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# INTERNATIONAL TRUSTS



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# Succession Planning Opportunity

2

- Multigenerational, large-scale structures to last in perpetuity benefitting family members and charity in multiple jurisdictions.
- Non-US settlor wants jurisdiction with well-established trust laws, stable business environment, responsive and efficient trust officers, and clearly stated comprehensive annual fees.
- SD-based foreign trust often attractive over traditional English law trust because can include:
  - US-style document with detailed intentions/distribution provisions
  - Flexibility of decanting statutes
  - Directed trustee provisions
  - Clearly defined tax laws and trustees comfortable with regulatory compliance

*If not already acting as trustee for foreign trusts – consider business opportunity of non-US wealth-generators choosing South Dakota.*

# With Opportunity Comes Responsibility

3

- SD Division of Banking guidance:
  - ▣ Foreign Trust Acceptance and Oversight Guidance
    - Develop pre- and post-acceptance review process that identifies risk profile of each foreign trust.
    - Implement initial and ongoing due diligence review program commensurate with level of risk each trust poses.
    - Draft written policies and procedures to provide management with comprehensive customer identification and oversight guidance.
  - ▣ Foreign Trust Taxation and Reporting Guidance
    - Develop and implement comprehensive written guidance to address compliance with foreign trust taxation and reporting requirements.
    - Consider maintaining a matrix for tracking filing due dates and oversight responsibilities.

*It is better for the health of the trust industry if we know the rules and respect the laws, both here in the US and abroad.*

# Know the Foundations

4

- Foreign vs Domestic
- Grantor vs Non-Grantor
- Form W-8IMY vs W-8BEN-E
- NFFE vs FFI
- Chapter 3 withholding tax status vs Chapter 4 FATCA status

*For every trust, know whether foreign or domestic, grantor or non-grantor, Chapter 3 tax status and Chapter 4 FATCA status.*

# Foreign Trusts with non-US Grantors

5

- All trusts are domestic unless they fail either:
  - Court Test – SD law/trustee so will not fail
  - Control Test – substantial trust decision
    - Non-US settlor can revoke
    - Non-US investment director
    - Non-US protector
- Foreign Grantor Trust only two ways:
  - Non-US settlor can revoke the trust, or
  - Non-US settlor or spouse are the sole beneficiaries.

*For every trust, know whether foreign or domestic, grantor or non-grantor.*

# EVERY Foreign Entity has a FATCA Status

6

## **FATCA:** Foreign Account Tax Compliance Act

- IRS GOAL: Force foreign financial institutions (FFIs) to provide IRS with info on US account holders.
- TOOLS: Entity Classification and W-8 Forms.
- BROAD APPLICATION: Foreign trusts often classified as FFIs, whether US-based or offshore.

*Your goal: reputable trust company complying with all applicable laws/regulations and having no intention to facilitate money-laundering, terrorist financing, or tax evasion.*

# EVERY Foreign Entity is either FFI or NFFE

7

- Foreign Financial Institution (FFI)
  - Banks and custodial institutions.
  - Investment Entities:
    - “In the business of” trading, portfolio management, otherwise investing, administering, or managing funds, money or financial assets on behalf of other persons; TRUST COMPANIES
    - or
    - “Managed by” an Investment Entity and gross income primarily attributable to investing. FOREIGN TRUSTS
- Non-Financial Foreign Entity (NFFE)
  - “Active” – operating company not in the financial industry.
  - “Passive” – not an FFI and not an Active NFFE.

*Every foreign entity is either an FFI or an NFFE.*

# FATCA status determines who reports

8

- Active NFFE – no FATCA due diligence or reporting obligations.
- Passive NFFE – no FATCA due diligence or reporting obligations.
- FFI – collects due diligence & files FATCA Reports on US account holders.
  - Banks & custodial institutions –provide IRS with name/SSN of US account holders. IRS can check whether filed Form 8938 and FBAR.
  - Investment Entity FFIs – due diligence on “equity interest” holders.  
In the case of Foreign Trusts:
    - A person who is an owner of all or a portion of the trust under the grantor trust rules;
    - A beneficiary who is entitled to a mandatory distribution from the trust; or
    - A beneficiary who may receive a discretionary distribution but only if such person receives a distribution in the calendar year.

