Cross-Border Estate Planning After Tax Reform: New Opportunities and Obligations

Expanded Definitions of U.S. Shareholders, Deemed Repatriation or Trust Holdings, Restructuring Entities for Tax Minimization

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Today’s faculty features:

Lucy S. Lee, Shareholder, Greenberg Traurig, McLean, Va.
Lawrence M. Lipoff, CPA, TEP, CEBS, Director, CohnReznick, New York
Alvina H. Lo, Chief Wealth Strategist, Wilmington Trust, New York

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Strafford Webinar:
Cross-Border Estate Planning Post Tax-Reform

Alvina Lo
Chief Wealth Strategist
Wilmington Trust

April 25, 2018
Table of Contents

I  Key Provisions and Changes Under Tax Reform
   • Reduction of Individual Tax Rates
   • Reduction of Corporate Tax Rates
   • Transfer Tax Changes

II  Impact on Outbound Activities of US Persons

III  Impact on Inbound Activities of Foreign Persons
   • Disposition of Partnership Interest
   • Foreign Blocker Corporations
   • New ESBT Rules Involving Nonresident Shareholders of S Corporations

IV  Impact on Offshore Vehicles Established for US Beneficiaries
SECTION I

Key Provisions and Changes Under Tax Reform
Tax Reform in the US

• On December 22, 2017, Tax Cuts and Jobs Act of 2017 (“TCJA”) was enacted, representing the most significant tax reform in the US in the last 30 years

• As applied to private wealth clients, 3 major areas of impact
  – Income tax for individuals
  – Income tax for corporations, including new “pass-through” deductions
  – Transfer tax (estate, gift and generation skipping tax)

• Federal law only
Reduction of Individual Tax Rates

- Tax rate for ordinary income for non-US individuals, trusts and estates was reduced:
  - Top rate decreased from 39.6% to 37% on effectively connected income (ECI)
  - If ECI is also “Qualified Business Income”, then a further 20% rate reduction, bringing the top rate to 29.6%

- If capital gains does apply, 20% rate remains unchanged
- This change is temporary – it will expire for taxable years beginning after 2025

What does it mean for non-US individuals?
- Lower rate is beneficial to non-US individuals and their income earned from employment in the US and income from the investment via flow-through structures, that is “Qualified Business Income”
- 30% withholding on Fixed, Determinable, Annual, or Periodical (FDAP) income remains unchanged (e.g., US source dividends)

*A new deduction, commonly called the “Pass-Through” deduction under IRC Section 199A allows for a 20% deduction if certain requirements are met*
Reduction of Corporate Tax Rates

Corporations:
- Formed under a US corporation statute
- Formed under a foreign business entity statute that confers limited liability on its members, and it does not elect different treatment for US tax purposes
- Listed in the US Treasury Regulations as a “per se corporation”
- Any other entity, makes election to be treated as a corporation for US tax purposes under the “check-the-box” rules

Tax Reform:
- Tax rate on corporate net income was reduced from 35% to 21%
- “Second Layer” of corporate tax still applies – 30%
  - On earning distributed from US corporations to shareholders of corporations (i.e., dividends)
  - On earnings from non-US corporations, on the “dividend amount” under the branch profits tax regime
- This change is permanent, unless further changed by law

Source: Benesch – US Tax Reform: Key Considerations for Non-US Families with Connections to the United States
Reduction of Corporate Tax Rates

Before TCJA:
- Non-US individuals refrained from using corporate structures due to high taxes
- Solution was flow-through structures, like LLCs and partnerships
  - Required tax filing on individual basis
  - Unclear whether effective “blocker” for US estate tax purpose

Now tax rate difference between corporation and pass-through is not as significant as before

Pre-TCJA:
- Corporation: 35% + 30% second layer → 54.5%*
- Pass-through: 39.6%

Post-TCJA:
- Corporation: 21% + 30%, second layer → 44.7%*
- Pass-through: 37%
- Pass-through, with “pass-through” deduction: 29.6%

