Pitfalls in International Estate Planning - Potpourri of Topics and Problem Areas

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I. Introduction

This presentation will consist of two parts: firstly, it will provide an overview of current international hot topics in 2012, and secondly, it will point out some of the landmines confronting advisors in international planning. It is not meant to cover all the pitfalls, but a sampling of where an advisor may run astray.

II. Overview of Current International Tax Related Changes in 2012

A. Current Exclusion and Reporting Thresholds for 2012

Annual Exclusion - $13,000/donee

Marital annual exclusion to a non U.S. citizen spouse - $139,000

Applicable exclusion amount for U.S. citizens and domiciliaries - $5.12 million[1]

Applicable exclusion amount for non U.S. citizens/non domiciliaries - $60,000

Form 3520 filing thresholds for gifts received from NRAs: $100,000/year; from foreign companies: $14,723

Income tax liability threshold for covered expatriates: $151,000

Exit tax gain exemption amount: $651,000

B. Offshore Voluntary Disclosure

The IRS reopened the Offshore Voluntary Disclosure Program (OVDP) on January 9, 2012 following continued strong interest from taxpayers and tax practitioners after the closure of the 2011 and 2009 programs. In all, the IRS has seen 33,000 voluntary disclosures from the 2009 and 2011 offshore initiatives. Since the 2011 program closed last September, hundreds of taxpayers have come forward to make voluntary disclosures. Those who have come in since the 2011 program closed last year will be able to be treated under the provisions of the new OVDP program.

The third offshore effort comes as IRS Commissioner Schulman announced the IRS has collected $3.4 billion so far from people who participated in the 2009 offshore program, reflecting closures of about 95 percent of the cases from the 2009 program. On top of that, the IRS has collected an additional $1 billion from up front payments required under the 2011 program. That number will grow as the IRS processes the 2011 cases. The third offshore program will be open for an indefinite period until otherwise announced.

For the new program, the penalty framework requires individuals to pay a penalty of 27.5 percent of the highest aggregate balance in foreign bank accounts/entities or value of foreign assets producing unreported foreign income during the eight (8) full tax years prior to the

[1] Rev.Proc. 2011-52

disclosure. That is up from 20 percent in the 2009 program and 25 percent in the 2011 program. Some taxpayers will be eligible for 5 percent or 12.5 percent penalties; these remain the same in the new program as in 2011. Participants must file all original and amended tax returns and include payment for back-taxes and interest for up to eight (8) years as well as pay accuracy-related and/or delinquency penalties.[2]

C. New Filing Compliance Procedures for Non-Resident U.S. Taxpayers

On June 26, 2012, the IRS announced a new procedure for current non-residents who have not filed U.S. income tax and information returns to file their delinquent returns. This procedure will go into effect on September 1, 2012 and further details will be forthcoming. Taxpayers who are eligible for this procedure will be required to file delinquent tax returns for the past three years and to file delinquent FBARs for the past six years. The intensity of review will vary according to the level of compliance risk presented by the submission. For those taxpayers presenting "low compliance risk," the review will be expedited and the IRS will not assert penalties or pursue follow-up actions. Submission that present higher compliance risk are not eligible for the procedure and will be subject to a more thorough review and possibly a full examination, in a manner similar to opting out of the Offshore Voluntary Disclosure Program.

The IRS will determine the level of compliance risk presented by the submission based on information provided on the returns and additional information that will be required as part of the submission. "Low compliance risk" will be based on a simple return with little or no U.S. tax due. Absent high risk factors, if the submitted returns and application show less than $1,500 in tax due in each of the years, they will be treated as low risk. High risk factors include sophisticated tax planning or avoidance, material economic activity in the United States, additional history of noncompliance with the U.S. tax law, and the amount and type of U.S. source income.

D. Portability Rules for Estates

Proposed and temporary rules were released June 15, 2012 for estates to claim the unused estate and gift tax exclusion amounts of their deceased spouses.[3] These portability rules allow executors of estates that are not otherwise required to file an estate tax return to avoid reporting the value of property that qualifies for the marital or charitable deduction. If an executor chooses to make use of this special rule in filing an estate tax return, the temporary rules say the executor must estimate the total value of the gross estate, including the values of the property that do not have to be reported on the estate tax return under this provision. In addition, the proposed and temporary rules require estates to timely file an estate return even if they have no filing obligation, affirmatively opt out if they do not want to claim the election, and compute the portability amount using the applicable, rather than the basic, exclusion amount if more than one predeceased spouse is involved.

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[2] Note: most states piggy back on the Federal system and require taxpayers to amend their state returns when they have amended their federal return. In other words, taxpayers cannot rely on an otherwise "closed" year. See Va. Code § 58.1-311 and MD Code Ann. § 13-409.

[3] Reg 141831-11, T.D. 9593.

The temporary regulations provide in Treas. Reg. §20.2010-2T(a)(5) that an executor of the estate of a nonresident decedent who was not a citizen of the U.S. at the time of death may not make a portability election on behalf of that decedent. The temporary regulations in Treas. Reg. §§20.2010-3T(e) and 25.2505-2T(f) provide that a nonresident surviving spouse who was not a citizen of the U.S. at the time of such surviving spouse's death may not take into account the Deceased Spousal Unused Exclusion ("DSUE") amount of any decease spouse of such surviving spouse, except to the extent allowed under a treaty obligation of the U.S. When a QDOT has been created for the benefit of a decedent's surviving spouse, the executor of the decedent's estate will compute a DSUE amount, on a preliminary basis, that may decrease as distributions constituting taxable events under Section 2056A are made. The DSUE amount of such a decedent shall be redetermined upon the final distribution or other taxable event on which estate tax under Section 2056A is imposed, which is generally upon the death of the surviving spouse or the earlier termination of all QDOTs created for that surviving spouse.

