

## LB&I International Practice Service Transaction Unit

IPS Level	Number	Title	UIL Code	Number
Shelf	N/A	Individual Outbound	–	–
Volume	12	Pass-Thru Entities	<b>Level 1 UIL</b>	9434
Part	12.2	Individual with a Grantor Trusts Interest	<b>Level 2 UIL</b>	9434.02
Chapter	12.2.1	Taxability of Income from Grantor Trust	<b>Level 3 UIL</b>	9434.02-01
Sub-Chapter	12.2.1.1	Defining the Entity	–	–

<b>Unit Name</b>	Defining the Entity – Foreign Trusts
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# Issue and Transaction Overview

## Defining the Entity – Foreign Trusts

### What is the proper entity classification?

You are auditing a taxpayer who has been linked to a foreign entity which appears to be a trust. What audit steps should be taken? The first step is to gather information about the entity in order to determine what type of entity is involved. By correctly classifying the entity, the appropriate tax and reporting responsibilities for the entity under the United States (U.S.) tax law can be determined.

This International Practice Service (IPS) Unit will focus on the classification of entities for U.S. tax purposes. It will outline information necessary to classify the entity, and the process for determining whether the entity qualifies as a trust under U.S. tax law or whether it is a business entity. For those arrangements classified as a trust, a determination must be made as to whether the trust is a domestic trust or foreign trust for U.S. tax purposes. This IPS Unit will outline the tests utilized in making those determinations.

Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code (IRC), if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit. Foreign trusts have been used by U.S taxpayers to hide assets and income, therefore, Congress has imposed special reporting obligations for those U.S. taxpayers holding interests in foreign trusts or receiving distributions from foreign trusts.

Once it is determined the entity is a foreign trust, the next step is to determine if it is a foreign grantor trust or a foreign non-grantor trust. The type of trust is important in determining the taxability of the trust and its distributions as well as related reporting obligations. Whether a trust is a grantor trust is determined under IRC §§ 671-679, with IRC § 679 applying specifically to foreign trusts. Any trust determined not to be a grantor trust will be treated as a non-grantor trust. Practice Unit “Foreign Grantor Trust Determinations – Part I – Section 679” DCN: FEN/9434.02\_02(2013) will be useful in determining if the entity is a foreign grantor trust or non-grantor trust. Practice Unit “Foreign Grantor Trusts Determinations – Part II – Sections 671-678” DCN: FEN/9434.02\_07(2013) will focus on the grantor trust rules of IRC §§ 671-678. There are additional IPS units that cover other aspects of trusts, such as the taxability of trust income and distributions, and information reporting requirements. If the entity at issue is determined to be a business entity, other IPS units will assist you in determining the proper classification of such entity, such as a corporation, partnership or disregarded entity.

# Summary of Potential Issues

## Defining the Entity – Foreign Trusts

### [Issue 1](#)

Is the entity a trust for U.S. tax purposes?

### [Issue 2](#)

If the entity is a trust for U.S. tax purposes, is the entity classified as a foreign trust or a domestic trust?

# All Issues, Step 1: Initial Factual Development

## Defining the Entity – Foreign Trusts

What information is needed to determine the proper classification of an entity for U.S. tax purposes? If it is classified as a trust, is it a domestic trust or a foreign trust for U.S. tax purposes? This IPS unit will outline the tests utilized in making those determinations.

Fact Element	Resources	6103 Protected Resources
<ul style="list-style-type: none"><li>▪ The first step is to determine if the entity should be treated as a trust for U.S. tax purposes.</li><li>▪ Background information must be gathered to determine whether the entity constitutes a trust.</li><li>▪ Organizational documents and actual operations will control the critical determinations.</li></ul>	<ul style="list-style-type: none"><li>▪ Form 3520</li><li>▪ Form 3520 Instructions</li><li>▪ Form 3520-A</li><li>▪ Form 3520-A Instructions</li><li>▪ Treas. Reg. §301.7701-4</li><li>▪ IRS AM 2009012 – Entity Classification of Lichtenstein Anstalts and Stiftungs</li></ul>	

# All Issues, Step 1: Initial Factual Development (cont'd)

## Defining the Entity – Foreign Trusts

What information is needed to determine the proper classification of an entity for U.S. tax purposes? If it is classified as a trust, is it a domestic trust or a foreign trust for U.S. tax purposes? This IPS unit will outline the tests utilized in making those determinations.

