# International Estate Planning

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## I. Asset Protection Trusts

### A. BACKGROUD

Asset protection trusts, sometimes referred to as APTs, are trusts established for the purpose of thwarting claims of creditors in jurisdictions with statutes purporting to limit the ability of settlors to access trust assets. For U.S. tax purposes, APTs usually are grantor trusts, incurring no gift tax, but do subject the settlor to U.S. income tax. In 1999, the Ninth Circuit decided *Federal Trade Commission v. Affordable Media, LLC*,[1] which affirmed a district court injunction against the settlors of an APT requiring the defendants to repatriate any assets held for their benefit outside of the United States. *Affordable Media* and *In re Lawrence* are now being cited as authority to nullify the "inability" or "impossibility" defense in response to orders to repatriate assets from APTs.[2]

### B. 2000 CASES

*Securities and Exchange Commission v. Brennan*[3] involved the settlor of a Gibraltar trust who migrated first to Mauritius and then to Nevis. The settlor and his company were the subject of a U.S. district court judgment in favor of the SEC, which ordered the settlor to disgorge $75 million in illegal gains. The settlor then filed for bankruptcy. The court of appeals held that a district court order directing the settlor/debtor to repatriate assets from the offshore trust violated the automatic stay provision of the Bankruptcy Code[4] and was not within the "governmental unit" exception[5] because it was more than the mere entry of

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1. *See* Federal Trade Commission v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999). This case was described in last year's survey, 34 INT'L LAW. 591 (2000).

2. Though not involving asset protection trusts, *Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d 500, 506 (8th Cir. 2000) and *Fed. Trade Comm'n v. Think Achievement Corp. et al.*, 2000 U.S. Dist. LEXIS 19593, at 20 (N.D. Indiana 2000) cite *Affordable Media* favorably.

3. *See* Securities and Exchange Commission v. Brennan, 230 F.3d 65 (2d Cir. 2000).

4. *See* 11 U.S.C. § 362(a) (1994).

5. *See* 11 U.S.C. § 362(b) (1994).

a money judgment. The bankruptcy court denied a request for a repatriation order and the SEC obtained an *ex parte* order for repatriation of assets in the district court proceeding. *Affordable Media* was mentioned only in a footnote referencing descriptions of "offshore asset protection trusts."[6]

In *Securities and Exchange Commission v. Bilzerian,*[7] following a conviction for criminal securities fraud, the defendant was the subject of a civil suit by the SEC; he was found liable and, inter alia, ordered to disgorge his profit from the fraud. After protracted litigation on the discharge of the disgorgement judgment in bankruptcy proceedings, the SEC filed an application for contempt against the debtor. In analyzing the standards for civil contempt, the court of appeals relied on cases older than *Affordable Media*, but considered *Affordable Media* in finding that the debtor failed to demonstrate "categorically and in detail" that he had no control over a Cook Islands trust. The court noted: "Where assets are held in an offshore trust, the 'burden of proving impossibility as a defense to a contempt charge will be especially high.'"[8] Unlike the court in *Affordable Media*, the court in *SEC v. Bilzerian* did not rely upon the status of the debtor as the protector of the trust. Indeed, the debtor claimed to not be a beneficiary or trustee of the offshore trust. The court based its holding on the failure to provide adequate documentation to establish his inability to comply with the court's orders, that he had not made all reasonable efforts to comply, and that the purported inability to comply was the result of his own actions.[9]

*In re Coker,*[10] involving a Bahamian trust created with the assistance of bankruptcy counsel, relies on and specifically adopts the principles set forth in *Affordable Media* and *In re Lawrence*. The bankruptcy court held that the defense of impossibility is not available when the impossibility is self-created.[11]

## II. Partnerships

### A. Partnerships with Foreign Partners

In determining the taxable year of a partnership, Proposed Treasury Regulation Section 1.706-4(b)[12] requires that the taxable year shall be that of the majority partner, or if there is no majority partner, the taxable year of all the principal partners. Proposed regulations provide that foreign partners who are not subject to U.S. tax on a net basis on income earned through the partnership are to be disregarded for determining the partnership's taxable year.[13] The purpose of this proposed rule is to prevent the taxable year of a partnership to be determined for U.S. income tax purposes by reference to the taxable year of a partner who may not be subject to U.S. tax on income earned through the partnership.[14] This would occur, for instance, in a partnership with a majority foreign partner with a tax

6. *See Brennan*, 230 F.3d at 68.

