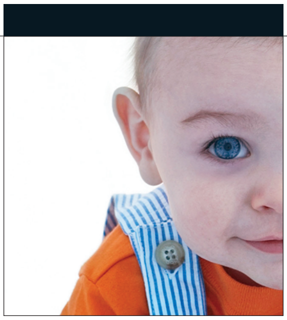

International Estate Planning for the Domestic Lawyer

Knowing the questions to ask and forms to file helps practitioners service clients with estate planning issues that reach beyond U.S. borders.

MICHAEL T. MELTZER, MICHAEL S. SCHWARTZ, AND SEAN R. WEISSBART

As the iconic Disney Theme Park ride repeatedly states, "it's a small world after all." And in an increasingly international society, the world is getting even smaller. It is now fairly common for the average trusts and estates client to have connections to countries outside of the U.S. From a U.S. client who owns foreign assets or who is a beneficiary of a foreign trust to a nonresident alien (NRA) who owns U.S.-source assets, a failure by the practitioner to identify and plan around potential international estate planning issues may result in large tax bills that could otherwise have been avoided by using the strategies discussed below.

The purpose of this article is to make estate planners who focus primarily on domestic issues cognizant of the international estate planning considerations and techniques that cannot be ignored in our ever-globalized society. The article begins by highlighting some of the latest developments in international estate planning and then continues by exploring some of the more important international estate planning questions that every trusts and estates practitioner should consider.[1]

Latest developments

Although the majority of this article is devoted to briefly outlining the fundamentals of international estate planning, recent developments in this field are both interesting and indicative of the need to remain cognizant of the rapidly changing laws. The following are some of the more significant developments from the last year or so, all of which are discussed in more detail below:

- *EU law allowing choice of succession laws.* The European Council passed new legislation, sometimes referred to as "Brussels IV," which, in effect, may allow residents, nationals, or owners of property in participating countries in the European Union to elect out of the inheritance or succession laws of the participating country, and instead apply the succession laws of a country of which such person is a national (even a country that is not a participant to "Brussels IV" or a part of the EU).[2]
- *Proposed regulations on transfer tax on covered gifts and bequests from covered expatriates.* The IRS issued proposed regulations under Section 2801, which imposes a special transfer tax on certain gifts or

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bequests received by a U.S. citizen or resident from a person who has expatriated from the U.S., but only if the expatriate is deemed to be a "covered expatriate" as defined in the Code.[3]

- *Increased guidance on failure to file FBARs.* The IRS issued interim guidance regarding the annual Report of Foreign Bank and Financial Account (FBAR) Form that must be filed with the U.S. Department of Treasury—Financial Crimes Enforcement Network ("FinCen") to report ownership interests in, or signature authority over, foreign accounts, lessening potential penalties for failure to file FBARs.[4] In addition, it was recently announced that effective for FBAR Forms relating to calendar year 2016 and later, the FBAR Form will be due on April 15 of the following year (with a six-month extension available on request) as opposed to its previous due date of June 30.[5]
- *Penalties for failure to file BE-10.* The U.S. Department of Commerce-Bureau of Economic Analysis increased the potential penalties associated with a failure to file Form BE-10, which is required for U.S. entities that directly or indirectly own or control 10% or more of the voting interest in a "foreign affiliate," such as a foreign corporation.[6]

International estate planning—the "fundamentals"

International estate planning is a complex, quickly evolving area of the law, the nuances of which could fill (and have filled) multiple volumes of legal treatises.[7] However, as a starting point for practitioners who fashion themselves as primarily domestic estate planners, below is a basic primer geared towards identifying and planning effectively when international considerations are involved. This primer is presented as a series of questions that estate planners should consider when confronting an international problem, followed by the answers and related planning strategies.

What is the client's tax status: U.S. citizen, U.S. resident alien, or NRA? Perhaps the most obvious place to start is to determine whether the client is a U.S. or foreign person. This may seem to be a fairly straightforward inquiry, but unless the individual is a U.S. citizen (in which case he or she is clearly a U.S. person), there are complexities involved in this determination that are sometimes overlooked. The answer to this first question can have a tremendous impact on the client's tax and reporting obligations.

The definition of residency for U.S. gift and estate tax purposes differs significantly from the definition of residency for U.S. income tax purposes. For U.S. income tax purposes, in general, a citizen of another country is considered a U.S. resident based on two objective tests:

1. The substantial presence test, which examines the number of days the individual spent in the U.S.[8]
2. The "green card test," which examines whether the individual is a "Lawful Permanent Resident" for U.S. immigration purposes.[9]

The definition of residency for U.S. gift and estate tax purposes differs significantly from the definition of residency for U.S. income tax purposes.

The determination of residency for U.S. gift and estate tax purposes, on the other hand, involves a much more subjective analysis: A U.S. resident is someone who was domiciled in the U.S. at the time of the property transfer.[10] A person is deemed to acquire a domicile in the U.S. if that person resides in the U.S. and has no present intention of leaving.[11] Once a domicile is established, it remains so until it is shown to have changed.

Determining intent in this context is a question based on the facts and circumstances of each case.[12] Courts often look at such factors as:

1. Whether the person has a visa, work permit, or similar official document.

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1 An in-depth discussion on all things related to international estate planning is beyond the scope of a single article. Although this article briefly flags many important international estate planning considerations, the reader is encouraged to review independently the cited sources for complete details on any given topic.

2 Regulation (EU) 650/2012.

3 Guidance Under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests From Covered Expatriates, 9/10/2015; www.federalregister.gov/articles/2015/09/10/2015-22574/guidance-under-section-2801-regarding-the-imposition-of-tax-on-certain-gifts-and-bequests-from (last visited on 1/25/2016).

4 Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, (5/13/2015), Control Number: SBSE-04-0515-0025; www.irs.gov/pub/foia/ig/spder/SBSE-04-0515-0025%5B1%5D.pdf (last visited on 1/25/2016).

5 Pub. Law 114-41.

6 For more on Form BE-10, see www.bea.gov/surveys/respondent_be10.htm (last visited on 12/21/2015).

7 See e.g. Lawrence, *International Tax and Estate Planning*, 3rd Ed. (Practicing Law Institute, 2014).

8 Reg. 301.7701(b)-1(c).

9 Section 7701(b).

10 Regs. 20.0-1(b)(1) and (2).

11 See e.g. Rev. Rul. 80-363, 1980-2 CB 249.

12 See e.g. Bank of New York & Trust Co., 21 BTA 197 (1930).

13 Sections 1 and 61.

14 Section 871.

15 FactSet Universal Screening, accessed 10/6/2015.

2. The number and location of the person's business and property interests.
3. The person's family immigration history.
4. A comparison of the size and other attributes of the person's residential property.
5. Testimony and statements of individuals acquainted with the person.
6. Travel and duration of stay in the U.S.
7. Community affairs and group affiliations.

