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FATCA’s full force felt offshore

The implications of the US Foreign Account Tax Compliance Act for offshore fiduciaries, and recent developments in the investigation and enforcement of US tax evasion

Abstract

- The US Department of Justice and US Internal Revenue Service are aggressively investigating and prosecuting US tax evasion and those who facilitate it.
- Offshore fiduciaries have been at the heart of the US government's enforcement efforts to date, and there is little reason to expect this pressure to abate.
- FATCA will soon become the crown jewel in the US government's enforcement regime.
- There have been several other recent developments in the US government's efforts to locate offshore accounts – and to punish those who continue to try to hide those accounts.

The US Department of Justice (DOJ) and US Internal Revenue Service (IRS) are aggressively investigating and prosecuting US tax evasion and those who facilitate it. The global reach of this crackdown has dramatic implications not only for US taxpayers but also for professionals in the offshore banking and fiduciary services industries. Even the vast majority of financial professionals who have conducted their businesses honestly and diligently could find themselves in the crosshairs.

In its zealous quest to root out tax evasion, the US government is deploying a dizzying array of information-gathering strategies and tactics. Chances are high that foreign financial professionals will encounter at least some of these methods – particularly the Foreign Account Tax Compliance Act (FATCA) – and it is important to stay one step ahead of the rapidly evolving regulatory landscape. The risks to foreign financial professionals are real and should be dealt with proactively.

Offshore fiduciaries in the crosshairs

The DOJ's enforcement efforts to combat tax evasion via use of non-US structuring began in earnest in 2008 with the high-profile prosecution of UBS. Since then, at least 14 Swiss banks have been embroiled in criminal investigations, most notably Credit Suisse, Wegelin, HSBC, Julius Baer, and Swiss Cantonal Banks. Wegelin pleaded guilty to assisting tax evasion in January 2013, marking the first time an overseas bank had been indicted and convicted by the US on tax charges. On 19 May 2014, Credit Suisse became the second bank to do so.

A federal prosecution can have broad implications for a financial institution's ability to continue to do business in the US, and a guilty plea can threaten a bank's very existence. For example, Benjamin Lawsky, New York's Superintendent of Financial Services, was heavily involved in Credit Suisse's negotiations with US prosecutors because he has the authority to revoke the bank's licence to operate in New York for criminal violations.[1] Furthermore, the top federal prosecutor in the Southern District of New York, Preet Bharara, recently expressed his view that corporations should not be permitted to avoid criminal prosecution simply because they could face adverse business consequences; his office is viewing 'with more and more scepticism and with more and more doubt all the breathless claims of catastrophic consequences made by companies both large and small.'[2]

Although the DOJ's major corporate prosecutions to date have involved large banks, the broader non-US fiduciary industry has both (a) figured prominently in those prosecutions already and (b) stands to become another major target itself. The prosecution of Credit Suisse provides a case in point. In the statement of facts supporting its guilty plea, Credit Suisse prominently admitted to using a wholly owned subsidiary and other affiliated trust companies to form, manage and maintain 'sham' trusts, foundations and other non-US companies for the purpose of helping US clients avoid taxes.[3] Further, once the US government's crackdown on US tax evasion became well known, Credit Suisse devised ways to 'spin off' its undeclared US accounts to other entities, thus maintaining the appearance of legitimacy and independence while still exercising ultimate control over the transferred US accounts.

Some prosecutions of individuals – including those of Peter Amrein, Michael Berlinka, Urs Frei, Roger Keller, Andreas Bachmann, Renzo Gadola, Martin Lack, Beda Singenberger, Hansruedi Schumacher, Josef Beck, and Matthias Rickenbach – also illustrate the pressure on the panoply of financial professionals who set up the structures that facilitate tax evasion. Swiss lawyer Matthias Rickenbach has been indicted in connection with creating sham entities in Liechtenstein and Hong Kong.[4] Swiss wealth managers Beda Singenberger and Josef Beck also have been charged with setting up sham entities to shield their US clients' assets.[5] On 12 May 2014, the Swiss wealth management firm Swisspartners agreed to a fine of USD4.4 million for helping to facilitate US tax evasion, as well as, crucially, agreeing to hand over to the IRS the details of 110 US clients, in addition to a three-year period of continued co-operation with the DOJ. In short, the fiduciary industry with any type of US nexus is under intense scrutiny.