7. *See* Securities and Exchange Comm'n v. Bilzerian, 112 F. Supp. 2d 12 (D.D.C. 2000).

8. *See id.* at 26, *citing Affordable Media, LLC,* 179 F.3d at 1241.

9. *See id.* at 23.

10. *See* American Ins. Co. v. Coker (*In re* Coker), 251 B.R. 902, 905 (Bankr. M.D. Fla. 2000).

11. *See id.* at 905, *citing In re Lawrence, Affordable Media,* and Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1521-1522 (11th Cir. 1986).

12. Prop. Treas. Reg. § 1.706-4(b), 66 Fed. Reg. 3920 (Jan. 16, 2001).

13. *See* Prop. Treas. Reg. § 1.706-4(a)(1), (2), 66 Fed. Reg. 3920 (Jan. 16, 2001).

14. *See* Preamble, 66 Fed. Reg. 3920 (Jan. 16, 2001).

year other than the calendar year and the remaining partners being U.S. persons with calendar tax years. The income would be deferred for the U.S. partners because the majority foreign partner had a different tax year.

For these purposes, a foreign partner will be considered subject to federal income tax only if the partner is allocated gross income of the partnership that is effectively connected with the conduct of a trade or business within the United States during the partnership's immediately preceding taxable year.[15] The Preamble to the proposed regulations states that this treatment is consistent with the treatment of tax-exempt partners.[16]

Foreign persons who are controlled foreign corporations or foreign personal holding companies are not treated as foreign partners for this purpose.[17] If partners who are not disregarded (i.e., generally partners who are U.S. persons) own in the aggregate less than a 20 percent interest in the partnership, the foreign partners will not be disregarded.[18] The proposed regulations would become effective for the first partnership taxable year after the final regulations are published in the *Federal Register*, which might create a short taxable year.[19]

### B. Brown Group Regulations

The Treasury Department proposed more regulations under Subpart F regarding the treatment of items of income received by a partnership in which a controlled foreign corporation (CFC) is a partner.[20] The underlying premise of the Brown Group regulations is that a CFC should not be able to avoid generating Subpart F income by earning foreign source income through a partnership in which it is a partner rather than earning the income directly. Under these additions to the existing Brown Group proposed regulations, gross income would be characterized at the partnership level instead of in the hands of the CFC that is a partner.[21] If any part of the partnership's gross income would be Subpart F income if received directly by partners that are CFCs, it must be separately taken into account by each partner.[22]

## III. Foreign Trust Rules

### A. Background

The classification of a trust as either foreign or domestic has significant consequences for U.S. income tax purposes. If a trust that has previously been treated as a U.S. person becomes a foreign trust under Treasury Regulation Section 301.7701-7,[23] a taxable transfer will be deemed to have occurred. Internal Revenue Code Section 684 treats such a transfer from a U.S. trust to a foreign trust as a sale or exchange for an amount equal to the fair

15. *See* Prop. Treas. Reg. §§ 1.706-4(a)(1), 1.706-4(a)(2), 66 Fed. Reg. 3920.
16. *See* Preamble, *supra* note 14 (citing Temp. Reg. § 1.706-3T).
17. *See* Prop. Treas. Reg. § 1.706-4(c), 66 Fed. Reg. 3920 (Jan. 16, 2001).
18. *See* Prop. Treas. Reg. § 1.706-4(b), 66 Fed. Reg. 3920 (Jan. 16, 2001).
19. *See* Preamble, 66 Fed. Reg. 3920.
20. *See* Prop. Treas. Reg. §§ 1.954-2(a)(5)(ii), 1.954-1(g), 65 Fed. Reg. 56,836 (2000) (the so-called "Brown Group regulations" after Brown Group, Inc. v. Comm'n, 77 F.3d 217 (8th Cir. 1996)).
21. *See* Prop. Treas. Reg. § 1.952-1(g), 65 Fed. Reg. 56,836 (2000).
22. *See* Prop. Treas. Reg. § 1.702-1(a)(8)(ii), 65 Fed. Reg. 56,836 (2000).
23. Prop. Treas. Reg. § 301.7701, 65 Fed. Reg. 60,822 (Oct. 12, 2000).