Fact Element	Resources	6103 Protected Resources
<p>Items to Request:</p> <ul style="list-style-type: none"> <li>▪ Trust Instrument (other titles include: Declaration of Trust, Trust Deed, Trust Agreement, etc.)               <ul style="list-style-type: none"> <li>– This document names the parties to the trust, establishes the duties and powers of the trustee, and establishes the rights of the beneficiaries.</li> <li>– If parties to the trust are not contained within the trust instrument, seek separate documentation to identify the settlors, trustees and beneficiaries.</li> <li>– The settlor is the person who establishes the trust, also known as the grantor or creator.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Form 3520</li> <li>▪ Form 3520 Instructions</li> <li>▪ Form 3520-A</li> <li>▪ Form 3520-A Instructions</li> <li>▪ Treas. Reg. §301.7701-4</li> <li>▪ IRS AM 2009012– Entity Classification of Lichtenstein Anstalts and Stiftungs</li> </ul>	

# All Issues, Step 1: Initial Factual Development (cont'd)

## Defining the Entity – Foreign Trusts

What information is needed to determine the proper classification of an entity for U.S. tax purposes? If it is classified as a trust, is it a domestic trust or a foreign trust for U.S. tax purposes? This IPS unit will outline the tests utilized in making those determinations.

Fact Element	Resources	6103 Protected Resources
<p>Items to Request:</p> <ul style="list-style-type: none"> <li>▪ Letter of Wishes                             <ul style="list-style-type: none"> <li>– The settlor of an offshore trust commonly provides the trustee with a non-binding “letter of wishes” or memorandum of wishes” It expresses the settlor’s true intentions as to the trustee’s discretionary exercise of powers such as the types of investments or the disposition of property. A letter of wishes is a separate document and not a part of the trust instrument.</li> <li>– # [REDACTED]</li> <li>[REDACTED]</li> <li>[REDACTED]</li> <li>[REDACTED].#</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §1.679-2(a)(4)</li> </ul>	

# All Issues, Step 1: Initial Factual Development (cont'd)

## Defining the Entity – Foreign Trusts

What information is needed to determine the proper classification of an entity for U.S. tax purposes? If it is classified as a trust, is it a domestic trust or a foreign trust for U.S. tax purposes? This IPS unit will outline the tests utilized in making those determinations.

Fact Element	Resources	6103 Protected Resources
<p>Items to Request:</p> <ul style="list-style-type: none"> <li>▪ Identification of all assets held by entity                             <ul style="list-style-type: none"> <li>– Information on how the trust assets are titled, controlled, and used, will assist in defining the entity.</li> </ul> </li> <li>▪ Any additional agreements with respect to the trust                             <ul style="list-style-type: none"> <li>– Question Taxpayer whether additional agreements, either written or oral, exist.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Form 3520</li> <li>▪ Form 3520 Instructions</li> <li>▪ Form 3520-A</li> <li>▪ Form 3520-A Instructions</li> <li>▪ Treas. Reg. §301.7701-4</li> <li>▪ IRS AM 2009012 – Entity Classification of Lichtenstein Anstalts and Stiftungs</li> </ul>	



# Issue 1, Step 2: Review Potential Issues

## Defining the Entity – Foreign Trusts

### Issue 1

Is the entity a trust for U.S. tax purposes?