E. Foreign Account Tax Compliance Act ("FATCA")

In March 2010, the Hiring Incentives to Restore Employment Act ("the HIRE Act") was signed into law. The HIRE Act imposes a new reporting regime for foreign financial institutions (FFIs), certain non financial foreign entities (NFFEs) and U.S. persons with foreign financial assets. The additional reporting requirements were adopted in response to the perceived abuse of offshore accounts by U.S. taxpayers, as demonstrated by a number of recent high-profile offshore tax evasion cases. The new reporting regime was first introduced under FATCA in October 2009 and later became part of the HIRE Act. Because of the name of the original act, the regime is commonly referred to as FATCA. FATCA consists of sections 1471-1474 of the Internal Revenue Code. To date, the IRS has issued three Notices and proposed regulations regarding FATCA.[4]

Generally, FATCA introduces a new 30% withholding tax on U.S. source withholdable payments to foreign financial institutions ("FFIs") that have not entered into an agreement with the IRS to identify, report, withhold upon and/or close non-compliant U.S. accounts. FATCA also introduces a new 30% withholding tax on U.S. source withholdable payments to certain Non-Financial Foreign Entities ("NFFEs") who fail to certify that they have no substantial U.S. owners and are not otherwise eligible for an exception. FATCA requires FFIs to either agree to implement procedures to identify all U.S. financial accounts held at the FFI, report information related to such accounts to the IRS and withhold tax on payments to certain accounts or suffer a punitive withholding tax on various U.S. source payments to the FFI. Surprisingly, the law transforms withholding tax from its typical purpose (a method for collecting income tax due from taxpayers beyond the jurisdiction of the United States) to a tool used to incentivize or coerce information reporting from foreign entities. This unprecedented use of withholding taxes and the complexity of the FATCA reporting regime leave FFIs that are invested in the U.S. market with the daunting task of evaluating their options under the new law.

FATCA essentially seeks to increase U.S. taxpayer compliance and prevent tax evasion by U.S. persons by presenting FFIs and NFFEs that have U.S. investments with the choice to disclose their U.S. accountholders and U.S. owners or suffer 30% withholding tax on certain

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[4] Notice 2011-53, Notice 2010-60, Notice 2011-34, proposed regulations issued February 8, 2012.

U.S. source payments. Most observers expect that FATCA's impact on the global financial system will be expansive and that most FFIs with significant exposure to U.S. markets will have a strong incentive to participate through a FATCA Agreement.

FFIs that choose to comply with FATCA may do so by entering into a § 1471(b) agreement with the IRS (an "Agreement"). FFIs that enter into Agreements are participating FFIs; those that do not are non-participating FFIs who are not otherwise "deemed" compliant. FATCA grants certain authority to IRS to identify FFIs that may be "deemed" to meet the requirements of a FATCA Agreement or that otherwise pose a low risk of tax evasion. IRS has provided only limited guidance on this to date. Certain local banks and investment vehicles may qualify but from the limited guidance to date, it remains unclear whether or to what extent FFIs could be deemed compliant without entering into a FATCA Agreement.

FFIs are broadly defined and would include banks, investment and mutual funds, hedge funds, certain insurance companies, and other similar entities organized outside of the U.S. An FFI is defined as any entity organized outside of the U.S. that: (1) accepts deposits in the ordinary course of a banking or similar business; (2) as a substantial portion of its business, holds financial assets for the account of other persons; or (3) is engaged or holds itself out as being engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, or commodities.

Section 1474(b) generally allows the beneficial owner of a payment subject to withholding under FATCA to seek a refund for any overpayment of tax. However, specific procedures must be followed to obtain a refund, and in certain cases entitlement to the refund is limited. As a result of the limitations on the availability of refunds, and the procedures required to receive such refunds, section 1474(b) provides only limited relief from FATCA to non-participating FFIs and their account holders. Entitlement to a credit or refund for overpayment of tax depends on whether the beneficial owner of the payment to which the withholding tax was attributable is an account holder or the non-participating FFI itself. Account holders (other than non-participating FFI account holders) are entitled to credits and refunds as if the withholding was made under the withholding regime for U.S. source FDAP income. Accordingly, such account holders are entitled to a credit or refund for overpayments if the amounts withheld upon were entitled to reduced rates or exempted under either the Code or an income tax treaty. For example, assume that a custody account holder at a non-participating FFI earns $10,000 of U.S. source portfolio interest through investments in his account. If the institution where the account is held is a non-participating FFI, the payor of the interest (the withholding agent) will deduct and withhold 30% tax at source.15 If the account holder is not a U.S. person, the interest payment should be exempt from U.S. income tax because it qualifies for the portfolio interest exemption under § 871(h). Accordingly, the account holder is entitled to a $3,000 refund under § 1471(b)(1).

FATCA was expected to be effective generally for payments after 12/31/12, however, due to the significant practical difficulties expected in its implementation, the IRS has decided to implement it in accordance with the phased-in time-line detailed in Notice 2011-53. Some notable highlights of the Notice 2011-53 Phased-in time-line include:

2012:

Grandfathered Obligations: No withholding imposed on any obligation outstanding on 3/18/2012. Notice 2010-60.

2013:

FFIs will not be subject to withholding; Original effective date of January 1, 2013 postponed and now scheduled to begin on January 1, 2014.

Applications / Registration:

- IRS will begin accepting applications (electronically) for agreements beginning no later than January 1, 2013. (Notice 2011-53)
- Any agreement entered into on or before June 30, 2013 will be effective on July 1, 2013.
- Effective date of agreement entered into post June 30, 2013 will be the date of such agreement.

Due Diligence - New Accounts:

- Procedures for due diligence for new accounts set forth in Notice 2010-60 must be in place for all accounts opened on or after the effective date of the Agreement.

2014:

Withholding agents are obligated to withhold on U.S. source FDAP payments to non-participating FFIs starting January 1, 2014.

Withholding on other withholdable payments is postponed to 2015.

FFIs that fail to enter into an agreement by June 30, 2013 may be subject to withholding by U.S. agents beginning January 1, 2014.

Due Diligence:

- Preexisting Private Banking Account Due Diligence:
    - Private Banking Accounts with values of $500,000 or more:
        - Within 1 year of the effective date of the Agreement, the procedures described in Section 1.A.2 of Notice 2011-34 must be in place for all accounts opened before the effective date of the agreement that have a balance of $500,000 or more on the effective date.
        - Private Banking Accounts with less than $500,000:
            - The FFI will have until the later of December 31, 2014 or one year after the effective date of its FATCA agreement to comply with the due diligence procedures.

Reporting:

FFI must report by September 30, 2014 any U.S. account if the account holder has provided a Form W-9 by June 30, 2014.

FFI must report by September 30, 2014 any recalcitrant account holders that have been identified by June 30, 2014 under the prescribed procedures.

2015:

Withholding agents must withhold on all withholdable payments to non-participating FFIs, including gross proceeds from the sale of a type which can produce withholdable payments.

Obligation of participating FFIs to withhold on passthru payments to recalcitrant account holders or non-participating FFIs to begin no earlier than January 1, 2015.

