You've Never Seen Penalties Like These!

Nosy IRS International Reporting Forms Apply to Non-U.S. Persons, Too
Failure to File Can be Very Costly

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The implementation of FATCA, as well as the ongoing efforts of the Internal Revenue Service and the Department of Justice to ensure compliance with U.S. tax and related laws, have all raised global awareness of U.S. tax and related information reporting obligations. Regardless, many non-U.S. Persons continue to be surprised at the extent to which these obligations can apply to them They are even more surprised at the cost and effort required for them to comply with such obligations. That surprise often turns to shock when they learn of the non-compliance penalties they can be assessed. After all, such penalties can exceed any tax owed the U.S. or even the income earned from an activity or the overall value of the assets comprising such activity.

Many of these information reporting requirements and their related forms do not exist to directly generate taxes, but only to gather information. That is why I often refer to them as the "nosy forms." The nosy forms concerned with international activities keep the IRS apprised of such so it can be on the lookout for taxes that may be or become due from U.S. Persons. Regardless, many of the nosy forms apply to non-U.S. Persons, too. FATCA, as well as the U.S. government's desire to curtail an ever-growing number of activities it deems offensive (e.g., money laundering, terrorist activity financing) have only made the situation worse.

Currently there are over 25 different forms gathering items of international activity information. A few also can directly give rise to taxes, but most are just, well… nosy. This presentation generally discusses those forms and their related requirements, as well as the consequences and/or penalties for not complying with such. The nosy forms and their applicability to non-U.S. Persons break down into four big categories:

a) Administrative forms that must first be filed in order for one to even be allowed to file many of the rest;

b) Forms that if their required conditions are triggered, obviously and absolutely must be filed by all non-U.S. Persons, but should generate no tax (though penalties apply if they are not filed);

c) Forms that if their required conditions are triggered, less obviously, but nonetheless absolutely, must be filed by non-U.S. Persons who are dual-resident taxpayer treaty benefit claimants, but should generate no tax (though penalties apply if they are not filed); and

d) Forms that if their required conditions are triggered, obviously and absolutely must be filed by non-U.S. Persons and generate tax (and penalties apply if they are not filed).

I. Administrative forms

a. Form W-7 – Application of IRS Individual Taxpayer Identification Number (ITIN).

1. Purpose. Some form of Taxpayer Identification Number (TIN), an IRS issued number identifying the holder of the number, is required to file most of the forms listed herein (as well as any most other IRS forms). A TIN can be any of a Social Security number (SSN), an Employer Identification Number (EIN) or an Individual Tax Identification Number (ITIN). An ITIN is the form of TIN used by all non-U.S. Person individ-

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uals who are *not* eligible to apply for a Social Security number (SSN). A Form W-7 is used to obtain an ITIN.

2. Penalty for not filing. If you do not file a Form W-7, no ITIN can be issued. Without an ITIN (or an SSN) an individual cannot file an ever-growing list of forms with the IRS or other U.S. agencies. Ultimately the penalty for not filing a Form W-7 and obtaining an ITIN is that penalties can be assessed on the other required forms that cannot be filed without an ITIN.

3. Issues concerning form (if any).

   A. As of 1 January 2017 it has become exceedingly difficult to obtain an ITIN without making an appointment with an office of the IRS within the U.S. and physically appearing at such appointment with your passport. The only alternatives to such at this time are to send your *original* identification documents (e.g., passport) to the IRS along with the required application or to send a "certified copy" of such identification documents to the IRS along with the required application. In this case the only such copies considered "certified" are those certified by either:

      i. an embassy or consulate of the country of an individual's nationality; or

      ii. a U.S. embassy or consulate in the country of the individual's residence.

   B. Unless an individual meets a very short list of exceptions such individual must submit a U.S. tax return (or a required IRS information form) along with the Form W-7 applying for an ITIN. Perhaps the most common exception is that the individual is directly or indirectly a partner required to make U.S. tax filings relative to a U.S. for foreign entity taxed in the U.S. as a partnership. You must submit proof of the above with the Form W-7.

   C. It takes the IRS a long time to issue an ITIN (often seven weeks or more). So one needs to plan ahead.

   D. Beginning 1 January 2017, all ITINs will expire on 31 December of the third consecutive tax year of non-use. If an ITIN expires the above process must be repeated.

b. Form SS-4 – Application for Employer Identification Number (EIN)

1. Purpose. Used by all U.S. and non-U.S. entities and trusts (a trust technically not being an entity under U.S. or English law) to obtain an EIN.

2. Penalty for not filing. If an entity or trust does not file a Form SS-4, no EIN can be issued. Without an EIN an entity or trust cannot file an ever-growing list of forms with the IRS or other U.S. agencies. Ultimately the penalty for not filing a Form SS-4 and obtaining an EIN is that penalties can be assessed on the other required forms that cannot be filed without an EIN.

3. Issues concerning form (if any). Other than related to the requirement of disclosing information about the entity's "responsible party" discussed below, very few. Some U.S. entities and trusts can get an EIN issued virtually instantly online. However, a foreign entity or trust can only obtain an EIN by physically sending a completed and executed Form SS-4 on paper to the IRS or by faxing such to the IRS, *while someone authorized by the entity or trust is on the telephone with the IRS.* The entity or trust can also arguably appoint an authorized representative (e.g., a U.S. lawyer or CPA) to obtain the EIN for it. However in the author's experience, this simply does not work well. On form SS-4 you must disclose information about the entity's "responsible party," including such responsible party's name and SSN, ITIN or EIN. For non-publicly traded entities, the "responsible party" is the individual who has a level of control

over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the individual, directly or indirectly, to control, manage, or direct the entity and the disposition of its funds and assets. The ability to fund the entity or the entitlement to the property of the entity alone, however, without any corresponding authority to control, manage, or direct the entity, doesn't cause the individual to be a responsible party. Having to disclose information about an entity's or a trust's responsible party thwarts privacy and may not sit well with many non-U.S. Persons.

c. Form 8832 – Entity Classification Election.

1. Purpose. Used to change the entity classification for U.S. federal tax purposes of an "eligible entity" from that of such entity's default entity classification. The most common U.S. chartered eligible entity is a limited liability company (LLC). Any entity (excluding a trust, because a trust is not an entity) chartered under non-U.S. law that is not on a specified IRS list of entity types (the "per se corporation list") for a given country is also an eligible entity. Typically the primary types of entities that are on the per se corporation list and, therefore, are not eligible entities are those that are chartered in a form that lets them be publicly traded (e.g., UK PLC, but not a UK Ltd) or if chartered in most civil law countries, are a sociedad anónima (SA) or the equivalent (but not a Limitada, Ltda. or SRL). The default classification of an eligible entity and the effect of changing such by filing a Form 8832 is different depending on whether or not the entity is chartered in the U.S. and are as follows:

A. U.S. Chartered Entities. By default a U.S. eligible entity having one member is disregarded for *most (very important see below for further explanation)* tax purposes. If disregarded it simply does not exist separate from its owner (i.e., it is treated as a "branch" of its owner). By default a U.S. eligible entity having more than one member is treated as a partnership for U.S. federal tax purposes. However,

i. a single member U.S. chartered eligible entity can elect via a Form 8832 to be taxed as a corporation; and

ii. a multi member U.S. chartered eligible entity can elect via a Form 8832 to be taxed as a corporation.