Fact Element	Resources	6103 Protected Resources
<p>What is a trust?</p> <ul style="list-style-type: none"> <li>▪ The Regulations define a “trust” as an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries.</li> <li>▪ In a legitimate trust, the grantor transfers property to a trustee to hold and protect for the benefit of the trust beneficiaries, often pursuant to the terms of a written trust agreement.</li> <li>▪ A trust is a separate legal entity or arrangement typically used for family and estate planning purposes. Trusts allow assets to be held by an entity, other than a natural person, with an indeterminate life. Accordingly, trusts are often used to hold property and facilitate a transfer of such property to beneficiaries without the need for probate proceedings.</li> <li>▪ An arrangement will be treated as a trust if it can be shown that its purpose is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-4</li> </ul>	

# Issue 1, Step 2: Review Potential Issues (cont'd)

## Defining the Entity – Foreign Trusts

### Issue 1

Is the entity a trust for U.S. tax purposes?

Fact Element	Resources	6103 Protected Resources
<p>What is <u>Not</u> a Trust?</p> <ul style="list-style-type: none"> <li>▪ An entity created to operate a business rather than to protect or conserve assets is not recognized as a trust for U.S. tax purposes. Instead, entities conducting business activities are more properly classified as business entities. If it is a business entity, other IPS Units are available to assist you in determining the proper classification, such as a corporation, partnership or disregarded entity.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-4(b)</li> <li>▪ Treas. Reg. §301.7701-2</li> </ul>	

# Issue 1, Step 3: Additional Factual Development

## Defining the Entity – Foreign Trusts

### Issue 1

Is the entity a trust for U.S. tax purposes?

Fact Element	Resources	6103 Protected Resources
<p><b>ABUSIVE TRUST ARRANGEMENTS OR SHAMS:</b></p> <ul style="list-style-type: none"> <li>▪ Where a trust exists solely for tax avoidance purposes, it is an “abusive trust arrangement” or “sham” whereby the IRS may ignore the purported form for U.S. tax purposes.</li> <li>▪ Factors you should consider in a sham analysis (not an exclusive list):               <ul style="list-style-type: none"> <li>– Lack of Change: The relationship between the grantor and property conveyed to the trust does not materially change after conveyance to the trust.</li> <li>– Retained Control: A grantor continues to use and/or exercise dominion and control over trust property as if it was his/her own.</li> <li>– Retained Benefit: Property and/or income of the trust are used to benefit the Grantor</li> <li>– Lack of Independent Trustee: Trustee’s failure to exercise fiduciary responsibilities. The trustee merely approves actions directed by grantor, and is trustee “in name only”, often due to family relationships or grantor’s position of control over trustee.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Notice 97-24</li> <li>▪ Rev Rul 80-74</li> <li>▪ Rev Rul 90-106</li> <li>▪ <u>Markosian v. Commissioner</u>, 73 T.C. 1235 (1980)</li> <li>▪ <u>Zmuda v. Commissioner</u>, 79 T.C. 714 (1982), aff’d 731 F.2d 1417 (9th Cir. 1984)</li> <li>▪ <u>Alan v. Commissioner</u>, 767 F.2d 618 (9th Cir 1985), aff’g TC Memo 1983-249</li> <li>▪ <u>Able Co. v. Commissioner</u>, TC Memo 1990-500</li> </ul>	

# Issue 1, Step 3: Additional Factual Development (cont'd)

## Defining the Entity – Foreign Trusts

### Issue 1

Is the entity a trust for U.S. tax purposes?



