



FOREIGN TRUSTS – FOCUS ON REPORTING REQUIREMENTS

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Delaware Trust Conference

October 22, 2019

Wilmington, Delaware

Agenda

- I. Foreign trust
- II. Foreign trust with US persons
- III. US trust with foreign persons

Overview of Topics

- I. Not so uncommon factual scenario
- II. Trusts Under U.S. Federal Tax Law
 - What are trusts in general?
 - What are the key elements of a trust?
 - What makes a trust foreign for tax purposes?
 - Types of trust for income tax purposes
 - Who is a grantor of a trust?
 - Grantor trust when grantor is US
 - Grantor trust when grantor is not US
 - Simple trusts and complex trusts
 - Foreign grantor trust
 - Benefits
 - Some limitations
 - Foreign non-grantor trust
 - Its taxability
 - Things to know with US beneficiaries
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 - Interests in foreign corporations
 - UNI and Throwback rules
 - Loans
 - Indirect distributions

Overview of Topics

III. U.S. Estate Tax Considerations

- What are U.S. situs assets?
- Retained interest

IV. Tax Returns and Filings

- IRS Form 3520
- IRS Form 3520-A
- IRS Form 5471
- IRS Form 5472
- IRS Form 1040NR for Foreign Trusts
- IRS Form 1040NR for Grantor Trusts with NRA Settlor/Trustor

V. Information Reporting Requirements

- Foreign Bank Account Report (FBAR)
- Common Reporting Standard (CRS)
- Foreign Account Tax Compliance Act (FATCA)
- How to figure out the labyrinth of W-8 forms?

I. Not So Uncommon Factual Scenario

- Mr. Winston Churchberry is a British citizen who was born in France. His professional career has been split between three major cities over the last thirty years (London, Geneva and New York). He met his wife of ten years in New York, Ms. Betty Boopp, who was born in Toronto but lived most of her life in the U.S. where she studied and graduated from University fifteen years ago at the age of twenty-two. Betty carries a Canadian passport and recently learned that she "...might have rights to apply for a U.S. passport... since a close friend also born in Canada did so – and they both have U.S. born parents"
- Winston has amassed very valuable real estate assets in London, Geneva and New York (plus a summer home in California) along with a large investment portfolio of both U.S. and foreign stocks, bonds and an increasing amount of ETFs issued by U.S. financial institutions. He also stands to inherit significant assets from his UK parents who are quite wealthy, world travelers.
- Betty has few material assets; except for the beach home in California which Winston gifted her and a promise from him to gift US\$2M in cash. She has grown accustomed to world travel and material wealth during her ten years of marriage.
- Winston and Betty have two children; a boy born in London who is age six and a girl born in California who is two years old. They spend significant time in California where they have a summer home on the beach. They were married in London and Winston has recently asked Betty to enter into a property agreement to clarify the worldwide ownership of the assets. They have taken no significant steps during their marriage towards planning for their estate and assets worldwide. However, Winston has both a revocable and irrevocable trust that was created during his first marriage that holds income producing assets. He also has a Will he had prepared while living in London during his first marriage

II. Trusts Under U.S. Federal Tax Law – Subchapter J (Focus on Income Taxation)

II.A What are trusts generally? And what are the key elements of a trust?

- “Ordinary Trust” –Treas. Reg. § 301.7701-4(a)
- Trustee takes title to property for the benefit of another (Id.)
- Three elements of a U.S. trust for federal tax purposes consistent with the Restatement of Trusts (Rest.2d Trusts, §2 (h. The elements of a trust)):
 - Trustee: holds trust property and is subject to equitable duties
 - Beneficiary: to whom the trustee owes equitable duties to deal with the trust property
 - Trust property: held by the trustee for the beneficiary

II.A What are trusts generally? And what are the key elements of a trust? (cont'd)

The Internal Revenue Code does not define the term “trust.”

Instead, “ . . . the term “trust” as used in the Internal Revenue Code [is called an “ordinary trust” in the regulations] and refers to, “an arrangement created either by a will or by an inter vivos declaration whereby **trustees** take title to property for the **purpose of protecting or conserving it for the beneficiaries** under the ordinary rules applied in chancery or probate courts...Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees **responsibility for the protection and conservation of property for beneficiaries** who cannot share in the discharge of this responsibility and, therefore, are **not associates in a joint enterprise for the conduct of business for profit.**” Treas. Reg. § 301.7701-4(a). (emphasis added).

II.A What are trusts generally? And what are the key elements of a trust? (cont'd)

- How do you know one – if you see it?
- Not necessarily written document required to have a trust (*Estate of Henry James Davis v. Comm’r*, 51 T.C. 361 (1968))
- Characterization under State Law not definitive for U.S. income tax purposes (*U.S. v. De Bonchamps*, 278 F.2d 127 (9th Cir. 1960))
- Is “Check the Box” Analysis relevant?
 - “Business” or “commercial” or “investment” trusts – ***may*** be classified as “associations” or “partnerships” and not “trusts” under Treas. Reg. § 301.7701-4(b) and (c)

II.B What makes a trusts foreign for tax purposes?

- “Foreign trust” vs. Trust that is a “United States Person”
 - Key technical distinctions; no such thing as a “domestic trust” in the IRC or the Treas. Reg.
 - PLR 200243031 – first and only PLR to address when a trust subject to U.S. Law (California law in that case) was a “foreign trust”
 - IRS confirmation that a trust subject to U.S. law could nevertheless be a “foreign trust” for U.S. federal income tax and estate tax purposes.
 - IRS confirmation that the non-resident was the “grantor” treated as the owner of the trust assets.
 - Now a “no rule” area by the IRS

In this case, Settlor retained the absolute power to revest title to the trust corpus in himself. Accordingly, the exception to the general rule of [section 672\(f\)\(1\)](#) is applicable and the rules of [§§ 671-679](#) may be applied to treat Settlor as the owner of the Trust. For federal income tax purposes, Settlor is treated as the owner of the entire Trust under [§ 676](#).

II.B What makes a trusts foreign for tax purposes? (cont'd)

- A trust is a “U.S. Person” if both of the following are satisfied (Court and Control Test):
 - “Court Test” – §7701(a)(30)(E)
 - (1) Trust instrument does not direct that the trust be administered outside of the US, (2) trust administered exclusively in the U.S., and (3) the trust is not subject to an automatic migration provision

AND

- “Control Test” – Substantial decisions - Treas. Reg. 301.7701-7(d)(1)(ii)
 - **All** “substantial decisions” must be made by, or such powers shall be held by, a “U.S. person”. Includes power to litigate, arbitrate claims, change trustees and designate Beneficiaries.

A trust shall be treated as a Foreign Trust if the trust does not satisfy either or both of the tests.

It is easy to have a Foreign Trust without knowing or understanding these rules (e.g. special trustee, the Canadian aunt in Vancouver, etc.).

II.B What makes a trusts foreign for tax purposes?

Control Test – Substantial Decisions

Substantial decisions mean all decisions, other than ministerial decisions, that persons are authorized or required to make include, *but are not limited to*, to the following:

- timing and amount of distributions;
- selection of beneficiaries;
- allocation of receipts between income and principal;
- termination of trust;
- compromise, arbitrate or abandon claims of the trust;
- sue on behalf of, or to defend suits against the trust;
- remove, add or replace a trustee;
- appoint successor trustee (unless power is limited in such a way as to not permit loss of residency); and
- investment decisions.

Treas. Reg. § 301.7701-7(a)(ii).

II.B What makes a trusts foreign for tax purposes?

Control Test – Substantial Decisions (cont'd)

Substantial decisions mean all decisions, other than ministerial decisions, that persons are authorized or required to make include, *but are not limited to*, to the following:

- sue on behalf of, or to defend suits against the trust;
- remove, add or replace a trustee;
- appoint successor trustee (unless power is limited in such a way as to not permit loss of residency); and
- investment decisions.

Treas. Reg. § 301.7701-7(a)(ii).

II.B What makes a trusts foreign for tax purposes?

Control Test – Ministerial Decisions

By contrast, ministerial decisions include:

- bookkeeping;
- collection of rents; and
- execution of investment decisions.

Treas. Reg. § 301.7701-7(a)(ii).

II.B What makes a trusts foreign for tax purposes?

Control Test – Unintended Loss of “U.S. person” Trust Status

The Regulations allow a trust 12 months* from the date the trust loses U.S. status to make changes necessary to grant control over all substantial decisions of the trust to U.S. persons by reason of the trustee’s:

- resignation (but not removal),
- disability,
- death, or
- loss of U.S. status. Treas. Reg. 301.7701-7(d)(2)(i).

* The appropriate IRS district director has the power to extend this period. Treas. Reg. 301.7701-7(d)(2)(ii).

II.C Types of trusts for income tax purposes

- Types of Trust for income tax purposes:
 - Grantor trust vs. Trust that is not a “grantor ” (§§ 671 – 679)
 - More important than whether the trust is a “Foreign Trust” or not; since a grantor trust has the same basic income tax consequences if it is a “foreign trust” or not.
 - Complex trust vs. Simple trust

II.C.a Who is the “Grantor” of a Trust”? (Federal Income Tax concept)

Only the Treasury Regulations use the term “nongrantor trust” – not the Internal Revenue Code.

