



**Current Trends, Government Focus and Penalties for
Informational Reporting: FBARs, IRS Forms 5471,
8865, 8858, 8806, 8854, 3520, 3520-A, etc.**

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Increased IRS Scrutiny of International Transactions

- “As part of the President’s budget, the IRS would be funded to hire nearly 800 new employees devoted specifically to international enforcement, such as agents, economists, lawyers and specialists”
- **Prepared Remarks of IRS Commissioner Doug Shulman Before the Organization For Economic Co-Operation And Development (Washington, DC, June 2, 2009)**
<http://www.irs.gov/newsroom/article/0,,id=209342,00.html>



February 2011 - IRS Announces “Offshore Voluntary Disclosure Initiative”

- The IRS announced on 8 February 2011 a specific program for U.S. taxpayers who have unreported foreign accounts and other foreign assets that have not been previously reported and/or taxed.^[1] The IRS Commissioner’s Statement on the 2011 Offshore Voluntary Disclosure Initiative (referred to as the “2011 OVDI” throughout this article) can be reviewed online at <http://www.irs.gov/newsroom/article/0,,id=235728,00.html>.
- 2011 OVDI – is a follow-on to the 2009 Offshore Voluntary Disclosure Program
- This offshore initiative is part of the longstanding voluntary disclosure program (“VDP”), yet provides specific terms for participation.



February 2011 - IRS Announces “Offshore Voluntary Disclosure Initiative”

- The time for participation is very short (i.e., August 2011) and the terms of the IRS offer are rigorous and are explained further in this article. Taxpayers who participate will need to have completed all of the paperwork and tax returns by August of this year.
- See, **IRS FAQs on 2011 OVDI - 2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers**
<http://www.irs.gov/businesses/international/article/0,,id=235699,00.html>



February 2011 - IRS Announces “Offshore Voluntary Disclosure Initiative”

- The 2011 OVDI is clearly **NOT** for every foreign person who has recently learned they might have a U.S. tax filing obligation merely because of their U.S. citizenship.
- The costs under the 2011 OVDI are significant and paying 25% of a total account balance, which has no correlation to any income tax liability or penalties, may not be sensible for a foreign person who is a dual or multiple national with U.S. citizenship.



February 2011 - IRS Announces “Offshore Voluntary Disclosure Initiative”

- For instance, the FBAR penalties (e.g., 50% of account balances) under the law do not apply to everyone.
- Those who were not aware of the FBAR filing requirements cannot generally be liable for the 50% willful penalty.



February 2011 - IRS Announces “Offshore Voluntary Disclosure Initiative”

- Also, taxpayers may be entitled to foreign tax credits for income taxes paid in their home country of residence and the foreign earned income exclusion.
- Hence, a taxpayer’s actual U.S. income tax liability, even if millions of dollars were earned over time, may be modest or nil.



February 2011 - IRS Announces “Offshore Voluntary Disclosure Initiative”

- Each taxpayer must analyze their facts on a case by case specific analysis
-
- Therefore, a 25% transfer of a taxpayer’s account assets (i.e., the “25% penalty” under the 2011 OVDI) to the U.S. Treasury may have no basis under the law, depending upon the specific facts of your case.
- Foreign persons who recently learned that U.S. citizens are U.S. taxpayers should take special note of the 2011 OVDI and the way the U.S. tax laws apply to them.



Reporting Overview for Foreign Transactions

I. Non-Tax Reporting Requirements (FBARs)

- A. Foreign bank account reporting requirements of the Bank Secrecy Act/USA Patriot Act

II. In-Bound Informational Tax Reporting Requirements

- A. Domestic corporations that have a 25% foreign shareholder - §6038A
- B. Foreign corporations engaged in a U.S. trade or business - §6038C
- C. Foreign persons who own direct interest in U.S. real property - §6039C
- D. Applying for U.S. Passport or legal residency - §6039E
- E. Large gifts received by U.S. persons from foreign persons - §6039F
- F. Distributions received by U.S. persons from foreign trusts - §6048(c)

III. Out-Bound Informational Tax Reporting Requirements

- A. U.S. persons who control foreign corporations or partnerships - §6038
- B. Nonrecognition transfers to foreign corporations or partnerships - §6038B
- C. Losing U.S. citizenship or long-term resident status - §6039G
- D. Taxable Mergers and Acquisitions - §6043A
- E. U.S. persons who become officers or directors of a foreign corporation - §6046
- F. U.S. persons who acquire any interest in a foreign partnership - §6046A
- G. Gratuitous transfers to foreign trusts and U.S. owners of foreign trusts - §6048(a), (b)
- H. Foreign Single Member Disregarded Entities - (No Statutory Authority)



