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Life after FATCA Annoyance or Disaster?

Swiss-American Chamber of Commerce

Zurich

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by

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I. Overview

A. Collecting U.S. Tax on Offshore Passive Income

- Many in the U.S. Congress believe that U.S. persons who have, or may benefit from, “offshore” assets are attempting to avoid U.S. income tax. Collecting taxes on income from offshore assets is a significant priority for both Congress and the IRS.
 - IRS’ efforts to collect taxes on offshore income, such as the 2009 FBAR voluntary compliance program, have had limited success.¹
 - IRS has launched a “Global High Net Wealth Industry Group” to centralize and focus IRS audit expertise on high net worth individuals.²
 - IRS has identified withholding on payments of U.S. source income as a priority (Tier I) audit issue.
 - In many respects, Congress seems to consider an interest in a foreign hedge or similar fund as much of an issue as a foreign bank account.

1 According to the IRS, only some 14,700 persons applied for the Voluntary Compliance Program.

2 Prepared remarks by Commissioner of Internal Revenue Douglas Shulman before the New York State Bar Association Taxation Section Annual Meeting on January 26, 2010, IRS News Release IR-2010-13.

I. Overview

- The Foreign Account Tax Compliance Act (“FATCA”) was introduced in the House on October 27, 2009 to help prevent future U.S. tax avoidance by the use of offshore financial accounts.
- HIRE,³ legislation to encourage hiring of employees in the U.S. (est. cost \$17 billion), required \$17 billion of “revenue offsets.” Congress added FATCA to HIRE to offset 50% of the required revenue offsets.
 - The FATCA provisions added to HIRE were modified from what was in the 2009 bill, including by extending the effective date for withholding from 1/1/11 to 1/1/13.⁴

3 Hiring Incentives to Restore Employment Act (H.R. 2847) which was enacted on March 18, 2010.

4 There are no House or Senate Committee reports on FATCA: only (i) the Joint Committee on Taxation Technical Explanation of FATCA (10/27/09) when it was introduced in the House; (ii) the Joint Committee on Taxation Technical Explanation of the Revenue Provisions in HIRE (2/23/10) (the “JCE”); and (iii) a statement in the Congressional Record by Sen. Carl Levin (156 Cong. Rec. Sec. 1745 (3/18/10)).

I. Overview

B. Income Tax Rates

- U.S. citizens are subject to U.S. income tax on their global income.
- The U.S. marginal income tax rates (assuming no additional tax increases) will be:

	2010	2011	2012	2013	Total 2013
Ordinary Income	35%	39.6%	+ 1.2% ⁶	+ 3.8% ⁷	44.6%
Dividends	15%	20-39.6% ⁵	+ 1.2%	+ 3.8%	25-44.6%
Long Term Capital Gains	15%	20-25% ⁵	+ 1.2%	+ 3.8%	25-30%

5 Unless there is legislation, the 2011 tax rate will be 39.6%. Recent indications are that the dividends (and long-term capital gains) will be subject to a 25% tax. See, e.g., Goldman Sachs Global Research comment, "Tax Increases on the Horizon," March 2010.

6 1.2% is a "stealth" increase resulting from limitations on deductions.

7 Applies to taxpayers with taxable income generally in excess of \$200,000. Scheduled to take effect for tax years beginning in 2013.

II. Executive Summary of FATCA

A. Entities

- FATCA requires foreign entities to assist in collecting U.S. income tax on income derived by U.S. taxpayers on their “offshore” assets.
- FATCA requires foreign financial institutions (“FFIs”) to either (i) agree to satisfy specified reporting and diligence requirements for each “United States account” or (ii) be subject to 30% U.S. (“Chapter 4”) withholding tax on payments of U.S. source income that the FFI receives on its accounts.
 - It is important to note that the goal of Chapter 4 withholding is to encourage reporting, not collect revenue.
 - The main purpose of FATCA is “to have reporting on offshore financial and other passive investments of U.S. taxpayers so that we can reconfirm the confidence and trust we have in our voluntary regime.”⁸
 - Success will be in the reporting of information to the IRS even if the withholding tax is never collected.
 - Can an FFI avoid FATCA by closing all accounts of U.S. persons? Questionable, since FATCA applies to payments of U.S. source income to an FFI, not the existence of accounts that are beneficially owned by U.S. persons.

8 IRS Associate Chief Counsel (International) Steven Musher (4/26/10), reprinted in Tax Notes International, Vol. 58, No. 5 388 (5/3/10).