B. Non-U.S. Chartered Entities. By default if each and every member of a non-U.S. entity has limited liability (i.e., no member is personally liable for the debts of the entity solely due to the member's status as a member), then such entity is treated as a corporation for U.S. federal tax purposes. The number of members of the entity is not important. However,

i. a single member non-U.S. chartered eligible entity can elect via a Form 8832 to be disregarded for (most) U.S. federal tax purposes; and

ii. a multi member non-U.S. chartered eligible entity can elect via a Form 8832 to be taxed for U.S. federal tax purposes as a partnership.

2. Penalty for not filing. You are stuck with the default entity classification for the entity. Whether this is a "penalty" or not depends on one's structure design and desires.

3. Issues concerning form (if any). You must have an EIN to file a Form 8832 to make an entity classification election. Moreover, other than relative to an entity classification election made at the inception of the entity (or at the first time the entity has "relevance" for U.S. federal tax purposes), once an entity classification is changed from its default it generally cannot again be changed for 60 months. Changing the entity classification of an existing business with an operating or holding company history can have significant U.S. federal income tax consequences. Whether such tax consequenc-

es are negative or not depends on the specific facts concerning the entity. One is advised to never change the entity classification of an entity without seeking advice of competent U.S. tax lawyer or CPA.

II. Forms obviously required of non-U.S. Persons that should generate no tax

a. FinCEN Form 114/114a (also known as an "FBAR"). Report of Foreign Bank and Financial Accounts.

1. Purpose. FinCEN Form 114, Report of Foreign Bank and Financial Accounts, is used by a United States person (defined more broadly than under normal IRS rules) to report a financial interest in, or signature authority (likely defined much more broadly than most people think) over, a foreign (from an office or branch located outside the U.S.) financial account. *This is NOT an IRS form and (theoretically) it is NOT concerned with taxation.* Instead it is a form required the Financial Crimes Enforcement Network (FinCEN) division of the U.S. Treasury. The form is one of multiple Bank Secrecy Act (BSA) reports and its purpose is stated to be to track hidden money in foreign financial accounts used for illicit purposes (e.g., tax evasion, money laundering, corruption or terrorism).

2. Penalty for not filing. Can border on the obscene as follows:

A. Penalty for non-willful failure to file. "Non-willful" is not defined in the statutes requiring the filing of FBARs. A thorough discussion of what constitutes "non-willfulness" is outside the scope of this presentation. However, non-willfulness is generally thought of as being non-filing due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law. A non-willful failure to file can result in any or all of the following penalties:

i. A civil penalty not to exceed USD 10,000 per violation (i.e., per account, per year, for up to six years).

ii. This may be reduced or eliminated by showing "reasonable cause." What constitutes "reasonable cause" is outside the scope of this presentation.

B. Penalty for willful failure to file. Any failure to file that is not "non-willful" is "willful." Again a thorough discussion of what constitutes "willful" is outside the scope of this presentation. A willful failure to file can result in any or all of the following penalties:

i. A civil penalty equal to the greater of USD 100,000 or 50% of the balance of the account at the time of the violation (i.e., of each and every account for each and every year, for up to six years). Moreover, there can be two violations for each account in each year and each can trigger a separate penalty. Failure to report and failure to keep required records can be treated as separate violations. Under certain circumstances the IRS agent assessing the penalties may be able to mitigate and reduce the penalties (i.e., there is a penalty ceiling but no penalty minimum).

ii. Willful failure to file can also result in criminal prosecution.

3. Issues concerning the form (if any). There are plenty… including but not limited to:

A. For FBAR purposes, the "United States" includes the 50 states, the District of Columbia and (unlike for normal U.S. tax purposes) *all of U.S. territories and possessions (e.g., American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam and the U.S. Virgin Islands).*

B. For FBAR purposes a United States person includes U.S. citizens, U.S. residents (whether under the substantial presence test or the green card test), and any and all U.S. chartered entities, including but not limited to, corporations, partnerships *and limited liability companies even if such are disregarded for U.S. federal tax purposes.* United States persons also include any U.S. estate or any trust formed under the laws of the U.S., *even if such trust would NOT be considered a U.S. Person for U.S. federal tax purposes because such trust failed the control test.*

   i. Said another way, the federal tax treatment of an entity does not determine whether the entity has an FBAR filing requirement. Thus all of: disregarded entity single member limited liability companies; grantor trusts; and a U.S. formed trust that is foreign for U.S. federal tax purposes because a non-U.S. Person (for tax purposes) holds some item of control over the trust (so that the trust fails the control test); are ALL required to file FBARs if otherwise required to do so.

C. A United States person has a "financial interest" in an account for which:

   i. they are the owner of record or holder of legal title, regardless of whether they are the beneficial owner; so this would include United States persons (as defined above) that are nominees or agents for non United States persons; or

   ii. the owner of record or holder of legal title is any of the following:

      a. an agent, nominee, attorney or a person acting in some other capacity on behalf a United States person with respect to the account;

      b. a corporation in which the United States person owns directly or indirectly more than 50% by vote, or more than 50% by value of all shares of its stock;

      c. a partnership in which the United States person owns directly or indirectly an interest in more than 50% of the partnership's profits, or more than 50% of the partnership's capital;

      d. a trust of which the United States person is a grantor of the trust and is considered an owner of the trust under the U.S. federal income tax grantor trust rules;

      e. a trust in which the United States person has a greater than 50% present beneficial interest in the assets or income of the trust for the calendar year (but not if the trust is fully discretionary and such beneficiary received nothing during such year); or

      f. any other entity in which the United States person directly or indirectly more than 50% of the voting power, total value of equity interest or assets or interest in profits.

D. A United States person has "signature authority" over an account if such person is an individual and has the power (alone or in conjunction with another individual) to control the disposition of assets held in the account by direct communication (whether in writing or otherwise) to the bank or other financial institution that maintains the financial account. There are certain limited exceptions to the above, but they are outside the scope of this presentation.

b. Form 5472 –Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business (*Note:* this form now also applies to U.S. disregarded entities that are directly or indirectly wholly foreign owned).

1. Purpose. Form 5472 is used to provide information regarding any of the below relative to a U.S. corporation that is directly or indirectly 25% foreign owned, and for tax years beginning after 31 December 2016 and ending after 12 December 2017, any U.S. disregarded entity (i.e., a U.S. single member limited liability company or "SMLLC") that is directly or indirectly wholly foreign owned. A foreign person will be considered to wholly own an SMLLC if such foreign person has direct or indirect sole ownership of the SMLLC. Indirect sole ownership means ownership by one person entirely through one or more other disregarded entities or through one or more grantor trusts, regardless of whether any such disregarded entity or grantor trust is domestic or foreign.