Reporting Overview for Foreign Transactions

I. **Non-Tax Reporting Requirements (FBARs)**

- A. Foreign bank account reporting requirements of the Bank Secrecy Act/USA Patriot Act

II. **In-Bound Informational Tax Reporting Requirements**

- A. IRS Form 5472 - §6038A
- B. IRS Form 5472 - §6038C
- C. No IRS Form - **NOT IMPLEMENTED – YET** - §6039C
- D. No IRS Form for Taxpayer to Complete (Passport and Residency Application Forms) - §6039E
- E. IRS Form 3520 - §6039F
- F. IRS Form 3520-A (and possibly IRS Form 3520) - §6048(c)

III. **Out-Bound Informational Tax Reporting Requirements**

- A. IRS Form 5471 - §6038
- B. IRS Form 926 - §6038B
- C. IRS Form 8854 - §6039G
- D. IRS Form 8806 - §6043A
- E. IRS Form 5471 - §6046
- F. IRS Form 8865 - §6046A
- G. IRS Form 3520 - §6048(a), (b)
- H. IRS Form 8858 (No Statutory Authority)



USA PATRIOT Act and FBARS

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism

- Passed October 26, 2001
- Compliance Reporting Requirements
- Treasury Obligations to Study Methods for Improving Compliance with Reporting Requirements of Section 5314 of title 31 (Bank Secrecy Act)
- Art 4 of US/Mex Treaty: Broader Scope



FBAR – Foreign Bank Account Reports

Treasury Department Form - TD F 90-22.1 – Report of Foreign Bank and Financial Accounts

- FinCEN's Role
- FinCEN's Report to Congress – April 2002
- Delegation of Authority to IRS - April 2003



FBAR Overview

- 31 U.S.C. § 5314 - Authority
- 31 C.F.R. § 103.24 – Reporting
- 31 C.F.R. § 103.32 – Recordkeeping
- 31 C.F.R. § 103.27(c) – Due Date
- FBAR Instructions – Additional Guidance



Bank Secrecy Act (“BSA”)

BSA Authorized Treasury to issue Regulations

– 31 CFR 103.24

- (a) Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Commissioner of the Internal Revenue for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form . . .

– Form is TD F 90-22.1

- Filers include persons without financial interest in foreign account (e.g., corporate officer with authority over corporation’s foreign account), and indirect owners of foreign accounts (e.g., domestic corporation with foreign subsidiary)



Title 31 and Title 26 – Merging Two Worlds!

- Integrating Title 31 with Title 26 (IRS Form)
- Schedule B, Part III, Line 7a and 7b ask whether the taxpayer at any time had an interest in a foreign bank account (where a portion of the relevant parts of the return is as follows)

		Yes	No
Part III	You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; or (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.		
Foreign Accounts and Trusts	7a At any time during 2008, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See page B-2 for exceptions and filing requirements for Form TD F 90-22.1.		
(See page B-2.)	b If "Yes," enter the name of the foreign country _____		
	8 During 2008, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See page B-2		

For Paperwork Reduction Act Notice, see Form 1040 instructions. Schedule B (Form 1040) 2008



FBAR Violations

- ❑ Jointly Owned Accounts
- ❑ Multiple Violations
- ❑ Mitigation Guidelines

FBAR Workbook:

<http://www.irs.gov/businesses/small/article/0,,id=159757,00.html#top>



Civil Penalties for FBAR Violations

- Section 5321(a)(5)(A) – Penalty Authorized
- Section 5321(a)(5)(B) – Any Violation
- Section 5321(a)(5)(C) – Willful Violations
- Section 5321(a)(6)(A) – Negligence
- Section 5321(a)(6)(B) – Pattern of Negligent Activity



Civil Penalties for FBAR Violations

□ Section 5321(a)(5)(B) – Any Non-willful violation:

- Penalty: up to \$10,000 for each violation
- Waived if violation was due to reasonable cause and the amount of the transaction or the balance in the account at time of transaction was properly reported.



Civil Penalties for FBAR Violations

- Section 5321(a)(6)(B); 31 CFR 103.57(h) – Negligence (only applicable to a “financial institution” or non-financial trade or business):
 - Penalty: up to \$500
 - If “pattern of negligent violations” the Treasury may, in addition to \$500 penalty under Section 5321(a)(5)(A), impose a penalty of up to \$50,000 on the financial institution or non-financial trade or business.



Civil Penalties for FBAR Violations

- Section 5321(a)(5)(C) – Willful violation
 - Willful failure either to:
 - (a) File FBAR; **or**
 - (b) Retain FBAR-related records or account.
 - Penalty: up to the greater of-
 - (a) \$100,000; **or**
 - (b) 50% of the amount in the account at the time of the violation.
 - No reasonable cause exception available.