market value of the trust assets, and any gain realized would be recognized by the transferring trust in the year of transfer.[24] Similarly, under Section 679, a U.S. person who transfers property to a foreign trust (or to a trust that becomes a foreign trust) that has a U.S. beneficiary will be deemed to be the owner of the trust. The status as "owner" of a grantor trust, or a portion of a trust, causes income of the trust to be taxed to that person.[25]

### B. Treasury Proposes Regulations on Transfers to Foreign Trusts

The Treasury Department has proposed regulations under Section 679[26] and Section 684.[27] The proposed regulations under Section 679 flesh out the statute with definitions and examples, as well as attempt to clarify concepts central to the application of the statute and related provisions. The proposed regulations expand on the statutory definition of "U.S. beneficiary" by stating that a U.S. person would be a beneficiary even if the interest in the trust income or corpus is contingent on a future event.[28] A person who is not named or is not a member of a class of beneficiaries is not considered a U.S. beneficiary, however, unless the trustee has discretion to make a distribution to that person.[29] For this purpose, persons who might benefit only under the laws of intestate succession in the event of the prior death of all named beneficiaries are generally not included.[30] The proposed regulations add some extra-statutory standards for determining the existence of a U.S. beneficiary by the aggregation of documents, the terms of the trust allowing changes to benefit U.S. persons, application of foreign law to cause the trust to benefit U.S. persons, and the failure of the parties to follow the terms of the instruments.[31]

The proposed regulations under Section 684 reiterate the general rule of immediate recognition of gain when a U.S. person transfers appreciated property to a foreign trust or estate.[32] The proposed regulations define the term "transfer" to mean any direct, indirect, or constructive transfer, and reference the simultaneously proposed regulations under Section 679.[33] A transfer of property by a U.S. person to a foreign trust will not require the recognition of gain on the transfer to the extent such trust is considered owned by any person under Section 671.[34]

Finally, amendments to the regulations defining a foreign trust would add employee benefit trusts and investment trusts as satisfying the special control test for domestic trust treatment in Treasury Regulations Section 301.7701-7(d)(1)(iv).[35]

24. *See* I.R.C. § 684(a) (1997).
25. *See* I.R.C. § 671 (1954).
26. *See* Prop. Treas. Reg. § 1.679-1—§ 1.679-6, 65 Fed. Reg. 48,185 (Aug. 7, 2000), corrected 65 Fed. Reg. 67,318 (Nov. 9, 2000).
27. *See* Prop. Treas. Reg. § 1.684-1—§ 1.684-4, 65 Fed. Reg. 48,198 (Aug. 7, 2000), corrected 65 Fed. Reg. 58,973 (Oct. 3, 2000).
28. *See* Prop. Treas. Reg. § 1.679-2(a)(2)(i), 65 Fed. Reg. 48,185.
29. *See id.* § 1.679-2(a)(2)(ii).
30. *See id.*
31. *See id.* § 1.679-2(a)(4).
32. *See* Prop. Treas. Reg. § 1.684-1, 65 Fed. Reg. 48,198 (2000).
33. *See id.* § 1.684-2(b) and (c).
34. *See id.* § 1.684-3(a).
35. *See* Prop. Treas. Reg. § 301.7701 (d)(1)(iv), 65 Fed. Reg. 60,822 (Oct. 12, 2000).