   A. A list of over 25 monetary transactions between a such reporting U.S. corporation or U.S. SMLLC and any foreign party that is related to the corporation or SMLLC. The entire list of such monetary transactions is beyond the scope of this presentation, but can be found at Part IV of Form 5472.

   B. In the case of an SMLLC, also any of the following that takes place between the SMLLC and any foreign party that is related to the SMLLC: any sale; assignment; lease; license; loan; advance; contribution or other transfer of any interest in or a right to use any property or money; as well as the performance of any services for the benefit of, or on behalf of, another taxpayer (i.e., another individual or company).

   C. In the case of a U.S. corporation or SMLLC any nonmonetary and less-than-full-consideration transactions between the reporting U.S. corporation or SMLLC and a related foreign party.

   D. Unlike relative to a U.S. corporation, the "small corporation" and "de minimis transaction" exceptions do not apply to an SMLLC (i.e., there are likely no exceptions to an SMLLC having to do everything required by Form 5472 and its enacting Internal Revenue Code and related regulations.

   E. **NOTE:** Form 5472 cannot be filed without the filing U.S. corporation or SMLLC having an EIN. As stated above, an SS-4, the application for an EIN, requires that you disclose the name and SSN, ITIN or EIN of the entity's "responsible party." Therefore, if the responsible party of the U.S. corporation of an SMLLC is a non-U.S. Person individual, such responsible party individual will be required to obtain an ITIN. As stated above relative to Form W-7, obtaining an ITIN has become quite cumbersome and difficult so if one needs an ITIN for this purpose it is wise to start working on obtaining such as soon as possible.

   F. **NOTE:** The Internal Revenue Code sections (and related regulations) that require the filing of Form 5472 also require that the reporting U.S. corporation or SMLLC keep certain permanent books and records. These books and records must be sufficient to establish the accuracy of the return, including information relating to related parties to the extent relevant. ***Unlike "small corporations," all SMLLCs must keep these books and records.***

2. Penalties for not filing – There is a penalty for not filing (or filing incorrectly), as well as a separate penalty for not keeping the required records. Each can be separately assessed as stated below.

A. For each failure to either file, timely and correctly, or keep records (so potentially double all of the amounts stated below) per *company*, per *reportable transaction with a related party*, per *year*, the base penalty is USD 10,000.

B. If the IRS notifies you that you have failed to meet either of the above requirements in any given year, a 90-day clock starts running. If the failure continues after expiration of such 90 days, then there is an additional USD 10,000 for each 30-day period (or part thereof) during which any such failure continues. Again, a separate penalty can be assessed for each omitted (or incorrectly reported) related party transaction, per company, per year, and each of such can be doubled if proper records are not kept.

C. *A third penalty in effect for any year (starting, depending on the facts, in a year somewhere in the mid-200s) in which this form has not yet been timely filed is as follows. By not filing this form you keep the statute of limitations open indefinitely relative to the entire U.S. tax return for the year to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return until the latter of: forever or until at least three years after the form is ultimately filed.*

3. Issues concerning form (if any). There are several.

A. Obviously, the form can be quite complicated and require significant time and effort to do all the things necessary to complete it. This is especially true relative to wholly owned SMLLCs because of all the steps the "responsible party" must take (get an EIN, which likely will require an ITIN, which is currently very difficult to obtain) just to be able to file the form.

B. Especially relative to an SMLLC, once you have given the IRS "responsible party" information, if that responsible party is the owner (and not the manager of a manager managed LLC who is not also the owner) you have surrendered sufficient amounts of privacy to the IRS.

C. Regardless and especially relative to an SMLLC, because contributions of property or money to the LLC by a foreign owner is a related party reportable transaction, even if you are able to keep privacy relative to the responsible party by using a manager managed LLC, you will have to report all of the following concerning the foreign owner (the "related party"):

i. Name and address

ii. U.S. Taxpayer Identification Number, *if any*. So the foreign owner does not have to get an ITIN just to complete this information.

iii. The principal business activity of the related party owner.

iv. A description of how such person is related to the reporting company.

v. The principal countries where business is conducted.

vi. The country(ies) under whose laws the related party owner files an income tax as a resident.

c. IRS (FinCEN) Form 8300 – Report of Cash Payments of Over $10,000 Received in a Trade or Business (*Note:* This form is now more likely to be required because real estate having a value of between USD 500,000 and 3,000,000 depending on location is purchased by an "entity" for "cash" in certain parts of New York, south Florida, California and Texas must file it and the information below only covers such circumstances).

1. Purpose (relative to cash purchase by an entity of certain real estate). FinCEN has issued a "Geographic Targeting Order" ("GTO") to collect information concerning purchases by entities (U.S. or non-U.S., as defined in the GTO and such do NOT in-

clude trusts) of high value real estate with cash (which does NOT include funds sent by wire) in order to determine the underlying beneficial owner of the real estate, as well as the UBO's source of the cash used to purchase the real estate. This is being done in order to track funds FinCEN believes are being used for illicit purposes (e.g., tax evasion, money laundering, corruption or terrorism).

2. Penalty for not filing. FinCEN has tasked U.S. title insurance companies with compliance relative to this form (relative to the covered real estate purchases). The GTO states that such title insurance companies, as well as any of such companies' officers, directors, employees and agents may be liable without limitation for civil or criminal penalties for violating any terms of the GTO. Practically speaking this means that no title insurance company will issue title insurance on any real estate that would otherwise be covered by the GTO and trigger the filing of Form 8300, if the title company does not get the information required to complete such form. Whether this is a penalty to the underlying beneficial owner of the real estate depends (one supposes) on the value such UBO places on the title insurance. Generally speaking, because the U.S. does not have a land registry system of title ownership, not acquiring title insurance can potentially be quite costly to such UBO.

3. Issues concerning form (if any). The form is very, very nosy. If the information required to complete the Form 8300 ever got into public hands it would vitiate the privacy reasons (if any) behind why the UBO had a company acquire the property.

d. Form 3520-A – Annual Information Return of Foreign Trusts with a US Owner (Under §6048(b)).

1. Purpose. Form 3520-A is the annual information return of a foreign trust that is deemed to have at least one U.S. owner under the U.S. taxation grantor trust rules. The form provides information about the foreign trust, its U.S. beneficiaries, and any U.S. person who is treated as an owner of any portion of the foreign trust under the grantor trust rules (I.R.C. §§ 671 through 679).

2. Penalty for not filing. Neither the trust itself (nor its trustee) are subject to any direct penalties. Instead:

A. If Form 3520-A *is not filed by the trust* or is filed by the trust, but the trustee furnishes incomplete or inaccurate information, the person deemed to be the U.S. owner of the trust is subject to penalties of the greater of USD 10,000 or 5% of the gross value of the portion of the trust such U.S. Person is deemed to own (usually the entire value of the trust, so 5% of the entire value of the trust) at the close of EACH tax year.