II. Executive Summary of FATCA

- FATCA also requires non-financial foreign entities (“NFFEs”) to report the identity of their “substantial U.S. owners.” Failure to comply will subject the NFFE to the 30% (Chapter 4) U.S. withholding tax on U.S. source income that it receives.
- The FATCA withholding tax (Chapter 4) rules apply first. If no Chapter 4 withholding is required, “mainstream” (Chapter 3) withholding may apply. While payments can be subject to both regimes, the intention is that the ordering rule will avoid double withholding.
- FATCA withholding differs from Chapter 3 withholding in several important aspects:
 - Other than FIRPTA gain, “mainstream” U.S. withholding does not apply to capital gains. FATCA withholding applies to the **gross proceeds from the sale** of assets that produce U.S. source dividend and interest income. The “other disposition” language or “other dispositions” may cover stock distributions in tax-free transactions.
 - Unlike Chapter 3 withholding, FATCA withholding does not apply to payments made directly to an individual but only to payments to foreign entities.

II. Executive Summary of FATCA

- FATCA supplements the QI rules, but its reach may be much broader. FFIs participating in the QI program must comply with the new FATCA rules.
 - FATCA applies to a wider range of financial institutions and types of accounts than the QI regime.
- Like the QI rules, FFIs seeking to avoid FATCA withholding must enter into a written agreement with the IRS setting forth their undertakings to the IRS (a “QI2 Agreement”).
- If amounts are incorrectly withheld under Chapter 3 or Chapter 4, the IRS need not pay interest on any refund if it refunds the overpayment within 180 days from the return or claim for refund is filed.
 - The rule for Chapter 3 withholding refunds had been that interest began 45 days from the date the return or claim for refund was filed.
- If tax is withheld, even by error, it will be difficult to obtain a refund. Obtaining a refund will require filing a U.S. tax return and disclosure adequate to establish that there should not have been withholding.
 - In the case of an FFI, there generally will be no refund unless the FFI qualifies for the benefit of a U.S. income tax treaty.

II. Executive Summary of FATCA

B. Bonds and Dividend Equivalents

- FATCA eliminates long-standing practices that were perceived to impact U.S. tax evasion, including:
 - U.S. source interest on bearer bonds will no longer be exempt from U.S. withholding tax.
 - Dividend equivalent payments, frequently used to avoid U.S. income tax on dividend income, will generally be subject to the FATCA withholding tax.

C. Individuals

- While emphasizing foreign entity compliance, FATCA also contains a number of provisions that apply to individual U.S. taxpayers.
- FATCA increases the reporting obligations of U.S. taxpayers by imposing:
 - “FBAR II” reporting requirements; and
 - A Requirement to report investments in foreign hedge funds, private equity funds, etc.

II. Executive Summary of FATCA

- FATCA also provides for a 6-year (vs. a 3-year) statute of limitations for certain omission of income from foreign assets.
- There are also a number of provisions that affect foreign trusts with U.S. beneficiaries.
- There are new penalties for individuals who fail to file a disclosure statement reflecting offshore assets.
 - There is a new 40% accuracy-related penalty on understatements of income attributable to an “undisclosed foreign financial asset.”

III. Reporting or Withholding

- A. FFIs must report information on their United States accounts
- The central feature of FATCA is that an FFI must enter into an agreement (a “QI2 Agreement”) with the U.S. Treasury Department (“Treasury”) under which the FFI (a “Participating FFI”) agrees to obtain and report information on its U.S. accounts or be subject to Chapter 4 withholding tax on U.S. source income that it receives (a “Nonparticipating FFI”). As discussed infra, NFFEs must report information on their beneficial owners or be subject to Chapter 4 withholding tax on U.S. source income that they receive.
 - Payments subject to the new Chapter 4 withholding tax (“withholdable payments”) include U.S. source “fixed or determinable annual or periodical (“FDAP”) income as well as gross proceeds from the sale or disposition of securities that could generate interest or dividends from U.S. sources.
 - Note that, like FIRPTA, Chapter 4’s requirement to withhold on gross proceeds can result in withholding on a sale of a security at a loss. FIRPTA has mechanisms to reduce withholding to the estimated tax on net income.
 - An “FFI” is broadly defined as any “financial institution” that is foreign.

