



Tax and Regulatory Fall-Out from the Recent Financial Crisis: Latest Developments

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We Live in Troubled Times

- Collapse of Bear Stearns & Lehman
- Pained History of the US Auto Industry
- AIG: Black Hole of Credit Default Swaps
- Iceland in Bankruptcy
- UBS on Life Support?
- Goldman Sachs becomes the Über-Banker

The Class War Begins: *Main Street v. Wall Street*

- Populist Charge Pervades Congress:
 - “Bring Down the Greedy and Make them Pay”
 - Clawback of AIG bonuses -- retroactively
- Underlying Sentiment is that Lack of Regulation Got Us Here
 - Maybe So: After all Madoff was a Nasdaq Darling
 - Is Greed Still Good? Probably not (at least for now)

America's Response?

- Obama Landslide
- America moves toward Socialism or at least greatly enhanced regulation
 - Government owns and controls the banks.
 - Government funds insurers, the auto industry
 - Workers and unions “sitting in”, demanding that banks support bankrupt companies and displaced workers

Impact to Transnational Business and Taxation?

- Long Arm of the US Law – attempting to rewrite global rules of engagement – or “How the World Just Got Smaller”.
 - So much for Swiss Banking Secrecy
 - Congress focus on “Tax Cheats” – whoever they are – scooping up among them Maples & Calder and its Ugland House
 - Foreign bankers indicted, presumably convicted and fugitives of US law

The World as a Smaller Place?

- The US Elbows for Extra Room
 - Swiss banks forced out of the United States: UBS convicted
 - The Netherlands becomes a “Tax Haven”
- Enforcement of “Existing” Regulations – Not Historically an Emphasis
 - Tax Cheats – “Voluntary Disclosure” and Prosecution
 - Investment Advisers – Principally Banks “facilitating” Cheats and “Hiding Behind Secrecy”

Investment Advisers Act of 1940: Just One of Many Rules Overlooked in Past

- Money Managers, Investment Consultants and Financial Planners Regulated Under Advisers Act if Investment Advisers – If use phone, Internet, “Interstate Commerce”
- Definition of Investment Adviser: Any person or firm that:
 - For compensation
 - Is engaged in the business of
 - Providing advice or issuing reports regarding securities

Seems Like a Very Broad Rule? It Is!

- Lawyers, Bankers, Trustees, Accountants, Family Offices – Basically You and Me
- US Based or Foreign – Doesn't Matter
 - No exception for non-US persons advising US persons
 - SEC does not accept “home state registration” of non-US advisers
- If Investment Adviser without Exemption, Must Register – nasty rules about non-compliance

Relevant Exemptions from Registration

- Lawyers, Accountants & Other Professionals – If Merely “Incidental” to the Practice of Profession
 - No holding self out as adviser
 - Based on Same Factors as Professional Charges
 - Exemption Not Available for Trustees
- Banks and Trust Companies – But Only if Regulated in the US by Federal or State Government
 - Foreign banks out of luck

Primary Exemption from Registration

- Private Adviser Exemption
 - Fewer than 15 clients during preceding 12 months
 - No holding out as adviser to “public”
 - No adviser to “registered” investment company
- Classic Hedge & Private Equity Fund Managers
 - Watch for Increased Regulation and a Broader Net
 - Hedge Funds have become “too big to fail”

Private Adviser in the Foreign Context: Do we have more than 14 US Clients?

- US Advisers Count both US and Non-US Clients
- Non-US Advisers Count Only US Clients
- Non-US Trust May Be Considered US Client if US Beneficiary or Settlor with Retained Power to Direct Investments
- Swiss “private” banks shutting out US clients and US Trusts with US beneficiaries, closing down relationships

Recent Moves Against Wall Street: Money Managers Under Attack

- “Carried Interests” Would Become Taxable as Ordinary Income – 15% vs. 35% tax rate
 - Traditional money manager tool by which manager shares in “profits” of fund
 - Where fund generates capital gain (e.g., classic “long-short fund”), manager is allocated share of gains and enjoys rate break of capital gains
- Deferred Compensation in Foreign Funds becomes non-deferred

Recent Moves of Obama

- Codification of Economic Substance Doctrine
 - Existing common law doctrine
 - Generally denies tax benefits from a transaction that does not meaningfully change a taxpayer's economic position even if satisfies literal requirements of the Code
- Son of BOSS, Contingent Liability or Basis Shifting Transactions – Tax Shelters

Codification of Economic Substance

- Under proposed rules, transaction satisfies economic substance doctrine only if (1) it changes in a meaningful way (apart from tax consequences) the taxpayer's economic position; and (2) the taxpayer has a substantial purpose (other than tax) for entering the transaction.
- Present value of reasonably expected pre-tax profit must be substantial in relation to the present value of net federal tax benefits

Codification Continued

- All bets are off?
- Is the US government moving to a subjective application of the federal tax law?
- Combination of long-arm of the US law and codification of IRS discretion to determine whether taxpayers' purposes are appropriate and profits are substantial – Watch Out!!

Recent International Proposals

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