B. If such U.S. Person who is deemed to own the portion of the trust does not file a complete Part II of Form 3520 (discussed further below) such person is subject to an *additional separate* penalty of the greater of USD 10,000 or 5% of the gross value of the portion of the trust such U.S. Person is deemed to own (usually the entire value of the trust, so 5% of the entire value of the trust) at the close of EACH tax year.

C. Additional penalties can be imposed if the IRS gives notice of the noncompliance and such continues for more than 90 days after such notice was given.

D. Criminal penalties can be imposed

E. All of the above can be reduced or eliminated by the appropriate party showing reasonable cause for the noncompliance. What constitutes reasonable cause is outside the scope of this presentation.

F. *A third penalty in effect for any year (starting, depending on the facts, in a year somewhere in the mid-200s) in which this form has not yet been timely filed is as follows. By not filing this form you keep the statute of limitations open indefinitely relative to the entire U.S. tax return for the year to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return until the latter of: forever or until at least three years after the form is ultimately filed.*

3. Issues concerning form (if any). As a practical matter it may be quite difficult for a U.S. Person who is deemed the owner of foreign grantor trust to force the trustee to file the required form. Moreover, in the author's experience few non-U.S. trust companies (or individual trustees) provide (or in many cases, keep for a sufficient period of time) the type of records necessary to complete all the information required by this form. Also, if the trust does not appoint a U.S. agent who can provide the IRS with all such relevant trust information and records on the request of the IRS, the trust must agree that either the IRS or the U.S. deemed owner has the right to inspect and copy all of the trust's permanent books and records at any time. Practically speaking (and in the author's experience), all of the above generally requires that a U.S. tax CPA or U.S. tax lawyer, familiar with U.S. trust accounting methods, as well as U.S. taxation, must obtain from the trustee all information necessary to calculate or otherwise determine all the information required by the form. Using such information the U.S. CPA or U.S. tax lawyer then must complete the Form 3520-A, present it to the trustee and (hopefully) obtain the trustee's execution and filing of the form.

e. Foreign Trust Beneficiary Statement – Technically, this is not a specific IRS form. Instead it is a statement required of a foreign trust that must contain a list of certain information about the trust. The items required by the statement were first set out in IRS Notice 97-34, 1997-1 C.B. 422. However, *relative to a foreign grantor trust having a U.S. Person beneficiary*, the information required to be in a Foreign Trust Beneficiary Statement by Notice 97-34 is found in a portion of Form 3520-A, which was discussed above. So if the trust is properly completing a Form 3520-A each year and gives a copy of it to each U.S. Person beneficiary each year, such should suffice. The required Foreign Trust Beneficiary Statement for a foreign non-grantor trust is more complex as discussed below. Regardless, due to the potential indirect penalty applicable to any U.S. Person beneficiary of the trust described below, the information required to compile a Foreign Trust Beneficiary Statement for a foreign non-grantor trust that currently has, *or at any point in the future may have*, a U.S. Person beneficiary, should be kept from the inception of the trust. Because it is very difficult in today's mobile society to know if a foreign trust will or will not have a U.S. Person beneficiary in the future, arguably all foreign non-grantor trusts should keep the records necessary to compile a Foreign Trust Beneficiary Statement at any time (now or in the future) that such is required.

1. Purpose. The Foreign Trust Beneficiary Statement is a statement of various items concerning the trust and / or any U.S. Person beneficiary of the trust. Without the information contained in the required Statement no current of future U.S. Person beneficiary will be able to comply with such person's U.S. federal income tax and reporting obligations. The requirements of the Statement vary depending on whether the trust is a foreign grantor or non-grantor trust and are as follows:

A. Foreign Grantor Trust. As stated above, so long as such is given to or available to a U.S. Person beneficiary, a properly and completely Form 3520-A that was filed as required by the foreign trust itself should satisfy the requirements for a Foreign Trust Beneficiary Statement for a foreign grantor trust.

B. Foreign Non-grantor Trust. Unfortunately there is no specific IRS tax form on which all the information required of a foreign non-grantor trust to complete a

Foreign Trust Beneficiary Statement can be found. Regardless, that information is as follows:

i. Name, address and taxpayer identification number (TIN) (if any) of the trustee furnishing this statement.

ii. Method of accounting used by the trust (cash or accrual).

iii. The taxable year of the foreign trust to which the statement applies.

iv. A statement identifying whether any grantor of the trust was a partnership or foreign corporation. If so, attach an explanation of the relevant facts.

v. Name, address and TIN of U.S. Beneficiary.

vi. A description of the property (including cash) distributed or deemed distributed to the U.S. person during the taxable year, and the fair market value of the property distributed.

vii. Sufficient information to enable the U.S. beneficiary to establish the appropriate treatment of any distribution or deemed distribution for U.S. tax purposes. Normally, information similar to the information required by Schedule K-1 of Form 1041 would be adequate for this purpose. If relevant, the trust must also provide the beneficiary with adequate information for the beneficiary to complete Forms 4970, 5471, and 8621.

viii. Representation on Access to Books and Records as follows:

a. A statement that, upon request, the trust will permit either the Service or the U.S. beneficiary to inspect and copy the trust's permanent books of account, records, and such other documents that are necessary to establish the appropriate treatment of any distribution or deemed distribution for U.S. tax purposes; or

b. The name, address and EIN of the trust's U.S. agent [who has copies of the above books, records and documents].

2. Penalty for not filing. Neither the trust itself (nor its trustee) are subject to any direct penalties. Instead:

A. Relative to a Foreign Grantor Trust. The U.S. Person beneficiary will find it difficult to complete Form 3520-A without such trust's Foreign Trust Beneficiary Statement. The penalties relative to not filing (or incompletely or inaccurately filing) Form 3520-A are covered above.

B. Relative to a Foreign Non-grantor Trust. Current and any potential future U.S. Person beneficiaries will find it difficult to complete Form 3520 without such trust's Foreign Trust Beneficiary Statement.

i. The direct penalties relative to not filing (or incompletely or inaccurately filing) a Form 3520 are covered below.

ii. In addition to such direct penalties for any U.S. Person beneficiary of such trust not correctly filing Form 3520, any U.S. Person beneficiary of the trust will be taxed on any distributions from the trust under what is known as the "default method." Occasionally the default method can be advantageous, but generally it results in more adverse taxation than if an accurate and complete Foreign Trust Beneficiary Statement is given to such U.S. Person beneficiary in each year in which such beneficiary receives a distribution from the trust.

3. Issues concerning form (if any). As a practical matter it may be quite difficult for a U.S. Person beneficiary to accurately complete the required tax returns and international disclosure forms required of such beneficiary without an accurate Foreign Trust Beneficiary Statement.

   A. Moreover, in the author's experience few non-U.S. trust companies (or individual trustees) provide (or in many cases, keep for a sufficient period of time) the type of records necessary to complete all the information required to be included in an accurate Foreign Trust Beneficiary Statement. This issue is exacerbated when a long-existing foreign non-grantor trust finds itself after many years of having only non-U.S. Person beneficiaries suddenly having a U.S. Person beneficiary.