Non-US individuals have to carefully examine their existing structures to determine maximum tax efficiency

* “Second Layer” of tax may often be mitigated through proper structuring
Reduction of Corporate Tax Rates

With TCJA, the use of corporations can provide the following benefits:

- Significant reduction in income tax rate
- Prevent cumbersome filing obligations for non-US individuals, on a personal basis
- If properly structured and maintained, could eliminate US estate tax exposure
Reduction of Corporate Tax Rates

Investing in US Real Estate Properties

Income Tax:

- Rental income – generally taxed as FDAP at 30%, unless non-US individuals make “net rent” election to have income treated as ECI, in which case it will be taxed at the ordinary graduated rates
- Gain from sale - under the Foreign Investment and Real Property Act (FIRPTA) of 1980, gains and losses from the sales and exchanges of US real property interests (USRPIs) are taxed as ECI

USRPI includes:

- Real Property located within the US
- Subject to certain exceptions, shares of a domestic corporation if the majority of the corporation’s assets are either shares of the US real property holding corporation or assets described above

FIRPTA also generally imposes a withholding requirement on the part of the purchaser at 15% of the sales proceeds, certain exceptions apply

TCJA Impact: No change to the above, although the tax rate for ECI dropped from top rate of 39.6% to 37%
Impact of Transfer Tax Changes

- TCJA Impact:
  - For US individuals, the transfer tax exemption increased from $5,490,000 USD to $11,180,000 USD per individual
  - Transfer tax exemption = US estate tax, gift tax and generation skipping tax
  - Non-US individuals will be affected differently

- What did not change:
  - Non-US individuals remain subject to the US estate tax upon death with respect to “US-situs property” having a value of more than $60,000 USD. Top rate 40%
  - Non-US individuals are subject to gift tax only with respect to gifts of real and tangible personal property situated in the US. There is no gift tax on intangible property. Top rate 40%
  - There is a $15,000 annual gift tax exclusion for 2018 ($152,000 for a non-citizen spouse) for gifts of present interests (indexed for inflation) per donee. There is no lifetime gifting exemption for non-US individuals
  - The unlimited marital deduction is not available unless the surviving spouse is a US citizen (or the property is left to a Qualified Domestic Trust)
Impact of Transfer Tax Changes

- Some treaties provide an increased estate tax exemption to non-US individuals who are eligible treaty residents through a prorated credit based on the ratio of US situs assets to worldwide assets
  - For example, with US-Canada Income Tax Treaty, if 20% of an eligible decedent’s worldwide estate is comprised of US situs assets, the prorated exemption would have increased from $1,098,000 in 2017 (20% of $5,490,000) to $2,236,000 in 2018 (20% of $11,180,000)
- The increase is temporary, so it is important to do planning with assumption that the old exemption amount will apply in 2025
Special Note on Treaty Treatment

TCJA is a Federal law, does not impact state and local taxes:
• States and localities have their own tax systems although most use federal system as a starting point
• In general, in instances of conflict, the latest law would apply. Therefore, if there's a conflict between TCJA and treaty, TCJA will likely control
II. Impact on Outbound Activities of U.S. Persons

Lucy S. Lee, Shareholder
leelu@gtlaw.com | +1.703.903.7537
Table of Contents

II. Impact on Outbound Activities of U.S. Persons

- Participation Exemption: Limited Territorial Regime
- Deemed Repatriation: Transition Toll Tax
- Modifications of Subpart F Provisions
- Global Intangible Low Tax Income (GILTI)
Participation Exemption: Limited Territorial System

**General Rule:** Provides a 100 percent deduction for the foreign-source portion of dividends received from a “specified 10% owned foreign corporation” by a U.S. corporation that own 10 percent or more (by vote of value) of such foreign corporation.