Many foreign corporations and individuals discount the threat of criminal prosecution because they think they are beyond the reach of the US government. Increasingly, this is an erroneous assumption. Wegelin infamously believed that 'as a practical matter, it would not be prosecuted in the US for this conduct because it had no branches or offices in the US and because of its understanding that it acted in accordance with, and not in violation of, Swiss law and that such conduct was common in the Swiss banking industry.'[6] Even foreign individuals are not beyond the reach of the US government – as demonstrated by a string of guilty pleas over the past year, including those by Pius Kampfen, Martin Lack and Andreas Bachmann. Raoul Weill, a Swiss national and former head of global wealth management at UBS, was recently arrested while vacationing in Bologna; he was extradited to the US in December 2013 and is now facing trial in Florida in October 2014. Taking the lead, senators John McCain and Carl Levin, the powerful bipartisan leaders of the Senate's Permanent Subcommittee on Investigations, urged federal prosecutors in March 2014 to pursue extradition requests in dozens of other cases involving Swiss nationals. There is currently little sympathy in the US government for the fiduciary industry, and the message is clear: 'The United States is ready to make full use of available legal tools to stop facilitation of US tax evasion and hold alleged wrongdoers accountable.'[7]

FATCA: the perfect storm

The US government has developed a comprehensive arsenal for encouraging or compelling financial institutions and individuals to self-report US taxable income – and to report on those who do not. As of

1 July 2014, the government will add a particularly powerful weapon to its information-gathering techniques: FATCA. By requiring persons or entities with control over specified US-source payments to withhold a 30 per cent tax on such payments to non-compliant foreign financial institutions (FFIs) – or else face secondary liability for that tax – FATCA essentially compels these 'withholding agents' to do the government's work for it.

FFIs and their clients can no longer rely on scarce government resources and hope to fly under the IRS' radar, because, on 1 July 2014, the financial institutions and intermediaries they do business with have a strong incentive to enforce FATCA and penalise non-compliance. Further, as more and more FFIs become FATCA-compliant and disclose their US accounts, the government will have more and more information with which to pursue those who try to continue to avoid disclosure.

To top it all off, FATCA violations can give rise to civil and criminal liabilities – in addition to already-substantial penalties for failing to file reports of foreign bank and financial accounts (FBAR reports) – for US taxpayers who provide false statements or fail to file Form 8938 ('Statement of specified foreign financial assets'), including civil penalties of up to USD60,000, criminal penalties of up to USD250,000 and five years in jail for individuals, and a 40 per cent understatement penalty with respect to non-disclosed foreign financial assets (or 75 per cent in cases of fraud).[8] The 'responsible officer' tasked with overseeing a foreign financial entity's FATCA compliance may also be held criminally responsible if they knowingly make false compliance certifications, a crime that can entail substantial fines and imprisonment.[9] In short, FATCA represents a virtuous (or vicious) cycle leading inexorably to the disclosure of those who attempt to hide US taxable income.

The pressing issue for any non-US structure is determining precisely how its various entities fit into FATCA's scheme. Unfortunately, there is no one-size-fits-all answer. Self-evidently, there is a wide variety of fiduciary structures, and the parameters for FATCA compliance are (a) in flux and (b) dependent on country-specific intergovernmental agreements (IGAs).[10] Nonetheless, the following key components are sure to be relevant to the US government's ongoing enforcement efforts:

- Each entity within a non-US fiduciary structure generally will be expected to register with the IRS or its own government as an 'investment entity' FFI and comply with FATCA's disclosure and withholding obligations, as provided by federal regulations and/or applicable IGAs.
- Trust structures can try to delegate FATCA obligations to 'sponsoring' entities, but this strategy has risks.
- FATCA responsible officers will be a natural target for US regulators.