Grantor – Settlor - Trustor:

1. Person (individual or entity) who makes direct or indirect **gratuitous transfer of property** to a trust. Treas. Reg. §1.671-2(e).
2. A trust beneficiary who holds and exercises an IRC §678 power. Treas. Reg. § 1.671-2(e)(6), Example 4.

Relevance: A grantor will generally be treated as the owner of a trust for federal income tax purposes if the grantor possesses certain powers set under §§673-679. Note exceptions for NRAs.

A trust may have more than one Grantor for income tax purposes (Treas. Reg. §1.671-2(e)(1))

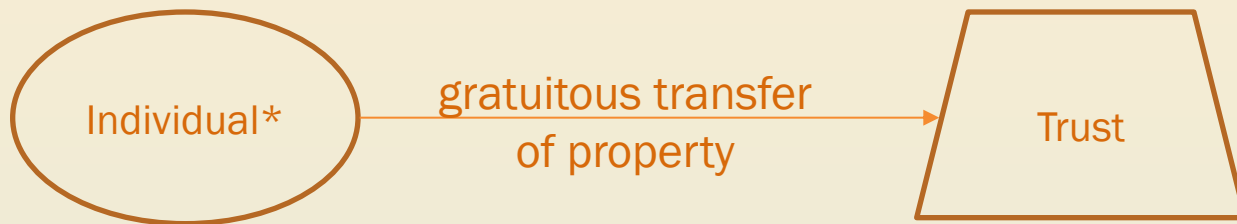
- Each Grantor will be a Grantor of the trust for as to the amount or property contributed by each person.

II.C.a Who is the “Grantor” of a Trust”?

Person who Makes Direct or Indirect Gratuitous Transfer of Property to a Trust

A “gratuitous transfer” means a transfer other than a transfer made for fair market value. Treas. Reg. § 1.671-2(e)(2)(i).

Such transfers do not include payment for services, use of property or distributions with respect to an interest held by a trust. Treas. Reg. § 1.671-2(e)(2)(ii) and (iii).



* Grantors may include **business entities** if the trust is established for a business purpose. Treas. Reg. § 1.671-2(e)(4). However, if an entity establishes a trust for the benefit of a shareholder or partner, that shareholder or partners will be deemed to have received the property before constructively contributing it to the trust. *Id.*

II.C.a Who is the “Grantor” of a Trust”?

A Trust Beneficiary Who Holds and Exercises IRC §678 Power

A beneficiary who exercises a general power of appointment, which includes an IRC §678 power, over one trust to create a new trust will be a grantor of the new trust. Treas. Reg. § 1.671-2(e)(5).



Note: a beneficiary holding a right to withdraw property from a trust is generally treated as an owner (but not grantor) of the trust. Treas. Reg. § 1.671-2(e)(6), Example 4. However, nonresident individuals can not be treated as owners of a trust simply by reason of holding an unexercised power (§672(f)).

II.C.a Who is the “Grantor” of a Trust”? (Federal Income Tax concept)

Revenue Act of 1924

- §219(g) and §219(h) of the Revenue Act of 1924 taxed taxpayers on the income of any trust which could be revoked by the Settlor.

§§671 - 679 Internal Revenue Code

- Settlor is generally subject to taxation on all the trust income (§671).
- Settlor must include in his or her personal income tax computation all income, deductions, and credits against tax attributable to the total or portion of the trust.

II.C.b “Grantor” Trusts (When “Grantor” is a “U.S. Person”)

- A trust is treated as a “Grantor” trust if the settlor retains:
 - Reversionary interest in either the corpus or the income that exceeds five percent of the value thereof (§673(a));
 - Power to control the beneficial enjoyment of the trust corpus or trust income without the consent of an adverse party (§674(a));
 - Administrative powers over the trust (§675);
 - Power to revoke the trust (§676(a)); **OR**
 - The income of the trust can be used for his benefit (§677(a)).

II.C.b “Grantor” Trusts (When “Grantor” is a “U.S. Person”) (cont’d)

- Trust's income (whether distributed or not), deductions, and credits are utilized on calculating the Settlor’s individual income tax liability (§671)
- When a U.S. person directly or indirectly transfers property to a “foreign trust”, if there is a United States beneficiary of such trust, the U.S. transferor will be treated as the owner (§679(a)(1))
 - Rule is applicable even if the trust is irrevocable and even if the U.S. person who transferred the property retains no interest in the trust property (e.g., in cases of completed gifts)

II.C.c “Grantor” Trusts (When “Grantor” is NOT a “U.S. Person”)

- Trust, settled by a non-resident alien (with one or more U.S. beneficiaries) is only a grantor trust and deemed to have foreign ownership for income tax purposes ONLY IF:
 - Settlor (NRA) has the power to revoke the trust without requiring the consent of a third person (§672 (f)(2)(A)(i)); **OR**
 - The only amounts distributable during the lifetime of the grantor are amounts distributable to the grantor or the spouse (§672 (f)(2)(A)(ii)); **OR**
 - Foreign compensatory trusts - any portion of a trust distributions from which are taxable as compensation for services rendered may also be treated as grantor trust (§672 (f)(2)(B)).

II.C.d Simple Trusts and Complex Trusts

Treasury Regulations' concept, not IRC.

- If **NOT** a grantor trust - classified as a complex trust or a simple trust (Treas. Regs. §1.651(a)-1 et. seq.).
- Trusts that do not qualify as simple trusts (and all estates) are classified as complex trusts (Treas. Regs. §1.651(a)-1 et. seq.).
- Not definitive characterization - each year the trust must be analyzed to determined whether it is complex or simple (Treas. Regs. §1.651(a)-2(c)).

II.C.d Simple Trusts and Complex Trusts (cont'd)

- Simple trust: (§651(a))
 - All fiduciary accounting income is distributed currently;
 - Trust does not provide for amounts to be paid or used for charitable purposes under §642(c); and
 - Trust does not actually distribute any amounts during the year other than the fiduciary accounting income required to be distributed currently.

These concepts of simple and complex trust are relevant if the trust is a “United States person”.

In contrast, “foreign trusts” draw attention to UNI and DNI concepts.

(Treas. Regs. §1.651(a)-1, §1.651(c)-1 et. seq.).

II.D Foreign “Grantor” Trusts

The **BIG BENEFIT** – U.S. Beneficiaries

- **NO U.S. Income Taxation - NUNCA**

Such a foreign trust (with an NRA grantor) that is not engaged in a U.S. “trade or business”, generally is not subject to U.S. income taxes from the following U.S. income – and all foreign source income escapes taxation too:

- Gains from investing and trading in U.S. securities or commodities for the foreign trust’s own account (§864(b)(2));
- Gains from the sale of certain U.S. personal property (§871(a)(2));
- Interest income from certain deposits with U.S. banks (§897(h)(1)); or
- Interest earnings from U.S. “portfolio interest” debt instruments (§897(h)(1)).

II.D Foreign “Grantor” Trusts

Limits to Ownership of Trusts by NRA– Power to Revoke Exception

A trust *will be treated as a grantor trust*, despite §672(f), if the grantor may unilaterally revoke the trust or revoke with the consent of a “related or subordinate party” (under §672(c)) who is subservient to the grantor.



The grantor must hold this power for a period of 183 days or more during the taxable year, or in a short taxable year for each day of the year. Treas. Reg. § 1.672(f)-3(a)(2).

II.D Foreign “Grantor” Trusts

Limits to Ownership of Trusts by NRAs – Trust for NRA Grantor or Spouse Exception

A trust *will be treated as a grantor trust*, if the only amounts distributable are distributable solely to the grantor or the grantor’s spouse during the grantor’s lifetime.



If distributions are permitted to any other persons during the grantor’s lifetime, even if temporarily, the trust will not qualify as a grantor trust under this exception. Treas. Reg. § 1.672(f)-3(b)(4), Example 3.

Amounts distributable to discharge a legal obligation of the grantor or grantor’s spouse are treated as distributable to the grantor or grantor’s spouse. Treas. Reg. § 1.672(f)-3(b)(2)(i). If such an obligation is owed to a related party (under Treas. Reg. § 1.643(h)-1(e)) it is not a “legal obligation” unless it was contracted for bona fide and adequate and full consideration in money or money’s worth. Treas. Reg. § 1.672(f)-3(b)(2)(ii).

II.E.a Foreign Trust that is not a Grantor Trust (Its taxability)

A Foreign Trust that is not a Grantor Trust may be subject to U.S. income taxation.

Similar regime to the foreign trust as is the case to a “Non Resident Alien”.

- U.S. Income Taxation at Trust level (if any) -

Such a foreign trust that is not engaged in a U.S. “trade or business”, generally is not subject to U.S. income taxes from the following:

- Gains from investing and trading in U.S. securities or commodities for the foreign trust’s own account (§864(b)(2));
- Gains from the sale of certain U.S. personal property (§871(a)(2));
- Interest income from certain deposits with U.S. banks (§897(h)(1)); or
- Interest earnings from U.S. “portfolio interest” debt instruments (§897(h)(1)).

See also §665(d)(2) – definition of the term “taxes imposed on the trust”.

II.E.b Things to know with U.S. Beneficiaries (cont'd)

U.S. Income Taxation to U.S. Beneficiaries

U.S. Income Taxation focus on distributions to U.S. beneficiaries.