- A “specified 10% owned foreign corporation” is any foreign corporation owned 10% or more (by vote or value) by any U.S. corporation, but excludes any passive foreign investment company (“PFIC”) that is not a controlled foreign corporation (“CFC”).
- The foreign-source portion of any dividend is the amount that bears the same ratio to the dividend as undistributed foreign earnings bears to the total undistributed earnings of the foreign corporation.
- To qualify for the exemption, a 365-day holding period and certain other conditions must be satisfied.
Participation Exemption: Limited Territorial System (cont’d)

- No foreign tax credit or deduction allowed for any taxes paid or accrued with respect to a dividend that qualifies for the participation exemption.

- Participation exemption would not apply to capital gain realized on the sale of a foreign subsidiary. However, it could apply if the gain is recharacterized as a dividend under section 1248, because it is attributable to undistributed earnings.

- No participation exemption is available with respect to earnings of foreign branches.
General Rule: As part of the migration to a participation exemption regime, section 965 provides for a mandatory deemed transition toll tax as a subpart F income inclusion for any U.S. shareholder of a specified foreign corporation (“SFC”) on post-1986 earnings and profits (“E&P”) which have accumulated in such corporation.

- An SFC includes any CFC and any other foreign corporation (other than a PFIC) with respect to which one or more domestic corporations is a U.S. 10% Shareholder.
- The portion of the post-1986 E&P subject to the transition toll tax does not include E&P that were accumulated by a foreign corporation prior to attaining its status as an SFC.
- A U.S. shareholder may elect to pay the tax over a period of 8 years.
Deemed Repatriation: Transition Toll Tax (cont’d)

- **Participation Exemption Deduction and Foreign Tax Credits:**
  - For purposes of the transition toll tax under section 965, a deduction is allowed such that a 15.5 percent tax would be imposed on post-1986 E&P to the extent of foreign cash and other liquid assets, and an 8 percent tax would be imposed on all other E&P.
  - Foreign tax credits are allowed only with respect to the foreign taxes paid or accrued by a U.S. corporation in proportion to the taxable portion of section 965 inclusion.
Special Rule for S Corporations: Each shareholder of an S corporation may elect to defer the payment of transition toll tax until certain triggering events occur. The triggering events include:

- Termination of the S election
- Liquidation or sale of substantially all the assets of the S corporation
- A transfer of any share of stock in the S corporation (including by reason of death or otherwise)
  - In the case of a partial transfer of stock in the S corporation, the triggering event applies only with respect to so much of tax liability as is properly allocable to such stock
  - If the transferee agrees to take the liability, toll charge may be deferred
Deemed Repatriation: Transition Toll Tax (cont’d)

- **Special Recapture Rule for Expatriated Entities**: A 35 percent tax on the entire section 965 inclusion is imposed if a U.S. shareholder that claimed a deduction with respect to the section 965 inclusion becomes an expatriated entity (as defined in section 7874(a)(2)) at any point within the 10-year period following the enactment of the Act.
  
  - Recapture tax applies in the taxable year in which the U.S. shareholder becomes an expatriated entity as a result of a corporate inversion.
  
  - No foreign tax credits are allowed.
  
  - A surrogate foreign corporation (i.e., an inverted entity) that is treated as a domestic corporation (because it is continued to be owned more than 80% by U.S. owners) under section 7874(b) is excluded from the recapture rule.
Modification of Subpart F Provisions

- **Modification of Stock Attribution Rule for Determining CFC Status**: The new law repeals section 958(b)(4), so that now a U.S. corporation is treated as constructively owning the stock of a foreign corporation held by its foreign shareholder for determining CFC status of the foreign corporation.

- **Elimination of the 30-day rule under Section 951**: The new rule eliminates the requirement that a corporation must be controlled for an uninterrupted period of 30 days before subpart F income inclusion.