Other Preexisting Accounts:

- The FFI must complete the account due diligence procedures within two years of the effective date of the FATCA Agreement (*e.g.* by July 1, 2015).

The United States is working with various countries to facilitate FATCA. Currently, an intergovernmental agreement is being negotiated with the US and France, Germany, Italy, Spain and the United Kingdom whereby information will be collected and exchanged on an automatic basis. A second approach where FFIs report directly to the IRS has been negotiated in Switzerland and Japan.

Possible Framework for Intergovernmental Approach

1. The United States and a partner country (FATCA partner) would enter into an agreement pursuant to which, subject to certain terms and conditions, the FATCA partner would agree to:

> *a. Pursue the necessary implementing legislation to require FFIs in its jurisdiction to collect and report to the authorities of the FATCA partner the required information;*
>
> *b. Enable FFIs established in the FATCA partner (other than FFIs that are excepted pursuant to the agreement or in US guidance) to apply the necessary diligence to identify US accounts; and*
>
> *c. Transfer to the United States, on an automatic basis, the information reported by the FFIs.*

2. In consideration of the foregoing, the United States would agree to:

> *a. Eliminate the obligation of each FFI established in the FATCA partner to enter into a separate comprehensive FFI agreement directly with the IRS, provided that each FFI is registered with the IRS or is excepted from registration pursuant to the agreement or IRS guidance;*
>
> *b. Allow FFIs established in the FATCA partner to comply with their reporting obligations under FATCA by reporting information to the FATCA partner rather than reporting it directly to the IRS;*

c. Eliminate US withholding under FATCA on payments to FFIs established in the FATCA partner (i.e., by identifying all FFIs in the FATCA partner as participating FFIs or deemed-compliant FFIs, as appropriate);

d. Identify in the agreement specific categories of FFIs established in the FATCA partner that would be treated, consistent with IRS guidelines, as deemed compliant or presenting a low risk of tax evasion;

e. Commit to reciprocity with respect to collecting and reporting on an automatic basis to the authorities of the FATCA partner information on the US accounts of residents of the FATCA partner.

3. In addition, as a result of the agreement with the FATCA partner described above, FFIs established in the FATCA partner would not be required to:

a. Terminate the account of a recalcitrant account holder;

b. Impose passthru payment withholding on payments to recalcitrant account holders;

c. Impose passthru payment withholding on payments to other FFIs organized in the FATCA treaty partner or in another jurisdiction with which the United States has a FATCA implementation agreement.

F. Form 8938 (*Statement of Specified Foreign Financial Assets*)

The IRS now requires individuals with a "specified foreign financial asset" to file IRS Form 8938, *Statement of Specified Foreign Financial Assets*, in addition to Form TD F 90-22.1 ("FBAR") starting in 2012 for the tax year ending 2011. Temporary and proposed regulations were issued in late 2011.

Who must file? Currently, Form 8939 must be filed by U.S. citizens, U.S. resident aliens and resident aliens who elect to be taxed as a resident of a foreign country under the treaty tie breaker rules. Until the proposed regulations are finalized, only individuals, not domestic entities, must file Form 8938. Currently there are two look-through rules applicable to individuals. First, the owner of a disregarded entity (such as a single-member limited liability company) is treated as having an interest in foreign financial assets owned by the entity for purposes of the Form 8938 filing requirement. Similarly, the grantor of a grantor trust is treated as owning the foreign financial assets of the trust.

Beginning with 2012 tax returns, closely held domestic partnerships and corporations which earn predominately investment income will also be subject to Form 8938 filing requirements. Some domestic nongrantor trusts will also be required to file.

Form 8938 is due with an individual's tax return and has a minimum filing threshold of $50,000 of the aggregate value of all foreign financial assets for individuals, however the filing thresholds vary depending on the individual's filing status and whether he or she is married and are living in the U.S. or abroad. Taxpayers must file Form 8938 if the aggregate value of their specified foreign financial assets is more than the following reporting thresholds:

	Aggregate value of all specified foreign financial assets on December 31st is more than:	*OR at any time during the year is more than:*
Unmarried taxpayers living in the US	$50,000	$75,000
Married taxpayers filing a joint income tax return and living in the US	$100,000	$150,000
Married taxpayers filing separate income tax returns and living in the US	$50,000	$75,000
Unmarried taxpayers living abroad	$200,000	$300,000
Married taxpayers living abroad	$400,000	$600,000

- **Unmarried taxpayers living in the US:** The total value of their specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year.

- **Married taxpayers filing a joint income tax return and living in the US:** The total value of their specified foreign financial assets is more than $100,000 on the last day of the tax year or more than $150,000 at any time during the tax year.

- **Married taxpayers filing separate income tax returns and living in the US:** The total value of their specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year.

- **Taxpayers living abroad. A taxpayer is living abroad if:**

    - He or she is a U.S. citizen whose tax home is in a foreign country and he or she is either a bona fide resident of a foreign country or countries for an uninterrupted period that includes the entire tax year, or

    - He or she is a U.S. citizen or resident, who during a period of 12 consecutive months ending in the tax year is physically present in a foreign country or countries at least 330 days.

- **A taxpayer living abroad must file if:**
  - He or she is filing a return other than a joint return **and** the total value of his or her specified foreign assets is more than $200,000 on the last day of the tax year or more than $300,000 at any time during the year; or
  - He or she is filing a joint return **and** the value of his or her specified foreign asset is more than $400,000 on the last day of the tax year or more than $600,000 at any time during the year.

Valuation of assets. One must perform two valuations: (1) value the assets as of the end of the taxable year, and convert the value of assets denominated in a foreign currency into U.S. dollars using the U.S. Treasury Department's Financial Management Service exchange rates; and (2) value the assets as of the maximum fair market value of the asset at any time during the taxable year, and again converting it using the exchange rate as of the end of the taxable year. The regulations specifically state that third party appraisals are not required in order to obtain a reportable value. One can rely on values from publicly available information.

Specified foreign financial assets. A SFFA includes not only financial accounts but financial assets, e.g., stock in foreign entities and foreign contract rights. It includes any interest in stocks, other securities, and other financial instruments issued by non-U.S. persons (unless held in an account at a financial institution). Interests in foreign entities such as foreign partnerships, corporations, and limited liability companies are also considered to be foreign financial assets. A U.S. beneficiary's interest in a foreign estate or foreign trust is considered to be a foreign financial asset if the U.S. person knows (or has reason to know) of the existence of the interest. If the person receives a distribution from the trust or estate, he or she is deemed to have knowledge.