## IV. Income Tax Treaties

### A. New Treaties

#### 1. *Denmark*

The new U.S.-Denmark Income Tax Treaty[36] became effective on March 21, 2000, but was not effective for withholding until May 1, 2000, and for other taxes on January 1, 2001.

#### 2. *Ukraine*

The new U.S.-Ukraine Income Tax Treaty[37] entered into force on June 5, 2000, but was not effective for withholding taxes until August 1, 2000, and for other taxes on January 1, 2001.

#### 3. *Luxembourg*

The Luxembourg government approved the U.S.-Luxembourg Mutual Legal Assistance in Criminal Matters Treaty[38] on October 25, 2000. The ratification of the income tax treaty between the United States and Luxembourg, approved in 1997, was conditioned on ratifying the proposed U.S.-Luxembourg Mutual Legal Assistance in Criminal Matters Treaty. Instruments of ratification of the income tax treaty were exchanged in December 2000. The treaty is effective for taxes paid or credited and for taxable years beginning on or after January 1, 2001.

### B. Developments Involving Existing Treaties

#### 1. *New Regulations on Treatment of Pass-Through Entities*

Final regulations under Section 894(c) were issued[39] becoming effective June 30, 2000. Subsection 894(c) prohibits the entitlement of treaty benefits to pass-through entities if certain conditions are not met. The regulation provides that the tax imposed on U.S. source income not connected with a U.S. trade or business by a foreign person that is fiscally transparent is eligible for treaty benefits only if the income is derived by a resident of the treaty jurisdiction.[40] The treatment of the foreign person as fiscally transparent by either the United States or the foreign jurisdiction invokes application of the rule. Though primarily applicable in cross-border corporate structures, the final regulations will also be applicable to investments into the United States through foreign pass-through entities chartered in treaty countries.

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36. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Aug. 19, 1999, U.S.-Den., Treaty Doc. 106-12, 1999 U.S.T. LEXIS 167. Announcement 2000-59, 2000-2 C.B. 120.

37. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Mar. 4, 1994, U.S.-Ukr., Treaty Doc. 103-30, 1994 U.S.T. LEXIS 221. Announcement 2000-89, 2000-2 C.B. 467.

38. Mutual Legal Assistance in Criminal Matters Treaty, Mar. 13, 1997, U.S.-Lux.,Treaty Doc. 105-11, 1997 U.S.T. LEXIS 93. Press Release, Treas. Dep't, LS-1091 (Dec. 20, 2000), *available at* http://www.ustreas.gov/taxpolicy/documents.html.

39. *See* Prop. Treas. Reg. § 1.894-1(d), 65 Fed. Reg. 40,993 (July 3, 2000).

40. *See id.*

2. *United States–Ireland Income Tax Treaty*

A new Protocol to the United States–Ireland Income Tax Treaty[41] was amended with the exchange of instruments of ratification on July 13, 2000. The new treaty protocol partially relaxes the existing 30 percent U.S. dividend withholding tax applicable to payments from a real estate investment trust (REIT) to Irish residents, making the 15 percent withholding rate more available to Irish corporate recipients of REIT dividends. The amendment is effective for dividends paid or accrued on or after September 1, 2000.

## V. New U.S.-German Protocol[42]

On November 5, 1999, the Senate approved a new protocol for the 1980 U.S.-German Estate Tax Treaty. The United States and Germany exchanged ratification instruments on December 14, 2000, which was the final step required to bring the treaty into force. The treaty applies generally with respect to deaths occurring after December 14, 2000. The estates of certain persons dying after November 10, 1988, however, may be eligible for benefits relating to the unified credit and marital deduction, if a return or claim for refund asserting those benefits is filed no later than December 14, 2001, or is filed within the otherwise applicable period for filing the return or claim under U.S. law.