- **Modification of Definition of U.S. Shareholder**: The new definition of “U.S. Shareholder” under section 951(a) is expanded to include ownership of 10 percent or more of the total value (not just vote) of all classes of stock of a foreign corporation.

- **Other Provisions**:
  - Look-through rule under section 954(c)(6)
  - No inflation adjustment to the section 954(b)(3) de minimis exception
  - No exception for section 956 inclusion with respect to a domestic corporation.
Global Intangible Low Tax Income (GILTI): Section 951A

**In General**

- Any GILTI realized by a foreign corporation that is a CFC is included on a current basis in the income of each of its U.S. shareholders that owns 10 percent or more of the stock of the CFC by vote or value (a “U.S. 10% Shareholder”) regardless of whether that income is actually distributed to them

  - GILTI rules only apply only to U.S. 10% Shareholders of CFCs
  - GILTI rules function like the subpart F rules, although they are applied separately and subpart F income is specifically excluded from the definition of GILTI
  - Income that is subject to the GILTI provisions is **not** eligible for the Participation Exemption
Global Intangible Low Tax Income (GILTI): Section 951A (cont’d)

- **Corporations**: U.S. 10% Shareholders that are corporations are subject to special rules that ameliorate this result to a certain extent:
  - Entitled to deduct 50 percent of the GILTI included in their income (resulting in an ETR of 10.5 percent) in any year through 2025, and to deduct 37.5 percent (resulting in an ETR of 13.125% percent) thereafter
  - Eligible for an indirect foreign tax credit with respect to 80 percent of the non-U.S. income taxes paid on their GILTI (these credits fall into a separate basket, which cannot be used to offset U.S. taxes in other income categories)

- **Individuals**: Not entitled to a deduction with respect to their GILTI or to a foreign tax credit, so are taxable at individual tax rates up to 40.8 percent (i.e., 37 percent and the additional 3.8 percent tax that may apply to net investment income)
What is GILTI?

- The stated purpose of the GILTI rules was to impose a minimum tax on a CFC’s “low taxed intangible income” derived from holding intangible assets in low-tax countries, the theory being that such assets could be held and licensed from the U.S. as easily as from a tax haven.

- However, the formula for calculating a CFC’s GILTI does not attempt to determine the actual amount of a CFC’s “intangible income” (or even whether it has any) or the foreign tax rate to which it is subject.

- Rather, to calculate a CFC’s GILTI, you start with its gross income, exclude certain categories of income and then apply a formula that subjects to the GILTI rules all remaining income above a permitted rate of return on capital invested in tangible property outside the United States.
Global Intangible Low Tax Income (GILTI): Section 951A (cont’d)

• Start with the CFC’s gross income for a taxable year and exclude the following categories of income:
  • Income that is effectively connected with a U.S. trade or business;
  • Subpart F income;
  • Income that would have been included in the CFC’s Subpart F income except that it was subject to foreign tax that is at least 90% of the U.S. rate of tax imposed on corporations (i.e., 18.9%);
  • Any dividends received from a “related person” (i.e., a corporation in which the CFC owns, directly or indirectly, stock possessing more than 50 percent of the total voting power or value).
  • Any foreign oil and gas extraction income.
Global Intangible Low Tax Income (GILTI): Section 951A (cont’d)

- Deduct expenses (including taxes) properly allocable to the income remaining. The result is referred to as the CFC’s “Tested Income” or “Tested Loss” depending on whether the result is positive or negative.