Is there U.S. income tax exposure?

U.S. citizens and income tax residents are taxed on their worldwide income.[13] Thus, a truly domestic client has income tax exposure that is broad reaching, but fairly straightforward. In contrast, NRAs are generally subject to U.S. income tax on only their U.S.-source income.[14]

Therefore, it is logical to question why any NRA would invest money in a U.S.-sourced investment that produces taxable income. The answer to this question varies from person to person and depends on each individual's unique circumstances. This should be carefully coordinated with the client and an investment advisor who has expertise in this particularly sensitive subject.

From an investment perspective, focusing on after-tax returns is highly important. After all, the only dollars and cents that a client actually has at his or her disposal are those that are left in the client's portfolio after taxes have been paid. Professional investors who ignore the tax implications of their clients' investments are doing their clients an immense injustice. Suppose, for example, an investor (a U.S. resident with a marginal tax rate of 40% for simplicity's sake) buys a high-yield corporate bond that yields 8% of fully taxable interest. Now suppose the same investor buys a tax-free municipal bond with a 5% yield. At first blush, 8% appears to be far superior to 5%. However, on an after-tax basis, the 5% yield for the tax-free municipal bond is actually greater than the 4.8% after-tax yield of the high-yield corporate bond.

This example very simply illustrates the importance of focusing on after-tax returns. Equally important, do not let "the tax tail wag the investment dog," meaning investment decisions should not be based solely on what is better for tax purposes. Over 40% of the worldwide stock market consists of U.S companies,[15] and to exclude 40% of the

EXHIBIT 1
Different Tax Treatments for U.S. Citizens, Residents, and NRAs

	Income Tax Base	U.S. Gift Tax Exemption	U.S. Estate Tax Exemption	Tax on Marital Transfers	U.S. Annual Exclusion for Gifts
U.S. Citizen	Worldwide income	$5.45 million	$5.45 million	Full marital deduction for assets passing to a U.S. citizen spouse or in a qualified marital trust, such as a "QTIP trust"	$14,000 per donee each year
U.S. Tax Resident (non-Citizen)	Worldwide income	$5.45 million	$5.45 million	Same as above	$14,000 per donee each year
NRAs	U.S.-source income	$0	$60,000	Gifts or bequests to an NRA spouse are not eligible for the marital deduction unless made to a QDOT trust. However, annual exclusion gifts are allowed to be made to an NRA spouse in the amount of $148,000 per year.	$14,000 per donee each year

Notes:
1. For the "Tax on Marital Transfers" column, the tax status of the donee spouse determines the tax impact. The tax status of the donor spouse is irrelevant for these purposes.
2. The figures reflect 2016 inflation adjustments, where applicable.

worldwide market simply for tax considerations may not make the most sense. After all, investors look for diversification in their investment portfolios and strive to construct a portfolio of assets that do not correlate with one another to reduce the overall volatility of their holdings. While eliminating U.S. investments completely on tax grounds might not make sense, the tax implications of including U.S.-sourced investments should certainly be carefully considered.

Circumstances also change from year to year. Losses in a business interest or real estate investment outside the investment portfolio may offset certain components of investment income in a given year. Alternatively, there may be a year when income is higher than usual from combined sources. In that year, the tax implications of U.S-sourced investment income could be more substantial than in a typical year. Finally, other mitigating considerations may be present—such as:

- The existence of treaty benefits (discussed in more detail below).
- The possibility of using the portfolio-interest exemption.
- The offsetting impact of foreign tax credits or other preferential tax regimes (the details of which are outside the scope of this article).

Because of all these moving parts, it is crucial to advise the NRA client to maintain close and regular communication with both his or her investment and tax advisors. Likewise, these advisors should be in close and regular communication with one another. By keeping on top of the various moving parts, these advisors can work with the client as a team to optimize the after-tax returns, which after all, produce the dollars and cents the client ultimately has in his or her portfolio.

Is there U.S. estate or gift tax exposure? As alluded to above, the classification of an individual as a U.S. resident[16] determines whether his or her non-U.S. property is subject to transfer tax in the U.S. and the amount and availability of any exemptions or exclusions from that U.S. transfer tax. Similarly, the tax status of an individual's spouse affects the applicability of the marital deduction. Exhibit 1 summarizes the different tax treatment between U.S. citizens, residents, and NRAs. The discussion that follows provides a more detailed explanation of these distinctions.

Every individual who makes a gift or bequest of assets deemed to be situated (or having a situs) in the U.S.—whether citizen, resident, or NRA—is subject to the U.S. estate or gift tax with respect to those assets.[17] In addition, U.S. citizens and residents are subject to U.S. estate or gift tax with respect to transfers of their worldwide assets.[18] Again, this is a very straightforward test. For NRAs, the rules get much more complicated.

Despite the unification of the estate and gift tax, NRAs face different exposure under the estate and gift tax systems. NRAs are generally subject to U.S. gift tax on only transfers of real or tangible personal property deemed situated in the U.S.[19] Although this seems like a fairly clear-cut rule, intricacies may result in unintended gift tax exposure for the unwary transferor.

For example, because cash itself is a physical item and may, therefore, be considered tangible personal property, a gift of cash even if made via a bank, wire transfer, or check may also be considered a transfer of tangible personal property. Thus, if an NRA desires to make a cash gift, the transfer should ideally be made from an offshore bank in the name of the transferor to another offshore bank in the name of the recipient.[20] That way, even if the assets being transferred are deemed to be tangible personal property, they will not be deemed to be "situated in the U.S.," and thus the transfer should not be subject to U.S. gift tax. Any gift that is subject to U.S. gift tax is subject to a maximum federal gift tax rate of 40%.

The list of assets subject to U.S. estate tax if held by an NRA is generally more expansive than the categories of assets subject to U.S. gift tax.[21] An NRA is subject to U.S. estate tax with respect to his or her property deemed situated in the U.S., whether tangible or intangible. Assets deemed situated in the U.S. for these purposes generally include:

- Real and tangible property situated in the U.S.
- Deposits with a U.S. bank if they are connected with a U.S. trade or business (as opposed to deposits with U.S. banks that are not connected with a U.S. trade or business, or deposits in foreign banks).
- Stock issued by a U.S. corporation.