## VI. Procedure

### A. Summonses Issues at Foreign Tax Authorities' Request

In separate cases, U.S. district courts uniformly upheld IRS summonses issued on behalf of foreign tax authorities. In *Urtuzuastegui v. United States*,[43] the district court denied an individual's motion to quash an IRS summons that was issued to its investment broker at the Mexican tax authority's request. In *Alimentos Aereos Especializados, S.A. v. United States*,[44] the IRS issued the summons to a bank seeking records in connection with the Mexican tax liability of a company. The court determined that another Mexican corporation lacked standing to contest the validity of the third-party summons because it was not the party identified in the summons. Finally, in *Mazurek v. United States*,[45] the district court denied an individual's request to quash an IRS summons issued to his bank at the request of the French tax authority.

In *Lidas, Inc. v. United States*,[46] the Ninth Circuit Court of Appeals upheld the enforcement of a summons issued by the IRS at the request of the France tax authority. The taxpayers, two individuals and their wholly owned corporation, challenged the enforcement

41. Convention Amending Convention with Ireland, Sept. 24, 1999, U.S.-Ire., Treaty Doc. 106-15, 145 Cong. Rec. S14226, Nov. 5, 1999. Press Release, Gov't of Ireland Dept. of Foreign Affairs, July 13, 2000.

42. Protocol Amending the Convention Between the United States and Germany (Dec. 14, 1998), *reproduced at* [U.S.] *Tax Treaties* ¶ 3295 (CCH 2001). Press Release, Treasury Dep't, LS-1080 (Dec. 18, 2000), *available at* http://www.ustreas.gov/taxpolicy/documents.html.

43. *See* Urtuzuastegui v. United States, No. CIV 00-381, 2001 U.S. Dist. LEXIS 1493 (D. Ariz. Jan. 9, 2001).

44. *See* Alimentos Aereos Especializados, S.A. v. United States, No. L-99-8, 2000 U.S. Dist. LEXIS 3967 (S.D. Tex. Feb. 23, 2000).

45. *See* Mazurek v. United States, No. 99-2003 C/W 99-2229, 2000 U.S. Dist. LEXIS 14131 (E.D. La. Sept. 19, 2000).

46. Lidas, Inc. v. United States, 238 F.3d 1076 (9th Cir. 2001).

of the IRS administrative summons on various grounds. The Court of Appeals stated that the exchange of information provision of the U.S.-France income tax treaty[47] was self-executing and severable from other treaty provisions[48] in answering the taxpayers' constitutional challenge to the treaty. The court found that the taxpayers had not overcome the prima facie case entitling the United States to enforcement of the summons based on Section 7602 and the four-part test from *United States v. Powell*.[49] The court also held that the Right to Financial Privacy Act[50] exempts IRS summons and that the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters[51] does not require actual receipt if reasonable notice was given by normal methods.[52]

### B. Summons Issues for Offshore Credit Card Records

In 1999, the *Affordable Media* decision seriously undermined the use of offshore asset protection trusts. In 2000, another offshore asset planning device and a primary tool of tax avoidance was threatened when a federal judge authorized the issuance of summons to two credit card companies for information about offshore account holders.[53] Normally, the IRS may administratively issue summons to taxpayers and third parties for information.[54] A U.S. district court had to approve these summons to American Express and MasterCard, however, because they were not issued with regard to any specific taxpayer. Such "John Doe" summons may be authorized by a U.S. district court in an *ex parte* proceeding only if the petition and supporting affidavits[55] establish that the summons relates to a particular taxpayer or to an ascertainable group of taxpayers, there is a reasonable basis to believe that the taxpayers may have not complied with a provision of the Internal Revenue Code, and the information sought is not readily available from other sources.[56]

The petition was supported by lengthy affidavits of a revenue agent and an attorney expert in money laundering issues. The affidavits cited and referred to a host of studies, reports, and personal experiences as to the use of offshore credit, charge, and debit cards for tax avoidance purposes.[57] The order granted the issuance of the summonses to the credit card companies for records relating to taxpayers who had signatory authority in 1998 and 1999 over credit, charge, or debit cards issued by or through financial institutions in the Cayman Islands, the Bahamas, Antigua, and Barbuda.

