)(10) of the DRIVE Act and Treas. Reg. Section 1.6081-5(a)(5) and (b)(1).
92. 31 C.F.R. § 1010.350(b).
93. Code § 7701(b)(3)(A).
94. Code § 7701(b)(3)(B).
95. 31 C.F.R. § 1010.350(a) and (c).
96. Supplementary Information to 31 C.F.R. § 1010.350, at Section II.A.
97. 31 C.F.R. § 1010.350(e)(1).
98. 31 C.F.R. § 1010.350(e).
99. 31 C.F.R. § 1010.350(g)(5).
100. Supplementary Information to 31 C.F.R. § 1010.350, at Section III.B.
101. *Id.* at Section III.I.
102. 31 C.F.R. § 1010.350(f)(1).
103. Supplementary Information to 31 C.F.R. § 1010.350, at Section II.B.
104. 31 C.F.R. § 1010.350(g)(1); Form TD F 90-22.1, General Instructions p. 7 (Item 14).

105. 31 U.S.C § 5321(a)(5). There is an exception if (i) the violation was due to reasonable cause, and (ii) the amount of the transaction or the balance in the account at the time of the transaction was properly reported. *Id.*; see also 31 U.S.C § 5322 for criminal penalties.
106. IRS News Release IR-2008-79 (17 June 2008).
107. *Id.*
108. 31 U.S.C § 5321(a)(5)(A), (B)(i).
109. The delivery address for private courier services is: U.S. Department of Treasury, Currency Transaction Reporting, 985 Michigan Avenue, Detroit, MI 48226. *Id.*
110. FAQs regarding Report of Foreign Bank and Financial Accounts (FBAR), http://www.irs.gov/ businesses/small/ article/0,,id=148845,00.html (last visited 9 December 2008) (Question 10).
111. Treas. Reg. §§ 1.6038D-1T to 1.6038D-8T.
112. Treas. Reg. §§ 1.6038D-1 to 1.6038D-8.
113. FATCA § 511(c).
114. Code § 6038D(a); Treas. Reg. § 1.6038D-2(a)(1).
115. Treas. Reg. § 1.6038D-2(a)(2), (3), and (4).
116. Treas. Reg. § 1.6038D-1(a)(1) and (2).
117. Treas. Reg. § 1.6038D-2(e)(1).
118. *Id.*
119. Preamble to Final Regulations of Code §6038D, Section IV G.
120. Treas. Reg. § 1.6038D-2(b)(1).
121. *Id.*
122. Treas. Reg. § 1.6038D-2(b)(4)(i).
123. Treas. Reg. § 1.6038D-2(b)(4)(ii).
124. Treas. Reg. §§ 1.6038D-2(b)(4)(iv) and 1.6038D-3(c).
125. *Id.*
126. Treas. Reg. § 1.6038D-2(b)(4)(iii).
127. Code § 6038D(d).
128. Code § 6038D(g).
129. Treas. Reg. § 1.6038D-5(f)(2)(i).
130. Treas. Reg. § 1.6038D-5(f)(2)(ii)
131. Code §1471(a).
132. Code §1471(b).
133. Treas. Reg. §1.1471-1(b)(78) and (79).
134. Treas. Reg. §1.1471-1(b)(78).
135. Treas. Reg. §1.1471-1(b)(79).
136. *See* Model 1 IGA, Article 1(1)(gg) and Treas. Reg. §1.1471-1(b)(39) and Code section 7701(a)(1).
137. Treas. Reg. §1.1471-5(e)(4)(A).
138. In addition to the policies underlying FATCA, the deemed compliant categories in the FATCA Regulations and IGA (and the IRS' statement in Notice 2010-60) strongly suggest that private family trusts can be FFIs—otherwise, the development of such deemed compliant categories in the FATCA Regulations and IGAs would have been unnecessary.
139. Treas. Reg. § 1.1471-5(e)(4)(i)(B).
140. A discretionary distribution means a distribution that is made to a person at the discretion of the trustee or a person with a limited power of appointment.
141. Treas. Reg. § 1.1471-5(b)(3)(iii).