The determination of whether a partnership interest is deemed to be situated in the U.S. for these purposes requires a very fact-specific inquiry, and even then, the rules regarding the situs of partnership interests are relatively unsettled.

The disconnect between the property subject to U.S. gift tax and the property subject to U.S. estate tax presents unique estate planning opportunities for NRAs. In addition to the possibility of either restructuring the investment plan/holdings so that the NRA's assets consist only of non-U.S.-situs assets, or of transferring the U.S.-situs property into a foreign corporation so that it should not be subject to U.S. estate tax, it is common and sometimes advisable for NRAs to make lifetime gifts of property that is not subject to U.S. gift tax, but which would be subject to U.S. estate tax (e.g., shares of stock of U.S. companies).

A gift can be made into a trust that is structured so that the client may be able to still receive benefits from the trust. If this route is pursued, however, care must be taken to ensure that doing so does not result in adverse U.S. estate or income tax consequences for the client.[22] Such planning is especially important because of the much lower U.S. estate and gift tax exemptions given to NRAs, as detailed in Exhibit 1.

Unintended estate or gift tax may also result for transfers by clients (even U.S. citizens or residents) to spouses who are NRAs. Although transfers between U.S. spouses normally enjoy an unlimited marital deduction, such deduction is not available for transfers to NRA spouses.[23] Instead, annual gift-tax-free transfers in the amount of $148,000[24] are allowed to be made to the NRA spouse. Any gifts in excess of this amount, and any bequests at death that are left to

16 As discussed above, the definition of residency for U.S. estate and gift tax purposes differs from the definition of residency for U.S. income tax purposes.

17 Sections 2101 and 2501.

18 *Id.*

19 Reg. 25.2511-3(a)(1).

20 Although, if the gift is to a U.S. person, this may be easier said than done, as foreign banks and foreign branches of U.S. banks are becoming increasingly reluctant to allow for U.S. account holders due to onerous reporting requirements.

21 Section 2104.

22 For example, care must be taken to ensure that the client's creditors cannot reach the trust assets so as to cause estate tax inclusion under Section 2036.

23 Sections 2056(d) and 2523(i).

24 The 2016 amount is listed above. This amount is indexed annually for inflation.

the NRA spouse, are subject to U.S. gift or estate tax (subject, in the case of a U.S. citizen or resident transferor or decedent, to the use of his or her unused gift or estate tax exemption).

Despite the unification of the estate and gift tax, NRAs face different exposure under the estate and gift tax systems.

To defer (not avoid) the imposition of the estate or gift tax, the transfer can instead be made to a qualified domestic trust (QDOT) for the benefit of the non-U.S. spouse.[25] QDOTs are similar in certain respects to standard qualified terminable interest property (QTIP) trusts that are commonly implemented in the "pure domestic" estate plan. The computation of the U.S. estate/gift tax on the trust property differs slightly, however, and the restrictions associated with their use are generally more onerous (and consequently, more complicated). If the use of a QDOT is desired, a careful study of and strict compliance with the QDOT regulations is recommended.

If there are trusts, are they foreign or domestic?[26] The distinction between a "foreign trust" and "domestic trust" is important. The tax and reporting implications of this distinction may be significant both for trusts established by the client, and also for trusts of which the client is a beneficiary or fiduciary.

A trust is a "domestic trust," and is therefore treated as a U.S. person for U.S. income tax purposes, if (1) a U.S. court is able to exercise primary supervision over the administration of the trust (the "court test") and (2) one or more U.S. persons have the authority to control *all* substantial decisions of the trust (the "control test").[27] A "foreign trust" is any trust that is not a domestic trust.[28]

The court test is satisfied if a U.S. court is able to exercise primary authority over the trust.[29] The "control test" involves more analysis, and is the portion of the inquiry that contains nuances that are easier to inadvertently overlook. To meet the control test, U.S. persons must have the ability to control all substantial decisions of the trust.[30] This means that if an NRA has the ability to control a single substantial decision, the trust will have failed the test and will be classified as a "foreign trust." The definition of a "substantial decision" is fairly expansive, and includes not only obvious powers such as distribution decisions, investment decisions, and whether to terminate the trust, but also includes other powers such as the power to remove, add, or replace a trustee, and the power to appoint successor trustees (unless this power is limited so that the appointment of the successor cannot change the residency status of the trust).[31]

What are the tax and reporting ramifications of using foreign trusts? The desirability of a "foreign trust" or a "domestic trust" vary depending on the applicable facts of a given situation. Taxable income of a nongrantor foreign trust is generally computed in the same manner as if the assets were held by an NRA. Compare this to a nongrantor domestic trust, where the trust (or perhaps, as discussed below, its beneficiaries, if distributions are made) is generally taxed on its worldwide income.

If a nongrantor trust makes a distribution to a beneficiary, the distribution carries out distributable net income (DNI) to the extent of the trust's current year income, and thus for U.S. beneficiaries, it will be subject to tax on their individual income tax returns.[32] This is the same for foreign and domestic trusts. Things get complicated if the foreign trust has U.S. beneficiaries and the foreign trust makes distributions to those U.S. beneficiaries in any year following the year in which the income was earned.

In addition, to the extent a foreign or domestic nongrantor trust distributes its DNI, it will not be subject to tax on its income in the year it was earned, because trusts are allowed to take a distribution deduction, which is equal to the DNI that is actually distributed in the year it was earned.[33] However, capital gains are generally not included in DNI of a domestic trust, but are included in the DNI of a foreign trust.[34]

If distributions of income are not made by a foreign nongrantor trust in a given year, and the income is instead accumulated, that income becomes undistributed net income (UNI).[35] Distributions of UNI (also called "accumulation distributions") are not only taxed at ordinary income rates even if the original source is capital gain, but the distributed UNI also becomes subject to the "throwback rules."[36] The

25 Section 2056A.

26 Portions of this section and the following section have been taken in large part from Sheehan and Schwartz, *Stocker on Drawing Wills and Trusts*, 14th Ed. (Practicing Law Institute, 2015).