   B. Again in the author's experience, it is often the case that the most (or perhaps the only) practical way for a foreign trust to produce an accurate Foreign Trust Beneficiary Statement is for a U.S. tax lawyer or U.S. tax CPA, in either case thoroughly familiar with fiduciary accounting rules, as well as U.S. taxation of foreign and domestic trusts, to produce such statement for the trust. However, even the ability to do that is often thwarted, especially relative to the requirements shown in italics above, by:

      i. the fact that the trust does not have sufficient records, especially over longer periods, necessary to complete an accurate Foreign Trust Beneficiary Statement;

      ii. even which such records exist, the trustee or the foreign persons and beneficiaries involved with the trust do not want to provide them to (or let them be inspected by) the U.S. tax lawyer or tax CPA; or

      iii. such foreign persons do not want to provide such records to (or let them be inspected by) the beneficiary, the IRS or a U.S. agent of the trust.

      iv. Finally, if there is no such U.S. agent, then when filing a Form 3520 or Form 3520-A the filer will often have to attach all of the following information to such form:

         a. Summary of all written and oral agreements and understandings relating to the trust;

         b. The trust instrument;

         c. Memoranda or letters of wishes;

         d. Subsequent variances to original trust documents;

         e. Trust financial statements; and

         f. Other applicable trust documents.

f. Form 8843 – Statement for Exempt Individuals & Individuals with a Medical Condition.

   1. Purpose. Used by foreign "exempt individuals" (other than a foreign government-related individual, i.e., a person legitimately related to a foreign consular, embassy of similar office) to explain the basis of their claim as being such an exempt individual. Also used by foreign individuals for whom a medical condition or problem begins after arriving in the U.S. that precludes such individual from leaving the U.S. Assuming the claim is validly made, the days during which: one is an exempt person; or cannot leave the U.S. due to such medical condition or problem; are not counted for purposes of determining resident alien (U.S. Person) status under the substantial presence test (SPT, the "day counting test"). Exempt individuals include: foreign teachers or trainees in the U.S. under a J or Q visa; foreign students in the U.S. under

a F, J, M or Q visa; and foreign professional athletes temporarily in the U.S. to compete in a "charitable sports event." Based on the author's experience this form is oftentimes not filed even though it is required. That is especially true relative to foreign students; more so relative to students not enrolled at major universities.

2. Penalty for not filing. *Relative to professional athletes and those kept from leaving the U.S. due to a medical condition that arose while such individual was in the U.S.*, such individuals cannot exclude the relevant days from the days counted for purposes of the substantial presence test. Notwithstanding the above, such individual will not be penalized if they show by clear and convincing evidence that such person took reasonable actions to become aware of the filing requirements and significant steps to comply with those requirements. *Relative to all other exempt individuals.* There is no expressly stated penalty when such individuals do not file the form. Nevertheless, the form is required and that alone would cause the author to file the form. In addition to the requirement itself, in the author's opinion the importance of a student visa holder filing the form increases the longer the individual is in the U.S. on the student visa. Such is particularly the case if one has been in the U.S. on a student visa for over five years because the presumption inherent in a student visa that one does not plan to reside permanently in the U.S. ceases after five years. Form 8843 has a place for a student in that circumstance to provide sufficient facts to establish that such individual does not intend to reside permanently in the U.S.

3. Issues concerning form (if any). None other than remembering to file it and the relatively small effort required to do so.

g. From 8840 – Closer Connection Exception Statement for Aliens -- Attach to Form 1040NR or 1040NR-EZ.

1. Purpose. Used by a foreign individual to claim the closer connection to a foreign country or countries exception to the substantial presence test. Such exception is not even potentially available if:

   A. such individual was present in the U.S. for 183 days in the relevant calendar year;

   B. such individual is a lawful permanent resident of the U.S. (i.e., a green card holder); or

   C. such individual has applied for, or taken other affirmative steps to apply for, a green card, or have an application pending to change status to that of a lawful permanent resident of the U.S.

2. Penalty for not filing. If one does not ***timely*** file Form 8840, such individual will not be eligible to claim the closer connection exception and may be treated as a U.S. resident. Said another way, one cannot file a late Form 8840 and be eligible for the exception. *Note:* An individual will not be penalized if such individual can show by clear and convincing evidence that such individual took reasonable actions to become aware of the filing requirements and significant steps to comply with those requirements.

3. Issues concerning form (if any). Despite the stated exception to the penalty above, the author would strongly urge anyone seeking this exception to timely file this form. *Note:* Remember that the exception is NOT automatically granted. In effect by filing the form one is simply requesting that the IRS accept that such person meets the closer connection exception. The IRS may not agree based on the facts such person presented on Form 8840. Unfortunately, one does not file the form until the year *after* that for which such individual is seeking the exception. Therefore, should the request for the exception be turned down, it will be too late for such individual to modify any

activities in the (now past) year for which the election is made. In certain cases that could result in very adverse tax consequences. *Note:* Unlike relative to Form 8833 discussed next, if the IRS accepts a closer connection exception request, such exception *also keeps such individual from being subject to and having to file numerous other nosy forms* (more on this below).

h. From 8833 – Treaty-based Return Position Disclosure Under Section 6114 or 7701(b).

1. Purpose. Used by taxpayers to make the treaty-based return position disclosure required by IRC section 6114. The form is also used (perhaps more often used) by dual-resident taxpayers to make the treaty-based return position disclosure required by Regulations section 301.7701(b)-7. A separate form is required for each treaty-based return position taken by the taxpayer. A dual-resident taxpayer is a foreign individual who is considered to be a resident of both the U.S. and another country under each country's internal tax laws; and:

   A. a full income tax treaty (sometimes called a "double tax treaty," but not including a tax information exchange agreement or "TIEA") that is applicable to the individual is in force between the U.S. and such other country;

   B. such tax treaty contains a provision for resolution of conflicting claims of residence of the U.S. and such other country (i.e. a "treaty tie-breaker" clause and most such treaties do contain such a provision); and

   C. such individual determines that under that provision such individual may claim treaty benefits as a resident of that foreign country (generally to be income tax resident in such foreign country and not in the U.S.).

2. Penalty for not filing. Any taxpayer who takes a treaty-based return position and does not file a Form 8833 is subject to a penalty of USD 1,000. If such taxpayer is taxed in the U.S. as a corporation, such penalty is increased to USD 10,000). *Note:* Despite the preceding monetary penalties, failure to timely file a Form 8833 should NOT keep a taxpayer from later filing (within the applicable statute of limitations relative to the underlying tax return) a Form 8833 and claiming a treaty-based return position. Said another way, there is not specific deadline for filing Form 8833 itself.

3. Issues concerning form (if any). There are two primary issues concerning the form:

   A. A treaty-based return position is based on the specific facts and circumstances existing and related to a given treaty-based return position. Therefore, applicability of such is fact dependent and subject to differences of interpretation. As with the Closer Connection Exception to the substantial presence test, by the time a taxpayer takes a treaty-based return position and files a form 8833, the tax year for which any activities affected by such position is in the past. Therefore, if the IRS does not agree with the position taken very adverse tax consequences can result.