- Subtract 10% (the “Deemed Tangible Income Return”) of the CFC’s “Qualified Business Asset Investment” (“QBAI”)
  - QBAI is the CFC’s adjusted basis (calculated using the alternative depreciation system) in tangible property used in the production of its Tested Income
  - 10% is supposed to represent a reasonable return on such assets
  - Any Tested Income over the QBAI is the CFC’s GILTI
SECTION III

Impact on Inbound Activities of Foreign Persons
Disposition of Partnership Interest

- TCJA requires that gains from the transfer of a non-US individual’s interest in partnership be treated as ECI to the extent that the partnership would have had ECI had the partnership sold all of its assets at fair market value
- Applies to both US and non-US partnership
- New withholding requirements
- Tax changes are permanent

New Tax Burden for non-US Investors

- Before TCJA, non-US individuals were able to sell partnership interest that owned US businesses without incurring any US tax consequences. The IRS in Revenue Ruling 91-32 disagreed with this approach
- Rev. Rul. 91-32: Gain or loss of a foreign partner from a disposition of an interest in a partnership that conducts a trade or business through a fixed place of business or has a permanent establishment in the U.S. is gain effectively connected with such trade or business (or loss allocable to such gain) or is gain attributable to a permanent establishment (or loss allocable to such gain).
- *Grecian Magnesite Mining, Industrial & Shipping Co., SA v. Comm'r, 149 T.C. 3 (2017)*: Tax Court rejected the IRS’s position and held that gains from the sale of an interest in a foreign partnership are not treated as effectively connected income even if the partnership is engaged in a US trade or business
Disposition of Partnership Interest

Section 864(c)(8):

(A) Nonresident alien individual or foreign corporation owns an interest in a partnership which is engaged in any trade or business within the US, gain or loss on the sale or exchange of all (or any portion of) such interest shall be treated as ECI to the extent such gain or loss does not exceed the amount determined under subparagraph (B)

(B) Amount treated as effectively connected:

(i) in the case of any gain on the sale of the partnership interest, is—

(I) the proportionate share of the gain which would have been ECI if the partnership had sold all of its assets at their fair market value as of the date of the sale or exchange of such interest, or

(II) zero if no gain on the sale, and

(ii) in the case of any loss on the sale or exchange of the partnership interest, is—

(I) the amount of loss on the sale described in clause (i)(I), or

(II) zero if no loss on such sale

(C) US real property interests. If a partnership holds any US real property interest, then the gain or loss treated as ECI under subparagraph (A) shall be reduced by the amount so treated with respect to such US real property interest

Source: 26 U.S. Code § 864 - Definitions and special rules
Disposition of Partnership Interest

New Withholding Requirement (IRC § 1446(f))

- The buyer must withhold 10% percent on gross proceeds and remit the same to the IRS on behalf of the non-US individual, IRC § 1446(f)(1)
- If the buyer fails to withhold, then the partnership is required to withhold an amount from future distributions to the buyer partner, IRC § 1446(f)(4) (temporary suspended by IRS Notice 2018-29)
- Withholding applies to the entire sale proceeds – not limited to the proceeds that represent the proportionate share of the US business assets:
  - The gross amount withheld could exceed the US tax owed due to the transaction. The individual may seek refund to reclaim the amount overcharged, which will add a filing burden to the investor
- Exception applies when an individual provides certificate that confirms non-foreign status
Disposition of Partnership Interest

Estate Tax Consideration

- New provision is income tax provision only, unrelated to estate tax
- Due to continual uncertainty to effectiveness of partnership as an estate tax blocker, new provision may provide argument that the aggregate theory (as opposed to entity theory) would prevail
Disposition of Partnership Interest

Additional Guidance Issued by IRS since TCJA

• Notice 2018-8 (December 29, 2017)
  – temporary suspend withholding requirements for disposition of Publicly Traded Partnership (PTP) interests
  – Withholding requirement practically challenging for PTP because the buyer of a PTP insert typically won’t be able to determine whether the seller is foreign