27 Reg. 301.7701-7(a).

28 Reg. 301.7701-7(a)(2).

29 Reg. 301.7701-7(c).

30 Reg. 301.7701-7(d).

31 For a complete list of what is a "substantial decision" for these purposes, see Reg. 301.7701-7(d)(1)(ii).

32 Sections 652(a) and 662(a).

33 Sections 651(a) and 661(a).

34 Sections 643(a)(6)(C).

35 Sections 665.

36 Sections 665 through 667.

throwback rules do not apply to domestic trusts.[37] As a general proposition, the throwback rules provide that UNI that is distributed to a U.S. beneficiary is not only taxable to the beneficiary, but is also subject to onerous interest charges depending on the length of time between the date the income was earned and its subsequent distribution. This can sometimes result in up to a 100% tax on the distributed UNI.

If a foreign trust with U.S. beneficiaries has significant UNI, below are some potential strategies to avoid or minimize the impact of the "throwback rules":

- Convert the foreign trust to a domestic trust to stop the build-up of UNI within the trust.[38] However, UNI accumulated during a period of foreign trust status remains potentially subject to the throwback rules.
- Make a distribution to a non-U.S. beneficiary equal to or in excess of undistributed trust income from prior years. This should "cleanse" the trust of UNI. Thereafter, unless additional UNI accrues, the trust would have no UNI. Care must be taken in using this approach. First, the distribution to the U.S. person should not be made in the same calendar year as the distribution to the foreign person; otherwise some of the UNI will be allocated to the distribution to the U.S. person. In addition, if the foreign person is anticipated to give funds back to the U.S. person after the UNI has been "cleansed," this will often not work because of intermediary rules enacted by the IRS to prevent this perceived abuse.[39]
- Limit trust distributions so that they will not carry out UNI. For example, distributions in each year can be capped at the DNI or the trust's fiduciary accounting income for that year.[40]

Note also that UNI will not accrue if the foreign trust is treated as a grantor trust for U.S. income tax purposes. However, foreign persons generally will be treated as the owners of a trust for U.S. income tax purposes in only very limited situations: If the trust is revocable or if the only people who can receive benefits from the trust during the life of the grantor are the grantor or the grantor's spouse.[41] Depending on what assets are used to fund the trust, the intended objectives of the trust, and whether the applicable trust jurisdiction allows for self-settled asset protection trusts, structuring a foreign trust so that it will be treated as a grantor trust for U.S. income tax purposes may inadvertently have the effect of triggering an estate tax on the death of the grantor.

In addition to being an important distinction for accumulation distribution purposes, whether a trust is classified as a foreign or a domestic trust matters for other reasons. First, there are additional reporting requirements for U.S. persons who receive distributions from a foreign trust, such as the requirement to file a Form 3520 (discussed in more detail below). Depending on the assets of the trust, there may be other reporting consequences for the U.S. beneficiaries (and even possibly the U.S. trustees), including the filing of FBAR and BE-10 forms, both of which are discussed below. Additionally, if a U.S. person transfers property to a foreign trust, he or she generally must recognize any gain on the property, but will not be allowed to recognize a loss.[42]

Does the client have an ownership interest in a foreign corporation? U.S. citizens or residents with (direct or indirect) ownership interests in foreign corporations may be subject to "anti-deferral rules" that impose a U.S. tax on the U.S. person's share of the foreign corporation's earnings and profits. These anti-deferral rules prevent U.S. per-

37 Section 665(c).

38 The trust will have to meet the control test and the court test (discussed above) to be converted to domestic status.

39 Section 643(h).

40 Section 665(b).

41 Section 672 (f). However, foreign grantors of certain older trusts may be treated as the owners of the trust for U.S. income tax purposes even if the trust does not meet these requirements, if the trust is grandfathered under the provisions of the Code.

42 Reg. 1.684-1(a).

sons from avoiding U.S. corporate tax by conducting activities through foreign entities, which are not subject to corporate income tax in the United States. If these rules did not exist, the U.S. corporate tax could easily be avoided by incorporating in a foreign country.

These anti-deferral rules are important to international estate planning because ownership in a foreign corporation is determined not only by what a U.S. person owns directly, but also by what a U.S. person owns indirectly through foreign corporations, partnerships, trusts, and estates. Thus, a U.S. beneficiary of a foreign trust or estate that is a shareholder of a foreign corporation may be subject to these anti-deferral rules.

Fortunately, the anti-deferral rules do not apply to all foreign corporations owned by U.S. persons; rather, they apply only to corporations classified by the Code as controlled foreign corporations (CFCs) or passive foreign investment companies (PFICs). This section briefly flags some of the general rules and considerations relating to CFCs and PFICs. However, the anti-deferral rules are among the most complex rules in the Code, and thus the practitioner is encouraged to review the cited sources and additional literature in order to obtain a greater understanding regarding these rules.

CFCs. Foreign corporations are not classified as CFCs unless at least (1) one or more U.S. person owns at least 10% of the total combined voting power of all classes of stock entitled to vote[43] ("U.S. Shareholders") and (2) the U.S. Shareholders collectively own *more than* 50% of the total combined voting power of the corporation's outstanding stock or more than 50% of the total value of the stock of the corporation.[44] If both tests are met, the corporation is classified as a CFC. However, the U.S. Shareholders will face a current U.S. tax only if the CFC has what the Code classifies as "Subpart F income."[45] Although the highly complex rules and exceptions are outside the scope of this article, Subpart F income generally includes income from passive assets or from operating activities with related parties that occur outside of the country of incorporation.

A domestic trust can also be considered to be a U.S. Shareholder, if the above test is met, because the trust itself is considered a U.S. person.[46] Obviously, the same rule does not apply to foreign trusts because they are not considered U.S. persons. Instead, U.S. beneficiaries of foreign trusts may be treated as the "owners" based on the Code's indirect ownership rules.[47] For example, this would include a U.S. person that is a partner in a foreign partnership, and most importantly for the estate planner, a U.S. person that is a beneficiary of a foreign trust.[48]

The Code does not clearly explain how to apply the indirect ownership rules to U.S. beneficiaries of foreign trusts. The Code simply states that "stock owned, directly or indirectly, by or for a ... foreign trust or foreign estate (within the meaning of section 7701(a)(31)) shall be considered as being owned proportionately by its beneficiaries."[49] This leaves some questions unanswered:

1. How do these rules apply to U.S. persons who are discretionary beneficiaries of a foreign trust?
2. Given the Code's requirement that the U.S. shareholder own at least 10% of the *voting* power of the trust, how can a beneficiary—a person with a mere equitable interest in the trust's assets—be deemed to own *voting* power when the right to vote the trust's shares of stock in the foreign corporation rests in the hands of the trustee?