Distributions of trust income depends on whether:

- Distribution represents current trust income, which is also known as “distributable net income” (“**DNI**”);^[1]
- Distribution represents accumulated trust income, which is also known as “undistributed net income” (“**UNI**”) (§665(a));or
- Distribution of principal (e.g., appreciated property) that is not treated as DNI or UNI.

[1] The DNI of the trust for any particular year equals the trust’s worldwide taxable income, including foreign-source income net of related deductions, income that is exempt under treaties, and capital gains reduced (but not below zero) by capital losses. §§643(a) and 643(a)(6).

II.E.b Things to know with U.S. Beneficiaries (cont'd)

A foreign trust computes its DNI in the same manner as a trust that is a “U.S. person” with three adjustments:

1. the DNI of a foreign trust includes its capital gains (§643(a)(6)(C));
2. foreign-source gross income reduced by expenses that would be deductible but for IRC §265 (§643(a)(6)(A)); and
3. U.S. source gross income excluded from gross income by treaty (§643(a)(6)(B)).

II.E.b.i Uncompensated Use of Property of a Foreign Trust (“Deemed Income”)

- Use of property by a U.S. person (§643(i)(1)) who is a beneficiary or related to the grantor or beneficiary (§643(i)(A) & (B)).
- Deemed distribution by the trust of the fair market value (FMV) of the use of the property (§643(i)(1)(B)).
 - If no DNI or UNI, then there is no income to the user of the trust property (e.g. foreign trust with residential real estate that is not generating DNI or UNI)
- Not applicable to trusts that are “grantor” trusts under §679(a)(1).
- Limited Application at the “End of the Day”

II.E.b.ii Interests in Foreign Corporations

Possible current taxation of U.S. Beneficiaries where Foreign Trust (that is not a grantor trust) owns interests in foreign corporations - Treas. Regulation Rules (valid?)

- Under certain circumstances, U.S. beneficiaries of a foreign trust will be taxed currently on DNI of the foreign trust (that is not otherwise immediately subject to taxation at the trust level) even if:
 - Terms of the trust do not require the Trustee to distribute income to them; and
 - They have not received an actual distribution of trust income.
- Such taxation on undistributed trust income can occur where a trust with one or more U.S. beneficiaries owns stock in:
 - Foreign corporation which is considered a controlled foreign corporation (**CFC**) (Treas. Reg. §1.1291-1(b)(8)(ii)(A) and ((ii)(C)); or
 - Passive foreign investment company (**PFIC**) (Treas. Reg. §1.1291-1(b)(8)(iii)(C)).

II.E.b.iii UNI and Throwback Rules

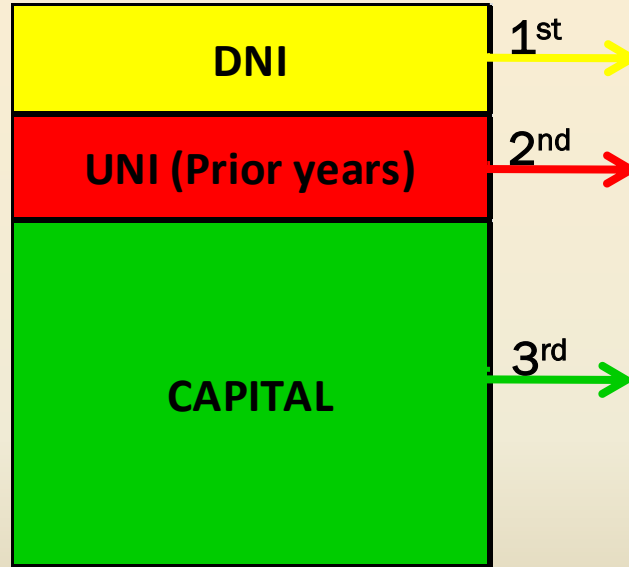
- Since foreign trusts are subject to tax only on certain U.S. source income (e.g., capital gains from the sale of stock in a U.S. corporation that is not a USRPHC is generally exempt from immediate taxation to the non-U.S. person), there is the possibility of significant deferral for the benefit of U.S. beneficiaries to the extent the foreign trust has UNI – i.e. accumulates income.
- Congress changed the law in 1996 concerned with the deferral of income tax on U.S. beneficiaries, the “throwback” tax seeks to tax distributions deemed to contain UNI as if the beneficiary received distribution of such income in the year it was earned.

II.E.b.iii UNI and Throwback Rules (cont'd)

U.S. Income Taxation on Accumulation Distributions - UNI

- This special tax, creates a disincentive for accumulations of income and is colloquially referred to as the “throwback” rule with an accompanying interest charge thereon (§§666 and 668).
- Any DNI that is not actually distributed, will become UNI. (§§665 and 666).
- Subsequent year distributions are first treated as coming from DNI, and once exhausted, then from UNI (on a FIFO method). (§668).

II.E.b.iii UNI and Throwback Rules (cont'd)



II.E.b.iii UNI and Throwback Rules (cont'd)

U.S. Income Taxation on Accumulation Distributions - UNI

- The amount of the tax under the throwback rule is taxed at the U.S. beneficiary's highest marginal U.S. income tax rate, and then the interest charge is calculated on such amount.
- Importantly, UNI that was from a capital gain (e.g., a long-term capital gain that would normally be taxed at the highest rate of 20%) loses its character and is taxed at ordinary income tax rates to the U.S. beneficiary when distributed.

II.E.b.iv Loans from Foreign Trust

In general, a loan of cash or marketable securities to a U.S. grantor or beneficiary will be treated as a distribution that carries out UNI. (§ 643(i)).



However, a loan will not be treated as distribution to a U.S. beneficiary so long as it is a “qualified obligation.” IRS Notice 97-34.

II.E.b.iv Loans from Foreign Trust (cont'd)

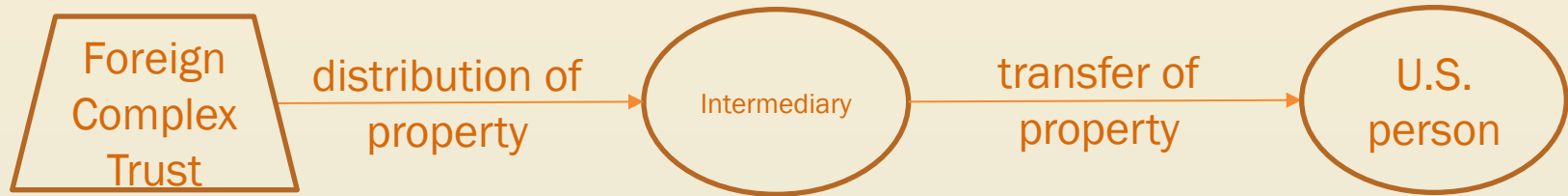
A qualified obligation must be:

- Reduced to writing by an express written agreement;
- Limited to a term of not more than 5 years and must actually be repaid within that term;
- Yield to maturity is not less than 100%, but cannot exceed 130% of the applicable federal rate for the day that obligation is issued; and
- U.S. beneficiary must generally agree to 3-year statute extension and report payments on principal and income on Form 3520.

IRS Notice 97-34.

II.E.b.v Indirect Distributions/Intermediaries

A U.S. person who receives property from another person (an intermediary), who has received such property from a foreign trust, will be treated as receiving such property directly from the foreign trust if a principal purpose is tax avoidance. (§643(h) and Treas. Reg. § 1.643(h)-1(a)(1)).



U.S. person treated as receiving property directly from foreign trust (i.e. a distribution).

II.E.b.v Indirect Distributions/Intermediaries (cont'd)

The Regulations create a presumption of tax avoidance if the following 3 factors are present:

1. The U.S. person is related to the grantor of the foreign trust or has another relationship that would make a gratuitous transfer to the U.S. person;
2. The intermediary receives a distribution and within a 4 year period beginning 2 years before such distribution, transfers to the U.S. person, the same property, proceeds from the sale of such property, or property “in substitution for” such property.
3. U.S. person cannot demonstrate to the satisfaction of the IRS that: (cont'd)

II.E.b.v Indirect Distributions/Intermediaries (cont'd)

- U.S. person has a relationship with intermediary where intermediary would make gratuitous transfer to U.S. person;
- The intermediary acted independently of the grantor or trustee of the foreign trust;
- Intermediary is not an agent of the U.S. person; and
- U.S. person timely reported receipt of property under IRC §6039F, if intermediary was a non resident alien (NRA).

Treas. Reg. § 1.643(h)-1(a)(2).

II.E.b.v Indirect Distributions/Intermediaries (cont'd)

The grantor of the trust is never an intermediary as to the portion of the trust from which the property that is transferred is derived. Treas. Reg. § 1.643(h)-1(b)(2).

Both the transfer (1) from the foreign trust to the intermediary and (2) the intermediary to the U.S. person must be gratuitous transfers for IRC §643(h) to apply. (Treas. Reg. §1.643(h)-1(b)(1)).

II.E.b.v Indirect Distributions/Intermediaries (cont'd)

- U.S. beneficiaries are required to include in income, as a distribution from a foreign trust, certain distributions from intermediaries.
- Small Business Job Protection Act of 1996:

“[A]ny amount paid to a United States person which is derived directly or indirectly from a foreign trust of which the payor is not the grantor shall be deemed in the year of payment to have been directly paid by the foreign trust to such United States person”

(§643(h) and Treas. Reg. 1.643(h)-1(a)).