Information to be reported. Information to be reported includes the date the asset was acquired, or disposed of and the income, deductions and credits resulting from each asset including a listing of where those amounts were reported on the income tax return field by the individual.

Duplicative filings. In order to minimize duplicative filings, assets reported on the following forms need not be reported on Form 8938, but the individual still must file Form 8938 to report that fact: Forms 3520, 5471, 8621, 8865, 8891.

Foreign trusts and estates. An individual's interest in a foreign trust or estate is not a SFFA unless the individual knows or has reason to know of the interest. A person is deemed to have actual knowledge of the interest if he or she receives a distribution from a foreign trust or estate. Special rules provide for reporting the value of interests in foreign trusts, estates, pension plans, and deferred compensation plans. The maximum value of a beneficiary's interest in a foreign trust is the sum of the fair market value of his or her trust distributions for the year, plus the value of that person's right as a beneficiary to receive mandatory distributions from the trust. The maximum value of an interest in a foreign estate, pension plan, or deferred compensation plan is the fair market value of the person's beneficial interest in such estate's or plan's assets determined as of the last day of the taxable year. If such information is unavailable, the maximum value to be reported is the distribution received during the taxable year.

Penalties. The penalty for failing to file Form 8938 is $10,000 per failure and increases by $10,000 for each 30-day period following notification from Treasury, and caps at a maximum of $50,000. The penalty will not be imposed if the failure to file was due to reasonable cause and not willful neglect. A separate accuracy related penalty equal to 40% of the underpayment applies if an individual underpays his or her U.S. tax liability as a result of a transaction not disclosed on Form 8938.

Statute of Limitations. The statute of limitations is three (3) years from the time that the Form 8938 is filed. If it is not filed, it does not begin to run. Additionally, if amounts relating to one or more specified foreign financial assets are not included in gross income, then the tax on that unreported income can be assessed at any time within six (6) years from the date the income tax return was filed (instead of the normal 3 year statute). This statute of limitations is extended to 6 years if an income tax return omits more than $5,000 of income attributable to a foreign financial asset, even if the asset is not required to be reported on Form 8938 (due to dollar threshold or the exception for duplicate filings).

The scope of Form 8938 disclosure is broader than the FBAR so taxpayers that do not have to file an FBAR may have to file Form 8938. For example, Form 8938 includes investments in foreign mutual funds, foreign hedge funds, and foreign private equity funds, which are exempted from FBAR reporting. (See attached comparison chart prepared by the IRS)

G. Uncompensated Use of Foreign Trust Property

Section 533 of the HIRE Act amended Code section 643(i) to provide that if a trustee permits a U.S. person to use foreign trust property (even if the property is located in the U.S.) without paying the fair market value for the use of such property, such use will be treated as a distribution from a foreign trust to the U.S. beneficiary. This deemed distribution related to the fair market value of the use of property may pose an administrative burden on trustees and beneficiaries, who will have to track the usage of trust property by each individual and assign a fair market value to such usage, in some cases for property that is not generally rented and, therefore, for which a rental value cannot be easily determined (*e.g.*, artwork, jewelry, household furnishing, etc.). It may be easier to value some larger types of trust property such as yachts, planes and real property. The deemed distribution will trigger a Form 3520 filing requirement, which includes a 35 percent penalty on the amount of the deemed distribution for failure to file.

Example: Iain Smith, working for an international organization is present in the U.S. on an A visa. His days of presence are exempt from day counting under the substantial presence test. He resides in McLean, VA with his wife and children (who were born in the US). His local Virginia attorney set up a revocable trust and retitled the McLean residence, his Bethany Beach property and his financial accounts in the name of his revocable trust. His wife and son spend the summer at the beach house and do not pay rent. Because he is an NRA and the grantor of the revocable trust, it is a foreign trust. To the extent the U.S. wife and children have the rent free use of the property, they are deemed to receive a distribution and have a Form 3520 filing requirement.

H. Filing PFIC Form Even Without a Distribution

A foreign corporation is a PFIC if it meets a passive income test or a passive assets test. A corporation meets the passive income test if at least 75 percent of its income consists of dividends, interest, and other passive items, or it meets the passive assets test if at least 50 percent of its assets produce passive income.

FATCA includes a requirement that shareholders in a PFIC must file an annual information return, Form 8621 (*Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*), disclosing their ownership of the PFIC. Under previous law, such disclosure was required only when taxpayers made a qualifying elective fund election, received certain distributions from the PFIC, or disposed of their interest in the PFIC. Now all interests in PFICs must be reported annually. Notice 2011-55 provides that shareholders who are not otherwise required to file Form 8621 annually prior to the enactment of Section 1298(f) are only required to file as provided in the current instructions for Form 8621. Thus, until revised Form 8621 instructions are released, which provide for Section 1298(f) annual reporting, this annual reporting requirement is suspended.

Note, almost all foreign mutual funds are PFICs and, generally, foreign life insurance wrappers will be PFICs.

III. Landmines Advisors Should Seek to Avoid.

Landmine #1: Naming a nonresident alien as trustee, successor trustee or trust protector.

If the trustee, successor trustee or trust protector is "foreign" i.e., a non resident alien, the U.S. trust may inadvertently convert from a U.S. domestic trust to a foreign trust and expose the trustee and beneficiaries to a whole host of reporting responsibilities, not to mention potentially adverse tax ramifications. A trust is a U.S. trust only if it satisfies the following two tests: (i) a U.S. court is able to exercise primary supervision over the administration of the trust; and (ii) one or more U.S. Persons have the authority to control all substantial decisions of the trust. If a trust does not meet both of these tests, the trust is treated as a foreign trust.[5] Trust attorneys drafting a U.S. trust will often provide for a trust protector who effectively has the "hire and fire" power; namely the authority to remove and replace a trustee. A foreign trust protector will cause the trust to be foreign.

Rule: Thus, even if you prepare a trust for a U.S. citizen, always ask for the nationality and residency of all back up trustees, co-trustees, successor trustees and trust protectors.

Landmine #2: Overlooking the 65-day Election

A fiduciary of a complex trust can elect to treat an amount properly paid or credited within the first 65 days of any tax year of the trust as paid or credited on the last day of the preceding tax year. The election need not be made for the entire amount distributed, but can apply to only a *portion* of amounts distributed to a beneficiary within the first 65 days following the close of the tax year. However, a 65 day election cannot apply to an amount greater than (a)

[5] Section 7701(a)(30)(E).

the trust's accounting income for the tax year for which the election is made, or (b) the trust's DNI (distributable net income) for that tax year.[6] Making this election may be particularly attractive in the case of foreign non-grantor trusts so they can distribute all of their DNI for the year and avoid it converting to UNI which likely will be subject to the throwback tax regime on future distributions.