Criminal Penalties for FBAR Violations

- ❑ Section 5322(a); 31 CFR 103.59(b)
- ❑ Willful violation - Continued
 - Criminal penalty for willful failure to either (a) File FBAR; or (b) Retain FBAR-related records of account
 - Penalty: up to \$250,000 or 5 years, or both
 - Civil and criminal penalties may be imposed together. Section 5321(d).



Civil Penalties for FBAR Violations

- Section 5321(a)(5)(C): Willful violation while violating certain other laws
 - Willful failure to either:
 - (a) File FBAR; or
 - (b) Retain FBAR-related records of account while violating “another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period” (Section 5322(b); 31 C.F.R. 103.59(c)) ;
 - Civil Penalty: Up to the greater of-
 - (a) \$100,000; or
 - (b) 50% of amount in the account at the time of the violation.



Criminal Penalties for FBAR Violations

- Section 5322(b); 31 C.F.R. 103.59(c)
- Willful violation - Continued
 - Criminal penalty:
 - (a) Up to \$500,000; or
 - (b) 10 years; or
 - (c) Both.



Civil Penalties for FBAR Violations

- Section 5321(a)(5)(C) - Knowingly and Willfully filing a false FBAR
 - Penalty: Up to the greater of-
 - (a) \$100,000; or
 - (b) 50% of amount in the account at the time of the violation.



Criminal Penalties for FBAR Violations

- 18 U.S.C. Section 1001(a), 31 C.F.R. 103.59(d)
- Knowingly and Willfully filing a false FBAR - Continued
 - Criminal penalty:
 - (a) Up to \$100,000; or
 - (b) 5 years; or
 - (c) Both.



Summary of FBAR Penalties

Violation	Civil Penalties	Criminal Penalties	Comments
Negligent Violation	Up to \$500	N/A	31 U.S.C. § 5321(a)(6)(A) 31 C.F.R. 103.57(h).
Non-Willful Violation	Up to \$10,000 for each negligent violation	N/A	31 U.S.C. § 5321(a)(5)(B)
Pattern of Negligent Activity	In addition to penalty under § 5321(a)(6)(A) with respect to any such violation, not more than \$50,000	N/A	31 U.S.C. 5321(a)(6)(B)
Willful - Failure to File FBAR or retain records of account	Up to the greater of \$100,000, or 50 percent of the amount in the account at the time of the violation.	Up to \$250,000 or 5 years or both	31 U.S.C. § 5321(a)(5)(C) 31 U.S.C. § 5322(a) and 31 C.F.R. § 103.59(b) for criminal. The penalty applies to all U.S. persons.
Willful - Failure to File FBAR or retain records of account while violating certain other laws	Up to the greater of \$100,000, or 50 percent of the amount in the account at the time of the violation.	Up to \$500,000 or 10 years or both	31 U.S.C. § 5322(b) and 31 C.F.R. § 103.59(c) for criminal The penalty applies to all U.S. persons.
Knowingly and Willfully Filing False FBAR	Up to the greater of \$100,000, or 50 percent of the amount in the account at the time of the violation.	\$10,000 or 5 years or both	18 U.S.C. § 1001, 31 C.F.R. § 103.59(d) for criminal. The penalty applies to all U.S. persons.
Civil and Criminal Penalties may be imposed together. 31 U.S.C. § 5321(d).			



Other Potential Penalties

Late tax payments to the IRS	0.5% per month of the unpaid tax due the IRS (maximum 25%) (The 0.5% rate increases to 1% after the IRS issues an IRS tax notice of intent to levy)
Negligence or disregard of IRS tax rules and IRS tax regulations	20% of tax underpayment due the IRS
Fraud	75% of tax underpayment due the IRS
Substantial understatements of income tax (tax underpayments that exceed the greater of 10% of the correct tax liability or \$5,000)	20% of tax underpayment due the IRS



Low Compliance with Form TD F 90-22.1?

- **Report to Congress under USA PATRIOT Act**
 - IRS - Detroit Computing Center
 - “DCC”
 - Financial Crimes Enforcement Network
 - “FinCEN”
 - 2005 Report of IRS Information Reporting Advisory Committee noted, “Present filing levels suggest the current form is not being properly utilized. The number of forms filed has increased since 2004, but not to the extent thought to be near full compliance. In 2005 there were 253,632 FBARS filed; a Treasury Financial Crimes Study estimated that as many as one million may be required to be filed.”