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Typically, trusts are administered by corporate trustees that hire professional managers to invest assets held by the trust through underlying companies. The IRS is likely to consider each of these

entities – the trustee, trust and underlying company – to be an investment entity with distinct FATCA reporting obligations.

FATCA divides foreign entities into two mutually exclusive categories: FFIs and entities that are not FFIs (NFFEs).[11] If an entity is an FFI, it generally must identify and report to the IRS (or its own government) the names, addresses, taxpayer identification numbers, account numbers and balances of its US account holders.[12] In the context of a non-US structure that is an FFI, this means reporting information about persons with an 'equity interest' in the trust – that is:

'(1) A person who is an owner of all or a portion of the trust under sections 671 through 679 [governing grantor trusts];

(2) A beneficiary who is entitled to a mandatory distribution from the trust as defined in § 1.1473-1(b)(3) [i.e. a distribution that is required to be made pursuant to the terms of the trust document]; or

(3) A beneficiary who may receive a discretionary distribution as defined in § 1.1473-1(b)(3) from the trust [i.e. a distribution that is made to a person at the discretion of the trustee or a person with a limited power of appointment of such trust] but only if such person receives a distribution in the calendar year.'[13]

In contrast, NFFEs have a less onerous burden. NFFEs with mostly passive income (dividends, interests, royalties, rents, etc) must identify and report their substantial US owners only to withholding agents, and NFFEs with mostly active income are exempted from even this requirement.[14] FFIs and NFFEs that do not satisfy their FATCA obligations face a 30 per cent withholding tax on specified US-source payments.[15]

Under FATCA regulations, a non-US entity is an investment entity FFI if, inter alia, at least 50 per cent of the entity's gross income, during the applicable period,[16] is attributable to certain investment activities, including (a) 'investing, administering, or managing funds, money or financial assets' on behalf of other persons (a 'type A' investment entity) or (b) 'investing, reinvesting, or trading in financial assets', if the entity is managed by certain other FFIs (a 'type B' investment entity).[17] As far as the IRS and the DOJ are concerned, most elements of non-US fiduciary structures will qualify as at least one of these two types of investment entities.[18]

First, a corporate trustee generally will be a type A investment entity because it earns most of its income 'administering, or managing funds, money, or financial assets' for or on behalf of trusts.[19] Second, most trusts managed by type A corporate trustees (or professional asset managers) will, by definition, be type B investment entities.[20] Trusts may also be type A investment entities to the extent they own shares in underlying companies, because such shares are considered 'financial assets'.[21] Third, underlying companies are likely to be either type A investment entities if they manage financial assets, or type B investment entities if they (or their assets) are professionally managed.[22] Trust structures operating in IGA jurisdictions typically will be considered investment entities for all of these same reasons.

Properly classifying a trust structure can be a vexing task, and creative and complex arguments can be made about why a particular trust-related entity should not qualify as an FFI in particular cases.[23] But the key point is not complicated: most such structures are investment entity FFIs, and the IRS will be expecting them to make the required disclosures. Attempts to avoid reporting obligations by claiming NFFE status are sure to draw scrutiny from the US government. They will also draw scrutiny from risk-averse withholding agents, which have an indemnity from the US government with respect to taxes withheld, but which face secondary liability with respect to taxes that should have been but were not withheld.[24]

Trust structures can try to delegate FATCA obligations to 'sponsoring' entities, but this strategy has risks

A common compliance strategy for fiduciary structures comprised of several investment entities is to consolidate FATCA obligations into a single 'sponsoring' FFI, such as the corporate trustee or investment manager.[25] To qualify under the regulations, a sponsoring FFI must be authorised to act on behalf of the sponsored entities, register itself and the sponsored entities with the IRS, and agree to perform the sponsored entities' due diligence, withholding, reporting and other FATCA obligations.[26]

If these conditions are met, each sponsored entity will be a 'registered deemed-compliant' FFI and not be required to bear the burden of registering and reporting on its own.