III. U.S. Estate Tax Considerations

III.A U.S. Estate Tax Considerations – “Not even scratching the surface”

- “U.S. situs assets” (property situated within the U.S.) owned by non-U.S. persons who are domiciled outside of the U.S.
 - The “forever taint” – for transfers to a revocable trust, even if the trust later converts the IRC §2104 property to §2105 property. (Transferred to trust (§2104(b) and Treas. Reg. §20.2104-1(a)) – should be included in the taxable estate if transferred gratuitously in trust within the provisions of IRC §§2035-2038.
- All real estate located in the U.S. (Treas. Reg. §20.2104-1(a)(1))
- Most all personal property physically located in the U.S. (Treas. Reg. §20.2104-1(a)(2))
- “Intangible personal property the written evidence of which is not treated as being the property itself, if it is issued by or enforceable against a resident of the United States or a U.S. corporation or governmental unit” (Treas. Reg. §20.2104-1(a)(4))
- Shares of stock of a U.S. corporation, regardless of the location of the stock in a U.S., including closely held corporation (Treas. Reg. §20.2104-1(a)(5))

III.A U.S. Estate Tax Considerations – “Not even scratching the surface” (cont’d)

- “U.S. situs assets” (property situated within the U.S.) owned by non-U.S. persons who are domiciled outside of the U.S.
 - Debt obligations of U.S. persons including certain governmental entities (Treas. Reg. §20.2104-1(a)(7))
 - EXCLUSION: Not including “portfolio debt” instruments (§2105(b)(4) and (5))
 - What about “partnership interests”?
 - What about LLC interests? *Pierre v. Commissioner*, 2010 WL 1945779 (U.S. Tax Ct.) (May 13, 2010) and successor Pierre cases

III.B U.S. Estate Tax Considerations – Retained Interest In General

- When a person dies, the property includable in his or her gross estate (after certain deductions) may be subject to U.S. estate tax (top tax rate is 40%).
- Property includable in a person's gross estate for U.S. estate tax purposes includes the following (each is discussed in more detail):
 - A. Transfers with retained life estate (IRC Sec. 2036)
 - B. Transfers taking effect at death (IRC Sec. 2037)
 - C. Revocable Transfers (IRC Sec. 2038)

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2036 - In General

The text of present law §2036(a)(1) is as follows:

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property.

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2036 - Four Basic Requirements

Section 2036(a)(1) will be triggered if each of the following requirements is satisfied:

- (1) the transferor made a lifetime transfer of property;
- (2) the transfer was made after March 3rd 1931;
- (3) the transferor retained the possession or enjoyment of, or the right to the income from, the transferred property; and
- (4) the possession or enjoyment or income was retained for (a) the transferor's life, (b) any period not ascertainable without reference to the transferor's death, or (c) any period that does not actually end before the transferor's death.

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2037 - In General

Section 2037 may be summarized as follows:

The value of a decedent's gross estate includes the value of property to the extent of any interest therein of which the decedent made a lifetime transfer if:

- (1) the interest requires surviving the spouse in order to obtain possession or enjoyment of the property, and
- (2) the decedent has retained a reversionary interest in the property the value of which immediately before the death of the decedent exceeds 5% of the value of the property. Section 2037 applies because the transfer is sufficiently incomplete if:
 - i. during life, the decedent did not fully dispose of the property given the retained reversionary interest; and
 - ii. the successor owner receives the property only by surviving the decedent.

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2037 – Five Requirements

Section 2037 prescribes five requirements to its application:

1. the decedent made a lifetime transfer of an interest in property, by trust or otherwise;
2. the transfer was after September 7th 1916;
3. possession or enjoyment of the interest in the property can be obtained only by surviving the decedent;
4. the decedent retained a reversionary interest in the property; and
5. the value of the decedent's reversionary interest immediately before the decedent's death exceeds 5% of the value of the property.

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2036 - Exceptions

1. Section 2036 excludes from its scope any lifetime transfer of property if the transfer was a bona fide sale for adequate and full consideration in money or money's worth.
2. Due to some rather confusing Supreme Court decisions and intervening legislation, Congress added §2036(c) to §2036. Piecing together all of the foregoing developments results in two categories of transfers under §2036(c), each of which is summarized below:
 - a) transfers before March 4th 1931, and
 - b) certain transfers after March 3rd 1931, and before June 7th 1932.
3. If the transferor of property retains possession or enjoyment, or income from, the transferred property, §2036(a)(1) generally will apply at the death of the transferor. If, however, the interest is divested, transferred, or relinquished, or the interest expires by its terms before the transferor's death, §2036(a)(1) cannot apply because the triggering interest is not owned at the moment of death.

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2036 - Retained Voting Rights

- §2036(b), provides that the direct or indirect retention of voting rights in transferred stock was deemed to be retained “enjoyment” of the stock under §2036(a)(1). This provision applies only if the transferor retained the right to vote (directly or indirectly) shares of stock of a “controlled corporation”.
- A corporation is treated as a “controlled corporation” if, at any time after the transfer of the property and during the three-year period ending on the date of the transferor's death, the transferor owned (applying §318 attribution rules), or had the right (either alone or in conjunction with any person) to vote, stock possessing at least 20% of the total combined voting power of all classes of stock.
- Under proposed regulations for §2036(b), stock that possesses voting rights only in extraordinary circumstances (e.g., preferred stock that gains voting rights only if no dividends are paid) would be subject to §2036(b).
- Also, a transfer for full and adequate consideration in money or money's worth would escape §2036(b), unless the buyer's consideration was supplied to the buyer by the decedent. Section 2036(b) would not be avoided by “acquiring” voting rights in the transferred stock pursuant to the exercise of other instruments transferred by the decedent (e.g., “warrants or options, or the conversion rights on convertible nonvoting stock or indebtedness”). Similarly, §2036(b) would not be avoided by “exchanging” the retained voting rights for voting rights in other stock of a controlled corporation.

III.B U.S. Estate Tax Considerations – Retained Interest

Section 2036 - Amount of Inclusion

- The amount included by §2036(a)(1) is not the date-of-death value of the retained interest. Instead, the amount included is the estate tax value of the property that was subject to the §2036(a)(1) retained interest.
- If the transferor retains all the income from the entirety of the property, §2036(a)(1) includes, not the present value of the retained income interest at the moment of death, but the estate tax value of the entirety of the property.
- Similarly, if the transferor retains the possession or enjoyment of the entirety of the property, §2036(a)(1) includes, not the present value of the retained right of use at the moment of death, but rather the estate tax value of the entirety of the property.
- If the transferor retains a §2036(a)(1) interest in only a portion of the transferred property, the estate tax value of only that portion of the property is included in the gross estate.

III.C U.S. Estate Tax, Income Tax and Residency MAZE

GRANTOR TRUST		OWNERSHIP		SITUS PROPERTY		RESIDENCE		ESTATE TAX?
YES	NO	Completed Gift	Incompleted Gift	U.S. Situs Property	No U.S. Situs Property	U.S. Trust	Foreign Trust	
X	✓	X	✓	✓	X	✓	X	Estate tax exposure?
X	✓	X	✓	✓	X	X	✓	Estate tax exposure?
X	✓	X	✓	X	✓	X	✓	No estate tax exposure?
X	✓	✓	X	N/A	N/A	N/A	N/A	No estate tax exposure?
X	✓	✓	X	N/A	N/A	N/A	N/A	No estate tax exposure?
✓	X	X	✓	✓	X	✓	X	Estate tax exposure?
✓	X	X	✓	X	✓*	X	✓	No estate tax exposure?
✓	X	✓	X	X	✓	X	✓	No estate tax exposure?
✓	X	✓	X	✓	X	✓	X	No estate tax exposure?

* Did the trust previously have “U.S. situs” property that was converted to property not situated in U.S.? (§2104).

IV. Tax Returns and Filings

IV.A Information Reporting Requirements – IRS Form 3520

§6039F – Notice of large gifts received from NRAs

IRS Form 3520 (Part IV)

- U.S. persons who receive aggregate foreign gifts or bequests of more than \$10,000 (adjusted for inflation) during any tax year are required to file Form 3520 to report the gift.
- Notice 97-34: gifts received from non-resident aliens or foreign estates are required to be reported only if the aggregate amounts received from one person or estate exceeds \$100,000 during a tax year; while gifts from foreign corporations or partnerships must be reported if the aggregate amount received from all corporations and partnerships exceeds \$10,000. (§6039(F)(c)(1)(B))

IV.A Information Reporting Requirements – IRS Form 3520 (cont'd)