Rule: For all foreign non-grantor trusts, tickler the 65-day deadline.

Landmine #3: Establishing a U.S. revocable trust with U.S. trustees who then move to the UK.

Beware of the tax ramifications resulting from the residency of the trustee.

U.S. attorneys often set up trusts and name their U.S. citizen client as trustee. If that client moves to the UK, it will cause the trust to be a UK resident trust for UK income tax purposes and subject it to UK income tax - currently 50%!

Rule: Always confirm the residency of the trustees and successor trustees even if they are U.S. citizens. Warn your clients to advise you if they move overseas, even if temporarily.

Landmine #4: Setting up a trust where there is any connection to France.

Under new French tax legislation with an effective date of July 31, 2011, onerous tax and reporting rules apply to trusts where (1) the settlor is French resident; (2) any beneficiary is French resident; or (3) any trust asset is French situs. There are certain exceptions for some French financial assets for non-French resident settlors, beneficiaries, and trustees. The new legislation imposes a disclosure requirement on the trustee. The trustee must disclose to the French tax authorities information regarding the trust such as the creation, modification, revocation, and terms of the trust as well as the net asset value of the trust as of January 1 of each year. Failure to so report incurs a penalty of 10,000 Euros or 5% of the trust assets. The trustee will be jointly liable with the settlor and beneficiaries for the payment of the penalty. For assets in a trust, French gift and inheritance taxes will now apply regardless of the location of the assets if either the settlor or the beneficiaries are French resident. French gift and inheritance tax will also apply to assets located in France even if both the settlor and the beneficiaries are non French resident. The tax rate that will apply to the gift (upon transfer to the trust) or inheritance (if at death) depends on the relationship between the settlor and the beneficiaries. The tax rate is 45% if the beneficiaries and the settlor are members of the same family. (Note, the rate can be lower if the assets are distributed to an identified person who is a descendant of the settlor). A 60% rate applies (1) if they are unrelated; (2) if the trust is governed under the law of an uncooperative jurisdiction, or (3) if the trust was settled by a French resident on or after May 11, 2011. In addition, assets in trust are counted for French wealth tax purposes. The settlor must include their value annually. A beneficiary will be deemed the settlor when the original settlor dies and then must include the value in his or her wealth tax calculation.

Rule: Avoid having trusts with any French connection, or proceed with great caution.

[6] Section 663(b).

Landmine #5: Setting up a trust that makes distributions to a resident of Germany or Spain.

Many foreign jurisdictions treat distributions from trusts to residents in their jurisdiction (even if U.S. citizens) as being between third parties and subject to higher rates of tax.

Example: Virginia resident parents establish second to die irrevocable life insurance trust naming their U.S. citizen daughter as trustee. She marries a Spaniard and moves to Spain. At her parents' deaths, the distribution from the trust to the daughter will be taxed at a rate of 80% (instead of 2% applicable to direct descendants).

Rule: Request your clients to notify you if a beneficiary changes residency.

Landmines #6 and 7: Failing to consider forced heirship rules and failing to take into account foreign tax ramifications of the tax clause in wills and trusts.

Most civil law jurisdictions have forced heirship rules which provide for a reserved share to certain reserved heirs (*e.g.*, children) which may disrupt and override the estate plan you have drafted. Further, in civil law jurisdictions, it is generally the recipient who pays the inheritance tax. So, if you draft a will whose tax clause provides as follows:

"all estate, inheritance, transfer, succession, legacy and other death taxes or duties, including any interest and penalties thereon, payable by reason of my death under any laws of the United States *or any foreign country* shall be paid as an expense of administration from my general testamentary estate"

the result could be that the U.S. beneficiaries and assets bear the brunt of the inheritance tax on assets passing to a disinherited heir.

Example: Mom, a U.S. citizen, establishes a U.S. revocable trust with the majority of her liquid assets. She also has real estate in a civil law jurisdiction e.g., France. Under her will and trust, she leaves all her assets to her granddaughter and charities and excludes her wayward son from whom she has been estranged for decades. Son makes a forced heirship claim against her estate in France and takes 50% of all her French assets valued at 10 million Euros. The tax is 40% or 4 million Euros. Based on the terms of the tax clause in the U.S. will and U.S. trust, he guts the U.S. trust of 4 million Euros to pay his French inheritance tax obligation.

Rule: Carefully consider whether your client's estate may be exposed to forced heirship claims which could disrupt the estate plan. Also, make sure you consider the tax clause in case an heir (even with a no contest clause) asserts a forced heirship claim in a foreign country.

Landmine #7: Using a standard pour over will with revocable trust when the client has any foreign assets.

Where foreign property is owned in a civil law jurisdiction, generally it is not advisable to use a pour over will to transfer such assets into a revocable trust. In addition, there may be forced heirship rules which will override the will and trust terms.

Example: Virginia attorney prepares pour over will and revocable trust for a husband and wife. Husband owns a villa in St. Raphael. Virginia attorney does not consult with French counsel. At husband's death, wife as executor is trying to deal with the will directing her to put the property into the trust which creates a bypass and marital trust. French law does not have a trust concept. France may not permit a spousal exemption and may treat the asset as passing to a third party taxable at a 60 percent rate..

Rule: Always engage foreign counsel when a client has a foreign asset. Generally, a trust may not be an appropriate vehicle in certain countries.

Landmine #8: Failing to consider the citizenship of your client.

Some countries apply forced heirship rules based on nationality rather than residency. For example: Germany applies its forced heirship rules on the nationality of the decedent. So, even if the client is a dual U.S. German national and resides in the U.S. with solely U.S. assets, an heir may make a claim under Germany's forced heirship rules and again disrupt the plan.

Rule: If your client has any connection to a foreign country, engage foreign counsel to advise on nontax ramifications.

Landmine #9: Failing to pay attention to a nonresident alien client's investments.

Some investments in the U.S. will be considered non U.S. situs and escape U.S. taxation at the death of an NRA, others will not. Bank accounts maintained at U.S. banks are not U.S. situs property, including checking and savings accounts, time deposits and CDs.[7] Cash on deposit in a U.S. bank is non U.S. situs for U.S. estate tax purposes, but cash deposits with U.S. brokers, money market accounts with U.S. mutual funds and cash in U.S. safe deposit boxes are U.S. situs property and subject to U.S. estate tax at the death of a NRA.[8]

Rule: If your NRA client is concerned about the U.S. estate tax exposure, structure the NRA's investments into non U.S. situs assets.

