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2023 US reporting checklist and deadlines

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Introduction

US tax and information reporting obligations have been increasing over the last few years. It is important for family advisers and trustees of foreign trusts to make note early in the year of which US filings will be required and the respective deadlines. If a foreign individual, entity or trust (non-US person) cannot meet the reporting deadline, a request for extension should be filed prior to the due date.

The following is a checklist of the major reporting deadlines. It should be noted that this list is not exhaustive and includes only federal returns, and that states may have their own filing obligations. Non-US persons with any US source income or assets, US persons who are grantors or beneficiaries of non-US trusts or own foreign assets, and trustees of foreign trusts with US grantors or beneficiaries should review possible US reporting obligations.

Due dates

When the statutory deadline for a particular form falls on a Saturday, Sunday or legal holiday, the due date is moved to the next business day. For tax year 2022 reporting, forms due on 15 April can be submitted up until 18 April without penalty, because 15 April 2023 is a Saturday and Monday, 17 April 2023, is the Emancipation Day holiday in Washington DC. Nevertheless, it is recommended that forms and extension requests be filed in advance of the deadline. A return or extension request is considered filed on time if the envelope:

- is properly addressed;
- has enough postage;
- is postmarked; and
- is deposited in the mail by the due date.

Sending forms via certified mail (with return receipt) is highly recommended so that the filer has proof of timely submission. Taxpayers outside the United States should take extra care to ensure timely filing if they are not using the US postal system.

6 March

65-day election

A trustee may elect to treat trust distributions made during the first 65 days of the year as being made on the last day of the preceding calendar year. A foreign trust can use this election to ensure that all of the trust's 2022 distributable net income (DNI) is fully distributed. Foreign trusts intending to make 65-day distributions must actually distribute the funds by 6 March 2023. The election itself is made on the trust's Form 1040-NR. If no Form 1040-NR is required, the trustee should mail the election statement to the Internal Revenue Service (IRS) centre where, if required, a Form 1040-NR is filed (for further details on DNI please see the section on "Taxation of trusts" in "[Overview \(August 2022\)](#)").

15 March

Form 3520-A, Annual Information Return of Foreign Trust with US Owner

The trustee of a foreign trust with a US grantor must file Form 3520-A annually. A US person who is treated as an owner of any portion of a foreign trust under the US grantor trust rules must ensure that the foreign trust files Form 3520-A. This is in addition to the US grantor's own Form 3520 requirement. Form 3520-A includes a Foreign Trust Owner Statement, a copy of which must be provided to the US grantor by the 15 March deadline (for further details please see "[Preparing US tax and information returns: Forms 3520 and 3520-A](#)").

Foreign Trust Beneficiary Statement

Although not filed with the IRS, the trustee of a foreign trust must provide US beneficiaries who received distributions in 2022 with a Foreign Trust Beneficiary Statement. If the foreign trust made a distribution to a US beneficiary during 2022, the trustee must provide that beneficiary with either a Foreign Grantor Trust Beneficiary Statement or a Foreign Non-Grantor Trust Beneficiary Statement, in each case with details on the amount of the distribution and allocable taxable income, if any. The details required to be included in a foreign trust beneficiary statement can be found in the instructions to Form 3520 (for further details on classification of trusts as grantor or non-grantor trusts please see the section on "Taxation of trusts" in "[Overview \(August 2022\)](#)").

31 March

FATCA reports

Where a foreign trust has been classified as an investment entity under the FATCA definitions, such as a trustee-documented trust under an intergovernmental agreement (IGA), the trustee may have to file a FATCA report. US grantors of foreign trusts are reported annually on a FATCA report. US beneficiaries are reported for the years in which they received distributions from the foreign trust. Trustees under a Model 2 IGA and foreign trusts subject to the FATCA Regulations must file directly with the IRS by the 31 March deadline. Trustees under a Model 1 IGA must file through their local reporting portal and deadlines are set by the FATCA partner jurisdiction (for further details please see "[FATCA reporting: where and how](#)").

15 April

Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts

US persons who receive distributions from a foreign trust, regardless of the amount, must file Form 3520. This includes a US trust that receives a distribution from a foreign trust, not just individual beneficiaries.