Compliance with BSA – Pre-VDP 2009

- **Nearly 1 Million Audits** (1999-2001 Annually)
- 1996-1998 - Nine Indictments
- 1999-2000 - Zero Indictments
- Only 3 Convictions Since 1995 to 2001
- U.S. Customs



Compliance with BSA – UBS Scandal 2009

- **New Focus on FBARs and Audits** (1999-2001 Annually)
 - Multiple Indictments for FBAR failures
 - B Iris Lai Hung Tam, of San Bruno, CA was sentenced to 7 days in custody with credit for time served, followed by 2 years of supervised release, and ordered to pay a special assessment fee of \$100, for willfully failing to file a Department of Treasury Report of Foreign Bank and Financial Accounts (FBAR), announced United States Attorney Joseph P. Russoniello and Special Agent in Charge, IRS-Criminal Investigation, Scott O'Briant. Tam pleaded guilty on August 14, 2009 to a superseding information which charged her with one count of willfully failing to file a report of a foreign bank account. Just over \$10,000 in account?
http://www.justice.gov/usao/can/press/2009/2009_08_21_tam.sentenced.press.html



Compliance with BSA – VDP 2009

- **New Focus on FBARs and Audits** (1999-2001 Annually)
 - Cittadini, a retired sales manager for Boeing, failed to report income from bank accounts under his control at UBS AG in Switzerland on his individual income tax returns from 2001 through 2003. Additionally, Cittadini failed to file a Report of Foreign Bank and Financial Accounts (F-BAR) for each of these years. - <http://www.justice.gov/opa/pr/2009/October/09-tax-1074.html>
 - A Saddle River, N.J., man pleaded guilty today to failure to file a Report of Foreign Bank or Financial Accounts (F-BAR. Juergen Homann appeared today before Judge Stanley R. Chesler in Newark, N.J., and accepted responsibility for concealing more than \$5 million in Swiss bank accounts.
<http://www.justice.gov/opa/pr/2009/September/09-tax-1027.html>



Compliance with BSA – VDP 2009

- **New Focus on FBARs and Audits (1999-2001 Annually)**

- United States Attorney Joseph P. Russoniello and Special Agent in Charge, IRS Criminal Investigation, Scott O'Briant announced Diana Hojsak a/k/a Diana Lu a/k/a Jing Jing Lu was convicted of tax evasion and filing false tax returns for 2000 and 2001 by a federal jury. After deliberating two days, the jury found that Ms. Hojsak failed to report income paid from Yangtze Optical Fibre and Cable Company, which was diverted from her corporation into a bank account in Hong Kong in her name. According to the testimony at trial, the foreign bank account was never disclosed to the IRS, and Ms. Hojsak used the unreported proceeds to purchase property in the Bay Area.

http://www.justice.gov/usao/can/press/2008/2008_06_09_hojsak_convicted_press.html



Compliance with BSA

Are Non-residents Subject to 31 CFR 103.24?

- Regulations provides “Each person subject to the jurisdiction of the United States”
- U.S. Jurisdiction (Person & Matter)



Voluntary Disclosure Program (VDP)

- **VDP – How it Works(ed)?**
- The VDP was designed for U.S. taxpayers who intentionally failed to file, report and pay tax on income earned in foreign bank accounts. The VDP focuses on those particular type of taxpayers.
- The VDP required the taxpayer take to the following steps including filing their application by this past October 15, 2009: The government will give no assurances that they will not recommend criminal prosecution of taxpayers for various tax evasion charges.



Voluntary Disclosure Program (VDP)

Offshore Voluntary Disclosures — Optional Format

If taxpayer has domestic issues only, please have them contact their local Criminal Investigation office for a traditional voluntary disclosure.

<DATE>

Internal Revenue Service
Criminal Investigation
ATTN: Voluntary Disclosure Coordinator
<CITY Field Office>
<Address>
<CITY, ST ZIP CODE>

Re: Taxpayer Name
Tax Identification Number
Taxpayer Date of Birth
Taxpayer Address

Dear Voluntary Disclosure Coordinator:

To assist in a timely determination of my acceptance into the Voluntary Disclosure Program, (for *Voluntary Disclosures involving offshore accounts or assets*) I have addressed *all* of the following items:

- Please include your:
 - Complete name:
 - Social Security Number:
 - DOB:
 - Address:
 - Passport Number (and Country):
 - Current Occupation
- Taxpayer Representative and his/her contact information.
- Explain the source of the funds.
- Disclose if you or any related entities are currently under audit or criminal investigation by the Internal Revenue Service or any other law enforcement authority.

- Has the IRS notified you that it intends to commence an examination or investigation?
Yes No
- Are you under criminal investigation by any law enforcement authority?
Yes No



Voluntary Disclosure Program (VDP)

- **VDP – Amounts Owning -**
- The taxpayer must not be under audit by the IRS and must come forward voluntarily and pay the following taxes, interest and penalties as part of the VDP:
 - (a) File or amend U.S. income tax returns for the last six years (e.g., tax year 2008 going back to 2003);
 - (b) Pay back taxes due on newly discovered assets (e.g., funds and investment assets) for the last six years;
 - (c) Pay statutory interest due on back taxes for the last six years;
 - (d) Pay a 20% accuracy-related penalty (Internal Revenue Code (“IRC”) Section 6662 or 25% delinquency penalty under IRC Section 6651) for each year at issue; and
 - (e) Pay a 20% penalty on the amount in the foreign bank account in the year (within the six-year period) with the highest aggregate account (or asset value). This 20% may be reduced to 5% if the taxpayer did not open the account, there was no account activity while the taxpayer controlled the account, and all taxes have been paid regarding the income from such account.