Landmine #10: Ignoring the provisions of a treaty.

The United States has tax treaties with a number of foreign countries. Under these treaties, residents (not necessarily citizens) of foreign countries are taxed at a reduced rate, or are exempt from U.S. taxes on certain items of income they receive from sources within the United States. These reduced rates and exemptions vary among countries and specific items of income. Under these same treaties, residents or citizens of the United States are taxed at a reduced rate, or are exempt from foreign taxes, on certain items of income they receive from sources within foreign countries. Most income tax treaties contain what is known as a "saving clause" which prevents a citizen or resident of the United States from using the provisions of a tax treaty to avoid taxation of U.S. source income

[7] Section 2104(c).
[8] Section 2104(c).

Treaties generally only help not hinder, but occasionally they can. Many treaties resitus shares of company stock to the domicile or residence of the decedent. For example: the treaties with France, UK and Germany treat a resident (not a U.S. citizen) of those countries' interest in U.S. stock as non U.S. situs. Note however the exception for French real estate companies (shares in companies holding more than 50% real property in France are considered French situs and subject to French inheritance tax).

Rule: When advising clients with any foreign connection, check the provisions of any applicable treaty.

Landmine #11: Making a gift from a NRA in the U.S.

A gift of cash in the U.S. is considered U.S. situs, so a gift (by check drawn on a U.S. bank or wire transfer from a U.S. bank) to a donee will be subject to U.S. gift tax unless an exclusion applies (*e.g.*, annual, marital, charitable). So for example, if the gift is in excess of the annual exclusion amount, it will be taxable at rates up to 35% in 2012. Note, there is no applicable exclusion amount available to NRAs for lifetime gifts (i.e., the NRA cannot apply any of the $60,000 exclusion amount to lifetime gifts).

Rule: Structure gifts from an NRA outside the U.S., i.e., from the NRA's foreign bank account to the donee's foreign bank account. Note: for an alternative, have the NRA gift stock in U.S. brokerage account.

Landmine #12: Failing to understand the reporting thresholds for gifts from non U.S. persons.

A U.S. person who receives a gift from a non U.S. person may have a reporting obligation on Form 3520 based on the identity of the donor and the amount of the gift. Failure to so file incurs a penalty of 5 percent of the amount of the foreign gift for each month for which the failure to report continues (not to exceed a total of 25 percent). A gift to a U.S. person does not include amounts paid for qualified tuition or medical payments made on behalf of the U.S. person.

The following rules apply:

- If the donor is an individual, the filing threshold is $100,000 in the aggregate per year:
- If the donor is a company: the filing threshold is $14,723 for 2012;
- If the donor is a trust: the filing threshold is -0-

Donees must aggregate gifts received from related parties. For example, if a taxpayer receives $60,000 from nonresident alien A and $50,000 from nonresident alien B, and the taxpayers knows or has reason to know they are related, the taxpayer must report the gifts because the total is more than $100,000. They are reportable in Part IV of Form 3520. Note, gifts from foreign trusts are treated as trust distributions and reportable in Part III of Form 3520.

Effective June 17, 2008, gifts from a covered expatriate (i.e., certain expatriating individuals who ceased to be a U.S. citizens or long term green card holder meeting certain thresholds on or after June 17, 2008) may be subject to special rules.

Taxpayers may be penalized if they do not file your Form 3520 on time or if it is incomplete or inaccurate. Generally, the penalty is 5% of the amount of the foreign gift for each month for which the failure to report continues (not to exceed a total of 25%).

Rule: Advise your client who receives gifts from foreign donors to be aware of their potential reporting obligations.

Landmine #13: Failing to recognize that a distribution from a foreign trust requires the filing of a Form 3520 or it will incur a 35% penalty on the amount of the distribution.

There is no filing threshold for distributions from foreign trusts. For example, wife has a U.S. green card. Her husband is an NRA, works for the World Bank and has a G 4 visa. Local attorney sets up revocable trusts for each spouse. Husband pays for some of wife's expenses from his trust. Wife has received a distribution from a "foreign trust" and must file a Form 3520 reporting the distribution. Failure to do so will trigger a 35% penalty.

Rule: Since a revocable trust drafted under U.S. law, can still be a foreign trust, care must be taken to report distributions to a U.S. person, even a spouse.

Landmine #14: Failing to quickly take action with respect to a U.S. person's inheritance of foreign entities after a foreign individual dies.

A typical foreign investment structure has an NRA setting up a foreign grantor trust which holds shares of a foreign holding company (*e.g.,* a BVI limited). After the NRA's death, the trust converts into a foreign nongrantor trust. The trust may provide for the BVI shares to be distributed to his U.S. resident children. Depending on certain tests, the BVI company may be a controlled foreign corporation ("CFC") or a passive foreign investment company ("PFIC") both of which are part of the U.S.' antideferral provisions. To avoid a host of adverse tax ramifications, the U.S. children should consider making a check the box election on Form 8832 within 75 days of their father's death to treat the foreign/BVI company as a disregarded entity.

The check-the-box election is available to such an entity only if it is not a *per se* corporation under the laws of any of the jurisdictions in which it is created or organized. An eligible entity uses Form 8832 to elect how it will be classified for federal tax purposes, as a corporation, a partnership, or an entity disregarded as separate from its owner. An election specifying an eligible entity's classification cannot take effect more than 75 days prior to the date the election is filed, nor can it take effect later than 12 months after the date the election is filed.

If you want the election to take effect before the date of death, so the beneficiaries obtain a step up in basis, you must file the Form 8832 for retroactive effect for the day before death. Thus, the form must be filed by the 74th day after the NRA's date of death. You would likely make this election if the corporation holds foreign assets and not U.S. assets, otherwise you risk U.S. estate tax exposure. However, if you are seeking pass through treatment because the foreign company would be treated as a CFC or PFIC in the hands of the U.S. beneficiaries and it holds what would be treated as U.S. assets if treated as a pass through, you would make the election to be effective for the day after death. If an election is to be effective for any period prior to the time it is filed, each person who was an owner between the date the election is to be effective and the date the election is filed must sign.

Rule: If your client mentions he or she is receiving a foreign inheritance, immediately tickler 75 days and review the assets in the estate.