The IRS has not provided sufficient guidance to answer these questions. Suffice it to say that given the uncertainty and lack of guidance in this area, practitioners should proceed with caution and independently consult the relevant authority before taking a position as to whether U.S. beneficiaries of a foreign trust will meet these tests.[50]

Passive foreign investment companies (PFICs). Foreign corporations are classified as PFICs when they meet either of two tests:

1. At least 75% of the corporation's gross income is characterized as passive income.
2. At least 50% of its assets[51] produce or are held for the production of passive income.[52]

Thus, for example, a foreign hedge fund or mutual fund that produces entirely investment income would be considered a PFIC. On the other hand, a foreign corporation which, for example, consists primarily of an active business and fails the above-described thresholds, would not be considered a PFIC (although it may be

43 Section 951(b).

44 Section 957(a).

45 See generally Section 952.

46 In this case, the trust itself (and not its beneficiaries) is considered the U.S. person and shareholder of the CFC. Thus, the trust (in accordance with general Subchapter J principles) would pay a current U.S. tax on its proportionate share of the CFC's Subpart F income.

47 Section 958(a)(2).

48 The same rules apply to foreign estates, but given the relatively short nature of estates, this article focuses on foreign trusts.

49 Section 958(a)(2).

50 For more on indirect ownership of CFCs in this context, see Moore, "Indirect Ownership of CFC and PFIC Shares by U.S. Beneficiaries of Foreign Trusts," 108 J. Tax'n 105 (February 2008).

51 Assets are generally based on fair market value.

52 Section 1297(a).

considered a CFC). When a corporation could be considered both a PFIC and CFC, a U.S. shareholder who owns at least 10% of the voting power of the company is taxed only on its share of Subpart F income under the CFC rules.[53]

Like with the CFC regulations, the PFIC rules do not set forth a clear method to determine indirect ownership of PFICs in all cases. The Service has not issued final regulations, but proposed regulations provide "if an estate or trust ... directly or indirectly owns stock, the beneficiaries of such estate or trust will be considered to own a proportionate amount of such stock."[54] Therefore, if a foreign trust was divided into discrete shares, the proposed regulations support that a U.S. beneficiary might have PFIC income. Indeed, unlike CFCs, ownership in a PFIC is not based on the shareholder's voting rights. However, there is still a lack of clarity on how to determine ownership attributable to a discretionary beneficiary of a trust.

In fact, the proposed regulations do not address how such beneficiaries would calculate any PFIC income other than a mere reference to using "reasonable methods" of the Code.[55] In TAM 200733024, the IRS indicated that it would use a "facts and circumstances" test for these purposes, which may result in purely discretionary beneficiaries being treated as the owner of the company for purposes of determining if it is a PFIC, even though the beneficiary may not actually receive any distributions from the trust. Of course, this TAM is merely an expression of the IRS's likely position in litigation, and thus is not binding authority.

The consequences of a U.S. person being treated as an owner of a PFIC can be severe:

1. The U.S. shareholder would be required to file Form 8621 each year the corporation is treated as a PFIC.
2. The computation of the tax on a dividend received or proceeds from the sale of shares of a PFIC can be extremely complicated and punitive.
3. There is an interest charge that involves the PFIC's return over the entire holding period, the calculation of which is beyond the scope of this article (and probably also beyond the ability of many inexperienced accountants).
4. Capital gains in PFICs are taxed at the highest effective tax rate for ordinary income (instead of the lower capital gains rates), and capital loss on a PFIC cannot be used to offset capital gains on other investments.

If a U.S. client is treated as the owner of a PFIC, or wishes to invest in a PFIC, an election can be made (called a qualified electing fund (QEF) election) that would effectively eliminate the punitive tax rates associated with PFICs.[56] However, this involves the U.S. owner being taxed on his or her share of income and gains of the company in the year it is incurred, even if no dividend is received. There are also strict accounting and reporting requirements that need to be met to make a QEF election, which not all PFICs will comply with.

Thus, given the unfavorable regime that accompanies the ownership of PFICs, it is best to advise the client to invest in such companies only with extreme caution. If a U.S. client has an ownership interest in a PFIC (whether direct or indirect), the practitioner is well advised to review the options for minimizing the associated tax and reporting obligations.

Convert the foreign trust to a domestic trust in order to stop the build-up of UNI within the trust.

Is there proper reporting to the IRS? An increasingly popular topic over the last few years has been reporting by U.S. persons of interests in foreign accounts, gifts received from foreign persons, or distributions received from foreign trusts or estates. These reporting requirements involve disclosures of information to the IRS that are above and beyond the normal annual income tax filing requirements, although most of the forms discussed in this section are filed together with a U.S. income tax return. Although this additional reporting typically involves only disclosure of information, and does not yield additional tax, penalties for failure to file these forms if otherwise required can be severe.[57]

Below is a list of some of the more common annual reporting forms, together with a very brief description of when they are required. Practitioners are encouraged to review the forms and the related instructions in more detail if any form appears to be possibly applicable, as the below is a very cursory introduction to these forms.[58]

1. *Statement of Specified Foreign Financial Assets (Form 8938).*[59] In general, this form is required for U.S. persons who have certain foreign financial assets or interests,

[53] Section 1297(d).
[54] Prop. Reg. 1.1291-1(b)(8)(iii)(C).
[55] Prop. Reg. 1.1291-1(j).
[56] Section 1295.
[57] Failure to file these forms may also result in leaving open the statute of limitations for the IRS to examine *the entire* tax return.

such as foreign accounts (including bank and brokerage accounts) maintained by a foreign financial institution, and foreign financial assets not held in a financial account but held for investment purposes, such as stock or securities issued by a foreign corporation, a capital or profits interest in a foreign partnership, or an interest in a foreign trust or estate. This filing requirement is triggered only if the taxpayer meets certain minimal filing thresholds based on the value of the specified foreign financial assets which vary depending on the taxpayer's filing status (e.g. for unmarried taxpayer's living outside the U.S., filing is required only if the value of such assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year). If the taxpayer lives in the U.S., however, there is no minimum filing threshold.

