

Estate Planning for Non-U.S. Citizens

San Antonio Estate Planners Council

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San Antonio

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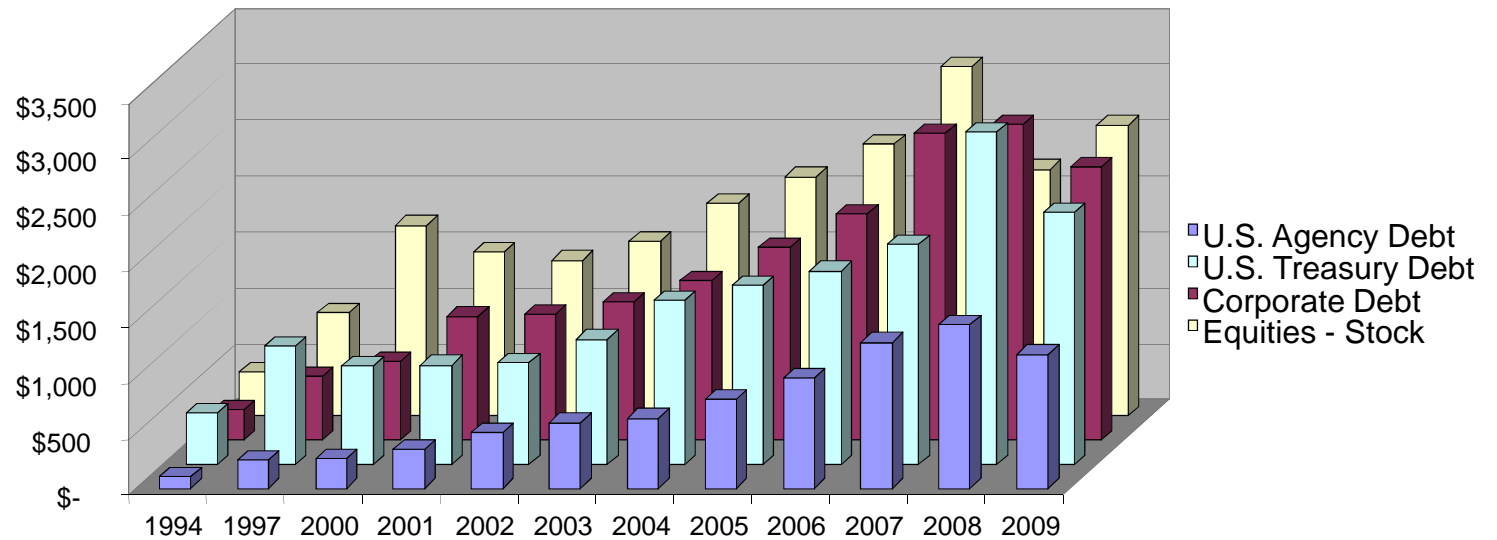
U.S. Treasury Statistics - Foreign Passive Investment in U.S.

**Foreign Portfolio Investment in Long-Term Securities
by Type of Security (Source: U.S. Treasury Department)
(Amounts in USD\$ Billions)** [Lu](#)

Type of Security	1994	1997	2000	2002	2004	2005	2006	2007	2008	2009
U.S. Agency Debt	107.1	252	261	492	623	791	984	1,304	1,464	1,196
Corporate & Municipal Debt	275.6	572	703	1,130	1,429	1,729	2,021	2,738	2,820	2,440
Equities	397.8	929	1,709	1,395	1,904	2,144	2,430	3,130	2,969	2,252
U.S. Treasury Debt	463.5	1,053	884	908	1,462	1,599	1,727	1,965	2,211	2,604
Totals	1,244.0	2,806	3,557	3,925	5,418	6,263	7,162	9,137	9,463	8,492

U.S. Treasury Statistics - Foreign Passive Investment in U.S.