Sponsorship may help streamline FATCA compliance, but it is not a silver bullet. First, it does not substantially reduce either of the required due diligence and/or reporting: instead, it simply transfers those tasks to the sponsoring entity. Second, sponsorship may have several drawbacks from an enforcement defence perspective. Although it appears that a sponsoring entity will not be held directly liable for failing to comply with the obligations placed on it as a sponsoring entity,[27] the sponsoring entity nonetheless may face secondary liability as a withholding agent if it has control over and fails properly to withhold on payments made to its sponsored entities. Because the sponsoring entity is itself responsible for its sponsored entities' compliance, it will be difficult for the sponsoring entity to claim it did not know and did not have reason to know that its sponsored entities were in fact subject to withholding.[28] Also, the sponsoring entity's responsible officer will often be required to make certifications with respect to the sponsored entities' compliance.[29] The more sponsored entities these certifications cover, the more risk they will entail. A sponsoring entity may also draw attention to itself and its sponsored entities. By centralising FATCA obligations in a single entity, sponsoring entities will be a natural point of contact for government investigators.

FATCA responsible officers

Under the regulations, FATCA responsible officers not only have the daunting task of establishing and periodically reviewing FATCA compliance programmes, but they must also make periodic certifications

to the IRS concerning the effectiveness of those programmes. Specifically, the responsible officer must certify that their participating FFI (a) has complied with due diligence identification procedures concerning certain pre-existing accounts and appropriately classified recalcitrant account holders and non-participating FFIs, (b) did not have any formal or informal practices or procedures in place after 6 August 2011 to assist account holders to avoid taxes, and (c) maintains effective internal controls, or will correct any identified material failures or defaults.30 Although most responsible officers will not face liability for good-faith missteps in a participating FFI's compliance programme, knowingly making or assisting a false statement to the IRS will incur harsh criminal penalties.9 For FFIs that fail to meet their FATCA obligations, the responsible officer will be an obvious first target for government investigators.

Sources of information and tactics

In pursuing its targets, the US government has developed a comprehensive legal arsenal to entice and, if necessary, compel the disclosure of relevant information about hidden offshore accounts. The government's first strategy is to provide incentives for self-disclosure. The government's second strategy is to provide incentives for individuals and institutions to report those that do not come clean. The third strategy is the increasingly aggressive use of compulsory legal processes to compel information from financial institutions and hold wrongdoers criminally responsible.

Strategy one: self-disclosure

The government's voluntary disclosure programmes have proven successful by almost any measure. They have produced information on many thousands of previously undisclosed financial accounts, and that information is now being used against those who have not self-disclosed.

Programme for non-prosecution agreements

The DOJ's Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks closed to new applicants on 31 December 2013.31 The programme offers Swiss banks not currently under formal criminal investigation leniency in exchange for detailed information about undisclosed US accounts. Although the programme does not directly apply to trust structures, banks participating in the programme will be asked to disclose information about all persons and entities that interacted with US accounts. This includes providing the names of any relationship managers, client advisors, asset managers, financial advisors, trustees, fiduciaries, nominees, attorneys or accountants known by the bank to be affiliated with US accounts since August 2008.32 Banks also will be required to disclose whether funds were transferred through an intermediary, the name and function of the intermediary, and any financial institutions that transferred funds into or received funds from the account.33

At least 106 Swiss banks have expressed interest in these terms, and the DOJ is now busy reviewing those banks' eligibility.[34] In an ominous sign that the DOJ is planning to prosecute at least some of the banks, however, top DOJ tax prosecutor Kathryn Keneally cautioned reporters on 9 April 2014 not to 'expect 106 prosecution agreements'. Even for banks that are accepted, the government is extracting a harsh price for participation in the programme: penalties range from 20 to 50 per cent of the maximum aggregate value of all previously undisclosed US accounts, depending on when the accounts were opened.[35] These penalties are markedly higher than those UBS and Wegelin agreed to pay for their roles in facilitating tax evasion, and thus reflect a ratcheting up of the DOJ's enforcement efforts with respect to those who come late to the table.[36] In turn, banks are turning up the pressure on recalcitrant account holders: in an effort to avoid or pass on penalties to account holders, some banks are encouraging their US clients to voluntarily report undisclosed accounts to the IRS – or else face an offset against their accounts in the amount of the banks' penalty.