Voluntary Disclosure Program (VDP)

- **VDP – Might it be Extended by the IRS? –**
- **IRS Considering Additional Deadline in Voluntary Disclosure Program, Official Says**
by David D. Stewart (Tax Analysts)
- **Date:** Oct. 27, 2009
- The IRS is considering imposing a deadline on information reports filed by individuals who have sought to voluntarily disclose assets held in offshore accounts before the special program deadline, an IRS official said October 26.
- The IRS is considering imposing a deadline on information reports filed by individuals who have sought to voluntarily disclose assets held in offshore accounts before the special program deadline, an IRS official said October 26 at a District of Columbia Bar Taxation Section luncheon.
- Following the rush to enter the program before the extended October 15 deadline, many individuals seeking to take advantage of the reduced penalties regime have not yet filed the three-page information disclosure letter released July 29 or submitted to an interview, said Rick Raven, director of operations, policy and support in the IRS Criminal Investigations division. (For the letter, see *Doc 2009-17261* [[PDF](#)] or *2009 TNT 145-22* .)



Voluntary Disclosure Program (VDP)

- **VDP – Might it be Extended by the IRS? –**
- **IRS Considering Additional Deadline in Voluntary Disclosure Program, Official Says**
by David D. Stewart (Tax Analysts)
Date: Oct. 27, 2009
- Raven explained that the flood of disclosures the IRS has received in the course of the program has led the Service to improve its procedures in ways that will continue even after the program is complete. He told the group that the success of the initiative "forced" the IRS to standardize its handling of voluntary disclosures across the country. Raven said the IRS will continue its current procedures for preclearance and for disclosures made according to the three-page letter.
- Raven said the IRS is currently considering imposing a deadline for the submission of required disclosures to remain eligible for the program. He added that although no decision has been made, he would like the deadline to be January 15, 2010.



Operaciones In-Bound

§6038A –Information With Respect To Certain Foreign Owned Corporations

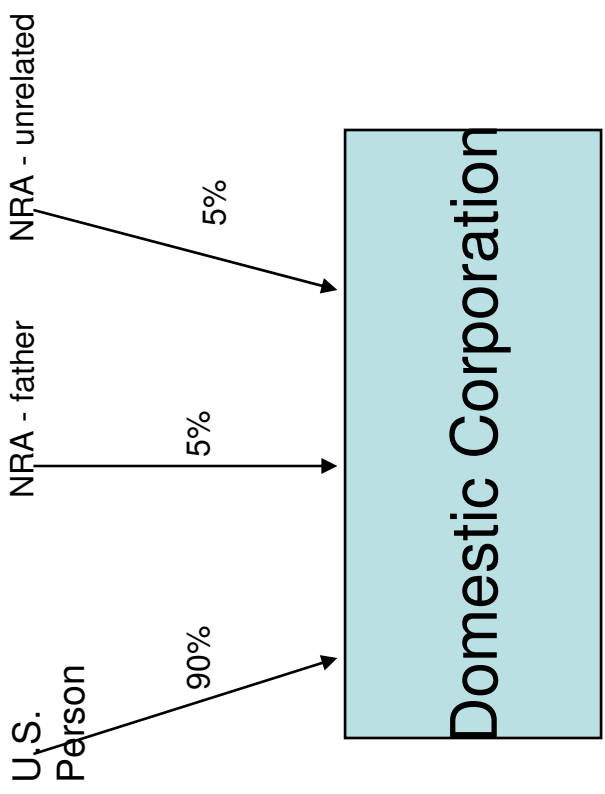
- Domestic corporations that have a 25% or more foreign shareholder (by vote or value) must file Form 5472 to report transactions with foreign or domestic “related parties”; maintain records
- Complex ownership attribution rules of §§318 and 267(c) apply to determine direct or indirect foreign ownership
- Related parties include (1) 25% foreign shareholder, (2) any person related (within the meaning of §267(b) or §707(b)(1)) to the domestic corporation or the foreign shareholder, and (3) any person related within the meaning of §482
- Penalty of \$10,000 for failure to file Form 5472 for any tax year, with additional \$10,000 penalties each 30-day period during which failure continues after expiration of 90-day IRS notice period (no limit); reasonable cause exception
- IRS: over-reporting and “substantially incomplete” Form 5472. CCA 200429007
- IRS: no statute of limitations concerning 5472 transactions. §6501(c)(8), TAM 200024051