• Notice 2018-29 (April 2, 2018)
  – Exempts from withholding: if the transferee receives a certification from the transferor that:
    – the disposition will not result in gain; or
    – transferor certifies that in each of the past 3 years, transferor's ECI from partnership < 25% of the transferor's total income from the partnership; or
    – partnership certifies that the partnership's ECI gain < 25% of the total gain on the deemed sale of all its assets
  – Temporary suspend secondary level of withholding at partnership level under IRC § 1446(f)(4)
  – Future regulations will be issued on tiered partnership
  – Withholding under IRC § 1446(f)(1) is to follow FIRPTA-related rules
  – The total amount required to be withheld generally is limited to the total amount of cash and property to be transferred, although this limitation may cease to apply after future guidance is provided
Foreign Blocker Corporations

- Non-US individuals typically use corporation as a foreign blocker to invest in US situs assets for US estate tax purposes. There is more certainty of effectiveness over other forms of entity ownership.
- Foreign “blocker” corporation insulates from direct income tax exposure.
- If the foreign corporation passes to the US owners it can often result in negative income tax consequences due to foreign anti-deferral rules.
- Typically include a foreign grantor trust to facilitate succession planning for future beneficiaries.
- The so-called “30-day” rule to check-the-box on the foreign blocker after the grantor’s death has been eliminated by TCJA.
S Corporations

What are S Corporations?

Pass-through entity that has to be:

- Domestic corporation
- Allows certain types of shareholders:
  - Individuals, certain trusts, and estates and
  - Not partnerships, corporations or non-resident alien shareholders
- No more than 100 shareholders
- Only one class of stock
- Not be an ineligible corporation (i.e. certain financial institutions, insurance companies, and domestic international sales corporations)

Certain trusts are qualified shareholders include Qualified Subchapter S Trust (QSST) and Electing Small Business Trust (ESBT)

Source: IRS – S Corporations
ESBT – New Opportunity for Non-US Residents?

What is ESBT?

ESBT is a US domestic trust with the following permissible beneficiaries:

- Individuals
- Estates
- Certain types of charitable organizations

Under Prior Law:

Non-US individual that becomes a potential current beneficiary of the ESBT exposes S-corporation to the risk of losing the status

“Potential Current Beneficiary” – person who has a present, remainder, or reversionary interest in the trust, treated as shareholder of the S-corporation

New Law:

Potential current beneficiary can now include non-US individuals. Thus, non-US individual may be beneficiaries of an ESBT

This will allow families with interests in S corporations to proceed with succession planning without cutting out interests of family members who become non-US individuals
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IV. Impact on Offshore Vehicles Established For U.S. Beneficiaries

Lucy S. Lee, Shareholder
leelu@gtlaw.com | +1.703.903.7537
Pre-2018 Tax Structure

- Nonresident ("NRA") planning for the transfer of wealth to U.S. persons post could establish a foreign grantor trust in which the primary asset of the trust would be U.S. situs assets held through a foreign corporation ("FCo").

- This structure effectively manages the U.S. income tax exposure of NRA by limiting NRA’s income tax exposure to U.S. source or business income and because the trust is a foreign grantor trust, any distributions received by other trust beneficiaries during the grantor’s lifetime are non-taxable gifts.

- FCo is foreign situs assets and thus allows for the avoidance of U.S. estate tax upon the NRA’s death, and basis in the shares of FCo are stepped up to FMV.

- At NRA’s death, FCo would file a “check the box” ("CTB") election to be treated as a disregarded entity, effective after but within 30 days of NRA’s death. The CTB election would result in a taxable liquidation for U.S. tax purposes, resulting in basis step up in the assets of the FCo. The deemed liquidation within 30 days after the grantor’s death also avoids CFC regime.
## Review of 2018 Tax Changes

### Pre-Change Rules

- A foreign corporation is a CFC if “U.S. Shareholders” who each own (directly, indirectly, or constructively) at least 10% of the vote, collectively own more than 50% of the vote or value.
- CFC status triggers annual reporting and deemed dividend inclusion to the extent of the CFC’s subpart F income.
- But, there is no subpart F income inclusion for U.S. Shareholders if a foreign corporation was not a CFC for an uninterrupted period of at least 30 days during its tax year.