Foreign Portfolio Investment in Long-Term U.S. Securities - Billions



“Income Tax Residency”

- Who is Not a U.S. Person?
 - Foreign Trust - IRC § 7701(a)(31)
 - Not a U.S. Trust - IRC § 7701(a)(30)(E)
 - Foreign Corporation
 - IRC § 7701(a)(5)
 - Foreign Partnership
 - IRC § 7701(a)(5)

Income Taxation of Foreign Persons

- FDAP Income of NRAs - IRC Section 871
 - Interest, Dividends, Royalties, etc.
 - New Definition? “ ... all income included in gross income under Section 61 (including original issue discount) . . .” 2001 Regulations - 1.441-2(b)(1)(i)
 - Exclusion - of gains from sale of property and other income that the IRS has published guidance . . Is not FDAP. 2001 Regulations

Income Taxation of Foreign Persons

- FDAP Income of Non-Resident Aliens and Foreign Corporations - - IRC Sections 871 and 881
 - 30% Withholding Tax on U.S. Sourced Payments of FDAP - IRC Sections 1441 & 1442 (Chapter 3)

Income Taxation of Foreign Persons

- Withholding Tax Reduction by Applicable Tax Treaty
 - Tax Treaty Positions and Compliance Issues –
 - IRC Section 6114
 - IRS Forms 1042-S, IRS Form 8833, etc.
- FIRPTA - Investments in Real Estate –
 - IRC Section 897 and Regulatory Law

FATCA - Income Taxation of Foreign Persons (New Chapter 4)

- FATCA is a Game Changer – Affects Foreign Persons
- Foreign Banks with Non-U.S. Clients
 - Imposes 30% Withholding Tax on U.S. Sourced Payments of FDAP – Plus 30% on Gross Proceeds (not income) on U.S. assets that can generate dividends or interest (namely stocks and debt instruments)
 - No Claim for Withholding for NRAs not Resident in Tax Treaty Jurisdiction

FATCA - Income Taxation of Foreign Persons (New Chapter 4)

- FATCA proposed regulations are extensive – 8 Feb. 2012
- Prop. Treas. Reg. Section 1.1471-1 through -6
 - Extraterritorial Application of the Law (e.g., so-called passthru payments)
 - Extensive due diligence by FFIs
 - Extends to FNFES

Income Taxation of Foreign Persons

- Capital Gains (Non-Real Estate)
 - Tax Treaty Positions and Compliance Issues
 - IRC Section 6114
- A Foreign Partners' Distributive Share of the Partnership's Effectively Connected Income
 - Foreign Partner of a U.S. Partnership – IRC Section 875
 - Subject to separate withholding taxes - IRC Section 1446

U.S. Estate and Gift Taxes and Non-Resident Persons

- Domicile – Estate Tax Residency - Treas. Reg. Section 20.0-1
 - A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.
- Green Card Holders – Where Is There Domicile?
 - Estate of Barkat A. Khan v. Commissioner, T.C. Memo 1998-22

U.S. Estate and Gift Taxes and Non-Resident Persons

- Lifetime Exemption Equivalent –
 - Currently \$ 5 million (for U.S. citizens and those domiciled in U.S.)
 - IRC Code Section 2010(c)
 - USD\$ 60,000 (not domiciled in U.S.)
 - I.R.C. §§ 2102(c)
 - No Lifetime Exemption Equivalent for Gifts

U.S. Estate and Gift Taxes and Non-Resident Persons (continued)

<i>Death in year</i>	<i>Estate and Gift Tax Life Time Exemption Equivalent for Non-U.S. Citizens with Foreign Domicile</i>	<i>Estate Tax Exemption Equivalent for U.S. Citizens or U.S. Domiciles</i>	<i>Highest estate and gift tax rate</i>
2002	US\$ 60,000	US\$ 1,000,000	50%
2003	US\$ 60,000	US\$ 1,000,000	49%
2004	US\$ 60,000	US\$ 1,500,000	48%
2005	US\$ 60,000	US\$ 1,500,000	47%
2006	US\$ 60,000	US\$ 2,000,000	46%
2007	US\$ 60,000	US\$ 2,000,000	45%
2008	US\$ 60,000	US\$ 2,000,000	45%
2009	US\$ 60,000	US\$ 3,500,000	45%
2010	Estate Tax - Repealed Gift Tax Rate - Equal to Income Tax Rate	Estate Tax - Repealed Gift Tax Rate - Maximum Rate	N/A 35%
<u>2011 & 2012</u> <u>2013</u>	<u>US\$ 60,000</u> <u>US\$ 60,000</u>	<u>US\$ 5,000,000</u> <u>US\$ 1,000,000</u>	<u>35%</u> 55% + 5% (surtax in higher estates)