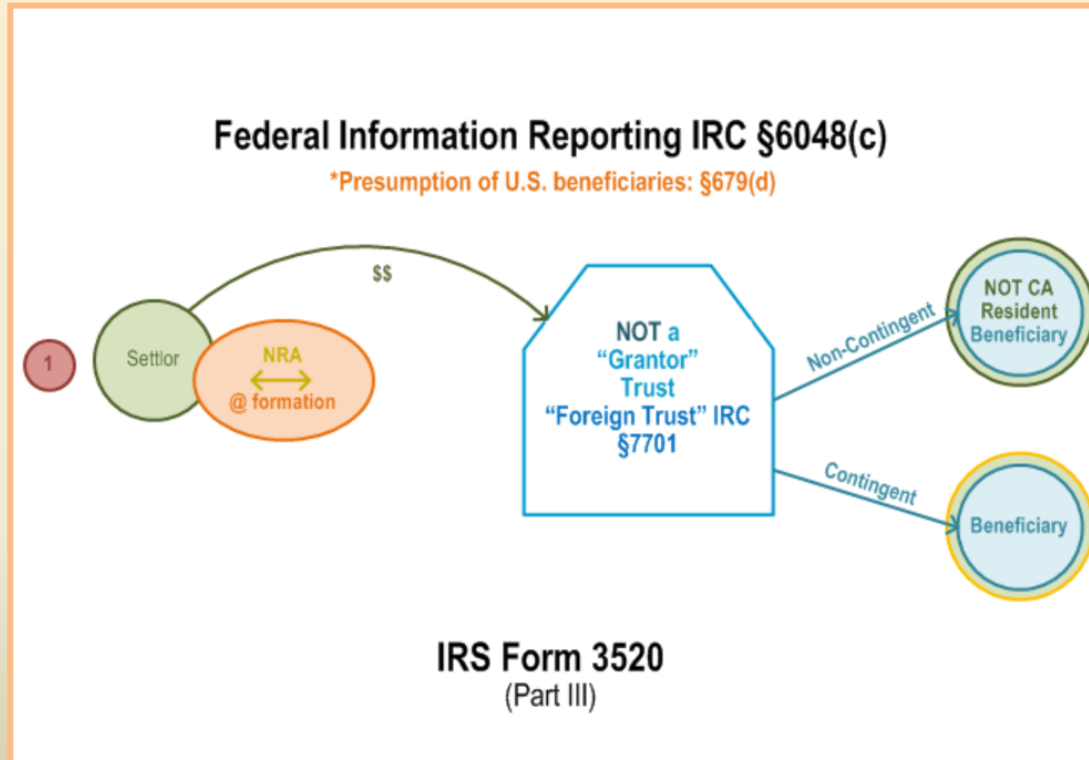
§6039F – Notice of large gifts received from NRAs

IRS Form 3520 (Part IV)

- IRS can re-characterize purported gifts from foreign corporations and partnerships.
- If gift is from a foreign trust, the reporting is required under the rules of §6048(c).
- Penalty for failure to file Form 3520 is 5% of the gift for each month failure continues, not to exceed 25% of gift; reasonable cause exception.

Form 3520 Department of the Treasury Internal Revenue Service	Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts ▶ Go to www.irs.gov/Form3520 for instructions and the latest information.	OMB No. 1545-0159 2018
Note: All information must be in English. Show all amounts in U.S. dollars. File a separate Form 3520 for each foreign trust.		
For calendar year 2018, or tax year beginning _____, 2018, ending _____, 20		
A Check appropriate boxes: <input type="checkbox"/> Initial return <input type="checkbox"/> Initial return (extension filed) <input type="checkbox"/> Final return <input type="checkbox"/> Amended return		
B Check box that applies to person filing return: <input type="checkbox"/> Individual <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation <input type="checkbox"/> Trust <input type="checkbox"/> Executor		
C Check if any excepted specified foreign financial assets are reported on this form (see instructions) <input type="checkbox"/>		
Check all applicable boxes.		
<input type="checkbox"/> (a) You are a U.S. transferor who, directly or indirectly, transferred money or other property during the current tax year to a foreign trust, (b) You held an outstanding obligation of a related foreign trust (or a person related to the trust) issued during the current tax year, that you reported as a "qualified obligation" (defined in the instructions) during the current tax year, or (c) You are the executor of the estate of a U.S. decedent and (1) the decedent made a transfer to a foreign trust by reason of death, (2) the decedent was treated as the owner of any portion of a foreign trust immediately prior to death, or (3) the decedent's estate included any portion of the assets of a foreign trust. Complete all applicable identifying information requested below and Part I of the form and see the instructions for Part I.		
<input type="checkbox"/> You are a U.S. owner of all or any portion of a foreign trust at any time during the tax year. Complete all applicable identifying information requested below and Part II of the form and see the instructions for Part II. You may also need to complete Part III. See the instructions for Part III.		
<input type="checkbox"/> (a) You are a U.S. person (including a U.S. owner) who, during the current tax year, received a distribution from a foreign trust, or (b) You are a U.S. person who is a U.S. owner or beneficiary of a foreign trust and such foreign trust (1) made a loan of cash or marketable securities, directly or indirectly, to you or a U.S. person related to you during the current tax year, or (2) provided you or a U.S. person related to you with the uncompensated use of trust property. Complete all applicable identifying information requested below and Part III of the form and see the instructions for Part III.		
<input type="checkbox"/> You are a U.S. person who, during the current tax year, received certain gifts or bequests from a foreign person. Complete all applicable identifying information requested below and Part IV of the form and see the instructions for Part IV.		

IRS Form 3520 (Not 3520-A)



IV.A Information Reporting Requirements – **IRS Form 3520** (cont'd)

§6048(c) – Information with respect to distributions to a U.S. person from certain foreign trusts

IRS Form 3520 (Part III)

- U.S. beneficiaries who receive any direct or indirect (e.g., loan) distributions from a foreign trust during any tax year are required to file Form 3520 to report the distribution
- If Form 3520 not filed, entire distribution is included in beneficiary's income as accumulation distribution subject to throwback rules and compound interest charge

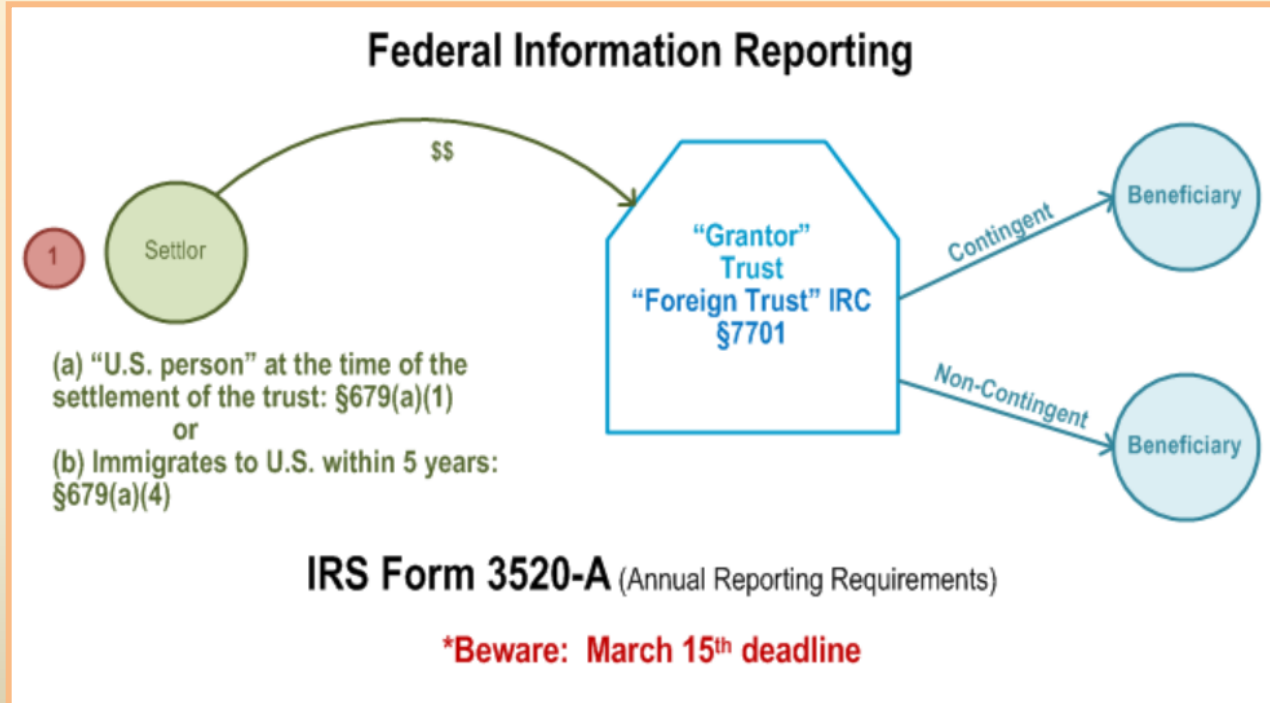
IV.A Information Reporting Requirements – IRS Form 3520 (cont'd)

§6048(c) – Information with respect to distributions to a U.S. person from certain foreign trusts

IRS Form 3520 (Part III)

- Beneficiary should obtain from the trust a Foreign Non-grantor Trust Beneficiary Statement (or a Foreign Grantor Trust Beneficiary Statement) and attach to Form 3520 to avoid default treatment as accumulation distribution.
- Penalty for failure to file Form 3520 is 35% of the distribution (even if distribution was non-taxable), with additional \$10,000 penalties for each 30-day period failure continues after 90-day notice period, not to exceed amount of distribution; reasonable cause exception (§6677).
- Statute of limitations does not commence until Form 3520 filed (§6501(c)(8), CCA 200024051).