Landmine #15: Failing to prohibit U.S. beneficiaries under a trust if a U.S. person wishes to transfer assets irrevocably to a foreign trust.

If a U.S. person transfers assets to a foreign trust, it will be fully income taxable to the grantor unless no U.S. person may be a beneficiary in the year.[9]

Rule: If the goal of the client is to irrevocably transfer assets to a foreign trust, draft to exclude U.S. persons as beneficiaries.

Landmine #16: Assuming that once a green card holder holds his green card for more than 8 out of 15 years, he should apply for U.S. citizenship since he will be subject to the U.S. exit tax under IRC 877A.

When a long term resident (i.e., one who has been a lawful permanent resident of the U.S. in at least 8 taxable years during the previous 15 taxable years) expatriates, he or she is treated in the same manner under Section 877A as a U.S. citizen who renounces his or her citizenship - with one important exception. If a U.S. green card holder relinquishes his or her green card, he or she has the right to take a step up in basis in the assets he or she held at the time of becoming became a U.S. resident. Conversely, a U.S. citizen may have to use his or her original basis. This could lead to significant gain on which the exit tax is imposed.[10] The Form 8854 instructions state that only an expatriating long-term resident can obtain an in-bound basis step- up, however, the Code is not clear. The ability to use in-bound basis step-up by a U.S. citizen is not clear because Section 877A(h)(2) states "property which was held by an individual on the date the individual first became a resident of the United States shall be treated as having a basis on such date of not less than the fair market value of such property on such date" where the previously applicable Section 877(e)(3)(B) states "property which was held by *the long-term resident.*" While the Code is not clear, it is a potentially important exception.

Rule: It may be better to give up a green card than citizenship. So, if there is any chance the client may consider leaving the US, he may not want to go forward with citizenship without first evaluating the effect it may have on his basis for exit tax purposes.

[9] Section 679.
[10] Section 877A.

Landmine #17: Failing to ask whether an inheritance is from a "covered expatriate".

Recipients of gifts or inheritances from a "covered expatriate" are subject to an inheritance/succession tax at the highest gift or estate tax rate in effect at the time of receipt.[11]

Example: A U.S. citizen with a net worth of $11 million and a basis of $1 million expatriates in 2010. He pays the U.S. exit tax of $2 million and nets $9 million. He ventures off to a lovely Caribbean island where he sets up his own offshore hedgefund, pays no income tax, and quickly grows it to $20 million. He dies in 2013 and leaves it to his son who is a U.S. citizen by birth, but resides in Canada. Son, a U.S. citizen, must pay $11 million in U.S. tax under section 2801. Father gets no benefit of any exemptions other than his $60,000.

Rule: Always ask your client if he expects a gift or inheritance from an expatriating individual.

Landmine #18: Making a treaty tie breaker election when client is a long term green card holder.

Under 877A, making a treaty tie breaker election is an expatriating act, triggering the U.S. exit tax.

Example: Taxpayer, a senior executive, worked in the U.S. with a green card for 20 years. Upon his retirement, he returns to his native England and settles in the picturesque Cotswolds. His U.K. accountant files his U.S. and U.K. tax returns taking a treaty tie-breaker election and filing Form 8833 (*Treaty Based Return Position Disclosure*). As a result, the taxpayer has committed an expatriating act and is immediately subject to the mark-to-market tax on his worldwide assets.

Rule: if a U.S. green card holder is living in a high tax jurisdiction, it is generally better to take the normal foreign tax credit and not make a treaty tie breaker election in order to avoid inadvertently triggering the "exit tax."

Landmine #19: Retitling assets when one spouse is a non U.S. citizen and failing to trace contributions.

If assets are jointly titled between spouses one of whom is a non U.S. citizen, 100% of the value of the asset is includible in the estate of the first spouse to die except to the extent the surviving spouse can prove contribution.[12]

Similarly, if jointly titled assets are severed, then there will be a gift from one spouse to the other to the extent one spouse receives more than such spouse's contributions.

Example: Husband and wife both Canadian nationals have been married for more than 20 years and living in Toronto where husband built a successful mining business. They titled all assets jointly including their home, their Whistler chalet, and all their liquid investments. They moved to Naples, Florida where the warm winters suited them better, and they obtained U.S. green

[11] Section 2801.
[12] Section 2040.

cards. They were advised to have separate trusts as Florida is a separate property jurisdiction. The attorney told them to split their assets 50/50 into each of their respective trusts. To the extent that husband was the sole earner during their marriage, the value of the jointly held assets will be attributable to him. To the extent wife received 50% of them, husband made a gift to wife of that amount. If it exceeds $139,000 in 2012, it will chip away at husband's applicable exclusion amount of $5 million. Thereafter, it will be taxable. Note: there is no unlimited marital deduction to a non U.S. citizen spouse and there are no lifetime QDOTs.

Rule: Be careful to trace all assets before changing title when one spouse is a non U.S. citizen.

Landmine #20: Failing to consider the effects of a community property regime.

Many jurisdictions outside the U.S. provide for community property as their default marital regime. For those couples married in such jurisdictions or electing into a community property regime by virtue of a nuptial agreement, they should take great care in the potential gift tax exposure, income tax exposure, and reporting requirements.

For example: Several problems may arise in the context of a couple's marital regime: gift, income and reporting.

Firstly, it could trigger U.S. gift tax if a couple changes from a separate to community property regime. For example: a U.S. citizen wife and NRA husband marry at wife's parents' summer home in Nantucket in 1985. Several years later the couple moves to the Netherlands. They are advised that it would be preferable if they chose a community property regime so that all assets could pass to the surviving spouse without a forced heirship share passing to their children and incurring inheritance tax at the first spouse's death. Dutch counsel fails to engage U.S. counsel and changes the couple's marital regime to universal community property. Wife who is quite wealthy and inherited the family fortune is deemed to have given 1/2 of all her assets to her husband an NRA. To the extent they exceed the $139,000 marital annual exclusion and her applicable exclusion amount, she will have to pay U.S. gift tax.

Secondly, it could trigger additional income tax. The husband must now include 1/2 of income generated from wife's assets and report it on a U.S. income tax return if it is U.S. source income. Wife also must report on her U.S income tax return 1/2 of her husband's income, with certain exceptions.

Thirdly, wife may have additional reporting obligations. Husband as a NRA has investments in foreign mutual funds which he holds in a Swiss account. Wife now has PFICs and may have additional foreign asset reporting, including the SFFA.