U.S. Estate Taxes and Non-Resident Persons

- U.S. Situs Assets (Estate Taxes)- The following properties are treated as **situated in** the U.S. as defined in Treas. Reg. §20.2104-1(a) to include:
 - All real estate located in the U.S. (Treas. Reg. §20.2104-1(a)(1))
 - Most all personal property physically located in the U.S. (Treas. Reg. §20.2104-1(a)(2))
 - “Intangible personal property the written evidence of which is not treated as being the property itself, if it is issued by or enforceable against a resident of the United States or a domestic corporation or governmental unit” (Treas. Reg. §20.21041(a)(4))
 - Shares of stock of a domestic corporation, regardless of the location of the stock in a closely held corporation (Treas. Reg. §20.21041(a)(5)) or
 - Debt obligations of U.S. persons including certain governmental entities (Treas. Reg. §20.21041(a)(7))

U.S. Estate Taxes and Non-Resident Persons

- Non-U.S. Situs Assets (Estate Tax) – the following properties are treated as **situated outside** of the U.S. as defined in Treas. Reg. § 20.2105-1(a):
 - All real estate located outside the U.S. (Treas. Reg. §20.2105-1(a)(1));
 - Shares of stock issued by a corporation which is not a domestic corporation (Treas. Reg. §20.2105-1(f));
 - Amounts and proceeds receivable as insurance on the decedent's life (I.R.C. § 2105(a) and Treas. Reg. §20.2105-1(g)); and
 - “Portfolio Debt Investments” - “Debt obligations, if, without regard to whether a statement meeting the requirements of I.R.C. §871(h)(5) has been received, any interest thereon would be eligible for the exemption from tax under §871(h)(1) where such interest received by the decedent at the time of his death,” I.R.C. §2105(b)(3).

U.S. Estate and Gift Taxes and Non-Resident Persons

- Non-U.S. Situs Assets (Gift Tax) –
 - Same as properties are treated as situated outside of the U.S. as defined in Treas. Reg. § 20.2105-1(a) - EXCEPT
 - Intangible Assets (including those in the U.S. - e.g., stock of a U.S. corporation)
- No Life Time Exemption Equivalent –
 - No Unified Credit Amount
 - Annual Exclusion of \$11,000
- No Unlimited Marital Deduction for Transfers From U.S. Citizens to Non-Citizen Spouses (Regardless of Residency)
 - QDOT Transfers IRC Sections 2056(d) and 2056A
 - Annual Gift Exclusion of Only \$100,000 - IRC 2523(a) and (i)

U.S. Estate and Gift Taxes and Non-Resident Persons

- Are ADRs and ADSs - Properties Situated Outside the U.S. under IRC Section 2105?

IRS Private Letter Ruling

PLR 200243031

- ADRs - Are ADRs and ADSs - Properties Situated Outside the U.S. under IRC Section 2105?
 - What are ADRs?
 - An American Depositary Receipt (ADR) - a registered security issued by a U.S. bank but representing shares of a foreign stock
 - Shares of stock issued by a corporation which is not a domestic corporation, regardless of the location of the certificates (Treas. Reg. §20.2105-1(f))

Informational Reporting – Resident Aliens (Tax Treaty)

TYPE OF INTERNATIONAL TRANSACTION	IRS/TREASURY FORM
Ownership or signature authority over a foreign bank account	TD F 90-22.1 – Report of Foreign Bank and Financial Accounts (“FBAR”)
Receipt of large gifts from foreign persons (including inheritances from foreign estates)	IRS Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
Ownership interest in a foreign corporation	IRS Form 5471 - Information Return of U.S. Persons With Respect to Certain Foreign Corporations
Ownership interest in a foreign partnership	IRS Form 8865 - Return of U.S. Persons With Respect to Certain Foreign Partnerships
Transfers of certain interests in a foreign partnership	IRS Form 8865 - Return of U.S. Persons With Respect to Certain Foreign Partnerships
Transfers to a foreign trust	IRS Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts

Informational Reporting – Resident Aliens (Tax Treaty)

TYPE OF INTERNATIONAL TRANSACTION	IRS/TREASURY FORM
Distributions from a foreign trust	IRS Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
Transfers of assets to a foreign corporation	IRS Form 926 - Return by a U.S. Transferor of Property to a Foreign Corporation
Officers and directors of certain foreign corporations	IRS Form 5471 - Information Return of U.S. Persons With Respect to Certain Foreign Corporations
Ownership interest in and transfer of certain foreign disregarded entities	IRS Form 8858 - Information Return of U.S. Persons With Respect To Foreign Disregarded Entities
U.S. citizens who renounce their citizenship and certain lawful permanent residents who abandon immigration status;	IRS Form 8854 - Initial and Annual Expatriation Statement
Annual return of activities of a foreign trust with a U.S. owner	IRS Form 3520-A - Annual Information Return of Foreign Trusts with a U.S. Owner

Resident Aliens who Are NOT U.S. Taxpayers per a Treaty

- Non-U.S. Taxpayers Also Must File Informational Return
- FBARs are Also Required (Per Feb. 2011 Regulations) for “Resident Aliens” who are Not U.S. Taxpayer per a U.S. Income Tax Treaty

Pre Immigration U.S. Tax Planning

- Taxation on a worldwide basis
- U.S. citizenship: *Cook vs. Tait* and the Fourteenth Amendment of the U.S. Constitution
- Stepped-up basis
- Installment sales - stepped up basis

Pre Immigration U.S. Tax Planning

- U.S. transparency
- Completed gifts (including in Trust)
- Estate vs. Gift Tax (U.S. transfer taxes on transfers)
- Foreign counsel
- Trusts: Subchapter J of the IRC
 - Nongrantor Trust vs. Grantor Trust

Pre Immigration U.S. Tax Planning

- Information Returns
- Exchange of Information: Treaties, TTEAs, MLATs, OECD
- Criminal Prosecutions
- Transparency and technology

Pre Immigration U.S. Tax Planning

- Law and Regulations
- Advisors are being included
- Competition in the world (China, India, etc.)
- Trusts - anti deferral
- Management of capital

Pre Immigration U.S. Tax Planning

- U.S. Tax Rates: 1980's to present time
 - Long term capital gains rate: 15% vs 28%
 - Tax collection
 - Estate and gift tax - lowest rate of collection
 - U.S. debt market
- Percentage of GDO lowest in the last three decades

Related Articles

- U.S. Estate Planning FAQs
<http://www.procopio.com/article/u-s-estate-planning-faqs-924-pdf>
- U.S. Tax Implications of Foreign Investment in U.S. Real Estate:
<http://www.procopio.com/article/u-s-tax-implications-of-foreign-investment-in-u-s-real-estate-921-pdf>

Related Articles

- Coming to America: The “Throwback Tax’s” Ugly Head – The Non-Resident Alien as Beneficiary of Accumulated Income

<http://www.procopio.com/article/coming-to-america-the-throwback-taxes-ugly-head-the-non-resident-alien-cum-resident-as-beneficiary-of-accumulated-income-904-pdf>

- Overview of U.S. Interest Income, Exempt from U.S. Income Taxation for the Foreign Investor (“Portfolio Interest”)

<http://www.procopio.com/article/overview-of-u-s-interest-income-exempt-from-u-s-income-taxation-for-the-foreign-investor-portfolio-interest-900-pdf>

Related Articles

- Proposed Guidance on FBARs and Foreign Persons:
<http://www.procopio.com/article/proposed-guidance-on-fbars-and-foreign-persons-pwm-1394-pdf>
- Foreign Bank Account Reports -2011 Regulations Extend Rules to Many Unaware Persons
<http://www.procopio.com/article/foreign-bank-account-reports---2011-regulations-extend-rules-to-many-unaware-persons>

Thank you.

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