Individual voluntary disclosure programmes

In addition to corporate disclosures, the US government is obtaining information directly from individual US taxpayers. The current voluntary disclosure programme was announced in January 2012 and encourages US taxpayers to disclose unreported accounts, pay reduced penalties, and cooperate with the US government in return for criminal immunity. Taxpayers participating in the programmes are also required to provide information about all offshore entities they own or control. As of February 2014, the IRS' three voluntary disclosure programmes have been used by approximately 43,000 US taxpayers, resulting in the disclosure of tens of thousands of offshore accounts, and recovery of approximately USD6 billion.[37]

An important part of the IRS' voluntary disclosure programmes is that they will in turn implicate the financial entities that helped hide offshore accounts in the first place. For example, in November 2013, the fruits of these programmes led to the issuance of summonses directed at US correspondent accounts used by Zürcher Kantonalbank (ZKB) and the Bank of NT Butterfield & Son Ltd (Butterfield). According to the DOJ, the voluntary disclosure programmes had identified 371 previously undisclosed accounts at ZKB and 81 accounts at Butterfield.[38] Three employees of ZKB have so far been indicted for conspiring with US taxpayers and others to hide USD423 million from the IRS.[33]

FBAR penalties

To further entice taxpayers to voluntarily submit to the reduced penalties that may be available for voluntary disclosure, the US government is imposing draconian penalties on those who do not voluntarily disclose their offshore accounts. US taxpayers who have a financial interest in or signature authority over a financial account outside of the US exceeding USD10,000 must disclose it to the IRS in an FBAR report.[39] Failure to file an FBAR report can result in a civil penalty of up to 50 per cent of the high-value amount of the account – for each violation. In other words, it takes only two missed FBAR filings to deplete an account. In egregious cases, criminal penalties may also be imposed of up to USD250,000 and five years' imprisonment.[40]

A notable example of the government's willingness to impose multiple FBAR penalties is its case against Carl Zwerner, a former client of ABN AMRO Bank in Switzerland, who maintained an undisclosed Swiss bank account through two foundations.41 In that case, the government has sought to collect four separate 50 per cent penalties, totalling USD3.5 million, for Zwerner's failure to file timely FBAR reports between 2004 and 2007, although the highest balance in the account during that period was only USD1.7 million.33 The government's message is clear: those who do not take advantage of voluntary disclosure programmes will be punished harshly once they are discovered.

Strategy two: informing on others

In addition to self-reporting, the US government has created strong incentives for individuals to report on others who facilitate US tax evasion.

Whistleblowers

Whistleblower programmes provide powerful financial incentives for individuals to report on institutions facilitating tax evasion. Regardless of whether the whistleblower has tax liabilities of their own or was involved in the tax evasion scheme, they are entitled to receive potential awards of 15 to 30 per cent of the amount ultimately recovered by the US government. The most infamous whistleblower in the US, Bradley Birkenfeld, received over USD100 million for helping the government prosecute UBS. But there are many other individuals who are willing to share their knowledge for much smaller rewards.

Cooperation agreements

In addition to using the carrot and stick of monetary awards and penalties, individual defendants who plead guilty will, in many cases, be offered reduced criminal charges in exchange for their cooperation against other defendants. As Deputy Attorney General James M Cole acknowledged in February 2014, the government seeks to 'make full use of cooperators and whistleblowers' and is 'receiving information from such individuals in the offshore cases we are working right now'.42 Deputy Attorney General Cole may have been referring to Swiss national and former Credit Suisse banker Andreas Bachmann, who pleaded guilty in March 2014 and has agreed to cooperate with the US government against Credit Suisse as part of his plea deal.