Fact Element	Resources	6103 Protected Resources
<p><b>SHAM INDICATORS:</b></p> <ul style="list-style-type: none"> <li>▪ The identities of the parties (grantor, trustee, beneficiaries) are concealed</li> <li>▪ The sole beneficiary of the trust is another trust--particularly if the beneficiary is a foreign trust.</li> <li>▪ Beneficiaries are “discretionary” (selected by the trustee).</li> <li>▪ Beneficial interest is evidenced by “trust certificates” or “units”, often transferable.</li> <li>▪ Trust instruments are vague or ambiguous.</li> <li>▪ Trust assets are commingled with those of the trustee, the grantor, or a beneficiary                             <ul style="list-style-type: none"> <li>– Such as a common checking account</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ <i>Zmuda v. Commissioner</i>, 79 T.C. 714, 720 (1982), aff'd. 731 F.2d 1417 (9th Cir. 1984)</li> <li>▪ <i>Rendel v. Commissioner</i>, TC Memo 1995-593, aff'd 129 F.3d 127 (9th Cir 1997)</li> <li>▪ <i>Waegemann v. Commissioner</i>, TC Memo 1993-632 (1993)</li> <li>▪ <i>Dahlstrom v. Commissioner</i>, TC Memo 1991-265, aff'd w/o pub.opin. 999 F2d 1579 (5th Cir. 1993)</li> </ul>	
<ul style="list-style-type: none"> <li>▪ If it is determined that the trust was set up for tax avoidance purposes, the facts and circumstances of your case will dictate how the trust transactions should be treated for U.S. tax purposes.</li> </ul>		

# Issue 1, Step 4: Develop Arguments

## Defining the Entity – Foreign Trusts

### Issue 1

Is the entity a trust for U.S. tax purposes?

Fact Element	Resources	6103 Protected Resources
<p> <b>DECISION POINT:</b> Based on the evidence, determine if the entity should be treated as a trust, a business entity or sham for U.S. tax purposes.</p> <ul style="list-style-type: none"> <li>▪ <b>Trust:</b> If the entity is a trust for U.S. tax purposes, then continue to <a href="#">Issue 2</a> to determine whether it is a foreign trust or a domestic trust.</li> <li>▪ <b>Business Entity:</b> Determine what type of business entity. If entity conducts a business, other IPS Units will assist in determining the proper classification (corporation, partnership or disregarded entity), taxation and filing requirements for those entities.</li> <li>▪ <b>Sham:</b> If the entity is a sham, ignore the entity for U.S. tax purposes and treat the transactions as if having occurred directly by the individual as though the entity never existed. # [REDACTED] [REDACTED] [REDACTED] [REDACTED].#</li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-4(a)</li> <li>▪ Treas. Reg. §301.7701-4(b)</li> <li>▪ Rev Rul 80-74</li> <li>▪ Rev Rul 90-106</li> <li>▪ Notice 97-24</li> <li>▪ <u>Markosian v. Commissioner</u>, 73 T.C. 1235 (1980)</li> <li>▪ <u>Zmuda v. Commissioner</u>, 79 T.C. 714 (1982), aff'd 731 F. 2d 1417 (9<sup>th</sup> Cir. 1984)</li> </ul>	
<p> <b>CONSULTATION:</b> Consult with Counsel if you have concerns about the correct entity classification.</p>		

# Issue 2, Step 2: Review Potential Issues

## Defining the Entity – Foreign Trusts

### Issue 2

If the entity is a trust for U.S. tax purposes, is it a foreign trust or a domestic trust?

Fact Element	Resources	6103 Protected Resources
<p><b>Is the trust foreign or domestic?</b></p> <ul style="list-style-type: none"><li>▪ If it is determined the entity is a trust for U.S. tax purposes, the next step is to determine whether the trust is foreign or domestic.<ul style="list-style-type: none"><li>– This classification impacts how the trust activities should be reported and taxed for U.S. tax purposes.</li></ul></li></ul>	<ul style="list-style-type: none"><li>▪ Treas. Reg. §301.7701-7</li><li>▪ Treas. Reg. §301.7701-7(a)(1)(i)</li><li>▪ Treas. Reg. §301.7701-7(a)(1)(ii)</li></ul>	

# Issue 2, Step 2: Review Potential Issues (cont'd)

## Defining the Entity – Foreign Trusts

### Issue 2

If the entity is a trust for U.S. tax purposes, is it a foreign trust or a domestic trust?

