

A photograph of a forest with tall, thin trees and a ground covered in fallen leaves and moss. The trees are mostly green, with some yellowing leaves visible. The ground is covered in a thick layer of brown and orange fallen leaves. In the foreground, a large tree trunk is visible, with its roots covered in bright green moss. The background shows a dense forest of similar trees, extending into the distance.

**Deloitte.**

## Deloitte Compliance & Advisory Services

US Federal Income Tax  
Consulting & Compliance  
Services for Luxembourg  
Funds

2016

# Preface

Luxembourg is one of the most important fund investment centre in the world. Many funds invest in the United States of America or have U.S. Investors.

This unique situation creates unexpected complexities for funds, asset managers, administrators and potentially their investors. This should be addressed from the beginning in order to determine what the expected return of the investment may be. *To be sophisticated and aware of those considerations may increase your opportunity to attract U.S. Investors and improve the return.*

# U.S. Federal Income Tax Consulting & Compliance Services

## Does your fund invest in the United States?

- What is the type of investment and legal entity your fund is investing in? – *For example, what are the U.S. federal income tax considerations if the Luxembourg fund invests in a U.S. partnership that owns U.S. Real Estate?*
  - What is the legal entity form of the Luxembourg fund? *For example, what are the U.S. federal income tax considerations if the Luxembourg fund is a Société Anonyme?*
  - In what jurisdiction(s) are the investors located and the type of investor? *For example, what are the U.S. federal income tax considerations if the investor is a governmental organization located in the Middle East?*
- ⇒ Any U.S. investment has some degree of U.S. tax reporting (some may be at the level of the Luxembourg fund)



# U.S. Federal Income Tax Consulting & Compliance Services

## Does your fund has United States Investors?

- What is the type of investment and legal entity your fund is investing in? – *For example, what are the U.S .federal income tax considerations if the Luxembourg fund invests in passive activities or if the investment is in the U.S.?*
  - What is the legal entity form of the Luxembourg fund? *For example, what are the U.S .federal income tax considerations if the Luxembourg fund is a Société Anonyme?*
  - What is the U.S. federal income tax status of your U.S. Investor? *For example, what are the U.S .federal income tax considerations if the U.S. investor is a tax exempt entity or an individual?*
- ⇒ Any U.S. investor requires some type of U.S. tax reporting



# U.S. Federal Income Tax Consulting & Compliance Services

Those basic questions (and additional ones) should be addressed from the beginning to ensure the desired return on the investment could be obtained.

For all structures and funds there is a three step lifecycle, Deloitte Professionals in Luxembourg and via the Network can help with each step. However, a **local contact is key for a swift and adequate response.**



# The Investment Cycle

# U.S. Federal Income Tax Consulting & Compliance Services

## Step 1: Pre-Investment Structuring & Analysis

Review of Structure from a U.S. centric point to address, but not limited to:

- FIRPTA withholding
- U.S. withholding considerations – treaty analysis; portfolio debt exemption
- FATCA analysis and reporting
- Type of income for U.S. purposes, e.g. CAI or UBTI
- Entity Classification – under the so called “check-the-box” regime
- PFIC classification and elections
- ECI and USTB analysis
- Permanent Establishment considerations

# U.S. Federal Income Tax Consulting & Compliance Services

## Step 2: During the holding period of the Investment

Tax Consulting (includes, but not limited to):

- Determination of the type of distribution for U.S. Investors.

Tax Reporting (includes, but not limited to):

- EIN Application
- Entity Classification
- W-8BEN
- FIRPTA withholding U.S. withholding reporting
- FATCA reporting
- Income Tax Reporting – Federal and State (of ECI Income)
- PFIC analysis and reporting
- Partnership Reporting – so called K-1 equivalent reporting
- Reclaim of withholding taxes

Note: Depending on the investment and investors, other reporting may be needed / required.

# U.S. Federal Income Tax Consulting & Compliance Services

## Step 3: Exit

Tax Consulting (includes, but not limited to):

- Determination of the type of distribution for U.S. Investors.

Final Tax Reporting (includes, but not limited to):

- FIRPTA withholding reporting
- U.S. withholding reporting
- FATCA reporting
- Income Tax Reporting – Federal and State
- PFIC analysis and reporting
- Partnership Reporting – so called K-1 equivalent reporting
- Reclaim of withholding taxes

Note: Depending on the investment and investors, other reporting may be needed / required.

# Deloitte's Approach

# U.S. Federal Income Tax Consulting & Compliance Services

Our approach to tax compliance services is straightforward and pragmatic. We will analyze the tax compliance requirements and assign teams responsible for the compliance services. We will establish good working relationships with you and monitor the compliance process using existing tools and processes we developed specifically for tax compliance engagements for the fund industry, which is unique in the market.

Our approach will be centered on regular and consistent dialogue and an open, collaborative approach to discussing issues and opportunities. Teamwork is second nature to us.

Compliance brings together people, processes, technology, and data in a recurring cycle. We can achieve efficiencies from year to year as we work together to address process and quality improvements. Local teams help with the centralization of the compliance process.