III. Reporting or Withholding

- A “financial institution” is defined as an entity that:
 - Accepts deposits in the ordinary course of a banking or similar business;
 - As a substantial part of its business holds financial assets for others; or
 - Is engaged (or is held out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities or any interest (including a futures, forward or option contract or option in such items).
- Foreign investment vehicles (e.g., as foreign hedge funds, etc.) are FFIs.
 - Would the definition of FFI cover a wholly owned foreign private investment company (“PIC”)?
 - Would the definition of FFI include a foreign insurance company? The JCE suggests that the answer may be yes.
- The definition of FFI is “clearly intended” to be applied “broadly, to include banks, securities firms, money services businesses, money exchange houses, hedge funds, private equity funds, commodity traders, derivative dealers, and any other type of financial firm that holds, invests or trades assets on behalf of itself or another person.”⁹

⁹ Statement by Sen. Carl Levin at 156 Cong. Rec. Sec. 1745 (3/18/10).

III. Reporting or Withholding

- A “United States account” generally includes:
 - A “financial account” held by a “specified U.S. person” (i.e., U.S. citizen, resident or business); and
 - A “financial account” held by a foreign entity that, directly or indirectly, has one or more “substantial U.S. owners.”
 - A “U.S. person” is a U.S. citizen, U.S. resident and all types of U.S. businesses.
- A “financial account,” which is the type of account that an FFI or NFFE must potentially consider as a “United States account,” is a:
 - Depository account maintained by a financial institution;
 - Custodial account maintained by a financial institution; or
 - Generally any non-publicly traded/equity or debt interest in an FFI (such as an interest in a hedge fund, private equity fund and other types of investment firms).
 - The JCE indicates that annuities and cash value life insurance policies may be financial assets. The proposed FBAR regulations (2/26/10) treat annuities and cash value life insurance policies as “financial accounts” for FBAR purposes. Prop. Reg. § 31.103.24 (c) (3).

III. Reporting or Withholding

B. QI2 Agreement

- Unless an FFI enters into a QI2 Agreement to provide information with respect to each “United States account,” payments of U.S. source income to the FFI are subject to a 30% U.S. withholding tax.
 - The IRS will develop a standard form QI2 Agreement after consultation with the Department of Justice to determine the best structure to use the information in tax enforcement.
- A QI2 Agreement will require an FFI to:
 - Obtain information regarding each account holder as is necessary to determine which accounts are “United States accounts”;
 - Comply with verification and due diligence procedures (to be prescribed by Treasury) with respect to the identification of United States accounts;
 - Comply with requests by Treasury for additional information with respect to any United States account maintained by the FFI;
 - Attempt to obtain a waiver in any case in which any foreign law would (but for a waiver) prevent reporting of information with respect to any U.S. account maintained by such institution and, if a waiver is not obtained within a reasonable period of time, to close the account;
 - If the account owner is a foreign entity with a “substantial U.S. owner,” the FFI must also report the name, address and TIN for each substantial U.S. owner;

III. Reporting or Withholding

- Report annually certain information related to any U.S. account maintained by such institution;
 - Deduct and withhold a 30 % tax from any “pass through payments” made by the FFI for the benefit of an account holder that refuses to provide the required information (a “recalcitrant account holder”) or other FFIs not meeting the requirements of FATCA.
- The JCE states (at page 4) that in complying with FATCA, an FFI and its affiliates will comply with “know your customer,” anti-money laundering, anti-corruption and similar rules as well as rules the Secretary may prescribe, both with respect to due diligence by the FFI and verification by or on behalf of the IRS to ensure the accuracy of the information, documentation or certification obtained to determine if the account is a United States account.
- An FFI must annually report the following information on all United States accounts:
- Name, address and TIN of each holder if a specified United States person;
 - Name, address and TIN of each “substantial United States owner” of any account holder that is a U.S.-owned foreign entity;
 - The account number; and
 - The account balance or value; and
 - Gross receipts and gross withdrawals or payments from the account.
- Alternatively, an FFI may elect to be subject to Form 1099 reporting.