*FATCA reporting should match up with US tax reporting.*



# Certifications

9

- Form W-9 – for US persons ONLY.
- Form W-8IMY – for foreign grantor trusts and foreign partnerships because someone else owns the income. Also provide W-8BEN/W-9 or withholding statement.
- Form W-8BEN-E
  - ▣ Foreign corporations
  - ▣ Foreign non-grantor trusts
  - ▣ Foreign disregarded entities to certify as to FATCA status. Disregarded entities also provide appropriate W Form for the owner of the income.

*Read the instructions.*

*Use Line 10 to include referencing information.*

# Chapter 3 Withholding Tax Status

10

- Partnership
- Simple trust
- Grantor trust
- Complex trust
- Corporation
- Disregarded entity

*Not new. 30% withholding on payments of US source income to foreign persons.*

# Chap. 4 FATCA Status – FFIs under Regulations

11

- Entity is registered, appears on FFI List, and has GIIN:
  - ▣ Participating FFI = foreign trust w/US trustee. Report distributions to US beneficiaries, online, XML, encrypted.
- Entity has FATCA sponsoring entity (SP GIIN):
  - ▣ Sponsored Investment Entity – has a sub-GIIN
  - ▣ Certified deemed-compliant sponsored, closely held investment vehicle – has no GIIN

Sponsor reports to IRS pursuant to agreement w/foreign entity.
- Owner-documented FFI – flips the reporting obligation to each financial institution where entity has an account.

*GIIN = Global Intermediary Identification Number*

# Chap. 4 FATCA Status – other entities

12

- NFFE:
  - ▣ Active NFFE – no further details, no GIIN.
  - ▣ Passive NFFE – no GIIN, provides details on substantial US owners so requesting FI can report.
  - ▣ Direct reporting NFFE or Sponsored direct reporting NFFE – flips the reporting obligation from the requesting FI to the entity itself. Will have a GIIN.
- Charity:
  - ▣ 501(c)
  - ▣ Nonprofit organization exclusively charitable
- Investment entity organized in a US possession:
  - ▣ Passive NFFE – provide details on substantial US owners

# Trustee of Foreign Trusts

13

- Business opportunity.
- Know reasons why SD is a strong trust law/administration jurisdiction.
- Trusts are excellent succession planning vehicles for non-US families.
- Be able to handle FATCA compliance.
  - Consider registering as FATCA Sponsoring Entity.
  - Be comfortable with W-8 forms.
  - Build compliance services into trust administration.
- If client intends to make foreign investments or needs US estate tax blocker company, be aware of Common Reporting Standard considerations.
  - Be able to complete a CRS entity self-certification for the trust.
  - Designate individual to be named as Controlling Person of trust company.
  - Consider whether can maintain foreign blocker as Passive NFE with US accounts.
  - Decide whether trustee will act as FATCA sponsor for FFI blocker company.

*Its all about the paperwork. Know the classification. Determine Controlling Persons.*

# Common Reporting Standard

14

- We want info on our taxpayers too!!
- If foreign trust outside US, trustee will also report under CRS.
- Entity Classifications – *generally* the same (minus a letter: FI, NFE) but no sponsoring entities.
  - ▣ FIs enroll on local portal and carry out CRS due diligence and reporting. No centralized list. No second GIIN.
- Self-Certifications
  - ▣ May include both FATCA and CRS status info.
  - ▣ Passive NFEs provide details on Controlling Persons who then provide their own self-certifications. Reported only if countries have agreed to exchange information.

*CRS reporting won't necessarily match up with home country tax reporting.*

# Resources

15

- FFI List: <https://apps.irs.gov/app/fatcaFfiList/flu.jsf>
- IGA List: <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>
- FATCA registration and account login: <https://sa.www4.irs.gov/fatca-rup/>
- Online FATCA Regulations: [https://www.pwc.com/us/en/financial-services/publications/fatca-publications/assets/pwc formatted regulations fatca.pdf](https://www.pwc.com/us/en/financial-services/publications/fatca-publications/assets/pwc_formatted_regulations_fatca.pdf)
- IRS Forms: <https://apps.irs.gov/app/picklist/list/formsPublications.html>
- CRS Implementation Handbook: <http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>
- CRS bilateral exchange agreements: <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/exchange-relationships/>

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# QUESTIONS & DISCUSSION

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