# U.S. Federal Income Tax Consulting & Compliance Services

## **U.S. Reporting and Compliance Requirements (additional reporting may be required)**

### *U.S. Investment and no U.S. Investors*

- U.S. Withholding Reporting
- Reclaim of U.S. Withholding
- U.S. Federal and State Tax returns (if required)

### *None U.S. Investment and U.S. Investors*

- PFIC Reporting / CFC Reporting (if required)
- K-1 Equivalent Reporting (if required)

### *U.S. Investment and U.S. Investors*

- U.S. Withholding Reporting
- Reclaim of U.S. Withholding
- U.S. Federal and State Tax returns (if required)
- K-1 Equivalent Reporting (if required)

Note: FATCA Reporting is required in each situation.

Why is U.S. Federal  
income tax consulting  
and reporting important?

# U.S. Federal Income Tax Consulting & Compliance Services

## Why is U.S. Federal income tax consulting and reporting important?

- U.S. Federal and State analysis regarding the investment structure – *A sound investment structure is key for your and your investor's success. The "wrong" type of income may have adverse impact on your investor.*
- U.S. withholding analysis and reporting assistance – *Unexpected withholding issues may result in a lower return*
- U.S. Federal and State reporting (as applicable) – *Being in compliance with U.S. Federal and State tax reporting is key for your reputation*

# Terms of Art

# U.S. Federal Income Tax Consulting & Compliance Services

## **FIRPTA:**

The Foreign Investment in Real Property Tax Act rules of IRC § 897 provide in effect that gain or loss from the disposition of U.S. real estate is subject to tax in the U.S.

## **UBTI:**

Too much Unrelated Business Taxable Income (UBTI) may prompt the U.S. Internal Revenue Service to revoke IRC § 501(c)(3) tax-exempt status of the organization – the Luxembourg fund has a U.S. tax exempt investor and due to the transparency for U.S. tax purposes income flows to the investor.

## **CAI:**

Under IRC §892, certain income earned by foreign governments and controlled entities thereof may qualify for an exemption from U.S. taxation. An excess of commercial activity income (CAI) can disqualify the foreign government entity from exempting otherwise qualified U.S. income – Important if the Luxembourg fund invests in the U.S. and is considered transparent for the investor – the foreign government entity.

# U.S. Federal Income Tax Consulting & Compliance Services

## **FATCA:**

Foreign Account Tax Compliance Act (FATCA) became law in March 2010 and imposes certain reporting requirements to most / all Luxembourg funds

## **PFIC:**

A Luxembourg fund or the underlying investment could be considered a Passive Foreign Investment Company. A PFIC is a foreign corporation (none U.S.) in which during the taxable year (a) 75% or more of its income is passive, or (b) 50% or more of its assets are held for production of passive income (measured based on FMV).

## **ECI / USTB:**

Effectively connected income with a U.S. trade or business is generally subject to U.S. federal and U.S. state taxes under IRC § 871(b). Thus, in order to be compliant, the Luxembourg fund or ultimate investors may be required to file a U.S. tax return. Investments in MLPs fall generally under this category.

# U.S. Federal Income Tax Consulting & Compliance Services

## **Check-the-Box Regulation:**

Certain entities (U.S. and non-U.S.) can be treated as transparent or non-transparent for U.S. Federal Income tax purposes. A Luxembourg fund (other than an S.A.) could elect to be treated as transparent for U.S. federal income tax purposes

## **CFC:**

A foreign corporation is a Controlled Foreign Corporation (CFC) if during the taxable year “United States shareholders” own (directly, indirectly, or constructively) more than 50% of the total combined voting power of all classes of voting stock, or more than 50% of the total value of the stock (IRC § 957(a)). In general, a Luxembourg fund should not be considered a CFC for U.S. federal income tax purposes.

# Key contact

## Partner – International Tax



### **Christian Bednarczyk**

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Christian has more than 12 years of international tax experience including working in the USA and Switzerland. Christian has far-reaching experience in consulting major funds, banks and private equity companies located in the U.S., Luxembourg, Switzerland and Germany.

He advised his clients on the appropriate investment structure into the USA focusing on the special needs of the client and its ultimate investors. Christian helps his clients throughout the life-cycle of the investment starting at the original structuring considerations to the ultimate exit. Reporting and compliance considerations are key to obtain the benefits of each structure. His specific international tax experience includes advising on withholding considerations, treaty related taxation matters and other cross-border planning. Christian's clients are investing in various industries including oil and gas (MLP investments), renewable energy, consumer products, financial services, insurance and real estate. Christian's professional affiliations include: Certified Public Accountant licensed in Florida and Texas, Member of AICPA and he is a lecturer at the University of Hamburg.

Christian holds a B.A. (Hons) degree from University of Brighton, UK and Masters in Science in Taxation from University of Miami.

# Key contact

## Partner – Financial Services Tax



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In September 2012 Eric joined the tax department of Deloitte Luxembourg where he currently works in the Global Financial Services Industry (GFSI) team. He gained a wide international tax expertise of more than 10 years in Luxembourg and London in supporting financial institutions in the management of their own corporate tax position and the tax position of their investors.

Eric developed a solid expertise in Operational Taxes where he assists financial institutions on various topics (Mutual Funds' local investment taxation, Corporate taxation of asset managers, banking institutions, insurance and reinsurance undertakings, EU Financial Transaction Taxes (FTT), Implementation of FATCA and Common Reporting Standard (CRS) projects).

In addition, Eric has a strong experience in group reorganisation (merger, spin-off, branch business model etc.) and the acquisition of new business. He was involved in numerous due diligence reviews over the last years to assess the tax position of target companies/group and prepare their post-acquisition phase from a tax standpoint.

Eric also assists financial institutions in relation to financial products and their tax implications.



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