III. Reporting or Withholding

- C. Non-Financial Foreign Entities (“NFFEs”) must report on “substantial U.S. owners” and are subject to the Chapter 4 withholding rules on withholdable payments if the beneficial owner of such payment is an NFFE that has not complied with FATCA.
- An NFFE is any foreign entity that is not a FFI. A foreign entity is any entity that is not a U.S. person.
 - A publicly traded corporation, certain U.S. possessor-entities, foreign government, international organization, foreign central bank, and entity that the IRS may identify are not NFFEs.
 - A withholding agent making payments of U.S. source income to an NFFE must withhold a 30% (Chapter 4) withholding tax unless the withholding agent receives:
 - A certification that the NFFE has no “substantial U.S. owners” or report the name, address and TIN of each “substantial United States owner”;

III. Reporting or Withholding

- A withholding agent can rely on an NFFE's certification if the withholding agent does not know, or have reason to know, that the information provided by the NFFE is incorrect; and
- The withholding agent must report the name, address and TIN of the NFFE to IRS in the manner to be prescribed by Treasury.
- A "substantial U.S. owner" generally is a 10%+ (by vote or value) U.S. owner of a foreign entity.
 - Ownership is broadly defined and includes vote, value or profits.
- In the case of a foreign investment vehicle, a specified United States owner is a person who owns any interest in the investment vehicle.
- Effective Date - Chapter 4 withholding is effective for payments made after December 31, 2012.
 - However, payments or gross proceeds from the disposition of any obligation outstanding on March 18, 2012 are exempt from Chapter 4 withholding.

IV. Bearer Bonds and Dividend Substitute Payments

A. Bearer Bonds – Elimination of Withholding Tax Exemption

- FATCA repeals the “foreign targeted” bearer bond exemption from Chapter 3 withholding tax. Thus, interest payable on a bearer bond will be subject to a 30% (or lower treaty rate) Chapter 3 withholding tax.
 - FATCA provides that debt obligations held through a dematerialized book system is a registered bond and thus not affected by the law change.
- The only exception is that bearer bonds may still be exempt for purposes of the U.S. excise tax on the principal amount of the bonds.
- Effective Date - The repeal is effective for obligations issued after March 18, 2012.

IV. Bearer Bonds and Dividend Substitute Payments

B. Substitute Dividends and Dividend Equivalent Payments

- FATCA also modifies the U.S. tax treatment of a “substitute dividend” payment and a “dividend equivalent payment” (“DEP”) made to a foreign person with reference to U.S. equities by resourcing such payments as U.S. source income.
 - A DEP is any substitute dividend payment that is made under a lending or sale-repurchase (“REPO”) transaction, or any payment made pursuant to a “specified notional principal contract” that directly or indirectly is either contingent upon or determined by reference to a U.S. source dividend or any other payment designated by regulations to be “substantial similar” to one of the foregoing payments.
 - By resourcing dividend substitute payments and DEPs to the United States, such payments become subject to U.S. Chapter 3 or Chapter 4 withholding tax.
- Effective Date – There are two effective dates:
 - 180 days after HIRE’s enactment date (March 18, 2010) which is on or after September 14, 2010 with respect to “specified notional principal contracts” and certain reference securities; and
 - March 18, 2012 with respect to payments not exempted by Treasury guidance.

IV. Bearer Bonds and Dividend Substitute Payments

- Notional Principal Contracts (“Swaps”) have a phased-in effective date for two years. The withholding provisions will apply to payments on swaps over U.S. securities made between 180 days and two years after March 18, 2010 if one of five conditions exist:
 - In connection with entering into such a contract, any long party transfers the underlying security to a short party (i.e., “crosses in”);
 - In connection with the termination of such a contract, any short party transfers the underlying security to any long party (i.e., “crosses out”);
 - The underlying security is not readily tradable on an established securities market;
 - In connection with entering into such a contract, the underlying security is posted as collateral by any short party to the contract; or
 - The contract is identified by the Secretary as a specified notional principal contract.

V. Other Reporting

A. PFIC reporting

- A non-U.S. company generally is a PFIC if:
 - 75% or more of its gross income is passive income; or
 - 50% or more of its assets produce passive income (or are held for production of passive income).
- There is no minimum ownership for a non-U.S. company to be a PFIC. Most foreign hedge funds, mutual funds or private equity funds are PFICs.
 - Compare the U.S. CFC rules which require concentrated U.S. ownership exceeding 50% of a non-U.S. company's vote or value.
- A U.S. shareholder of a PFIC is required to file a report (Form 8621) for a year in which he disposes of, or has income by reason of, his PFIC shares.
- FATCA expands the reporting requirements so that a PFIC shareholder must make an annual U.S. tax filing.
- Effective Date - The new PFIC reporting is effective March 18, 2010. However, IRS has announced reporting is deferred until **2011** (Notice 2010-34, 4/6/10).