   B. Unlike when a claim for the Closer Connection Exception is accepted, succeeding with a treaty-based return position that a foreign individual is a dual-resident taxpayer and is income tax resident in a foreign treaty-partner country *only applies relative to computing that individual's U.S. income tax liability under the provisions of the Internal Revenue Code and the Regulations thereunder and only with respect to the portion of any tax year during which that individual was considered a dual-resident taxpayer.*[2] *For* ***all other purposes of the Internal Revenue Code other than the computation of the individual's U.S. income tax liability*** *the individual*

[2] Treas. Reg. § 301.7701(b)-7(a)(1).

is treated as a U.S. resident.[3] This means that any and all of the nosy forms (including applicable FBARs because such are not impacted by dual tax treaties) that would otherwise be applicable to the taxpayer remain applicable and the dual-resident taxpayer treaty-based return position has no force or effect. In short, even if an individual is successful at taking a dual-resident taxpayer treaty-based return position, such individual still must file ALL applicable nosy forms (and is subject to all applicable penalties for not filing any of them). Such nosy forms include: FBARs; as well as Forms 8938, 5471, 8858, 8865, 8621, 3520-A, 3520 and 926.

i. Forms W-8.

1. Purpose. Forms W-8 are all withholding certificates that also certify that the provider is not a U.S. Person. They come in two major groups; those that do not include questions related to the Foreign Account Tax Compliance Act or FATCA (W-8BEN, W-8ECI) and those that do include FATCA related questions (W-8BEN-E, W-8IMY, W-8EXP). The primary purpose of the former group is to certify that the provider is not a U.S. Person for U.S. federal income tax purposes. The primary purpose of the latter group is to certify that the provider is not a U.S. Person for U.S. federal income tax purposes and to provide the information necessary to determine the provider's FATCA status (out of over 30 possible different FATCA statuses).

2. Penalty for not filing. There are no specified monetary penalties, but there are negative consequences from not providing the correct form to one requesting it. Such consequences differ between the two groups above (and may vary somewhat among the various Forms W-8 within each group).

   A. Relative to the former group (W-8BEN, W-8ECI):

      i. You could be denied treaty benefits;

      ii. You could be subject to adverse withholding relative to taxation;

      iii. You could cause any requester to not enter into a relationship or a transaction with you; and

      iv. Due to FATCA, you could cause the requester to cease any existing relationship it has with you (including by closing your accounts);

      v. Practically speaking, no U.S. financial institution will enter into a relationship with you or allow any existing relationship to continue without providing such financial institution with one of the Forms W-8 (or if you are a U.S. Person, a Form W-9); and

      vi. Practically speaking post FATCA (and now CRS), the same is likely also true relative to many (perhaps most) non-U.S. financial institutions.

   B. Relative to the latter group (W-8BEN-E, W-8IMY, W-8EXP):

      i. All of the consequences stated above relative to the former group; as well as

      ii. If the FATCA information is not answered fully or correctly, it is possible that the requester can place the provider in the category of a recalcitrant account holder, which can have differing (but likely negative) consequences depending on the specific fact pattern

3. Issues concerning form (if any). In the author's experience accurately completing the FATCA portions of the Forms W-8 that include such can be quite daunting. In order

[3] Treas. Reg. § 301.7701(b)-7(a)(3).

to accurately determine proper FATCA status (and answer any required questions for a given status), the author believes that the provider (or the provider with the help of tax counsel competent relative to FATCA) must have most if not all of the following knowledge:

A. A thorough understanding of the actual, substantive and procedural business and/or operations of the provider; and

B. A thorough understanding of FATCA in general, which means:

i. A thorough understanding of the extensive FATCA regulations in all cases; as well as

ii. A thorough understanding of any applicable intergovernmental agreement (IGA), together with any interpretive material or guidance notes relative to such IGA.

j. Form W-9 – Request of U.S. Person for Taxpayer Identification Number & Certification.

1. Purpose. This form certifies to the requester: that the provider is a U.S. Person for U.S. federal income tax purposes; the entity classification for U.S. federal tax purposes of the provider if such is an entity, trust or a sole proprietor individual; and that the Taxpayer Identification Number provided is valid and correct. *Note:* Although the audience to which this presentation is aimed is comprised of non-U.S. Persons, the author understands that many non-U.S. Persons have entities or structures that are U.S. Persons for U.S. federal tax purposes. Thus the inclusion of this form.

2. Penalty for not filing. There are no specified monetary penalties, but there are negative consequences from a U.S. Person entity or structure (or individual) not providing the form to one requesting it, some of which are the following:

A. You could be subject to adverse withholding relative to taxation that would otherwise not be required;

B. You could cause any requester to not enter into a relationship or a transaction with you; and

C. Practically speaking, no U.S. financial institution will enter into a relationship with any U.S. Person or allow any existing relationship to continue with a U.S. Person without providing such financial institution a Form W-9.

3. Issues concerning form (if any). None to speak of. The form is quite straightforward.

III. Forms less obviously required of non-U.S. Persons who are dual-resident taxpayer treaty benefit claimants that should generate no tax

Note: Few (if any) of the forms in this category should have to be filed by anyone not a U.S. Person, unless that person is: an individual; who is a dual-resident taxpayer; and is not treated as a U.S. Person solely for the purposes of computing that individual's U.S. income tax liability under the provisions of the Internal Revenue Code and the Regulations thereunder solely because of taking a successful treaty-based return position that such individual is tax resident in a foreign country that is a double tax treaty partner of the U.S. Because the forms in this category will apply to far fewer non-U.S. Persons, the author will cover them in less depth than those above. Any reader should further determine all details about each such form should it apply to a situation relevant to that reader.

a. Form 8938 – Statement of Specified Foreign Financial Assets.

1. Purpose. This form is sometimes anecdotally referred to as an "IRS FBAR" because it seeks to capture information similar to that captured for FinCEN by an FBAR. However, this form captures information about more different types of assets (called "specified foreign financial assets" or SFFAs) than does an FBAR. Two of the major

differences are that: Form 8938 does not capture assets over which one only has signature power (and an FBAR does); and Form 8938 requires reporting the fair market value of all of the filer's interests: in all foreign entities that are not held in an otherwise reported account; as well in trusts and estates (and an FBAR does not).

2. Penalty for not filing (many and varied) including:

   A. Failure to timely file penalty of USD 10,000 per required Form 8938 per tax year.

   B. Continuing failure to file penalty. If within 90 days after receiving IRS notice of failure to file you do not correct same, an additional USD 10,000 penalty for each 30 days (or part thereof) that such failure continues, up to a maximum of USD 50,000.

   C. Accuracy-related penalty. If one underpays tax as a result of a transaction involving an undisclosed SFFA, a penalty of up to 40% of the tax underpaid.