2. *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts (Form 3520).*[60] In general, this form requires a U.S. person to report the receipt of gifts, bequests, or distributions from foreign persons, trusts, or other entities during the calendar year if they are in excess of $100,000. If the gift is from a foreign corporation or foreign partnership, the threshold for filing this form is reduced (to $15,671 in 2016 and adjusted annually). This form is also required if the U.S. taxpayer is treated as the owner of a foreign trust under the grantor trust rules (similarly, the trust itself may be required to filed an Annual Information Return of Foreign Trust with a U.S. Owner (Form 3520-A)).
3. *Information Return of U.S. Persons with Respect to Certain Foreign Corporations (Form 5471).*[61] This form is generally required to be filed by U.S. persons who are officers, directors, or shareholders of certain foreign corporations. While direct ownership of a foreign corporation is fairly straightforward, as discussed above, determining deemed ownership of a foreign corporation by U.S. beneficiaries of foreign trusts can be complicated. The result of that analysis will inform as to the necessity to file this form.
4. *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund (Form 8621).*[62] This form is generally required to be filed by U.S. persons who own a direct or indirect interest in a PFIC. Again, as discussed above, determining indirect ownership of PFICs can be complicated.
5. *Return of U.S. Persons with Respect to Certain Foreign Partnerships (Form 8865).*[63] This form is generally required to be filed by U.S. persons with varying degrees of ownership or control of a foreign partnership or a foreign flow-through LLC (however, if the LLC is disregarded for tax purposes, Information Return of U.S. Persons with Respect to Foreign Disregarded Entities (Form 8858) must be filed instead).[64] Review of the instructions to this form is recommended, because the applicable thresholds vary depending on the specific facts of a particular taxpayer.

Is there proper reporting to other U.S. agencies? U.S. reporting obligations relating to foreign assets is of such prominence in recent international estate planning developments that it appears twice on this list. Justifying this second appearance is the fact that it is not just the IRS who is ramping up its reporting requirements; other governmental agencies are also getting in on the action, requiring sometimes duplicative reporting.

[58] For example, to the extent that there are duplicative or overlapping reporting requirements, the Code, or the regulations or guidance thereunder, may provide mitigating relief, and allow for reporting on a single form. Again, a detailed review of the forms, related instructions and applicable guidance is strongly recommended in this respect.

[59] For more information, see www.irs.gov/uac/Form-8938,-Statement-of-Foreign-Financial-Assets (last visited on 1/25/2016).

[60] For more information, see www.irs.gov/Businesses/Gifts-from-Foreign-Person (last visited on 1/25/2016).

[61] For more information, see www.irs.gov/uac/Form-5471,-Information-Return-of-U.S.-Persons-With-Respect-to-Certain-Foreign-Corporations (last visited 1/25/2016).

[62] For more information, see www.irs.gov/uac/Form-8621,-Return-by-a-Shareholder-of-a-Passive-Foreign-Investment-Company-or-Qualified-Electing-Fund (last visited 1/25/2016).

[63] For more information, see www.irs.gov/uac/Form-8865,-Return-of-U.S.-Persons-With-Respect-to-Certain-Foreign-Partnerships (last visited on 12/21/2015).

[64] For more information, see www.irs.gov/uac/Form-8858,-Information-Return-of-U.S.-Persons-With-Respect-To-Foreign-Disregarded-Entities (last visited on 11/25/2016).

[65] Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, (5/13/2015), Control Number: SBSE-04-0515-0025; www.irs.gov/pub/foia/ig/spder/SBSE-04-0515-0025%5B1%5D.pdf (last visited on 1/25/2016).

[66] Pub. Law 114-41.

[67] For more on Form BE-10, see www.bea.gov/surveys/respondent_be10.htm (last visited on 1/25/2016).

[68] The process of expatriation may vary slightly depending on the applicable consulate to which the application is submitted. The intricacies of the expatriation process and the nontax ramifications (such as possible immigration considerations) relating to the expatriation are outside the scope of this article. Instead, this discussion focuses on the estate and gift tax considerations accompanying a client who has expatriated or a client who receives a gift or bequest from an expatriate.

For example, as discussed above, the FBAR form, which is mandated by FinCen, requires that an individual list all foreign financial accounts he or she owns or over which he or she has signature authority (even if the individual has no ownership interest in the account over which signature authority is held). Thus, FBARs are a concern for account holders as well as for fiduciaries who have signature authority over foreign accounts.

Fortunately for trust beneficiaries, an FBAR need not be filed in any of the following three instances:

1. If they hold only a remainder interest in the trust.
2. If they are merely a discretionary beneficiary with no fixed interest in the trust and do not receive distributions totaling 50% or more of the trust income during the year.
3. If the trust, trustee, or agent is a U.S. person who filed an FBAR listing the foreign account.

The FBAR is a reporting form only, and results in no tax due.

As discussed above, on 5/13/2015, the IRS issued interim guidance that seems to somewhat soften potential penalties for failure to file FBARs, which previously could have exceeded the full value of the foreign account.[65] In addition, in an effort to facilitate compliance, it was recently announced that effective for FBARs relating to calendar year 2016 and later, the FBAR Form will be due on April 15 of the following year (with a six-month extension available on request) as opposed to its previous due date of June 30.[66]

As also mentioned above, the U.S. Department of Commerce-Bureau of Economic Analysis has also thrown its hat into the mandatory reporting ring, requiring the BE-10 Form to be filed by U.S. persons (including trusts) with at least a 10% voting interest in a foreign business enterprise (such as a foreign company). To perhaps unintentionally add an element of confusion, the BE-10 Form is not due on the same date as the income tax return. Instead, it is due on May 29 (however, in 2015, an automatic extension was given to June 30). The burden of reporting with respect to this form is somewhat lessened because unlike reporting associated with the income tax return and the FBAR Form, the BE-10 Form is not due annually, and instead it is due every five years.

