

FOREIGN TRUSTS – REPORTING OBLIGATIONS FOR U.S. PERSONS

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<i>Form</i>	<i>Who Reports</i>	<i>Conditions / Notes</i>	<i>What is Reported</i>	<i>When and Where</i>	<i>Penalties</i>	<i>Code</i>
1040	U.S. taxpayer	See 1040 instructions.	Worldwide Income (subject to treaties) Schedule B, Part III (disclosing interest in foreign financial account)	See 1040 instructions	See 1040 instructions	§6012ff
3520 / 3520-A	Grantor / Owner	Foreign trust established by US grantor with US beneficiaries will be a grantor trust. IRC § 679.	<u>Part I:</u> Initial transfer of assets to foreign trust (FMV, description, basis, gain, copy of any sale/loan documents). Also, if no US agent appointed, info re: beneficiaries and fiduciaries and copy of trust instrument, letters of wishes, financial statements). <u>Part II (Owner only):</u> Annual identifying information regarding foreign trust and confirmation that Trustee filed Form 3520-A.	1040 return date Filed separately (Ogden)	<u>3520:</u> Greater of \$10k or (a) 35% of property transferred / distributed (Parts I and III) or (b) 5% of trust FMV (Part II) <u>3520-A:</u> Greater of \$10k and 5% of trust assets, paid by U.S. owner Penalties may be waived if reasonable cause, not neglect	§6048
	Beneficiaries	Only if distribution (including use of trust property) received in that year, or qualified obligation outstanding. Be sure to get Foreign Grantor Trust / Nongrantor Trust Beneficiary Statement from Trustee (for UNI purposes).	<u>Part III:</u> Description and FMV of property received / used. If “qualified obligation,” details regarding loan. See also <u>Part IV</u> , receipt by US person of gift or bequest in excess of \$100k.		Criminal penalties possible	

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	Trustees	Form 3520-A	Only if US owner Financial information. Information regarding distributions. If no US agent appointed, copy of trust instrument (including letters of wishes).	3.5 months after end of trust's tax year Filed separately (Ogden)		
FBAR (FinCen Form 114)	Grantor	U.S. tax owner reports trust's accounts as if his own (financial interest). Only if more than \$10k (aggregated)	Identifying information; maximum value of account.	April 15 May extend (as with personal return) Automatic extension to June 15 for non-resident filers Filed electronically	\$10k (unless reasonable cause) ; if willful, greater of \$100k or 50% of balance of account (at high point), plus possible criminal penalties By statute, 50% penalties may be asserted for multiple years (see <i>U.S. v. Zwerner</i>) BUT, by interim guidance, no more than 100% of highest value in aggregate (in most cases, no more than 50%). See 5/13/15 LB&I Memo. Reasonable cause = exercise of ordinary business care and prudence. Ignorance is no excuse. <i>Moore v. United States</i> , No. 2:13-cv-02063 (WD Wash. 2015)	31 USC § 5314; 31 CFR §1010.350
	Beneficiaries	Only if foreign nongrantor trust Only if U.S. beneficiary has a present financial interest in more than 50 percent of the assets or receives more than 50% of current income (financial interest) Only if Trustee / agent does not file FBAR Only if more than \$10k (aggregated)				
	Trustees	Only for trustees who are U.S. persons (signature authority) Only if more than \$10k (aggregated)				

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8938 (FATCA)	Beneficiaries	<i>Filing threshold:</i> \$50k at end of year or \$75k during year (individual); doubled if filing jointly; higher if living abroad	<p>Interest in a specified foreign financial asset, including interest in trust</p> <p><i>Value:</i> Sum of (1) actual distributions to beneficiary in that year and (2) value of mandatory distribution rights in effect that year. If discretionary, and no distributions, report at \$0 value. If grantor trust, all trust property deemed grantor's property.</p>	Filed with 1040	<p>\$10k if not willful (unless reasonable cause)</p> <p>Higher (40%) accuracy-related penalties for transactions involving undisclosed 8938 assets</p> <p>Possible fraud and criminal penalties</p>	\$6038D
8621 (PFIC)	Grantors	Grantors of grantor trusts deemed indirect shareholders ((Reg. §1.1291-1T(b)(2)(v)(8)(D)).	<p>Identifying information (for taxpayer and PFIC). Shares held and range of values. Whether QEF or mark-to-market election applies.</p> <p>Separate 8621 required for each PFIC.</p>	Filed with 1040	<p>No express penalties, but failure to file leaves tax problems compounding.</p> <p>May compromise statute of limitations on 1040 (unless reasonable cause for failure to file 8621). See §6501(c)(8)(B).</p>	\$1298(f)
	Beneficiaries	Beneficiaries of non-grantor trusts indirectly own "a proportionate amount of such stock" (Reg. §1.1291-1T(b)(2)(v)(8)(C)). However, generally not required to file unless QEF or mark-to-market election applies, or trust has received excess distribution or recognized gain treated as excess distribution.	<p>Certain de minimis exceptions</p> <p>PFIC = foreign corporation meeting income test (75% or more of gross income is passive) or asset test (50% or more of assets are held for production of passive income).</p> <p>Tax on excess distributions (in excess of 125% of three-year average, plus capital gain on disposition).</p>			