47. France-United States Income Tax Treaty, Article 27—Exchange of Information, August 31, 1994, S. Treaty Doc. No. 103-32, *reproduced at* [U.S.] *Tax Treaties* ¶ 3001.28 (CCH 2001).

48. *See Lidas, Inc.*, 238 F.3d at 1081.

49. United States v. Powell, 379 U.S. 48, 57-58 (1964).

50. 12 U.S.C. § 3401 *et seq.*

51. 20 U.S.T. 361, 658 U.N.T.S. 163.

52. *See Lidas, Inc.*, 238 F.3d at 1083-84.

53. *See* In the Matter of the Tax Liabilities of John Does, (S.D. Fla. Oct. 30, 2000), *reproduced at* Tax Analyst Doc. 2000-28182 (Oct. 31, 2000).

54. *See* I.R.C. § 7602(a) (2000).

55. *See* I.R.C. § 7609(h)(2) (2000).

56. *See* I.R.C. § 7609(f) (2000).

57. *See* In the Matter of the Tax Liabilities of John Does, Ex Parte Petition for Leave to Serve John Doe Summonses, Exhibit A: Declaration of Joseph West, and Exhibit B: Declaration of Jack A. Blum, *reproduced at* Tax Analyst Doc. 2000-27434.

## VII. Reporting and Compliance

### A. Proposed Regulations on Reporting Requirements for Deposit Interest Paid to Nonresident Aliens

Regulations were proposed that would extend the information reporting requirement for bank deposit interest paid to nonresident alien individuals who are residents of foreign countries.[58] The proposed regulations extend the information reporting requirement for bank deposit interest paid to nonresident alien individuals who are residents of other foreign countries.[59] The Treasury Department gave two reasons for this major change in compliance for payors of bank deposit interest to foreign persons. First, it will further encourage voluntary compliance of U.S. taxpayers by minimizing the possibility of avoidance of the U.S. information reporting system, such as through false claims of foreign status. Second, several countries that have tax treaties or other agreements for the exchange of tax information with the United States have requested information concerning bank deposits of individual residents of their countries.[60] The requirement would be effective for payments made after December 31 of the year in which the final regulations are published in the *Federal Register*.[61]

### B. Withholding Regulations

Extensive regulations, originally promulgated in 1997, on the withholding, documentation, and information reporting requirements went into effect on January 1, 2001. These regulations apply to payments of income to foreign persons, particularly as they relate to payments handled by financial intermediaries.[62] Additional guidance was provided on the new withholding and reporting requirements on payments to foreign persons[63] and the qualified intermediary agreement.[64]

The application procedures and the qualified intermediary (QI) agreement form were set out in Revenue Procedure 2000-12. Notice 2001-4 established a transition period for a qualified intermediary to obtain account holder documentation and clarified the term "know your customer" in relation to the QI agreement. Notice 2001-4 also permits a QI to treat the beneficiaries of a foreign simple trust or the owners of a foreign grantor trust as direct account holders for purposes of the QI agreement if specific criteria are met. Furthermore, it provides that a U.S. payor is not required to report income paid for services under Section 6041[65] if specific conditions are met. Finally, the IRS stated that it intends to revise the withholding regulations so that income from sources within a possession of the United States that is exempt from taxation under Sections 931-935[66] does not have to be reported on Form 1099. The revision also extends to payors who reasonably believe that payments made to a resident of a possession is not required to be reported on Form 1099.

58. *See* Prop. Treas. Reg.§ 1.6049, 66 Fed. Reg. 3925 (2001).
59. *See id.* § 1.6049-4(b)(5)(i).
60. *See id.* at Preamble.
61. *See id.*
62. *See* T.D. 8734, Treas. Dec. Int. Rev. 8734 (as modified by T.D. 8881).
63. *See* I.R.S. Notice 2001-4, 2001-2 I.R.B. 267.
64. *See* Rev. Proc. 2000-12, 2000-4 IRB 387.
65. 26 C.F.R. § 1.6041-8.
66. I.R.C. §§ 931-935 (2000).