Strategy three: compelled disclosure

Once the government receives information about persons or institutions responsible for US tax evasion, it has several means of following these leads, compelling further disclosures, and imposing penalties – even when those persons or institutions have only a limited presence in the US.

Criminal grand jury subpoenas

Criminal grand jury subpoenas are a blunt instrument – enforceable through criminal contempt – to obtain documents and testimony from financial institutions. A grand jury subpoena often can be enforced regardless of foreign bank secrecy laws,[43] and can be served on any foreign financial institution with a presence in the US. In February 2014, the Senate Permanent Subcommittee on Investigations publicly urged the DOJ to more aggressively enforce grand jury subpoenas against financial institutions with branches in the US.[44]

Civil 'John Doe' summonses

In addition to criminal grand jury subpoenas, the US government can seek information about foreign banks' correspondent accounts in the US through 'John Doe' summonses upon court approval. The John Doe summonses recently issued with respect to the US correspondent accounts of ZKB and Butterfield broadly require five US banks (Bank of New York Mellon, Citibank NA, JPMorgan Chase Bank NA, HSBC Bank USA NA, and Bank of America NA) to produce records identifying US taxpayers holding interests in accounts at ZKB and its affiliates in Switzerland, as well as at Butterfield and its affiliates in Switzerland, the Bahamas, Barbados, the Cayman Islands, Guernsey, Hong Kong, Malta, and the UK.[45] The summonses also direct these five banks to produce information identifying other foreign banks that used ZKB's and Butterfield's correspondent accounts to service US clients, including HSBC India and FirstCaribbean International Bank. This is not the first time John Doe subpoenas have been effectively used by the US: approximately 4,450 client names were obtained from UBS through this method. Interestingly, Congress is currently considering legislation designed to improve the use of John Doe subpoenas to further facilitate their use and effectiveness.

Treaty requests

The current bilateral treaty governing the exchange of information between the US and Switzerland substantially limits the scope of banking information that Switzerland must share with the US. Under the treaty, information must be disclosed only to prevent 'tax fraud or the like', a term of art that generally is limited to non-tax crimes.[46]

However, pressure is mounting in the US to change the terms of the treaty to facilitate additional disclosures. A 2009 protocol amending the treaty has already been signed by both countries and would permit the exchange of information that 'may be relevant' for carrying out the domestic tax laws of the US or Switzerland.[47] The 2009 protocol also specifically eliminates certain grounds for refusing to provide requested information, such as domestic bank secrecy laws or fiduciary obligations.[48] Ratification of the 2009 protocol has so far been delayed in the US Senate and thus it has not yet entered into effect, but that may soon change. One of the five key recommendations of the February 2014 report by the Senate Permanent Subcommittee on Investigations addressing Credit Suisse's role in US tax evasion was to ratify the 2009 protocol.[44] In turn, the 2009 protocol was approved by the Senate Foreign Relations Committee on 1 April 2014, and is now poised to go to the full Senate for approval.

Multilateral instruments

Since the UBS tax evasion scandal, the global crackdown on tax evasion and efforts to increase transparency have had significant ramifications for Switzerland. For example, in October 2013, Switzerland became the 58th country to sign the OECD's Multilateral Convention on Mutual Administrative Assistance in Tax Matters.[49] The Convention would allow for all forms of administrative cooperation between countries 'in the assessment and collection of taxes',[33] and includes pledges to cooperate with cross-border requests for information as well as the recovery of foreign tax claims. In addition, on 7 May 2014, Switzerland, along with over 45 other countries, endorsed the OECD's declaration on the new automatic exchange of information standard, which commits countries to obtain financial information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis.[50] These multilateral initiatives signal increased international cooperation and commitment to tackling tax fraud. Furthermore, on 10 March 2014, Swiss law was amended so as to remove the need to inform an account holder before providing information pursuant to an overseas request.