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5471 (CFC)	Grantors	Grantors of grantor trusts deemed indirect shareholders (Reg. §1.6038-2(c); IRC 318(a)(2)(b)(ii))	Identifying information (for taxpayer and CFC). Shares held by all US shareholders. Income, deductions, assets and liabilities for CFC (different requirements for different categories of filer).	Filed with 1040	\$10k for late filing; reduction of foreign tax credits; accuracy-related or criminal penalties.	§6038; §318(a)
	Beneficiaries	Beneficiaries indirectly deemed to own stock “proportionately.” Constructively own stock “in proportion to the actuarial interest of such beneficiaries in such trust.” Facts and circumstances ((Reg. §1.6038-2(c); Reg. §1.958-1(c)(2); IRC 318(a)(2)(b)(i)). Constructive owners may not need to file if direct owners file.	Separate Form 5471 required for each CFC. CFC = more than 50% of vote or value held by U.S. persons, each of which holds at least a 10% voting interest. Each 10% holder must file. <i>Note:</i> US directors or officers of a CFC separately must file (as “Category 2” filers).			
8865 (CFP)	Grantors	Unclear in 267(c), but U.S. grantors of grantor trusts likely deemed indirect shareholders	Identifying information (for taxpayer and partnership). Ownership of US partners. Income, deductions, assets and liabilities for partnership, transactions with partners (different requirements for different categories of filer).	Filed with 1040	\$10k for late filing; reduction of foreign tax credits; accuracy-related or criminal penalties.	§6038; §6038B; §6046A; §267(c)
	Beneficiaries	Beneficiaries constructively own stock proportionately 10% controlling partners may not need to file if controlling partner (Category 1) files Constructive owners may not need to file if direct owners file	Separate Form 8865 required for each CFC. Taxpayers may instead attach Form 1065, if filed (for example, if the CFP has ECI). <i>Note:</i> Transfers of certain property to a foreign partnership also reported on Form 8865.			

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8858 (FDE)	Grantors	All US tax owners of FDEs, including grantors of grantor trusts, must file.	Identifying information (for taxpayer and disregarded entity). Information regarding income, gain/loss, assets and liabilities.	Filed with 1040	\$10k for late filing; reduction of foreign tax credits; accuracy-related or criminal penalties.	\$6011; \$6012; \$6031; \$6038
	Beneficiaries	US person constructively holding an interest in an FDE by way of a CFC or CFP must file.				

Key Terms:

- Foreign Trust: Either (1) US Persons do not control all substantial decisions of the trust (“control test”) or (2) a court within the US is not able to exercise primary supervision over the administration of the trust (“court test”). IRC §7701(a)(30)(E) and (31)(B). On “substantial decisions” see Treas. Reg. §301.7701-7(d). For court test safe harbor, see Treas. Reg. §301.7701-7(c) (ok if trust instrument does not direct that the trust be administered outside of the US, trust is in fact administered exclusively in the US, and trust is not subject to an automatic migration provision).
- Foreign Grantor Trust:
 - o IRC 679 (Foreign Grantor Trust with US Grantor): Virtually any foreign trust established by a US person for one or more US beneficiaries is treated as a grantor trust.
 - o IRC 672(f) (Foreign Grantor Trust with Non-US Grantor): Foreign grantor will not be recognized as tax owner of trust unless (i) grantor has power to revest absolutely in himself title to trust property, without the approval or consent of anyone other than a related or subordinate party who is subservient to the grantor or (ii) only the grantor or the grantor’s spouse are permissible beneficiaries during the grantor’s lifetime.