In-Bound Transactions

§6038A – Information With Respect To Certain Foreign Owned Corporations (Basic Example)

- Under ownership attribution rules, stock owned by U.S. Person is attributed to NRA – father. Because a foreign person (NRA – father) is treated as directly and constructively owning 25% or more of Domestic Corporation, Domestic Corporation is a “reporting corporation” for purposes of §6038A and must file Form 5472 each year to report related party transactions



- If Domestic Corporation inadvertently fails to timely file Form 5472 for a given year, a \$10,000 penalty can be imposed, and, if Domestic Corporation receives notice of failure from the IRS, additional \$10,000 penalties can be imposed for each 30-day period during which failure continues after expiration of the 90-day notice period



In-Bound Transactions

§6038C – Information With Respect To Foreign Corporations Engaged In U.S. Business

- Foreign corporations engaged in U.S. trade or business must file Form 5472 to report transactions with “related parties”; maintain certain records
- Generally same information must be reported as under §6038A
- Same definition of “related party” as §6038A
- Intended to assist with §482 enforcement and access to records
- IRS position: provision applies to foreign corporations from treaty countries who take position that U.S.-source income is not taxable because no “permanent establishment” (and thus file no income tax return)
- Penalty of \$10,000 for failure to file Form 5472 for any tax year, with additional \$10,000 penalties each 30-day period during which failure continues after expiration of 90-day IRS notice period (no limit); reasonable cause exception



In-Bound Transactions

§6039C – Returns With Respect To Foreign Persons Holding Direct Investments In U.S. Real Property Interests

- IRS is authorized to require foreign persons who are not engaged in a U.S. trade or business but who own direct interests in U.S. real estate with a fair market value of \$50,000 or more to report information concerning the real estate
- Real estate owned by a partnership, trust or estate is treated as owned proportionately by partners and beneficiaries
- **NOT IMPLEMENTED – YET (no regulations issued)**
- IRS is relying on the §1445 FIRPTA withholding rules as the means to enforce the tax imposed by §897 (buyer or transferee that is required to withhold tax must file Forms 8288 and 8288-A to report withholding information)
- If reporting requirement is implemented, failure to file results in \$25/day penalty, up to maximum of \$25,000 or 5% of FMV of U.S. real estate, whichever is less



In-Bound (and ‘Out-Bound’ Transactions)

§6039E – Information Concerning Resident Status

- Individual who applies for U.S. passport (including renewal) must supply a statement including taxpayer identification number (“TIN”), any foreign country in which residing, home or mailing address in that country, and date of birth
- Individual applying to become legal U.S. resident (green card) must supply statement including TIN (if any), address within U.S. or other home address, date of birth, statement as to whether he had U.S.-source income during most recent three tax years, and statement whether he was present in U.S. for more than 182 days in those years
- Information is collected by agencies administering the passport and legal residency programs, and then shared with the IRS
- Penalty of \$500 for each failure to supply information; reasonable cause exception



IRC section 6039E -

- “IRC section 6039E was enacted in 1986 to provide IRS with data from passport applications processed by the State Department for use in identifying individuals residing abroad who do not file tax returns. The law required passport applicants to provide their SSNs, foreign country of residence, and other information to be prescribed by Treasury, and established a penalty of \$500 for each failure to provide the required information. However, IRS has made little use of passport application data in identifying potential nonfilers abroad, and some application records are difficult to use because they lack SSNs, as noted previously.” See GAO Report –(May 1998) **GAO/GGD-98-106 Nonfiling Among U.S. Citizens Abroad**
- <http://www.gao.gov/archive/1998/gg98106.pdf>



In-Bound Transactions

§6039F – Notice Of Large Gifts Received From Foreign Persons

- U.S. persons who receive aggregate foreign gifts or bequests of more than \$10,000 (adjusted for inflation) during any tax year are required to file Form 3520 so the IRS can evaluate whether the amount is a gift or income
- Under Notice 97-34, gifts received from non-resident aliens or foreign estates are required to be reported only if the aggregate amounts received from one person or estate exceeds \$100,000 during a tax year; while gifts from foreign corporations or partnerships must be reported if the aggregate amount received from all corporations and partnerships exceeds \$10,000
- IRS can re-characterize purported gifts from foreign corporations and partnerships
- If gift is from a foreign trust, reporting required under the rules of §6048(c)
- Penalty for failure to file Form 3520 is 5% of the gift for each month failure continues, not to exceed 25% of gift; reasonable cause exception