### Post-Change Rules

- A foreign corporation is a CFC if “U.S. Shareholders” who each own (directly, indirectly or constructively) at least 10% of the vote or value, collectively own more than 50% of the vote or value of the foreign corporation.
- The 30-day rule has been eliminated beginning after December 31, 2017. Thus, if a foreign corporation is a CFC for even one day, there could be subpart F income inclusion for the U.S. Shareholders.
- May also impact attribution of CFC interests to U.S. beneficiaries of discretionary foreign trusts.
Potential New Structures

• One possibility may be to separate U.S. and foreign investments into separate holding companies. For foreign investments, use pre-2018 technique to avoid U.S. estate and post-death CFC status for U.S. beneficiaries while achieving basis step-up.

• For U.S. investments,
  • Step One: CTB election to disregard C with retroactive effective date before NRA-grantor’s death (75-day rule on CTB effective date); and,
  • Step Two: CTB elections to disregard A and B to be effective at least one day after NRA-grantor’s death.

• Result:
  • Liquidation of C should be a taxable transaction with basis step-up (A and B in receipt of the liquidated assets will be treated as amounts received in exchange for their stock in C).
  • Liquidations of A and B avoid CFC issues for U.S. beneficiaries.
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Lawrence M. Lipoff, CPA, TEP, CEBS
CohnReznick LLP
1301 Avenue of the Americas
New York, NY 10019
Lawrence.Lipoff@cohnreznick.com
646-601-7791
Traditional International Estate Planning Turned Upside Down

A typical fact pattern:

• Settlor of revocable foreign trust (e.g. Cayman Islands) is a nonresident alien (NRA) to the US

• The beneficiary is the settlor, followed post-mortem by NRA to the US surviving spouse

• The foreign trust owns a foreign company (e.g. British Virgin Islands)

• The foreign company owns various foreign investments including private equity and hedge fund interests

• The surviving spouse’s health/life expectancy is compromised and the contingent beneficiary is resident alien (RA)
Taking the Rules Step by Step

• When NRA settlor is alive, it is a grantor trust from a US perspective and NRA is subject to US income tax only on US situs income and US estate tax only on US situs assets.

• After NRA settlor passes and NRA surviving spouse is alive, trust becomes irrevocable, is a nongrantor trust from a US perspective and the trust is subject to US income tax on US situs income outside the US estate tax system.

• Should the NRA surviving spouse die and the US RA become the beneficiary, the trust remains a nongrantor trust from a US perspective and the trust is subject to US income tax on US situs income outside the US estate tax system.
However, the US beneficiary may be in for a big surprise!

- The US RA beneficiary will be subject to income taxation on distributable net income (DNI) received.

- If DNI was not distributed to the NRA surviving spouse or US RA and distributed in another year, the old DNI becomes undistributed net income (UNI) and subject to a throwback tax.

- The US RA will have to look through the foreign trust and treat the foreign corporation as a controlled foreign corporation, with the possibility of Subpart F income – leaving aside repatriation tax and GILTI potential.

- The US RA will then look through the foreign trust and foreign corporation to the private equity and hedge fund to determine passive foreign investment company (PFIC) treatment.

- Finally, if none of the aforementioned taxes are applicable, there will still be the various reporting compliance regimes to address.
Starting with the old approaches that still work!

- The US practitioner must ensure working relationship with the NRA’s tax practitioner in the home country and any other country that assets/income might have situs to ensure US planning does not create tax issues in another country.

- Assuming no home country issue, distribute out what would be DNI from a US perspective while NRA surviving spouse is alive to prevent UNI when RA child would receive distributions.

- Make US check-the-box (CTB) elections on what might become CFCs, creating deemed liquidations with basis step-up while NRA surviving spouse is alive before US taxation deemed to apply to RA child.

- Make qualifying electing fund (QEF) or mark-to-market (MTM) elections while NRA surviving spouse is alive before US PFIC anti-deferral regime are deemed to apply to RA child.