Fact Element	Resources	6103 Protected Resources
<p><b>Domestic Trust Tests:</b></p> <ul style="list-style-type: none"> <li>▪ A trust is considered to be a foreign trust <u>unless</u> it meets the following two tests:               <ul style="list-style-type: none"> <li>– The Court Test, and</li> <li>– The Control Test.</li> </ul> </li> <li>▪ A trust meets the <b><u>Court Test</u></b> if:               <ul style="list-style-type: none"> <li>– “A court within the United States is able to exercise primary supervision over the administration of the trust”.</li> </ul> </li> <li>▪ A trust meets the <b><u>Control Test</u></b> if:               <ul style="list-style-type: none"> <li>– One or more United States persons have the authority to control all substantial decisions of the trust with no other person having the power to veto any of the substantial decisions.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-7</li> <li>▪ Treas. Reg. §301.7701-7(a)(1)(i)</li> <li>▪ Treas. Reg. §301.7701-7(a)(1)(ii)</li> </ul>	

# Issue 2, Step 3: Additional Factual Development

## Defining the Entity – Foreign Trusts

### Issue 2

If the entity is a trust for U.S. tax purposes, is it a foreign trust or a domestic trust?

Fact Element	Resources	6103 Protected Resources
<p><b>The <u>COURT TEST</u> is met if:</b></p> <ul style="list-style-type: none"> <li>▪ “A court within the United States is able to exercise primary supervision over the administration of the trust”.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-7(a)(1)</li> </ul>	
<p><b>COURT TEST - SAFE HARBOR:</b></p> <ul style="list-style-type: none"> <li>▪ The regulations provide that a trust satisfies the Court Test if:               <ul style="list-style-type: none"> <li>– The trust instrument does not direct that the trust be administered outside of the U.S.;</li> <li>– The trust is administered exclusively in the U.S.; and</li> <li>– The trust is not subject to an automatic migration provision.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-7(c)(1)</li> </ul>	



# Issue 2, Step 3: Additional Factual Development

## Defining the Entity – Foreign Trusts

### Issue 2

If the entity is a trust for U.S. tax purposes, is it a foreign trust or a domestic trust?

Fact Element	Resources	6103 Protected Resources
<p><b>The <u>CONTROL TEST</u> is met if”</b></p> <ul style="list-style-type: none"> <li>▪ One or more <b>United States Persons</b> have the authority to <b>control</b> all <b>substantial decisions</b> of the trust with no other person having the power to veto any of the substantial decisions.</li> <li>▪ The term “United States person” means a U.S. Person within the meaning of section IRC §7701(a)(30). <ul style="list-style-type: none"> <li>– “Substantial decisions” are fiduciary decisions authorized or required under the terms of the trust agreement and applicable law, such as those dealing with distributions, selection of beneficiaries, investment decisions and changes of trustee.</li> <li>– “Control” means having the power, by vote or otherwise, to make all of the “substantial decisions” of the trust, with no other person having the power to veto any of those “substantial decisions.”</li> <li>– To determine whether a “United States Person” has the authority to control all substantial decisions you must consider all persons who have authority to make a substantial decision of the trust, not only the trustees. <ul style="list-style-type: none"> <li>▪ i.e. a trust protector who exercises powers traditionally held by fiduciaries or that can control the fiduciaries</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-7(a)(1)</li> <li>▪ IRC §7701(a)(30) Definition of USP</li> <li>▪ Treas. Reg. §301.7701-7(d)(1)(ii) - Substantial decisions</li> <li>▪ Treas. Reg. §301.7701-7(d)(1)(iii) - Control</li> </ul>	

# Issue 2, Step 3: Additional Factual Development

## Defining the Entity – Foreign Trusts

### Issue 2

If the entity is a trust for U.S. tax purposes, is it a foreign trust or a domestic trust?