In addition, just like the FBAR, there is no tax due with respect to the BE-10 Form, but, there are increased penalties for failure to file. If a BE-10 Form is required but not filed, the failure to file carries with it the potential for civil penalties of between $2,500 and $25,000. In theory, in the case of willful failure to report, criminal penalties and even the possibility of imprisonment exist.[67]

Is there a covered expatriate in the mix? Given the onerous reporting and tax obligations associated with U.S. citizenship, there has been a growing trend for individuals to expatriate from the U.S. to achieve more favorable tax treatment. However, as explained below, mere expatriation from the U.S. does not absolve the former U.S. person (or his or her intended beneficiaries) of all obligations under the U.S. tax laws.[68]

As an initial matter, many of these ongoing U.S. obligations generally apply only if the expatriate is deemed to be a "covered expatriate." A "covered expatriate" is an expatriate who meets *any* of the following three tests:

1. His or her average annual U.S. income tax liability for the five tax years preceding his or her expatriation date is more than $161,000.[69]
2. His or her net worth is at least $2 million on his or her expatriation date.
3. He or she is unable to certify under penalty of perjury that he or she has complied with all of his or her U.S. federal tax filing obligations for the five tax years preceding his or her expatriation date.[70]

Certain exceptions apply to the definition of "covered expatriate," which include individuals born in foreign countries who continue to reside in those countries and minors. In addition, the above-described rules regarding covered expatriates apply only to persons expatriating from the U.S. after 6/17/2008.[71]

Under the current rules, an expatriate from the U.S. must report on Form 8854 (Expatriation Statement) all of his or her assets on the day before the expatriation, including every interest he or she has in a "non-grantor trust" on the day before the expatriation date. For these purposes, the term "non-grantor trust" is much broader than the normal use of the term, and applies to any trust of which the expatriate is not deemed to be the owner for U.S. income tax purposes.[72] Thus, if the expatriate is a beneficiary of a "grantor trust," but someone else is deemed to be the owner of the trust for U.S. income tax purposes, the trust would be considered a "non-grantor trust" for expatriation purposes.

For these purposes, a person is deemed to have an "interest" in the "non-grantor trust" if he or she is a person (1) who is entitled or permitted, under the terms of the trust instrument or applicable local law, to receive a direct or indirect distribution of trust income or principal (including, for example, a distribution in discharge of an obligation of that person), (2) with the power to apply trust income or principal for his or her own benefit or (3) to whom the trust income or principal could be paid if the trust or the current interests in the trust were then terminated.[73]

Given the unfavorable regime that accompanies the ownership of PFICs, it is best to advise the client to invest in such companies only with extreme caution.

In addition, normally a "covered expatriate" is treated as selling his or her worldwide assets for their fair market value on the day before his or her expatriation date and is required to recognize, and pay tax on, any gain on this deemed sale (after reducing such net gain, but not below zero, by a $693,000[74] exemption) (referred to as the "mark-to-market rules").[75]

The mark-to-market rules, however, do not apply to a covered expatriate's interest in a "non-grantor trust," as defined above. Instead, after expatriation, if there is a direct or indirect distribution of property to a covered expatriate from a non-grantor trust of which the covered expatriate was a beneficiary on the day before his or her expatriation date, the trustee must deduct and withhold from the distribution an amount equal to 30% of the taxable portion of the distribution.[76]

In addition, after expatriation, a "covered expatriate" is generally subject to U.S. estate and gift tax only on the transfer of U.S.-situs assets in the same manner as an NRA. However, a U.S. citizen or resident who receives any direct or indirect gift or bequest from the covered expatriate (a "covered gift" or a "covered bequest") is subject to tax (referred to in this article as the "2801 Tax") on the value of such covered gift or bequest at the higher of the estate or gift tax rate in effect for the tax year of receipt.[77] Note that a covered gift or bequest of *any* property is subject to the 2801 Tax; such tax is not limited to property owned by the covered expatriate on his or her expatriation date (or the value of such property).

The definition of covered gift or bequest, however, has exceptions. For example, a gift or bequest that does not exceed the gift tax annual exclusion amount is not subject to the 2801 Tax, nor is a gift or bequest that would have qualified for the charitable or marital deduction if the covered expatriate were still a U.S. citizen.[78] In addition, a gift or bequest that a covered expatriate is required to report as taxable on a U.S. gift or estate tax return (such as real property, tangible personal property, or other property deemed

69 The 2016 amount is listed above. This amount is indexed annually for inflation.
70 Sections 877A(g)(1) and 877(a)(2)(A) through (C).
71 Further inquiry is required if an individual expatriated from the U.S. prior to this date, as a different (typically less onerous) set of rules would apply.
72 Section 877A(f)(3).
73 Sections 877A(c) and (f); Notice 2009-85, 2009-45 IRB 598.
74 This is the amount for 2016. The exemption is indexed annually for inflation.
75 Sections 877A(a)(1), (2), and (3).
76 Sections 877A(f). The term "taxable portion" means, with respect to any distribution, the portion of the distribution that would have been includable in the covered expatriate's gross income if the covered expatriate had continued to be subject to tax as a citizen or resident of the U.S.
77 Sections 2801(a) and (e)(1).
78 Sections 2801(c) and (e)(3).

situated in the U.S. for U.S. estate or gift tax purposes) is not subject to the 2801 Tax if it is in fact reported on a timely filed U.S. gift or estate tax return.[79] The 2801 Tax is payable by the recipient of the covered gift or bequest, not by the covered expatriate.

It is possible that multiple marital or inheritance regimes will apply to the same client.

The 2801 Tax also applies to covered gifts or bequests to U.S. trusts and certain distributions from foreign trusts. A U.S. trust is treated as a U.S. citizen for purposes of these rules and, therefore, is itself subject to the 2801 Tax on the receipt of a covered gift or bequest in the same manner as a U.S. citizen or resident.[80] Further, a U.S. citizen or resident is subject to the 2801 Tax on a distribution from a foreign trust that is attributable to a covered gift or bequest to the trust (generally reduced by foreign taxes paid by the U.S. beneficiary).[81]

As discussed above, in September 2015, the IRS issued proposed regulations regarding the 2801 Tax, which provide some guidance with respect to these rules. However, there still is no tax form to report any such transfers and pay the corresponding tax, and none will be issued until the proposed regulations are finalized.[82]

Thus, even if the client is not a covered expatriate, care must be taken in structuring any transfer of property to the client from another person (such as a relative) who is a covered expatriate.

Are there any restrictions on the transfer of property? If the client is a resident of a foreign jurisdiction, or if a married client has property subject to the marital regime of another jurisdiction, there may be restrictions on the client's ability to transfer some or all of his or her property because of the fixed rights of a spouse or other family member. Some of these considerations are not unique to international estate planning.

Spousal property rights vary by jurisdiction even within the U.S. In many separate-property jurisdictions, such as New York, a surviving spouse is entitled to an "elective share" of the deceased spouse's estate, which in effect ensures that the surviving spouse will receive a minimum amount from the deceased spouse's estate.[83] Similarly, in community-property states, such as California, as a general matter, spouses are each deemed automatically to own one-half of the marital property.[84] Thus, in community-property jurisdictions, even if property is titled in the name of only one spouse, he or she is generally free to dispose of only one-half of that property, because the other half is deemed to be owned by the other spouse.