US persons who receive gifts from a non-US individual must file Form 3520 if the total value of the gifts received during 2022 from that non-US individual, or related parties, total more than \$100,000.

US persons who receive more than \$17,339 (the 2022 threshold amount) from a foreign corporation that they treat as a gift must file Form 3520. Be aware that the IRS generally treats payments from foreign corporations as taxable dividends and care must be taken to appropriately document any gift from a foreign entity.

There are further reportable events that require the filing of Form 3520 (for further details, please consult the instructions to the form available on the IRS website, as well as "[Preparing US tax and information returns: Forms 3520 and 3520-A](#)").

Pro forma Form 1120 with Form 5472 attached

The title of Form 5472, Information Return of a 25% Foreign-Owned US Corporation or a Foreign Corporation Engaged in a US Trade or Business, does not seem to apply to limited liability companies (LLCs), but it can. An LLC created under the laws of a US state that is wholly owned by a single non-US person, including a foreign trust (a foreign-owned disregarded entity), is required to report transactions with its non-US owner and related parties to the IRS on Form 5472. Form 5472 is never filed on its own. Instead, it must be filed with a pro forma Form 1120, US Corporate Income Tax Return (for further details please see "[Completing US Tax Forms: Form 5472 – Foreign-Owned Disregarded Entities](#)").

Form 1040-NR, US Non-resident Alien Income Tax Return

Taxation of US source income depends on whether that income is:

- "effectively connected income" treated as attributable to the conduct of a trade or business in the United States; or
- "passive investment income", such as dividends and interest.

Effectively connected income is reported on Form 1040-NR. Form 1040-NR is also used by non-US persons engaged in a US trade or business, regardless of whether any income was actually earned in 2022.

In general, passive income is either not subject to US tax or is collected by means of the US withholding tax regime, in which case no return need be filed unless requesting a refund.

Form 8938, Statement of Specified Foreign Financial Assets

US persons must attach Form 8938 to their annual income tax return (Form 1040) to disclose any interest in a "specified foreign financial asset". This includes an ownership interest in a foreign trust as grantor under the US grantor trust rules. Form 8938 asks for detailed identifying information on each specified foreign financial asset being reported and its maximum value during the tax year.

Form 5471 and Form 8621

Form 5471 is an Information Return of US Persons with Respect to Certain Foreign Corporation. US persons owning, directly or through a trust, more than 10% of a foreign corporation must file Form 5471 with their annual income tax return.

Form 8621 is an Information Return by a Shareholder of a Passive Foreign Investment Company of Qualified Electing Fund. US persons investing, directly or through a trust, in a passive foreign investment company (PFIC) must file Form 8621 upon the disposition of stock, the receipt of a distribution or the making of certain elections. There is an annual PFIC reporting requirement as well, also on Form 8621.

FinCEN Form 114, FBAR

The Foreign Bank Account Report (FBAR) is not an income tax return. It is filed electronically with the Financial Crimes Enforcement Network (FinCEN), a bureau of the US Department of the Treasury. All US persons with any connection to a foreign financial account, including accounts held through entities or by trusts, should scrutinise the FBAR reporting rules (for further details please see "[IRS Releases Revised Foreign Bank Account Reporting Form](#)" and "[Recent IRS Notices and Actions Regarding FBAR and Other Reporting](#)").

Requesting extension of time to file

Penalties for late filing can be avoided by filing a request for an extension. The request must be filed before the due date of the return that will be late. The form on which to make the extension request and where to send it depend on the return or other filing at issue (for further details please see "[US reporting: requesting IRS filing extensions](#)").

Comment

The importance of meeting US tax and reporting deadlines cannot be overstated. The IRS will receive an additional \$45 billion for enforcement activities. FATCA is continuing to provide information from which the IRS can issue penalty notices and begin audit proceedings. The coming FinCEN Beneficial Owner Register will likely make additional details available to the IRS. Responsible advisers and concerned fiduciaries should make time to review the family's investments and structures to determine what if any US reporting will be due in 2023.

For further information on this topic please contact [Jennie Cherry](#) or [Eileen Reardon](#) at Kozusko Harris Duncan's New York office by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com or ereardon@kozlaw.com). Please note that the authors are unable to provide legal advice to non-clients. The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

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