   D. Fraud. If you underpay tax due to fraud, a penalty of up to 75% of the underpayment due to fraud (though this penalty applies generally to all underpayments of tax due to fraud).

   E. Criminal penalties. Such can be assessed in addition to the above for failure to file the form, failure to report an SFFA, or an underpayment of tax.

3. Issues concerning form (if any). The form has differing filing requirement thresholds depending on filing status (single versus married filing a joint income tax return versus married filing separately), as well as whether the filer lives inside or outside the U.S. Moreover, this form specifically states that it must be filed by dual-resident taxpayer taking a treaty-based return position and specifically states how to make the filing in such case depending on your status as of the end of a tax year.

b. Form 5471 -- Information Return of US Persons with Respect to Certain Foreign Corporations.

1. Purpose. The form is used by certain U.S. citizens and residents who are officers, directors or shareholders in certain foreign corporations. The nature of the information required by the form differs depending on which "category of filer" you are. There are five different categories of filers (though the first category is currently not in use).

2. Penalty for not filing.

   A. The penalties vary depending on category of filer. Generally, *relative to each foreign corporation*, the penalties are the same as for Form 8938. A non-filer can also lose the ability to credit foreign taxes paid by the corporation against U.S. taxes owed by the corporation (i.e., you can lose the benefit of the U.S. foreign tax credit). Criminal penalties can also be applicable.

   B. *A third penalty in effect for any year (starting, depending on the facts, in a year somewhere in the mid-200s) in which this form has not yet been timely filed is as follows. By not filing this form you keep the statute of limitations open indefinitely relative to the entire U.S. tax return for the year to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return until the latter of: forever or until at least three years after the form is ultimately filed.*

3. Issues concerning form (if any). The form is exceedingly complicated and has differing filing requirements depending on the category of filer. Just determining into which category a filer fits is exceedingly complicated. In the author's experience, only a U.S. tax lawyer or U.S. tax CPA, in either case thoroughly familiar with U.S. taxation of foreign corporations and their activities (including a thorough familiarity with Subpart F of the Internal Revenue Code and its provisions related to controlled for-

eign corporations) should attempt to complete this form. The author has had to file multiple voluntary disclosures due to incorrect or missing Forms 5471…

c. Form 8858 – Information Return of US Persons with Respect to Foreign Disregarded Entities.

1. Purpose. The form is used by certain U.S. Persons that own a foreign disregarded entity directly, or in some cases indirectly or constructively. The filing requirements and the nature of the information required by the form differ depending on which "category of filer" of other forms (e.g., Form 5471 or 8865) that you are.

2. Penalty for not filing.

A. Generally, *relative to each foreign disregarded entity*, the penalties are the same as for Form 5471. A non-filer can also lose the benefit of the U.S. foreign tax credit. Criminal Penalties can also be applicable.

B. *An additional penalty in effect potentially back to the mid-2000s is the by not filing this form when it is required you keep the statute of limitations open indefinitely relative to the entire U.S. tax return to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return indefinitely and until at least until three years after the form is ultimately filed.*

3. Issues concerning form (if any). The form is complicated and has differing filing requirements depending on the category of filer of other forms (e.g., Form 5471 or 8865) that you are. Therefore, the same caveats applicable to who should prepare a Form 5471 apply here.

d. Form 8865 – Return of US Persons with Respect to Certain Foreign Partnerships.

1. Purpose. The form is used to report information required with respect to controlled foreign partnerships, transfers to foreign partnerships or reporting of acquisitions, dispositions, and changes in foreign partnership interests. Due to the above different reporting triggers there are four categories of filers; each having different filing requirements. The form is a combination of an informational return and modified form of U.S. partnership tax return (Form 1065).

2. Penalty for not filing.

A. Generally, *relative to each foreign partnership*, the penalties are the same as for Form 5471. A non-filer can also lose the benefit of the U.S. foreign tax credit. Criminal Penalties can also be applicable.

B. For certain categories of filers, the penalty is based on amounts contributed to a foreign partnership. Such are 10% of the fair market value of the property at the time contributed, subject to a USD 100,000 maximum (though there is no limit if the failure to file was due to intentional disregard). *Moreover, the contributor must recognize all gain on such property as if the property was sold for its fair market value.*

C. *A third penalty in effect for any year (starting, depending on the facts, in a year somewhere in the mid-200s) in which this form has not yet been timely filed is as follows. By not filing this form you keep the statute of limitations open indefinitely relative to the entire U.S. tax return for the year to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return until the latter of: forever or until at least three years after the form is ultimately filed.*

3. Issues concerning form (if any). The form is very, very complicated and has differing filing requirements depending on the category of filer you are. One filing it must also

fully understand U.S. federal income taxation of partnerships, which is itself a complicated area.

e. Form 8621 – Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.

1. Purpose. The form is used by certain U.S. Persons having an interest in a passive foreign investment company (PFIC), as well as the making of or the existence of certain elections relative to a PFIC. A PFIC is any foreign corporation that meets either the income test or asset test described below:

A. Income test. 75% or more of the corporation's gross income for the taxable year is passive income (e.g., generally, but not limited to, interest, dividends, rents, royalties, annuities, as well as: gains from the sale or exchange of property that generate the above; gains on commodities transactions; and foreign currency gains).

B. Asset test. At least 50% of the average percentage of assets held by the foreign corporation during the tax year are assets that produce passive income or that are held for the production of passive income.

i. In short, virtually any type of non-U.S. pooled investment vehicle that is taxed for U.S. purposes as a corporation.

2. Penalty for not filing.

A. Currently, there is no specific penalty for not filing the Form 8621 itself.

B. However, if you do not file a Form 8621, as well as note on such has been filed on Form 8938, or report the value of the PFIC directly on the Form 8938, that will trigger the Form 8938 penalties discussed earlier.

C. *An additional penalty in effect potentially back to the mid-2000s is the by not filing this form when it is required you keep the statute of limitations open indefinitely relative to the entire U.S. tax return to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return indefinitely and until at least until three years after the form is ultimately filed.*

3. Issues concerning form (if any). Other than in the year of a distribution from, or the disposition of an interest in, a PFIC, the form is itself is not complicated. However, the entire subject of PFICs is complicated and the taxation of same is convoluted and adverse.

f. Form 3520 – Annual Return to Report Transactions with Foreign Trusts & Receipt of Certain Foreign Gifts.

1. Purpose. The form is used by U.S. Persons (and executors of estates of U.S. decedents) to report: certain transactions with foreign trusts; ownership of foreign trusts under the grantor trust rules (I.R.C. §§ 671 through 679); and receipt of certain gifts or bequests from foreign persons. A separate Form 3520 must be filed relative to any of the above that occurred with any foreign trust or person. Some of the information on Form 3520 is required to complete parts of Form 3520-A and the information on Forms 3520 and 3520-A must be consistent. Any distribution from a foreign trust to a U.S. Person triggers the need to file a Form 3520. All the practical issues stated above that apply to Form 3520-A also apply to Form 3520 (other than relative to Form 3520 reporting of gifts from foreign persons).