Conclusion

The US government's tax enforcement strategy is producing dramatic results, and FATCA will accelerate those results. Time is running out for foreign financial institutions and professionals to voluntarily become compliant, and correct past issues. Proactively engaging with the US government is likely to be a better long-term strategy than waiting for the IRS to begin enforcement actions.

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1. *[1]NY Banking Law §§ 39, 40*
2. *[2]Halah Touryalai, 'This Preet Bharara Speech Should Scare All Big Banks, Especially Citi', Forbes (3 April 2014)*
3. *[3]Statement of facts, paras 21–30, US v Credit Suisse AG, No.14-cr-188 (SDNY, 19 May 2014)*
4. *[4] Indictment at 25, US v Amrein, No.13-cr-972 (SDNY, 11 February 2014); indictment at 9, US v Schumacher et al, No.09-cr-60210 (SD Fla, 20 August 2009); DOJ press release, 'Swiss Banking Executive and Swiss Lawyer Charged with Conspiring to Defraud the United States' (20 August 2009)*
5. *[5] Indictment, US v Singenberger, No.11-cr-620 (SDNY, 21 July 2011); indictment, US v Beck, No.12-cr-211 (SDNY, 13 March 2012)*
6. *[6] Allocution, US v Wegelin & Co, et al, No.12-cr-02 (SDNY, 3 January 2013)*
7. *[7] Letter from Senators Carl Levin and John McCain to Deputy Attorney General James M Cole on seeking extradition from Switzerland of indicted bankers and financial advisors who have facilitated US tax evasion (18 March 2014)*
8. *[8]26 US Code (USC) §§ 6038D, 6662(j), 6663, 7201, 7203, 7206; see also 18 USC § 1001; 31 USC § 5322(a)*
9. *[9] [a] [b] 26 USC § 7206(1), (2)*

10 10 For example, the ‘final’ regulations implementing FATCA were revised in part through ‘temporary’ regulations issued in February and March 2014. Additional regulations and IGAs are sure to come in the future

11 11 Idem §§ 1471(d)(4), 1472(d)

12 12 Idem § 1471(c)

13 13 Idem § 1471(d)(2)(c); 26 Code of Federal Regulations (CFR) § 1.1471-5(b)(1)(iii), (b)(3)(iii)(B)(1)-(3)

14 14 26 USC § 1472(a), (b); 26 CFR § 1.1472-1(c)(1)(iv)

15 15 26 USC §§ 1471(a), 1472(a)

16 16 The shorter of the three-year period ending on 31 December of the year preceding the year of determination, or the period the entity has been in existence. 26 CFR § 1.1471-5(e)(3)(i)(A)

17 17 Idem § 1.1471-5(e)(4)(i)(A)(3), (4)(i)(B), (4)(iii), (4)(iv). The definition of an ‘investment entity’ under the IGAs is similar, although the IGAs do not distinguish between different types of investment entities and may not impose a 50 per cent income threshold

18 18 E.g. idem § 1.1471-5(e)(4) (example 6)

19 19 Idem § 1.1471-5(e)(4)(i)(A). A corporate trustee also would be type B investment entity if it is itself managed by another investment entity. Idem § 1.1471-5(e)(4)(i)(B)

20 20 Idem § 1.1471-5(e)(4)(i)(B); see also idem § 1.1471-5 (e)(4) (example 6)

21 21 26 CFR §1.1471-5(e)(4)(ii)

22 22 As noted, in non-IGA jurisdictions, classification as an investment entity depends on at least 50 per cent of the entity’s gross income being attributable to its investment activities; thus, trusts in non-IGA jurisdictions that do not own underlying corporations and earn most of their income through non-financial assets (e.g. real estate) may be NFFEs because such trusts would not earn a majority of their income from managing or trading in financial assets

23 23 E.g. Peter A Cotorceanu, ‘FATCA and Offshore Trusts: A Second Bite of the Elephant’, Tax Notes (23 October 2013)

24 24 26 USC § 1474(a)

25 25 26 CFR § 1.1471-5(f)(1)(i)(F)

26 26 Idem § 1.1471-5(f)(1)(i)(F)(3)

27 27 It is clear that a sponsored entity remains liable for its sponsoring entity’s failings. See 26 CFR § 1.1471-5(f)(1)(i)(F)(5) (‘A sponsored FFI will remain liable for any failure of its sponsoring entity to comply with the obligations contained in paragraph (f)(1)(i)(F)(3) of this section that the sponsoring entity has agreed to undertake on behalf of the FFI.’)