IRS Form 3520-A (Not 3520)



IV.B Information Reporting Requirements – IRS Form 3520-A

IRS Form 3520–A (*Annual Information Return of Foreign Trust With a U.S. Owner*) (§6048)

- Who: Filed by a foreign trustee with at least one U.S. owner to provide information about:
 - the trust,
 - its U.S. beneficiaries, and
 - any U.S. person who is treated as an owner of any portion of the foreign trust. (§679(a)(i))
- **When: Annually filed by the 15th day of the 3rd month after the end of the trust's tax year.**
- Reportable events:
 - Creation of any foreign trust by a United States person,
 - Transfer of any money or property (directly or indirectly) to a foreign trust by a U.S. person, including a transfer by reason of death, and
 - Death of a citizen or resident of the United States if
 - (I) the decedent was treated as the owner of any portion of a foreign trust, or
 - (II) any portion of a foreign trust was included in the gross estate of the decedent.

IV.B Information Reporting Requirements – IRS Form 3520-A

IRS Form 3520–A (*Annual Information Return of Foreign Trust With a U.S. Owner*) (§6048)

- Penalties: initial penalty equal to the greater of \$10,000 or 5% of the gross value of the portion of the trust's assets treated as owned by the U.S. person at the close of that tax year of the foreign trust (§6677(a) & (b))
 - i. fails to file a timely Form 3520-A, or
 - ii. does not furnish all of the information required by §6048(b) or includes incorrect information.

IV.C IRS Form 5471 - Information Return of U.S. Persons With Respect To Certain Foreign Corporations

- I. The IRS utilizes Form 5471 to have a complete record of which US persons own foreign corporations.
- II. A trust that is not foreign as defined in IRC Section 7701(a)(31) (complies with the Court and Control Test) is deemed a “U.S. person”.
- III. Generally, All U.S. persons described in “Categories of Filers” must complete IRS Form 5471.

Category	Description
1	This is an inactive category that has been repealed.
2	Applies in the year when a US person acquires 10% or more of the stock in a foreign corporation as an officer or director. Category 2 filers only have to report a minimal amount of information about the corporation and the US acquirer.
3	US person who adds to their stock in a company, thereby surpassing the 10% minimum ownership, or any US person who sells their stock in a company so that they own less than 10%.
4	Must report everything that Category 3 filers must report, as well as any information regarding the corporation’s undistributed earnings and any reportable transactions. US person who owns more than 50% of the stock of a foreign corporation.
5	US persons who own at least 10% of a “controlled foreign corporation” (CFC). These filers usually only need to provide identifying information about the corporation and any information regarding undistributed earnings.

IV.D IRS Form 5472 - Information Return of a 25% foreign-owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business

- I. As of January 1st, 2017 all foreign-owned Single-Member LLCs that are “disregarded entities” should file IRS Form 5472.
- II. “Foreign person” includes a foreign trust described in IRC Section 7701(a)(31): Any trust other than a trust that complies with the Court and Control Test.
- III. Form 5472 is used to provide information when **reportable transactions** occur during the tax year of a **reporting corporation** with a foreign or domestic **related party** (IRC Sections 6038A and 6038C).
 - Reportable transactions: Exchange of money (or property) between an LLC and its foreign owners (e.g., capital contributions and distributions).
 - Reporting corporation:
 - A 25% foreign-owned U.S. corporation.
 - Foreign-owned Single Member Disregarded Entity LLC is considered a Reportable Corporation (IRC Section 1.6038A-1).
 - A foreign company that is engaged in trade or business.
 - Related party: Some examples are (list not exclusive)
 - The LLC owner; LLC owner’s parents, grandparents, brother, sister, spouse, etc.; and other companies owned (directly or indirectly) by the LLC owner.

IV.E IRS Form 1040-NR for Trusts - (U.S. Nonresident Alien Income Tax Return)

- Who: Foreign trusts (among others)
- When:
 - Nonresident alien trust that has an office in the United States – by the 15th day of the 4th month after the tax year ends.
 - Nonresident alien trust that does not have an office in the United States – by the 15th day of the 6th month after the tax year ends

IV.E IRS Form 1040-NR for Trusts - (U.S. Nonresident Alien Income Tax Return)

Form 1040NR Department of the Treasury Internal Revenue Service		U.S. Nonresident Alien Income Tax Return ▶ Go to www.irs.gov/Form1040NR for instructions and the latest information. For the year January 1–December 31, 2018, or other tax year			OMB No. 1545-0074 2018	
beginning _____, 2018, and ending _____, 20____						
Please print or type	Your first name and initial		Last name		Identifying number (see instructions)	
	Present home address (number and street or rural route). If you have a P.O. box, see instructions.				Apt. no.	Check if: <input type="checkbox"/> Individual
	City, town or post office, state, and ZIP code. If you have a foreign address, also complete spaces below. See instructions.					
	Foreign country name		Foreign province/state/county		Foreign postal code	
Filing Status Check only one box.	1 <input type="checkbox"/> Reserved 2 <input type="checkbox"/> Single nonresident alien 3 <input type="checkbox"/> Reserved		4 <input type="checkbox"/> Reserved 5 <input type="checkbox"/> Married nonresident alien 6 <input type="checkbox"/> Qualifying widow(er) (see instructions)			
	Child's name ▶ _____					
Dependents If more than four dependents, see instructions and check here. <input type="checkbox"/>	7 Dependents: (see instructions)		(2) Dependent's identifying number	(3) Dependent's relationship to you	(4) <input checked="" type="checkbox"/> if qualifies for (see instr.):	
	(1) First name Last name				Child tax credit	Credit for other dependents
					<input type="checkbox"/>	<input type="checkbox"/>
					<input type="checkbox"/>	<input type="checkbox"/>
					<input type="checkbox"/>	<input type="checkbox"/>

V. Information Reporting Requirements

V.A Foreign Bank Account Report (FBAR) - FinCEN Report 114

Information form only (no payment).

Requirements:

1. The filer is a U.S. person;
2. The U.S. person has *a financial interest* in a financial account or *signature or other authority over* a financial account;
3. The financial account is in a foreign country; and
4. The aggregate amount(s) in the account(s) valued in dollars exceed \$10,000 at any time during the calendar year.

V.A Foreign Bank Account Report (FBAR) - FinCEN Report 114

“Financial interest in” AND “signatureauthority”

- A U.S. person has “**direct financial interest**” in all accounts for which she is listed as the owner of the account (including situations where she is a joint owner with one or more other persons) and all accounts for which she has legal title, regardless of whether she holds the accounts for her personal benefit or for the benefit of others.
- A U.S. person has an “**indirect financial interest**” in each foreign account for which the owner of record or the holder of legal title of the account is any of the following:
 - i. a person acting as an agent, nominee, attorney, or in some other capacity on behalf of the U.S. person with respect to the account
 - ii. a corporation in which the U.S. person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares;
 - iii. a partnership in which the U.S. person owns directly or indirectly more than 50 percent of the interest in profits or capital;
 - iv. any other entity (other than certain trusts described below) in which the U.S. person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;
 - v. a trust, if the U.S. person is the trust grantor and has an ownership interest in the trust for U.S. tax purposes; and
 - vi. a trust in which the U.S. person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.
- A U.S. person has “**signature or other authority**” over a foreign account if she has the ability (either alone or acting jointly with another person or persons) to control the disposition of money, funds, or assets held in a financial account by communicating (either orally or in writing) with the institution where the account is maintained.

V.A Foreign Bank Account Report (FBAR) - FinCEN Report 114

- Criminal Penalties.
- Civil Penalties.
 - Non-willful failing to file the FBAR is up to \$10,000.
 - Willful violation: the greater of \$100,000 or 50% of the account balance at time of violation.

V.A Foreign Bank Account Report (FBAR) - FinCEN Report 114

What's the standard for willfulness determination?

1. "Willful blindness"?

- Both knowing and reckless violation:

E.g., did not review Form 1040 or read Schedule B. (*Williams*, 4th Cir., 2012)

2. Based on knowledge and awareness of the duty; i.e., violates the law voluntarily rather than accidentally

- Executing and filing a Form 1040 with a failure to file an FBAR, even if TP believed he did not possess sufficient interest in a foreign account. (*McBride*, D. UT, 2012)

3. Constructive knowledge?

- Imputed by Form 1040 + sophistication. (*Jarnagin*, Ct. Fed. Cl., 2017)

4. A reckless disregard of legal duty under federal tax law to file FBARs?

- If answer "no" on Form 1040 Schedule B? (*Kimble*, Ct. Fed. Cl., 2018)
- Even if misinformed by expat friends, and accountant did not specifically ask about the foreign accounts. (*Horowitz*, D. Md., 2019)

5. Acting in a manner to conceal income and financial information; either recklessly or consciously avoiding learning of reporting requirements?

- Relatively unsophisticated, but opened, managed, closed account in Switzerland. (*Norman*, Ct. Fed. Cl., 2018)

V.B Common Reporting Standard

- I. Global standard for the collection, reporting and exchange of financial account information on foreign tax residents, developed by the OECD.
- II. Requires banks and other financial institutions to collect and report to tax authorities similar financial account information on non-residents. This information will be exchanged with other participating foreign tax authorities. As a result, each participating tax authority will receive information about its own residents' foreign financial accounts from other countries' tax authorities.
- III. Ensures that residents report income from financial accounts in other countries in compliance with domestic tax law, and acts as a deterrent to tax evasion.