Fourthly, if wife has an interest in an S-corporation, her husband will be deemed to own 1/2 her shares and as an NRA will blow the S election causing the corporation to be a C corp.

Rule: Always confirm a couple's marital regime and consider all the ramifications.

Landmine #21: Failing to analyze potential tax issues when making a split gift election when one spouse is a non U.S. citizen

Section 2513 permits gifts by husband and wife to third persons to be treated as made one half by each spouse if both spouses consent to this treatment for all gifts during the same calendar year (exclusive of gifts made while the spouses were not married to each other).

If a gift is made to a trust, the corpus of which may be invaded for the benefit of the grantor's spouse, it may be impossible to ascribe a reasonably accurate value to the interests of the remaindermen; if so, gift-splitting is barred. For example, if the grantor's spouse is entitled not only to the income of a trust, but also to distributions of corpus, remainder to the children, the remainder qualifies for gift-splitting only if corpus distributions to the spouse are governed by an ascertainable standard and even then, only if the amount of invasion is reasonably predictable or the likelihood of invasion is negligible. Similarly, gift-splitting is not allowed for an interest given to a third person if the donor's spouse has a general power of appointment over the interest.

Where one spouse is a U.S. citizen, *H*, and the other spouse, *W*, is a non-U.S. citizen (green card holder, U.S. domiciled), split gifting may not work to contribute assets to a trust of which *W* is a beneficiary. However, the annual spousal exemption to a non-U.S. citizen spouse (currently, $139,000) is still available.

Example: Husband is a U.S. citizen with $30 million titled in his name. He has established an irrevocable dynastic trust to benefit his wife who is a U.S. green card holder. He wishes to transfer $10 million into the trust in 2012 using his and his wife's $5 million applicable exclusions amounts. Depending on the terms of the trust, wife may be barred from split gifting resulting in a gift of $5 million by the husband and incurring a tax of approximately $1,750,000.

Rule: when one spouse is a non U.S. citizen and the couple is making a split gift election, be cautious especially for gifts to trusts where the NRA spouse is a beneficiary.

IV. Conclusion

Whether confronting new laws in the U.S., new laws in foreign countries or pitfalls that have existed for some time in the U.S. or abroad, advisers should arm themselves for combat, so their clients do not suffer collateral damage.

Comparison of Form 8938 and FBAR Requirements

The new Form 8938 filing requirement does not replace or otherwise affect a taxpayer's obligation to file Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts). Individuals must file each form for which they meet the relevant reporting threshold.

	Form 8938, Statement of Specified Foreign Financial Assets	**Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR)**
Who Must File?	Specified individuals, which include U.S citizens, resident aliens, and certain non-resident aliens that have an interest in specified foreign financial assets and meet the reporting threshold	U.S. persons, which include U.S. citizens, resident aliens, trusts, estates, and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold
Does the United States include U.S. territories?	No	Yes, resident aliens of U.S territories and U.S. territory entities are subject to FBAR reporting
Reporting Threshold (Total Value of Assets)	$50,000 on the last day of the tax year or $75,000 at any time during the tax year (higher threshold amounts apply to married individuals filing jointly and individuals living abroad)	$10,000 at any time during the calendar year
When do you have an interest in an account or asset?	If any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the account or asset are or would be required to be reported, included, or otherwise reflected on your income tax return	Financial interest: you are the owner of record or holder of legal title; the owner of record or holder of legal title is your agent or representative; you have a sufficient interest in the entity that is the owner of record or holder of legal title. Signature authority: you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account. See instructions for further details.
What is Reported?	Maximum value of specified foreign financial assets, which include financial accounts with foreign financial institutions and certain other foreign non-account investment assets	Maximum value of financial accounts maintained by a financial institution physically located in a foreign country
How are maximum account or asset values determined and reported?	Fair market value in U.S. dollars in accord with the Form 8938 instructions for each account and asset reported Convert to U.S. dollars using the end of the taxable year exchange rate and report in U.S. dollars.	Use periodic account statements to determine the maximum value in the currency of the account. Convert to U.S. dollars using the end of the calendar year exchange rate and report in U.S. dollars.
When Due?	By due date, including extension, if any, for income tax return	Received by June 30 (no extensions of time granted)
Where to File?	File with income tax return pursuant to instructions for filing the return	Mail to: Department of the Treasury Post Office Box 32621 Detroit, MI 48232-0621 For express mail to: IRS Enterprise Computing Center ATTN: CTR Operations Mailroom, 4th Floor 985 Michigan Avenue Detroit, MI 48226 Certain individuals may file electronically at BSA E-Filing System
Penalties	Up to $10,000 for failure to disclose and an additional $10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of $60,000; criminal penalties may also apply	If non-willful, up to $10,000; if willful, up to the greater of $100,000 or 50 percent of account balances; criminal penalties may also apply
Types of Foreign Assets and Whether They are Reportable		
Financial (deposit and custodial) accounts held at foreign financial institutions	Yes	Yes
Financial account held at a foreign branch of a U.S. financial institution	No	Yes
Financial account held at a U.S. branch of a foreign financial institution	No	No
Foreign financial account for which you have	No, unless you otherwise have an interest in the account as described	Yes, subject to exceptions

signature authority	above	
Foreign stock or securities held in a financial account at a foreign financial institution	The account itself is subject to reporting, but the contents of the account do not have to be separately reported	The account itself is subject to reporting, but the contents of the account do not have to be separately reported
Foreign stock or securities not held in a financial account	Yes	No
Foreign partnership interests	Yes	No
Indirect interests in foreign financial assets through an entity	No	Yes, if sufficient ownership or beneficial interest (i.e., a greater than 50 percent interest) in the entity. See instructions for further detail.
Foreign mutual funds	Yes	Yes
Domestic mutual fund investing in foreign stocks and securities	No	No
Foreign accounts and foreign non-account investment assets held by foreign or domestic grantor trust for which you are the grantor	Yes, as to both foreign accounts and foreign non-account investment assets	Yes, as to foreign accounts
Foreign-issued life insurance or annuity contract with a cash-value	Yes	Yes
Foreign hedge funds and foreign private equity funds	Yes	No
Foreign real estate held directly	No	No
Foreign real estate held through a foreign entity	No, but the foreign entity itself is a specified foreign financial asset and its maximum value includes the value of the real estate	No
Foreign currency held directly	No	No
Precious Metals held directly	No	No
Personal property, held directly, such as art, antiques, jewelry, cars and other collectibles	No	No
'Social Security'- type program benefits provided by a foreign government	No	No

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