In-Bound Transactions

§6048(c) – Information With Respect To Certain Foreign Trusts

- U.S. beneficiaries who receive any direct or indirect (e.g., loan) distributions from a foreign trust during any tax year are required to file Form 3520 so IRS can evaluate whether distribution is taxable (e.g., distribution of income or corpus)
- If Form 3520 not filed, entire distribution is included in beneficiary's income as accumulation distribution subject to throwback rules and compound interest charge
- Beneficiary should obtain from the trust a Foreign Nongrantor Trust Beneficiary Statement (or a Foreign Grantor Trust Beneficiary Statement) and attach to Form 3520 to avoid default treatment as accumulation distribution. Notices 97-34
- Penalty for failure to file Form 3520 is 35% of the distribution (even if distribution was non-taxable), with additional \$10,000 penalties for each 30-day period failure continues after 90-day notice period, not to exceed amount of distribution; reasonable cause exception. §6677
- Statute of limitations does not commence until Form 3520 filed. §6501(c)(8), TAM 200024051



Out-Bound Transactions

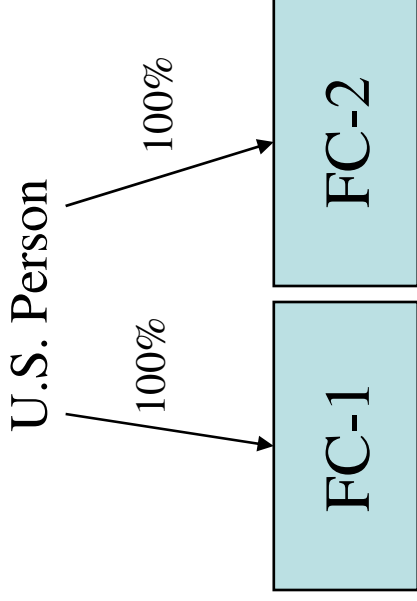
§6038 – Information With Respect To Certain Foreign Corporations And Partnerships

- U.S. person who “controls” a foreign corporation or partnership (>50% vote or value), or who is a 10% shareholder of a “controlled foreign corporation,” must file Form 5471 (for corporations) or Form 8865 (for partnerships) to report certain information concerning the foreign corporation or partnership
- Complex ownership attribution rules apply
- Penalty for failure to timely file Form 5471 for any tax year is \$10,000, with additional \$10,000 penalties for continued failure after notice by the IRS, up to a maximum of \$50,000 per year; reasonable cause exception
- Penalty may also include reduction of foreign tax credit
- As with Form 5472, statute of limitations with respect to reportable items does not commence until Form 5471 is filed. §6501(c)(8), TAM 200024051
- Penalty exposure may be eliminated if foreign corporation has single owner, is an “eligible entity,” and can make check-the-box election to be disregarded entity; PLR?



Out-Bound Transactions

§6038 – Information With Respect To Certain Foreign Corporations And Partnerships (Basic Example)

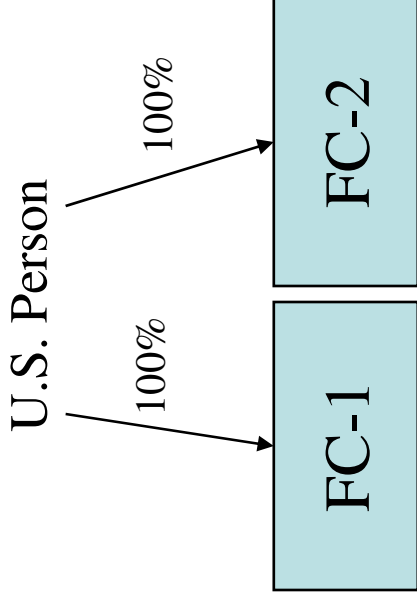


- U.S. Person forms FC-1 and FC-2 in 2001 (through the internet) but inadvertently fails to file Forms 5471 for tax years 2001, 2002 and 2003
- US. Person exposed to \$60,000 in penalties
- If FC-1 and FC-2 are not “per se” corporations, possible to eliminate penalty exposure with favorable private letter ruling granting extension to file Form 8832 check-the-box election for disregarded entity treatment since formation



Out-Bound Transactions

§6038 – Information With Respect To Certain Foreign Corporations And Partnerships (Basic Example)



- IRS began assessing penalties (Jan. 1 2009) for U.S. corporations filing late IRS Form 5471s regarding foreign corporations
- IRS has not yet began automatically assessing penalties for the Basic Example scenario
- Reasonable cause filings - minimizing penalty exposures



Out-Bound Transactions

§6038B – Notice Of Certain Transfers To Foreign Persons

- U.S. person who transfers property to a foreign corporation in a nonrecognition transaction (§§332, 351, 354, 355, 356, 361), or to a foreign partnership in a nonrecognition transaction (§721), must file Form 926 in the case of corporations, and Form 8865 in the case of partnerships, to report information concerning the transfer
- U.S. corporation's liquidation distribution (§336) to foreign person must also be reported by filing Form 926
- Penalty for failure to timely file applicable form is 10% of the fair market value of the property, not to exceed \$100,000; in the case of a contribution to a foreign partnership, the transfer is treated as a sale for fair market value
- Statute of limitations with respect to reportable items does not commence until applicable form is filed. §6501(c)(8), TAM 200024051



Out-Bound Transactions

§6038B – Continued

- IRS form 926, “Return by a U.S. Transferor of Property to a Foreign Corporation”
 - What to report:
 - Transfers of property to a foreign corporation, and information under §6038B.
 - Due date: due date of U.S. tax return.