V. Other Reporting

B. FBAR Reporting

(i) FBAR – Overview

- FBAR (Form TD F 90-22.1) is a Treasury annual report required under USC Title 31, the Bank Secrecy Act of 1970 (the “BSA”).
 - IRS administers FBAR compliance; U.S. Department of Justice, Criminal Division handles enforcement.
- In June 2008, IRS issued a “warning” about FBAR compliance and revised FBAR sections of the IRS Manual.
- In October 2008, IRS published revised FBAR with instructions that expanded definitions including U.S. person and financial accounts.
- Before 2009, many taxpayers did not file FBARs, by ignorance or otherwise. On March 26, 2009, the IRS announced a voluntary compliance program that certain taxpayers who should have filed FBARs might qualify for if they applied to the IRS by September 23, 2009. Both types of non-filers could qualify for the VCP program. IRS extended the date to seek entry into the VCP program until October 15, 2009.

V. Other Reporting

(ii) FBAR – Who Must File an FBAR?

- Any **U.S. Person** who has a **financial interest** *or* **signature authority** over **foreign financial accounts** with an aggregate value exceeding **\$10,000** at any time during the year must file an FBAR for such year.
 - A person required to file an FBAR also must check the appropriate box on their income tax return disclosing that they have a reportable foreign financial account.
- A U.S. shareholder of a Passive Foreign Investment Company (“PFIC”) (regardless of whether a “QEF” election is made) will be required to file an FBAR unless it is excluded from the definition of “foreign financial account” under new guidance that the IRS is considering. Note that an owner of a PFIC must nonetheless report under the new PFIC reporting rules discussed in Section V(A).

V. Other Reporting

(ii) FBAR – Who Must File? (continued)

- A U.S. Person must file an FBAR. For 2009 and after, the term “**U.S. Person**” includes:
 - A citizen or resident of the United States; **and**
 - **Any person *in, and doing business in, the U.S.***
 - The term “**person**” includes an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as defined in the Indian Gaming Regulatory Act), **and all entities cognizable as legal personalities.**
- 2009 FBAR reporting due to the changes in definitions. The IRS resolved two of the major issues in IRS Notice 2010-23 (2/26/10) as follows:
 - Persons with signatory control over, but no financial interest in, a foreign financial account, need not file a 2009 FBAR until 6/30/11; and
 - Unless new guidance provides otherwise, persons owning hedge funds, private equity funds, etc. must report only for 2010 and future years.
- In Announcement 2010-16 (2/26/10), the IRS “suspended” the 2009 FBAR reporting requirement for persons who are not U.S. persons but who are doing business in the United States.

V. Other Reporting

- On 2/26/10, FinCEN published **proposed** FBAR regulations and **proposed** revisions to the FBAR instructions that:
 - Provide that FBARs need not be filed by employees and officers with signatory or other authority over, but no financial interest in, a foreign financial account;
 - Reverse its position on foreign persons “in and doing business in” the United States being required to file FBARs;
 - Eliminate from reporting certain government and “bank-to-bank” accounts;
 - Clarified reporting for accounts held by CFC, partnerships and trusts; and
 - Added an anti-avoidance provision.
- Of particular interest, the proposed FBAR regulations provide that:
 - Owners of an LLC do not need to report with respect to an LLC even if the LLC is transparent;
 - The term “financial account” includes an account with mutual funds or similar pooled funds, but “reserved” treatment for hedge funds, private equity funds, etc.; and
 - Insurance policies with cash value and annuity contracts are “financial accounts” and thus require FBAR reporting.
 - A beneficiary of a trust required to file an FBAR would be exempt from FBAR filing if the trust is a U.S. trust and files an FBAR with respect to the trust’s financial accounts.

V. Other Reporting

(iii) FBAR II

- An individual who holds, in the aggregate, more than \$50,000 of “specified foreign financial assets” must include a disclosure statement with his/her annual U.S. tax return declaring the assets and provide certain information regarding the assets.
- “Specified foreign financial assets” include
 - a depository or custodial account held at an FFI;
 - assets not at an FFI including stock or securities issued by a foreign person, a financial instrument or contract with a foreign contracting party, or any interest in a foreign entity other than an interest that is publicly traded; and
 - Would an interest in a foreign entity not publicly traded be covered?