V.B Common Reporting Standard

- I. The Standard comprises two elements: the Common Reporting Standard (CRS) and a model Competent Authority agreement (Model CAA) for jurisdictions that want to participate at a later stage.
 - The CRS contains the due diligence and reporting procedures to be followed by financial institutions such as banks and investment entities. CRS needs to be implemented into domestic law by each participating jurisdiction.
 - The Multilateral Agreement and the Model CAA are the legal bases for the automatic exchange of financial information between jurisdictions. A large group of the signees, the so-called early adopters, committed themselves to implementing the CRS effective January 1, 2016.

V.C Foreign Account Tax Compliance Act (FATCA)

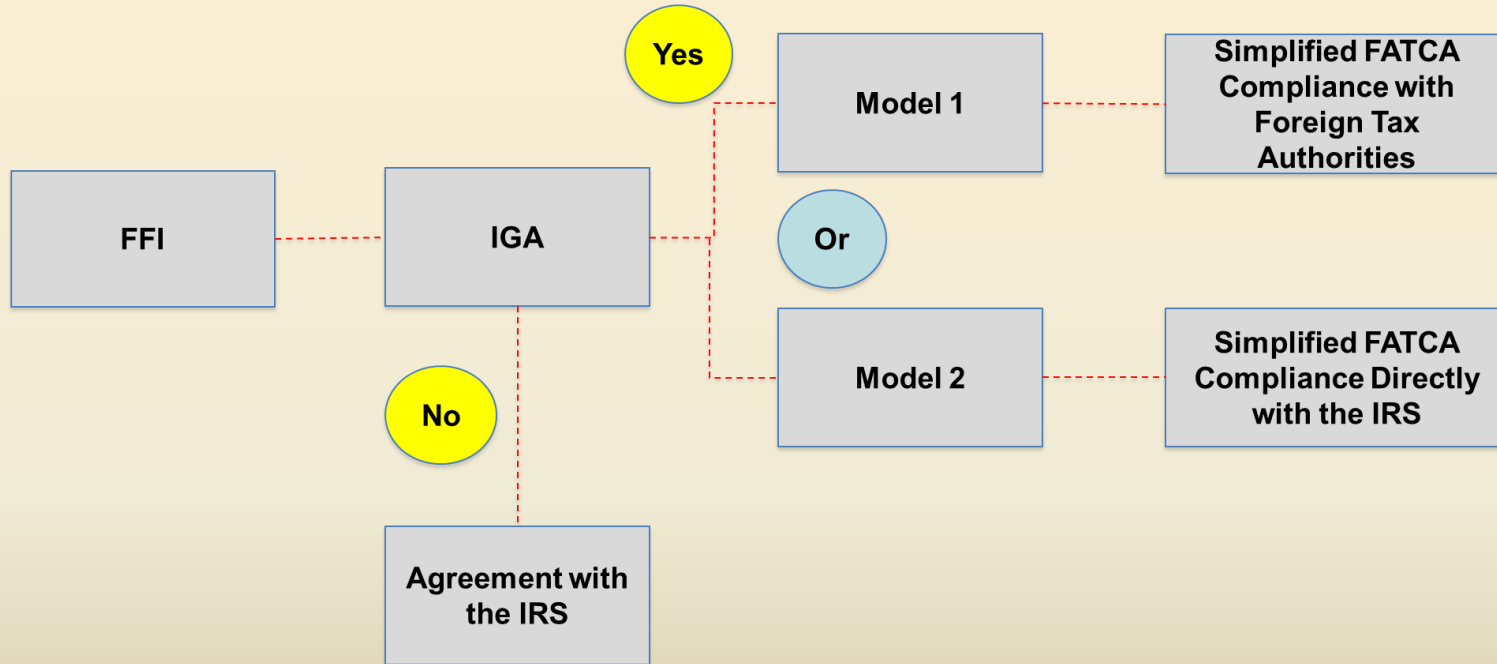
Background

- On March 18, 2010, President Obama signed into law the Hiring Incentives to Restore Employment Act (HIRE Act) - Chapter 4 was added to Subtitle A of the Internal Revenue Code named Foreign Account Tax Compliance Act (FATCA).
 - IRC Sections 1471 through 1474 and 6038D were added.
 - IRS' regulatory guidance for the implementation of FATCA.
 - Intergovernmental Agreements (IGAs) with foreign governments.
 - Exchange of information with foreign tax administrations of non-resident account holders of U.S. Fls.

V.C Foreign Account Tax Compliance Act (FATCA) Report and withholding obligations

- In essence, FATCA “invites” FFIs and certain NFFEs, which are located in a country which has not executed an IGA Model 1 or Model 2, to enter into an agreement (“FATCA Agreement”) with the IRS under which detailed information about their U.S. account holders and members would be disclosed to the IRS on an annual basis through extensive information reporting.
- Currently, there are two models of IGAs, Model 1 and Model 2.
- The principal advantage of a NFFE or a FFI which is located in a jurisdiction with a Model 1 or Model 2 IGA is that under the IGA the NFFEs and FFIs which reside in such jurisdiction are not subject to FATCA withholding unless in cases of unresolved significant non-compliance.

V.C Foreign Account Tax Compliance Act (FATCA)



V.C Foreign Account Tax Compliance Act (FATCA) Report and withholding obligations

- The Treasury Department, through FATCA, established a system of reporting and withholding obligations applicable to Foreign Financial Institutions (FFI) and non-compliant Non-Financial Foreign Entity (NFFEs).
- These reporting obligations are ostensibly designed to identify U.S. owners of various financial accounts of FFIs (by identifying ALL account holders, including non-U.S. owners).
- The withholding obligations under FATCA impose a 30% withholding tax on U.S. source income – withholdable payments (gross payments) as defined by the law, if the FFI does not comply with the new FATCA law.

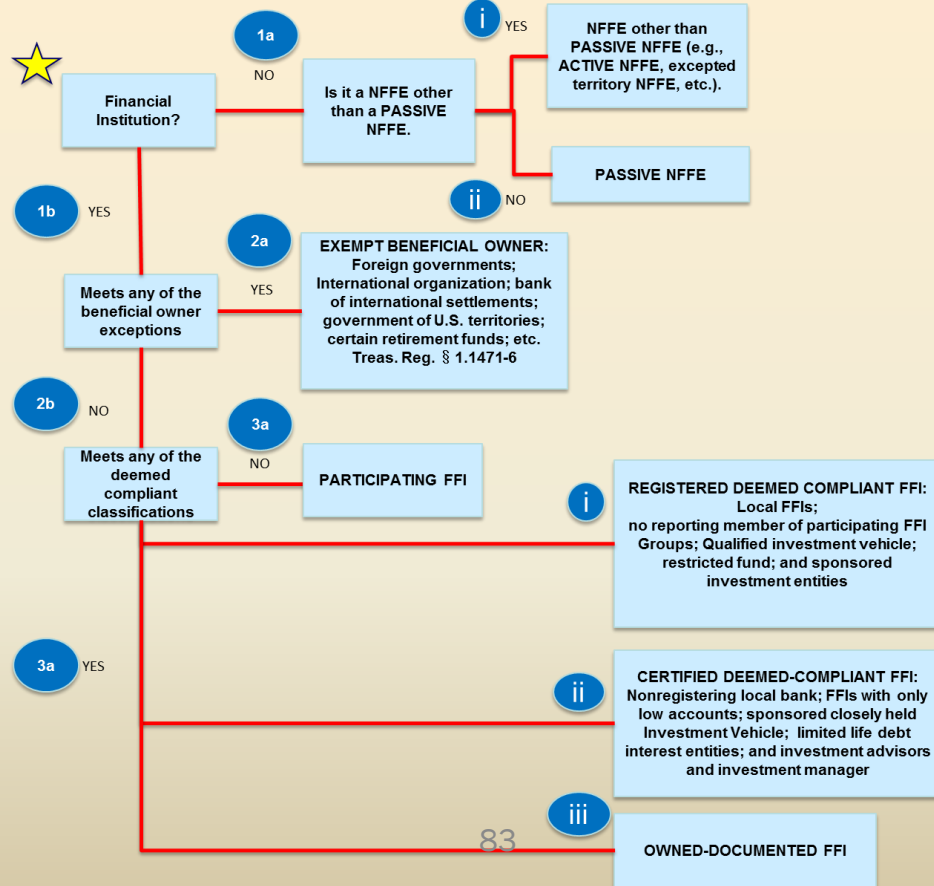
V.C Foreign Account Tax Compliance Act (FATCA)

- “Withholdable payment”: includes any U.S. source income from:
 - Interest
 - Dividends
 - Leases
 - Salaries
 - Awards
 - Annuities
 - Compensations
 - Income or gains
 - Payment of gross proceeds from the sale of stock or securities, even if sold at a loss.
 - Portfolio interest debt instruments, original issue discount and other forms of income

V.C Foreign Account Tax Compliance Act (FATCA)

- Dual Citizens / Lawful permanent residents:
 - Dual citizens who are also U.S. citizens by birth (e.g., born in the U.S. to a non-U.S. family) who has otherwise never lived in the U.S. will be affected.
 - Lawful permanent residents residing outside the U.S. will also be affected.
- Tax Treaties:
 - FATCA does not override the provisions contained in Tax Treaties.
 - To claim Treaty benefits, the effective beneficiary of the income would have to obtain a U.S. taxpayer identification number and file U.S. income tax return to make a claim for refund if the income was exempt from U.S. tax or entitled to a preferential treatment under the Treaty.

