HUNTON & WILLIAMS

Client Alert

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Stop Tax Haven Abuse Act

On July 12, 2011, U.S. Senator Carl Levin, a Michigan Democrat, proposed a revised version of an international tax reform bill referred to as the Stop Tax Haven Abuse Act (the "Proposed Legislation"). The Proposed Legislation makes a number of changes to the current tax treatment of international transactions and investments. A summary of the more noteworthy provisions is provided below. A copy of the Proposed Legislation may be found here.

Sanctions Against Foreign Jurisdictions or Financial Institutions

The Proposed Legislation provides the Treasury Department with the ability to sanction foreign institutions and jurisdictions that impede U.S. tax enforcement. Permitted sanctions primarily include restrictions or reporting requirements on U.S. financial institutions that do business with the foreign institutions or jurisdictions.

Enhancing FATCA and Establishing Presumptions to Limit Offshore Secrecy

The Proposed Legislation clarifies when foreign institutions are required to reveal foreign accounts of U.S. persons under the Foreign Account Tax Compliance Act ("FATCA"). Additional provisions target U.S. persons who use foreign financial institutions that do not comply with the provisions of FATCA by establishing certain rebuttable presumptions where privately held entities do business with such foreign institutions.

Characterize Certain Offshore Corporations as Domestic Corporations

The Proposed Legislation causes a corporation formed in a foreign jurisdiction to be treated as a domestic corporation if management and control of the corporation primarily occurs directly or indirectly in the U.S. and the corporation is either publicly held or has more than $50 million in assets. This provision could have substantial consequences for U.S. managed hedge funds, private equity funds, securitizations and certain other offshore business structures.

Increased Disclosure of Offshore Accounts

The Proposed Legislation requires financial institutions to make disclosures when they open a U.S. account or pay income for a foreign entity that the financial institution knows is beneficially owned by a U.S. person. Additionally, the provisions create disclosure requirements for U.S. financial institutions that assist U.S. persons in opening accounts with foreign institutions that do not comply with FATCA.

Sourcing Rules for Credit Default Swaps

Currently, payments received on credit default swaps are sourced to the location of the payment recipient and can avoid U.S. taxation if received by a foreign person. The Proposed Legislation provides that credit default swap payments would be sourced to the location of the payor. Thus, such payments made by a U.S. payor potentially would be subject to U.S. income or withholding tax if paid to a resident outside the U.S.

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Current Taxation for Controlled Foreign Corporation Assets Deposited in the U.S.

Subject to various limitations, U.S. owners of foreign corporations are permitted to defer U.S. income taxation on the earnings of such foreign corporations until those earnings are repatriated to the U.S. in the form of dividends. The Proposed Legislation provides an additional limitation by treating any controlled foreign corporation property in a U.S. financial account as a constructive dividend to its U.S. shareholders.

Increased SEC Reporting of Foreign Operations and Additional Penalties

The Proposed Legislation requires SEC-registered corporations to report to the SEC certain information related to foreign operations on a country-by-country basis and establish new penalties for failing to disclose offshore holdings in violation of U.S. securities laws.

Anti-Money-Laundering Program Requirements

The Proposed Legislation requires unregistered investment companies and formation agents to adopt anti-money-laundering policies. Hedge funds and private equity funds are the stated target of this provision.

Strengthen John Doe Summons

The Proposed Legislation expands Treasury's ability to issue summonses to unknown classes of people when certain conditions are met and there is a reasonable basis for believing such persons are not complying with U.S. tax laws. With respect to accounts held in non-FATCA financial institutions, a presumption is created that such a reasonable basis exists.

Change to FBAR Penalty Structure

Currently, the penalty for willfully failing to file Form TD F 90-22.1 is the greater of $100,000 or 50 percent of the balance in the unreported account at the time of the violation. The Proposed Legislation simplifies that rule, allowing for a penalty equal to the greater of $100,000 or 50 percent of the highest balance in the account during the reporting period.

Penalties for Tax Shelter Promoters

The Proposed Legislation strengthens penalties imposed on tax shelter promoters by increasing them to 150 percent of any income earned for promoting the transaction. Penalties would also be assessed on those aiding and abetting a tax shelter promoter.

Prohibition on Certain Fee Arrangements

The Proposed Legislation prohibits fee arrangements where fees are calculated as a percentage of taxes saved or losses generated. Penalties would be assessed against tax advisors accepting such fees.

Information Sharing with Federal Agencies

The Proposed Legislation allows the IRS to transmit tax returns and tax return information to the SEC, certain federal banking regulators and the Public Company Accounting Oversight Board.

Tax Opinion Standards

The Proposed Legislation directs the Secretary of the Treasury to impose standards on tax practitioners with respect to issuing tax opinions. The standards would cover issues including, but not limited to, conflicts of interest, appropriateness of fees, independence and collaborative efforts.

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If you have specific questions regarding how this legislation might impact your business, please call one of the lawyers listed on this alert.

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