

# Recent tax haven abuse legislation, developments and practical implications

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# Obama Proposal (Green Book May 12, 2009)

- Strengthen information reporting and withholding tax system
- Increased penalties, reporting obligations, withholding taxes
- Publication of QI list (non-QI disadvantages)
- Hire 800 new international IRS agents
- Extended limitation/examination periods
- Required information reporting by QI's for US clients

## Obama Proposal (Green Book May 12, 2009)

- 30% withholding tax on payments of FDAPI to non-QI's
  - Foreign partnerships?
- 20% withholding tax on **gross** security sales proceeds paid to non-QI's outside treaty and TIEA agreement jurisdictions
  - Refunds can be claimed
- 30% withholding tax on FDAPI paid to foreign entities unless UBO's identified
  - Public co. exception
- Expand definition of dividends for US withholding tax purposes
  - Relates to notional principal contracts, equity swaps

# Obama Proposal (Green Book May 12, 2009)

- Attach FBAR to income tax return **and** file with Treasury by June 30
- FBAR reporting for transfers between foreign accounts
  - QI and arm's length/business exceptions
- 10K FBAR threshold presumed met
  - QI exception
- 40% accuracy related/understatement penalty if foreign account involved and FBAR not filed
  - No reasonable cause exception
- Combo of > 200K non-QI deposits and FBAR filing failure creates willful presumption and 50% account value penalty.
  - n/a if only corporate signing authority
- 10K/mo. Form 3520 penalty until amount reported then compared against general 35% penalty Extended 6 year limitation period
  - Extends to more information returns
  - Applicable to the whole income tax return

## Obama Proposal (Green Book May 12, 2009)

- US banks, QI's required to report transfers to and from foreign accounts owned by US persons, or opening of foreign accounts for US persons
  - Public company and QI exceptions
- QI's cannot have any commonly controlled non-QI affiliates, subsidiaries or sister companies.
- US persons, QI's req'd to report formation and acquisition of foreign entities for US persons
- QI's must identify all US account holders, US UBO's of foreign entity account holders, and file Forms 1099

# Obama Proposal (Green Book May 12, 2009)

- Deferral rules not repealed.
- **No black list!**
- Proposal used to fund expiring R&E credit
- Expand tax credits for certain oil & gas income subject to foreign levies

# Obama Proposal (Green Book May 12, 2009)

- Revise check the box regulations to generate inter-company passive taxable income
  - Same country and 1st tier US owner exceptions
- Prevent US companies from taking interest deductions on loans used to fund foreign subsidiary investments
  - Carried forward
  - Matched against repatriated foreign E&P
- Greater scrutiny on transfers of intangibles to foreign corporations
  - Expanded intangible definition
  - Combine multiple intangibles to increase value
- Disqualify interest deductions for pymts by US corps. to related expatriated entities
- Repeal boot within gain limitation for reorgs involving exchanges of high basis foreign stock with untaxed E&P
  - Causes immediate dividend recognition
- Repeal 80/20 rule which exempts dividends paid by US corps. with > 80% foreign source income, from US withholding tax
  - Applied pro-rata
  - Look through rule for income source

# Baucus Proposal (March 12, 2009)

Senate Finance Committee Chairman Senator Max Baucus (D-MN)

- File FBAR with federal income tax returns
- Require increased offshore due diligence by CPA's
- 6 year SOL for int'l transactions/information reporting
- Increased reporting of offshore wire transfers
  - Require US banks to report wire transfers  $\geq$  10K offshore fbo US persons
- Use of foreign trust assets by US beneficiaries taxable
- Increased penalties (2X for offshore payment mechanisms)
- No offshore secrecy jurisdiction (OSJ) blacklist

# Stop Tax Haven Abuse Act (March 2, 2009)

US Senator Levin / US Representative Doggitt

- Presumption of ownership and control for 34 offshore secrecy jurisdiction (OSJ) entities (Black list)
- Increased bank reporting of opening accounts for or forming OSJ entities for US persons
- Transfers to and from OSJ entity presumed (unreported) income
- Increased bank reporting of transfers to foreign corps with US beneficial owners
- Require 1099 reporting by QI's to US persons
- \$50M foreign corps managed and controlled in US taxable as US corporations
  - n/a to foreign subs of active US parent companies

# Stop Tax Haven Abuse Act (March 2, 2009)

US Senator Levin / US Representative Duggitt

- Foreign trust protector powers attributed to US grantors
- Contingent US benes treated as current benes
- Use of foreign trust assets by US beneficiaries taxable
- Increased PFIC reporting (foreign hedge funds).
- Increased information return and security law violation penalties

# Stop Tax Haven Abuse Act (March 2, 2009)

US Senator Levin / US Representative Doggitt

- 6 year SOL where OSJ entity involved
- Limit protection from penalties afforded by legal opinions if OSJ entity involved
- Structure or codifying economic substance doctrine
- Increase anti-money laundering compliance for hedge funds, corporate service providers
- Expand def'n of dividends for withholding tax purposes to include derivatives

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