V. Other Reporting

- Information requested for FBAR II is similar to the information requested by FBAR. Filing an FBAR II statement does not eliminate the need to file an FBAR.
- There is a rebuttable presumption that if an individual had an interest in one or more undisclosed “foreign financial assets,” the \$50,000 filing threshold is satisfied.
- A requirement to file an FBAR II does not exempt a person from having to file an FBAR.
- The penalties for “failure to file” an FBAR II are \$10,000 for failure to file and \$10,000 for each additional 30 days the taxpayer fails to file beginning 90 days after IRS notifies taxpayer of his failure to file. Maximum penalty is \$50,000.
- In addition to the “failure to file” penalty, there is a new, 40% accuracy related penalty on understatements of income attributable to “undisclosed foreign financial assets.”

V. Other Reporting

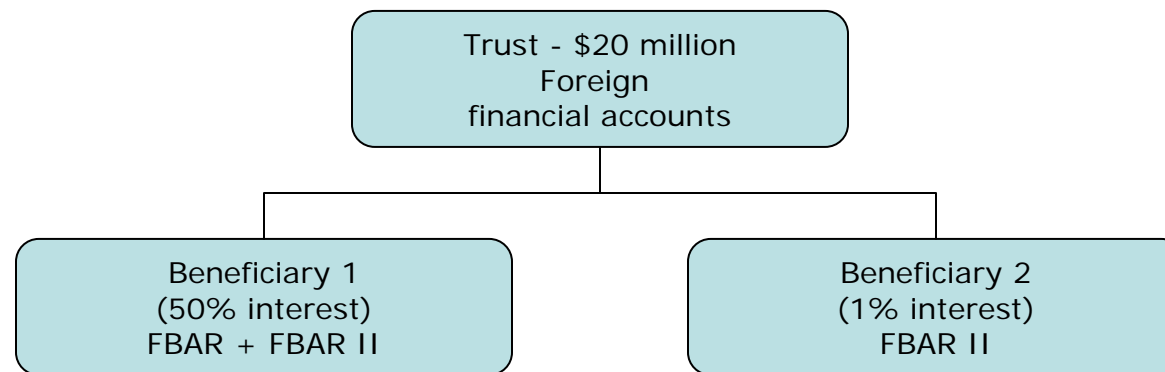
- Effective Date - Taxable years beginning after March 18, 2010.
- FATCA extends the Statute of Limitation from 3 to 6 years if a taxpayer omits more than \$5,000 of gross income attributable to assets that must be reported on a FBAR II filing. This provision applies to:
 - Tax returns filed after March 18, 2010; and
 - Tax returns related to years where the statute of limitations is open on March 18, 2010.

V. Other Reporting

(iv) Comparison of FBAR and FBAR II

- Beginning in 2011, beneficiaries of a foreign trust must file a FBAR-type report if interest in trust and other “specified foreign financial assets” exceed \$50,000. There are new penalties for failure to file.

Illustration:



- What is a beneficiary's interest in a foreign trust?
- Do new rules apply to foreign grantor trusts?
- New reporting rules will place more foreign trusts with U.S. beneficiaries on the IRS radar screen.

V. Other Reporting

C. 6-Year Statute of Limitations

- The U.S. tax law provided for a 6-year statute of limitations for deficiencies attributable to file (or properly file) the following “foreign reporting forms”:
 - Form 8858 (Foreign Disregarded Entities)
 - Form 5472 (Certain foreign-owned U.S. corporations)
 - Forms 926 and 8865 (Certain transfers to foreign persons)
 - Forms 5471 (Organization, reorganizations and acquisitions of stock of foreign corporations)
 - Form 3520-A (certain foreign trusts)
- FATCA provides for an extended (6-year) statute of limitations also to apply with respect to information required to be reported on the following information reports:
 - Form 8621 – (PFIC-QEF Election)
 - New PFIC report
 - New Foreign financial asset report

V. Other Reporting

- Extended statute of limitations applies if more than \$5,000 of income is omitted and the omitted income is attributable to an asset that should have been reported on a Form.
- FATCA also amended the U.S. tax law to provide that the extended 6-year statute of limitations applies to all income and is not limited to adjustments to income required to be reported on an enumerated foreign report.
 - Effective Date – Returns filed after March 18, 2010 and returns filed prior to March 19, 2010 if the statute of limitations is open