Although in the U.S. these restrictions generally apply to only spouses, Louisiana has forced heirship rules that also entitle children to fixed shares of a decedent's estate.[85]

Not surprisingly, the restrictions on the transfer of property are more varied among foreign jurisdictions. For example, some countries, such as France, provide fixed shares of a decedent's estate for spouses and other family members, such as children.[86] Complicating matters further is the fact that different rules may apply depending on where and when (1) spouses were married, (2) the property was acquired, or (3) the decedent or transferor was resident at the time of death or a gift, as applicable. Thus, it is possible that multiple marital or inheritance regimes will apply to the same client.

Perhaps recognizing the possibility for confusion and the benefit of a single regime to apply to an individual, "Brussels IV" was recently enacted by the European Council, as mentioned above.[87] In addition to other substantive provisions, "Brussels IV" in effect may allow residents, nationals, or owners of property in participating countries in the European Union to elect out of the inheritance or succession laws of the participating country, and instead apply the succession laws of a country of which such person is a national (even a country which is not a participant to "Brussels IV"). This is especially important for residents or owners of property in countries with onerous forced heirship regimes, such as France, which require set shares of a decedent's property to be left to surviving spouses and surviving children.

For example, under these new rules, a U.S. citizen who resides in France and owns an apartment in Paris can opt to have the laws of the U.S. govern the disposition of the apartment on death. Generally, this legislation will provide qualifying individuals with more testamentary freedom. "Brussels IV" took effect on 8/17/2015.

"Brussels IV" applies, however, only to inheritance or succession rights, and does not apply to the marital regime applicable to an individ-

79 Section 2801(e)(2).

80 Section 2801(e)(4)(A).

81 Sections 2801(e)(4)(B)(i) and (ii).

82 Guidance Under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests From Covered Expatriates, 9/10/2015; www.federalregister.gov/articles/2015/09/10/2015-22574/guidance-under-section-2801-regarding-the-imposition-of-tax-on-certain-gifts-and-bequests-from (last visited on 1/25/2016).

83 EPTL § 5-1.1A.

84 California Family Code § 760-761.

85 Louisiana Civil Code, Chapter 3, Article 1493.

86 C. Civ. 913.

87 Regulation (EU) 650/2012.

ual's property. Thus, even if an individual is a member of a participating European country, his or her spouse may be automatically deemed to own a fixed interest in marital property under the applicable marital regime, and this ownership interest is not affected by the new legislation.

Also, as may be obvious, "Brussels IV" allows an individual to opt out of the inheritance or succession rules of only a participating European country. An individual cannot opt out of a non-participating country's succession rules, even if it is in favor of the rules of a participating country.

Is there an applicable treaty? Up until this point, this article has discussed the general rules and considerations relating to international estate planning. However, if a practitioner is dealing with a client who has sufficient connections to a jurisdiction that has an applicable treaty with the U.S., the taxpayer may be eligible for preferential tax treatment under the treaty. Although the U.S. has income tax treaties with many foreign countries,[88] fewer than 20 countries currently have active estate or gift tax treaties with the U.S.[89] To make matters more complicated, of these countries, some have negotiated only estate or gift tax treaties, but not both, with the U.S. Finally, when a taxpayer takes a position that deviates from the Code but is consistent with an estate or gift tax treaty, this position must generally be disclosed on the taxpayer's return.[90]

As a general rule, estate and gift tax treaties provide a more favorable tax result than would occur under the Code. Consider, for example, an individual who is a Canadian citizen who owns substantial U.S.-source assets; the individual is neither a U.S. citizen nor resident at the time of his or her death. Under the Code, this individual would receive a mere $13,000 applicable exclusion against estate tax in the U.S. Here, the U.S.-Canada estate tax treaty provides a more favorable result. The estate can take a credit against the U.S. estate tax equal to the value of the decedent's U.S. assets over the value of the decedent's world-wide assets multiplied by the exclusion amount available to U.S. citizens in the year of the decedent's death.[91]

Of course, a taxpayer generally must be a tax resident in a jurisdiction that is a party to the tax treaty to be eligible for benefits under that treaty. Thus, a tax resident of Brazil could not elect the application of the U.S.-Canada treaty even though it might provide a more favorable tax result. The rules governing the required minimum contacts with the participating countries should be spelled out in the applicable treaty.

Finally, the Service has ruled that taxpayers cannot "cherrypick" application of treaty provisions in a given year.[92] Thus, although treaties generally provide a more favorable result, taxpayers should evaluate the treaty's overall tax effects before claiming the benefits of a tax treaty.

Given the importance and potential benefit accompanying treaties, practitioners should always evaluate whether a treaty exists and applies when advising clients with international residences, citizenships, or property.

Has local counsel been consulted? All of the foregoing questions and analysis focus on U.S. implications and considerations. However, if a client has a connection to another country, local counsel in that jurisdiction should be consulted. There may be other restrictions on the transfer of property or the structure in which it can be held, special tax considerations relating to property ownership or transfer in that country, or restrictions on the use of trusts or the benefits thereof. The U.S. estate plan can be undermined if any applicable foreign considerations are not also contemplated.

Conclusion

In the modern globalized world in which we live, it is becoming increasingly common for trusts and estates practitioners to encounter international estate planning issues. Although some practitioners may think to focus on these considerations only if the client is an NRA, these issues may even arise in the case of U.S. clients who have non-U.S. family members, who own foreign assets, or who are beneficiaries or fiduciaries of foreign estates or trusts. Thus, it is important for all estate planning practitioners to have an understanding of the fundamental international estate planning concepts discussed throughout this article. Failure to identify and plan around potential international estate planning issues may result in frustration of the client's wishes and the incurrence of an otherwise potentially avoidable tax bill. The average client's global reach is expanding; so too should the estate planning practitioner's knowledge of international estate planning issues. ■

88 www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-TreatiesA-to-Z (last visited on 12/21/2015).

89 www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-&-Gift-Tax-Treaties-International (last visited 12/21/2015).

90 Section 6114.

91 Canada-U.S. Income Tax Convention at Article XXIXB (9/26/1980).

92 Rev. Rul. 84-17, 1984-1 CB 308 (prohibiting treaty shopping and ruling that if a taxpayer takes advantage of a treaty for a given year, all items of income from that year must be governed by the treaty).