## VIII. Tax Shelters

### A. Guam Tax Shelter

The Internal Revenue Service identified a tax shelter in which promoters claim that Section 935 applies to a trust as part of a scheme in which the trust seeks to avoid both U.S. and Guam income tax.[67] Though repealed by the Tax Reform Act of 1986,[68] Section 935 remains in force until an agreement between the United States and Guam for the implementation of a new income tax system is in effect.[69] Section 935 provides the rules for filing income tax returns for persons with Guam source income.

The transaction that was the subject of the IRS notice involves the transfer of shares in an S corporation by a U.S. individual to a grantor trust. The trust elects to be an electing small business trust for S corporation purposes.[70] With this election, the beneficiaries of the trust are treated as shareholders unless there is no "potential current beneficiary,"[71] in which case the trust is the taxpayer. The trust then obtains a certificate under the Guam economic development program, which provides for the rebate of all income tax paid to Guam. The intent is to have the trust qualify as a Guam resident, subject to tax only in Guam under Section 935. This arrangement is similar to the U.S. Virgin Islands "inhabitant corporation" cases from the 1980s.[72]

In Notice 2000-61,[73] the IRS states that because trusts are not treated as individuals under Section 935, that section does not operate to relieve a trust of any obligation it may have to file a U.S. income tax return and to pay the United States any tax due. The IRS noted that penalties may apply, declaring that Guam resident trust arrangements are "listed transactions" under the temporary abusive tax shelter regulations.[74]

## IX. Other Developments

### A. OECD Report on Harmful Tax Practices

The Organisation for Economic Cooperation and Development (OECD) published a *Report on Progress in Identifying and Eliminating Harmful Tax Practices*,[75] which included a list of list of jurisdictions that are tax havens and the results of the review of OECD member country preferential regimes. The approach of the OECD was deemed a "tax cartel" by one U.S. legislator.[76]

67. *See* I.R.S. Notice 2000-61, 2000-49 I.R.B. 569.

68. *See* Act of Oct. 22, 1986, Pub. L. No. 99-514, § 1272(d)(2), 100 Stat. 2085 (reforming the internal revenue laws).

69. *See id.* § 1277(b).

70. *See* I.R.C. § 1361(e) (2000).

71. *See* I.R.C. § 1361(c)(2)(B)(v) (2000).

72. *See, e.g.*, Danbury, Inc. v. Olive, 627 F.Supp.513 (D.C.V.I. 1986), *rev'd*, 820 F.2d 618 (3rd Cir.) (reporting "the ultimate tax shelter").

73. I.R.S. Notice 2000-61, 2000-49 I.R.B. 569.

74. *See* Temp. Treas. Reg. §§ 1.6011-4T(b)(2), 301.6111-2T(b)(2) (2000).

75. *Report on Progress in Identifying and Eliminating Harmful Tax Practices, available at* http://www.oecd.org/daf/fa/harm_tax/Report_En.pdf.

76. *See* Letter from Richard K. Armey, Majority Leader, U.S. House of Representatives, to Lawrence Summers, Secretary of the Treasury (Sept. 7, 2000), reprinted at *Worldwide Tax Daily*, 2000 WTD 177-22 (Sept. 14, 2000).

Bermuda, Cayman Islands, Cyprus, Malta, Mauritius, and San Marino made commitments in advance of the issuance of the report, promising to eliminate harmful tax practices by the end of 2005, embracing international tax standards for transparency, exchange of information, and fair tax competition. In January 2001, the Isle of Man and the Netherlands Antilles also agreed to commit to the elimination of harmful tax practices.

### B. Treasury Issues Subpart F Study

The U.S. Treasury Department issued its study on Subpart F: "The Deferral of Income Earned Through U.S. Controlled Foreign Corporations."[77] Although the study provides a thorough review of the history and purposes of subpart F, it contains nothing significantly new to practitioners familiar with the subject.

77. "The Deferral of Income Earned Through U.S. Controlled Foreign Corporations: A Policy Study," Office of Tax Policy, Department of the Treasury (Dec. 2000).