2. Penalty for not filing. Obscene…

   A. Relative to a U.S. Person's creation of, transfer to, distribution from, or deemed ownership under the grantor trust rules of, a foreign trust, the greater of USD 10,000 or any of the following:

      i. 35% of the gross value of property transferred by a U.S. Person to a foreign trust if not reported (or if the creation of the trust is not reported) by the U.S. Person transferor or trust creator;

      ii. 35% of the gross value of property distributed from a foreign trust to a U.S. Person if not reported by the U.S. Person recipient; and

      iii. 5% of the gross value of the trust assets deemed owned by a U.S. Person due to the grantor trust rules for failure by the U.S. Person deemed owner to report the U.S. deemed owner information; and

         a. An additional separate 5% penalty of the gross value of the trust assets deemed owned by the U.S. Person due to the grantor trust rules (or USD 10,000 if greater), if the foreign trust: fails to Form 3520-A; or includes incorrect information on Form 3520-A.

      iv. Additional penalties will be imposed if noncompliance continues for 90 days after the IRS mails notice of such noncompliance.

   B. Relative to the reporting of gifts from a foreign person, a penalty equal to 5% of the amount of such foreign gifts times the number of months such remains unreported, subject to a maximum of 25% of the value of such gifts.

   C. *A third penalty in effect for any year (starting, depending on the facts, in a year somewhere in the mid-200s) in which this form has not yet been timely filed is as follows. By not filing this form you keep the statute of limitations open indefinitely relative to the entire U.S. tax return for the year to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return until the latter of: forever or until at least three years after the form is ultimately filed.*

3. Issues concerning form (if any). The form is complicated and has differing filing requirements depending on the category circumstances. As stated earlier relative to Form 3520-A, obtaining the information necessary to completely and accurately complete Form 3520 can be difficult and in addition to the above penalties, such can result in adverse tax consequences on distributions to U.S. Person beneficiaries from foreign non-grantor trusts. The author has had to file multiple voluntary disclosures due to incorrect or missing Forms 3520…

g. Form 926 – Return by a US Transferor of Property to a Foreign Corporation.

1. Purpose. The form is used by certain U.S. Persons to report certain transfers of tangible or intangible property to a foreign corporation. Such transfers are also often subject to U.S. federal income taxes as if the property transferred was sold or exchanged at the time the transfer is made.

2. Penalty for not filing.

   A. 10% of the fair market value of the property transferred, limited to USD 100,000 unless the failure to comply was due to intentional disregard.

   B. For tax years beginning after 18 March 2010, a 40% penalty may be imposed on any underpayment of taxes resulting from an asset required to be disclosed on Form 926 but not disclosed.

   C. *An additional penalty in effect potentially back to the mid-2000s is the by not filing this form when it is required you keep the statute of limitations open indefinitely relative to*

the entire U.S. tax return to which it relates. That means the IRS can examine (audit) such entire return and assess taxes on such entire return indefinitely and until at least until three years after the form is ultimately filed.

3. Issues concerning form (if any). The form itself is not that complicated. However, the taxation of "outbound" transfers to foreign corporations is complex for a number of reasons including that certain such outbound transfers are not subject to tax on such transfer.

IV. Obviously required forms that can trigger tax

a. Form 706-NA – Estate (and Generation-Skipping Transfer) Tax Return - Estate of nonresident not a citizen of the United States.

1. Purpose. Applies when any form of "U.S. Located Property" is transferred at the death of a person who is not a U.S. citizen and not domiciled in the U.S. (also called a non-U.S. Resident-Domiciliary or NUSRD). One only need hold a very low USD 60,000 worth of U.S. Located Property. U.S. Located Property includes all of the following if owned by a NUSRD at death *if such is not properly blocked by the decedent's prior imposition of an appropriate foreign blocker entity between the decedent and the U.S. Located Property*:

A. U.S. real estate and tangible personal property located in the U.S.;

B. The stock of any U.S. chartered corporation, mutual fund or other form of regulated investment company;

C. U.S. debt obligations unless the interest on them qualified for the portfolio debt exclusion from income taxation before death;

D. Deposits in a bank or bank branch located in the U.S. if such deposits are related to a trade or business that is effectively connected to the U.S.

E. *Note: A modified version of this death tax can apply to those who are "covered expatriates," which are certain former U.S. citizens or long-term green card holders who gave up their citizenship or green card after a certain date and met certain other criteria including their overall value of assets at the time of expatriation.*

2. Penalty for not filing. There are penalties for both non / late filing and non / late payment of any resulting tax, as well as valuation understatements that cause and underpayment of tax.

3. Issues concerning form (if any). The form does not appear to be that complicated, but that is a deception. The form actually is quite complicated because it incorporates many subsidiary forms used with a normal U.S. citizen / U.S. Resident-Domiciliary domestic estate tax return (Form 706). It would be very difficult to accurately complete this return unless one was completely familiar with the U.S. federal transfer tax system (which includes all of the gift, estate and generation-skipping transfer tax subsystems). From a practical perspective (subject to exceptions of course) because these taxes normally are prepared in tandem with estate planning or the handling of an estate or trust at death, it is more likely that a U.S. tax lawyer would be so familiar with the U.S. federal transfer tax system than would be most U.S. tax CPAs.

b. Form 709 – Gift (and Generation-Skipping Transfer) Tax Return.

1. Purpose. Applies when "U.S. Located Tangible Property" is transferred by gift / donation during life by a person who is not a U.S. citizen and not domiciled in the U.S. (also called a non-U.S. Resident-Domiciliary or NUSRD). In the case of NUSRDs, there is no lifetime exemption relative to this tax, however there is a USD 14,000 annual exemption for certain types of gifts, as well as a USD 100,000 annual exemptions

for certain types of gifts to NUSRD spouses (and an unlimited annual exemption for certain types of gifts to U.S. citizen spouses). U.S. Located Tangible Property only includes U.S. real estate and tangible property located in the U.S. at the time the gift / donation is made. *Note:* There are cases that indicate for purposes of this tax cash physically located in the U.S. is U.S. Located Tangible Property, as well as a few cases that indicate funds held in a U.S. account is U.S. Located Tangible Property.

2. Penalty for not filing. There are penalties for both non / late filing and non / late payment of any resulting tax, as well as valuation understatements that cause and underpayment of tax.

3. Issues concerning form (if any). The same form is used to report these transfers by NUSRD's that is used to report gifts made by U.S. citizens / U.S. Resident-Domiciliaries. Therefore, it is complicated. It would be very difficult to accurately complete this return unless one was completely familiar with the U.S. federal transfer tax system (which includes all of the gift, estate and generation-skipping transfer tax sub-systems). From a practical perspective (subject to exceptions of course) because these taxes normally are prepared in tandem with estate planning or the handling of an estate or trust at death, it is more likely that a U.S. tax lawyer would be so familiar with the U.S. federal transfer tax system than would be most U.S. tax CPAs.