- Sell appreciated investments, prior to commencement of US taxation, even if planning on buying back right away.

- If the trustee can meet diversification and investor control standards, consider private placement life insurance (PPLI) buying as minimal death benefit as possible with “compliant” and/or “frozen cash value” policies – see §7702(a) and §7702(g) respectively.
Unfortunately, the 30 Day Retroactive Check-the-Box Election to Prevent Attribution to Controlled Foreign Corporation Status is No Longer Available

- When the NRA beneficiary parent passes away, succeeded by RA beneficiary child, the foreign corporation under the foreign trust will be deemed a CFC

- The traditional planning was a 30 day retroactive CTB election so the foreign corporation would be considered a single member flow-through entity for US tax purposes so the foreign trust would be treating as owning the investments of the foreign corporation

- Now that the 30 day retroactive CTB election is no longer available under the tax changes, should there be built-in gain on investments, it is crucial to make a US CTB election while NRA surviving spouse is still alive or to deal with the income tax consequences
Some Reminders

• Leaving aside the income tax imposed on an RA beneficiary and unfavorable tax charges and interest expenses related to the anti-deferral regimes of Subpart F, PFIC, Throwback and now Repatriation and GILTI, the time, complexity, detail and cost of the tax compliance needs to be planned for and client expectations managed.

• The information required for the tax compliance is often no readily available to foreign advisors, and when information is supplied, frequently further questions from a US compliance perspective arise which is often frustrating to client families and their advisors

• If an RA beneficiary decides the US impositions are too much and decides to leave the country, query whether (if applicable) the expatriation regime will cause difficulties for these same reasons
Lawrence M. Lipoff, CPA, TEP, CEBS
Director – Trusts & Estates

1301 Avenue of the Americas
New York, NY 10019
646-601-7791
lawrence.lipoff@CohnReznick.com
www.cohnreznick.com

Lawrence M. Lipoff, CPA, TEP, CEBS, is a Director in CohnReznick LLP’s tax practice and is based in the Firm’s New York office. With more than 30 years of experience, Larry specializes in the delivery of domestic and international private client services to enable high net worth individuals and families to maximize their new or generational wealth. Larry provides strategic advice to his clients and their closely-held businesses in the areas of income tax planning and compliance, estate planning and administration services, consultation regarding formation of family trusts and philanthropic structures. Through his many years in practice, he is able to synthesize the work of various related professionals and their firms and integrate several planning strategies into solutions that maximize value.

He is a frequent lecturer and author of articles published through The New York State Society of Public Accountants and other professional forums on topics that include preparation of 706/709/1041/3520/3520-A returns, IRA/pension distribution, domestic and international asset protection, business succession, generation-skipping transfers, S corporation and fiduciary taxation including foreign trusts, alternative minimum tax, Chapter 14, family limited partnerships, international estate planning and administration, grantor charitable lead trusts, private placement life insurance and carried interest estate planning for private equity and hedge fund principals.

Education
- Wharton School, University of Pennsylvania, Bachelor of Science, Economics

Professional Affiliation History
- Society of Trusts & Estate Practitioners
- American Institute of Certified Public Accountants
- New York State Society of Certified Public Accountants
- Annual Estate Administration Conference - Chair
- Annual Estate Planning Conference - Chair
- Income of Estates and Trusts Committee - Chair
- Estate Planning Committee - Chair
- The Estate Planning Council of Rockland County - President
- The Estate Planning Council of New York City - Board Member
- The New York Public Library- Planned Giving Advisory Board
- Museum of Modern Art - Planned Giving Advisory Board
- Goldberg Study Group
Thank You

Lawrence M. Lipoff, CPA, TEP, CEBS
CohnReznick LLP
1301 Avenue of the Americas
New York, NY 10019
Lawrence.Lipoff@cohnreznick.com
646-601-7791