V.C Foreign Account Tax Compliance Act (FATCA)



V.D How to figure out the labyrinth of W-8 forms?

IRS Form	Title	Description	Revised Annually?	IRS Link
Form W-8BEN	Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)	This form is used by foreign individuals to: (1) Document that they are the beneficial owners of the income; (2) Document their status as a foreign person; and (3) To claim a reduced rate of, or exemption from, withholding under a tax treaty.	No	https://www.irs.gov/pub/irs-pdf/fw8ben.pdf
Form W-8BEN-E	Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)	This form is used by foreign entities to: (1) Document that they are the beneficial owners of the income; (2) Document their status as a foreign person; (3) Document their chapter 3 and chapter 4 classifications; and (4) To claim a reduced rate of, or exemption from, withholding under a tax treaty.	No	https://www.irs.gov/pub/irs-pdf/fw8bene.pdf

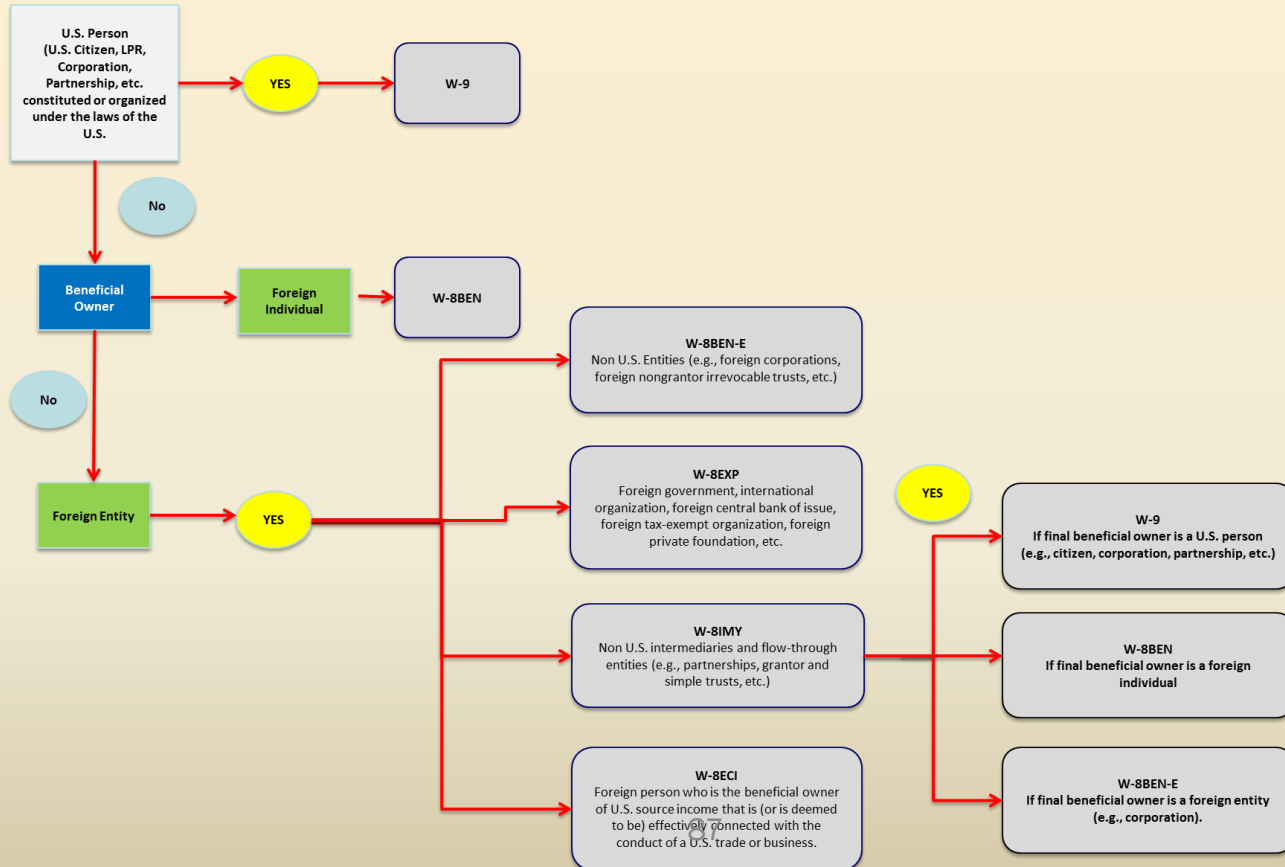
V.D How to figure out the labyrinth of W-8 forms?

IRS Form	Title	Description	Revised Annually	IRS Link
Form W-8ECI	Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States	This form is generally provided by a foreign person that has a U.S. trade or business and is earning effectively connected income.	No	https://www.irs.gov/pub/irs-pdf/fw8eci.pdf
Form W-8EXP	Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding and Reporting	This form is used by foreign governments, international organizations, central banks of issue, tax-exempt organizations, and private foundations to support the entity's claim of foreign status and to claim a reduced rate or an exemption from withholding based on the entity's special status (as opposed to an exemption based on a treaty claim).	No	https://www.irs.gov/pub/irs-pdf/fw8exp.pdf

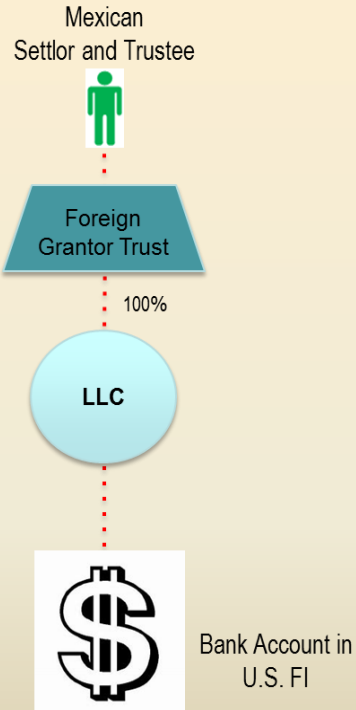
V.D How to figure out the labyrinth of W-8 forms?

IRS Form	Title	Description	Revised Annually?	IRS Link
Form W-8IMY	Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting	This form is provided by a foreign flow-through entity (e.g., partnership, simple or grantor trust, etc.) or intermediary (e.g., bank, custodian, etc.) to claim that it is not the beneficial owner of the income (i.e., the income in question belongs to the underlying partners, account holders, beneficiaries, etc.). The form must generally be accompanied by additional documentation (e.g., withholding statements and withholding certificates of the underlying beneficial owners).	No	https://www.irs.gov/pub/irs-pdf/fw8imy.pdf

V.D How to figure out the labyrinth of W-8 forms?



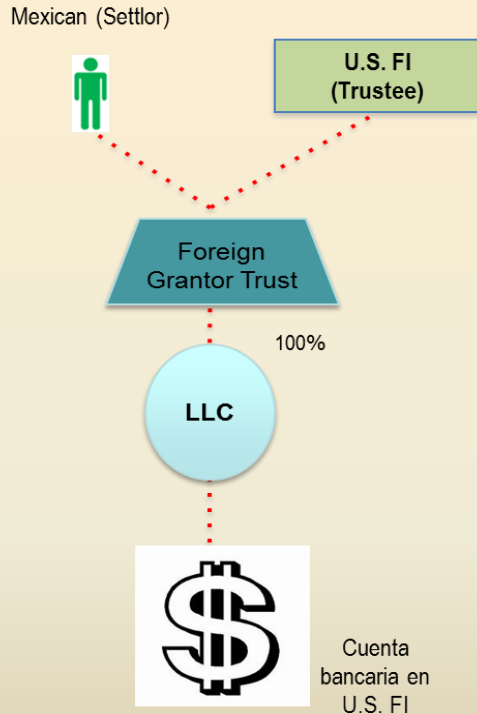
Foreign Account Tax Compliance Act (FATCA) Example I



- Mexican Settlor
- Mexican Trustee
- Grantor Trust created pursuant to Delaware law

- Form W-8IMY – Foreign Grantor Trust
- FATCA classification for Foreign Grantor Trust – Passive NFFE
- No W-8 for the LLC – Disregarded entity
- Form W-8BEN for the foreign settlor

Foreign Account Tax Compliance Act (FATCA) Example II



- Mexican settlor (individual)
- U.S. FI as Trustee
- Form W-8IMY – Foreign Grantor Trust
- FATCA Classification for Foreign Grantor Trusts – owned-documented FFI
- No W-8 for the LLC– Disregarded entity
- Form W-8BEN for foreign settlor

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- John A. Townsend, FEDERAL TAX PROCEDURE (2018 Practitioner Ed.)
- BNA Portfolio 6560-1st: Payments Directed Outside the United States – Withholding and Reporting, Working Papers, Worksheet 13 Additional IRS Resources – IRS Tax Documentation Forms.
- BNA Portfolio 6892-1st: Income Tax Treaties: Competent Authority Functions and Procedures of Selected Countries (L–N), 115-V. Exchange of Information, F. Exchange of Information under the CRS.

Thank you!

Questions? Please feel free to contact us any time for guidance.



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