Fact Element	Resources	6103 Protected Resources
<p><b>Special Rules</b></p> <ul style="list-style-type: none"> <li>▪ A trust is not considered to have met the Court Test nor the Control Test if the trust instrument contains an automatic migration provision or "flee clause."</li> <li>▪ A flee clause transfers jurisdiction and control of the trust to a different (foreign) jurisdiction under prescribed circumstances, such as:               <ul style="list-style-type: none"> <li>– An attempt by a U.S. Court to assert jurisdiction or otherwise supervise the administration of the trust absent the following exception:                   <ul style="list-style-type: none"> <li>Treas. Reg. §301.7701-7(c)(4)(ii) will not apply if the trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.</li> </ul> </li> <li>– An attempt by any government agency or creditor to collect information from the trust</li> <li>– An attempt by any government agency or creditor to assert a claim against the trust.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-7(d)(v)(3)</li> <li>▪ Treas. Reg. §301.7701-7(c)(4)(ii)</li> </ul>	

# Issue 2, Step 4: Develop Arguments

## Defining the Entity – Foreign Trusts

### Issue 2

If the entity is a trust for U.S. tax purposes, is it a foreign trust or a domestic trust?

Fact Element	Resources	6103 Protected Resources
 <p><b>DECISION POINT:</b> Based on the evidence, determine whether the trust meets both the Control Test and the Court Test.</p> <ul style="list-style-type: none"> <li>▪ If the trust meets both the Control test and the Court test, the trust is treated as a domestic trust.</li> <li>▪ If the trust fails <u>either</u> the Control Test or the Court Test, the trust is treated as a foreign trust.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Treas. Reg. §301.7701-7(c)</li> <li>▪ Treas. Reg. §301.7701-7(d)</li> </ul>	
<p><b>NEXT STEP</b> -- Grantor Trust Rules: I.R.C §§ 671 - 679</p> <ul style="list-style-type: none"> <li>▪ Once a decision is made as to whether the entity is a foreign trust or a domestic trust, the next step is to determine whether the trust is:               <ul style="list-style-type: none"> <li>– A Grantor Trust or a</li> <li>– Non-Grantor Trust</li> </ul> </li> <li>▪ Practice Unit “Foreign Grantor Trust Determinations – Part I – Section 679” DCN: FEN/9434.02_02(2013) will assist in the proper determination of the trust as either a foreign grantor or non-grantor trust.</li> <li>▪ Additional IPS Units will cover other aspects regarding trusts, such as the taxability of trust income and distributions, and information reporting requirements.</li> </ul>	<ul style="list-style-type: none"> <li>▪ IRC §671, IRC §672, IRC §673, IRC §674, IRC §675, IRC §676, IRC §677, IRC §678, IRC §679</li> <li>▪ <u>Helvering v. Clifford</u>, 309 US 331 (1940)</li> <li>▪ <u>Wesenberg v. Commissioner</u>, 69 TC 1005 (1978)</li> <li>▪ Practice Unit “Foreign Grantor Trust Determinations – Part I – Section 679” DCN: FEN/9434.02_02(2013)</li> </ul>	<p><a href="#">Back to Table Of Contents</a></p>

# Training and Additional Resources

## Chapter 12.2.1 Taxability of Income from Grantor Trust

Type of Resource	Description(s) and/or Instructions for Accessing	References
Podcasts / Videos	CPE 2011 – Day 1 – Foreign Corporations and Pass-Throughs	
Other Training Materials	Revenue Agent Foreign Trust and Other Offshore Entity Training (Catalog Number 20347E) – <b><i>WARNING this text was last updated in April 2009 so some information may be outdated.</i></b>	

# Index of Related Issues

Issue	Associated UIL(s)	References
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Taxation of Foreign Non-Grantor Trusts	9434.03	
Taxation of Beneficiary of a Foreign Non-Grantor Trust	9434.03	
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§6677(a) - Failure to file information returns for foreign trusts by U.S. owner and beneficiaries	9434.02.02	
Foreign Grantor Trust Determination– Part I - Section 679		FEN/9434.02_02
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