Out-Bound Transactions

§6039G – Information On Individuals Losing U.S. Citizenship

- Reporting requirement imposed in connection with rules on expatriation to avoid tax under §§877 and 2107
 - Old law: Individual who loses U.S. citizenship or long-term resident status (green card) must report for the year of expatriation: taxpayer identification number; mailing address of principal foreign residence; foreign country of citizenship; and, if net worth exceeds \$500,000 (adjusted for inflation; i.e., \$622,000 for 2004), information detailing assets and liabilities (Form 8854)
 - Penalty for each year of the ten-year period beginning with the loss citizenship or resident status equal to greater of \$1,000, or 5% of tax to which individual subject under §877; reasonable cause exception
- American Jobs Creation Act of 2004 amended §6039G to require annual reporting for each year taxpayer is subject to §877 (§877 also amended; applies if 5-year average annual net income tax is greater than \$124,000, or net worth in excess of \$2,000,000)
- Penalty increased to \$10,000 for each failure to file; reasonable cause exception



Out-Bound Transactions

§6043A – Returns Relating to Taxable Mergers and Exchanges

- If there is (a) an acquisition of control, or (b) a substantial change in the capital structure, of a domestic corporation (“reporting corporation”) in which the reporting corporation or any shareholder recognizes gain under §367(a) (if any), then the reporting corporation must file Form 8806 within 45 days of transaction
- “Acquisition of control” means acquisition of stock representing 50% or more in vote or value, but only if FMV of acquired stock is \$100M or more
- A corporation has a “substantial change in capital structure” if it has a change in capital structure and the amount of cash and FMV of property provided to shareholders is \$100M or more
- Penalty for failure to file is \$500/day up to a maximum of \$100,000
- Reporting corporation must also furnish Forms 1099-CAP to shareholders



Out-Bound Transactions

§6046 – Returns As To Organization Or Reorganization Of Foreign Corporations And As To Acquisitions Of Their Stock

- The following U.S. persons are required to file Form 5471: (1) U.S. persons who become officers or directors of a foreign corporation if a U.S. person owns 10% of its stock, (2) U.S. persons who acquire stock that causes them to own 10% of a foreign corporation, (3) U.S. persons who dispose of enough stock in a foreign corporation to reduce his interest to less than 10%, and (4) other U.S. persons who are treated as U.S. stockholders of foreign corporations under the captive insurance rules of §953(c)
- Complex ownership attribution rules apply
- Penalty for failure to timely file Form 5471 is \$10,000, with additional \$10,000 penalties for continued failure after notice up to \$50,000; reasonable cause exception
- Statute of limitations with respect to reportable items does not commence until Form 5471 is filed. §6501(c)(8), TAM 200024051



Out-Bound Transactions

§6046A – Returns As To Interests In Foreign Partnerships

- U.S. person who acquires any interest in a foreign partnership or disposes of any portion of an interest in a foreign partnership must file Form 8865 if they own at least a 10% interest in a foreign partnership before or after the change
- Reporting is also required if their proportional interest in a foreign partnership changes substantially (10%)
- Penalty for failure to timely file Form 8865 is \$10,000, with additional \$10,000 penalties for continued failure after notice up to \$50,000; reasonable cause exception
- Statute of limitations with respect to reportable items does not commence until Form 8865 is filed. §6501(c)(8), TAM 200024051



Out-Bound Transactions

§6048(a), (b) – Information With Respect To Certain Foreign Trusts

- Gratuitous transfers by U.S. persons to foreign trusts (e.g., creation of foreign trust) must be reported by the transferor on Form 3520
- If trust is treated as having a U.S. owner, U.S. owner required to annually file Form 3520-A to report trust information; U.S. owner should also appoint a U.S. person to act as trust's limited agent regarding requests by the IRS to examine records and/or produce testimony, otherwise IRS can unilaterally determine amount U.S. owner is required to take into income
- Failure to file Forms 3520 or 3520-A results in penalty equal to 35% of the reportable amount, with additional \$10,000 penalties for continued failure after notice up to a maximum of the reportable amount