VI. Foreign Trust Provisions

A. Use of Trust Property by a Foreign Trust Beneficiary

- Pre-FATCA, a loan of cash or marketable securities to a U.S. grantor, U.S. beneficiary or a U.S. person related to the grantor or beneficiary was treated as a distribution by the foreign trust to such grantor or beneficiary. The IRS was expected to allow as an exception to the rule, “bonafide” loans with arm’s length interest. See Notice 97-34 (6/2/97).
- Beginning March 19, 2010, if a U.S. grantor or beneficiary or person related thereto is allowed to use any “**property of a foreign trust,**” such use is treated as a “distribution” from the trust to the U.S. person. An exception is if the person pays fair market value compensation within a reasonable time after such use.
- “**Property of a foreign trust**” includes **real property** and **tangibles (chattels)** such as airplanes, art, antiques, jewelry and other chattels.

VI. Foreign Trust Provisions

B. U.S. Beneficiaries Presumed

- The FATCA foreign trust provisions are designed to prevent the “true beneficiaries” of a foreign trust from hiding behind nominees.
- FATCA provides that a foreign trust will be treated as having a U.S. beneficiary if:
 - An amount is accumulated for a U.S. person even if the U.S. person’s interest in the trust is contingent upon a future event;
 - Any person has discretion to determine the beneficiaries of the trust (unless effectively U.S. persons are excluded); or
 - Any (written or oral) agreement or understanding could result in income or principal being paid or accumulated for the benefit of a U.S. person.
- Also, under the FATCA provisions, if any U.S. person directly or indirectly transfers property to a foreign trust such foreign trust will be presumed to have a U.S. beneficiary (and thus be subject to a number of U.S. tax anti-avoidance rules) unless the U.S. transferor can establish that the trust has complied with all information reporting rules and submits such information as the IRS may request.
- These provisions were effective March 18, 2010.

VI. Foreign Trust Provisions

C. Minimum Penalties for Certain Failure to Report

- FATCA also increases the penalties for failing to timely file information regarding certain foreign trusts.
- The penalty is based upon the “gross reportable amount” which is essentially the value of the property that should have been reported.
- The penalties will be 35% of the gross reportable amount, but a minimum of \$10,000

D. New Reporting Requirements

- FATCA amends the Code to allow Treasury to expand the reporting requirements for a U.S. person treated as the owner of property held by a foreign trust.

VII. Effective Dates - Summary

FATCA Provision	Effective Date
Chapter 4 Withholding	Effective for payments made on or after January 1, 2013, except: <ul style="list-style-type: none"> • withholding is not required on payments made with respect to obligations outstanding on March 18, 2012.
Bearer Bonds	Debt obligations issued after March 18, 2012.
Disclosure of Information with Respect to Foreign Financial Assets	Taxable years beginning after March 18, 2010.

VII. Effective Dates - Summary

FATCA Provision	Effective Date
Dividend equivalent payments	<p>Applies to DEPs on securities loans and repos made 180 days or more after March 18, 2010.</p> <p>For swaps over U.S. equities, applies to payments made between 180 days and 2 years after March 18, 2010 if any of the following conditions are present:</p> <ul style="list-style-type: none"> • in connection with entering into such a contract, any long party transfers the underlying security to a short party (i.e., "crosses in"); • in connection with the termination of such a contract, any short party transfers the underlying security to any long party (i.e., "crosses out"); • the underlying security is not readily tradable on an established securities market; • in connection with entering into such a contract, the underlying security is posted as collateral by any short party to the contract; or • the contract is identified by the Secretary as a specified notional principal contract. <p>Provision applies to any payment on swap made two years or more after March 10, 2010.</p>

VII. Effective Dates - Summary

FATCA Provision	Effective Date
PFIC Reporting	Taxable years beginning after March 18, 2010
FBAR II	Taxable years beginning after March 18, 2010
Modification of Statute of Limitations (Amended Code § 6501(e))	Applies to returns filed after March 18, 2010, and (2) returns filed on or before such date if the period specified in Code §6501 for assessment of such taxes has not expired as of such date.
Treatment of a Foreign Trust as Having a U.S. Beneficiary in the Case of Certain Transfers (Amended Code § 679)	Transfers of property after March 18, 2010.
Uncompensated Use of Trust Property	Loans made and uses of property after March 18, 2010.
Reporting Requirement of U.S. Owners of Foreign Trusts	Taxable years beginning after March 18, 2010.

DISCLAIMER

This presentation is for discussion purposes only, and does not provide any tax or legal advice. It was not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer.

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