28 28 26 USC § 1472(b)(2) (withholding obligation satisfied with respect to NFFE if ‘the withholding agent does not know, or have reason to know’ that information provided by the NFFE with respect to its US owners is incorrect)

29 29 26 CFR § 1.1471-5(f)(1)(ii)(B)

30 30 Idem § 1.1471-4(a)(5), (c)(7), (f)(2)(i), (f)(3)(i)-(iii)

31 31 DOJ press release, ‘First Deadline Approaches for Participation in the Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks’ (12 December 2013)

32 32 Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, § II(D)(2)(v)

33 33 a b c d Idem

34 34 These banks reportedly include, among others, Coutts AG, the private Swiss banking arm of RBS, the Swiss units of Goldman Sachs Group Inc, Cie Lombard, Odier SCA, BSI Group, the Swiss private bank owned by Italy's Assicurazioni Generali SpA, Union Bancaire Privée, Edmond de Rothschild Group, and EFG International AG. See David Voreacos and Michael J Moore, 'Goldman Sachs, Morgan Stanley Swiss Units Seek Tax Deals', Bloomberg News (29 April 2014). See Jim Armitage, 'Coutts braced for hit from US tax inquiry into Swiss bank', The Independent (7 May 2014)

35 35 DOJ press release, 'Joint Statement between the US Department of Justice and the Swiss Federal Department of Finance' on Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks' (29 August 2013)

36 36 UBS paid USD780 million in fines, penalties, disgorgement and restitution, or approximately 4 per cent of the USD20 billion UBS held for US tax evaders. Ella Campi, 'The Secret Is Out: The DOJ Announces a Program For The Non-Prosecution of Swiss Banks, But Many Question The Price Of Peace', Lexology (31 October 2013). Wegelin paid USD74 million in fines, penalties, restitution, and forfeitures, or approximately 6.1 per cent of the USD1.2 billion the DOJ claimed Wegelin held in undeclared assets. Idem. In July of 2013, Liechtensteinische Landesbank AG entered into a non-prosecution agreement, agreeing to pay approximately USD23.8 million, or 7 per cent of the USD340 million of undeclared assets held on behalf of US taxpayers. 'Liechtenstein Bank Gets Non Prosecution Agreement, To Pay $23.8 Million', Corporate Crime Reporter (30 July 2013)

37 37 Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts: Hearing before the Senate Permanent Subcommittee on Investigations, S Hrg 112-781 (26 February 2014) (opening statement of Senator Carl Levin)

38 38 DOJ press release, 'Court Authorizes IRS to Issue Summonses for Records Relating to US Taxpayers with Offshore Bank Accounts' (12 November 2013)

39 39 31 USC § 5321(a)(5)(C)

40 40 Idem §§ 5321(d), 5322(a)

41 41 Complaint, US v Zwerner, No.13-cv-22082 (SD Fla, 11 June 2013)

42 42 DOJ press release, 'Deputy Attorney General James M Cole Testifies Before the US Senate Committee on Homeland Security and Government Affairs' (26 February 2014)

43 43 E.g. In Re Grand Jury Proceedings (Bank of Nova Scotia) 740 F.2d 817 (11th Cir 1984); In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir 1982)

44 44 a b Majority and Minority Staff of the Senate Permanent Subcommittee on Investigation, 113th Congress, Report on Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts 5 (2014)

45 45 DOJ press release, 'Court Authorizes IRS to Issue Summonses for Records Relating to US Taxpayers with Offshore Bank Accounts' (12 November 2013)

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