Onshoring Your Offshore Trust to the U.S.

By Joan K. Crain, CFP,® CTFA, TEP
Senior Director, Global Family Wealth Strategist

Myriam Soto
Head of International Wealth Planning and Fiduciary Services

Unlike the prevailing attitudes of past decades, there is growing interest from wealthy global families in having U.S. trusts.[1] Concerns about appearing on the radar of U.S. tax authorities and revealing assets and structures to prying eyes are fading in the face of the increasingly aggressive efforts by countries around the globe to combat tax evasion and money laundering.[2]

In addition to establishing new trusts with a U.S. situs, grantors and beneficiaries alike are moving existing trusts to the U.S. from other jurisdictions. Commonly referred to as "onshoring," domesticating a trust to the U.S. can provide important benefits, although it is important to seek experienced counsel.

Why Move Onshore

One of the most frequent situations in which an offshore trust is domesticated is at the death of a foreign settlor of a foreign grantor trust (FGT) with U.S. beneficiaries. Similarly, when the beneficiary of a foreign non-grantor trust (FNGT) becomes a U.S. person, or when there are no longer any non-U.S. beneficiaries,[3] onshoring is often appropriate.

Foreign settlors planning to immigrate to the U.S. may also prefer to establish a U.S. trust. However, this should only be done after consultation with counsel in both the U.S. and the home country as there may be important advantages to retaining the original offshore situs. An illustration is provided in the case study in the "Decanting" section of this article.

Increasingly, non-U.S. persons without U.S. connections or intent to move to the U.S. are favoring U.S. trusts to take advantage of the U.S. rule of law and the availability of so-called "modern trust" statutes in a number of states vying for trust business.[4] It is also possible that an offshore jurisdiction may be blacklisted in the home country of the non-U.S. person, or that scandals such as the "Panama Papers" may make high profile non-U.S. persons feel they face negative public perception by establishing or maintaining trusts offshore.

Further, having a U.S. situs trust can facilitate access to credit from the many U.S. financial institutions. With interest rates attractively low, trustees may seek to improve returns on trust portfolios through leverage. Options range from the most basic, such as using trust assets as collateral for loans to provide liquidity for distributions or further investments, to more complex options such as financing life insurance policies owned by irrevocable life insurance trusts. However, U.S. lenders are often unfamiliar with non-U.S. entities and view offshore trusts with concern. This can result in a frustrating and protracted process with no guarantee that credit will be obtained.

Finally, unlike most developed countries, the U.S. has largely resisted initiatives to share information about trust assets

[1]A trust could be governed by U.S. law but still be considered a "foreign trust" for U.S. tax purposes. This article generally refers to a U.S. trust or a trust with a U.S situs as one which qualifies as U.S. for income tax purposes. See Exhibit 2 for details. Further, we consider U.S. situs trusts to be "onshore", as compared to foreign trusts which, for the purpose of this paper, are labeled "offshore".
[2]For more information, see "Reporting Challenges for Multinational Families in the Era of Financial Transparency", by Joan K. Crain and Myriam Soto.
[3]The non-U.S. beneficiaries may have died or been "cashed out", either through outright distributions, or distributions into further trusts for the beneficiaries.
[4]States such as Delaware, South Dakota, Wyoming, Nevada and New Hampshire are among a growing number that may offer extensive creditor protection (including in the event of a divorce) as well as various means for settlors to maintain significant levels of control over trust administration and/or investments.

and beneficial owners.[5] Rightly or wrongly, the U.S. has been called the "greatest tax haven in the world" and been criticized by organizations such as the Financial Action Task Force (FATF) for lack of transparency. Therefore, the U.S. is often considered a desirable trust situs when privacy is key. That being said, choosing the U.S. with the sole intent to avoid regulatory reporting under the Common Reporting Standard or other laws will not be looked upon favorably by reputable banks or practitioners who may face penalties in the event of any fraudulent activity.[6]

Tax and Legal Implication to Onshoring

While trust settlors and/or beneficiaries may find it attractive to domesticate a non-U.S. trust, there are important tax and legal considerations that must be taken into account, particularly for non-U.S. beneficiaries. The U.S. has a highly taxable regime and a change in trust situs could result in new taxes for the trust, the settlor and/or the beneficiaries.

Settlors' Perspective

U.S. settlors, more commonly referred to in the U.S. as "grantors," would generally prefer to have a U.S. trust rather than a foreign one. If the trust is revocable, all income and realized gains flow through to the U.S. grantor regardless of the trust situs, and the trust is generally available to the grantor's creditors. Some offshore jurisdictions continue to claim protection from creditors for trust settlors, but this is highly dependent on the specific provisions in the trust as well as the identity and claims of creditors.[7]

As a result, U.S. grantors see little to no benefit in a foreign grantor trust over the typical revocable living trust commonly used in the U.S. to avoid probate and provide for easy succession in the event of incapacity or death. In fact, a foreign trust will create additional reporting requirements and could potentially be flagged for audit by the IRS.[8] In most cases, the burdensome reporting[9] for an offshore trust more than overrides any potential benefits for a U.S. settlor to establish or maintain a foreign trust.

Conversely, a non-U.S. settlor would be more likely to favor retaining the offshore situs for both revocable and irrevocable trusts. As the settlor of a FGT, the non-U.S. person would only be taxed on income from U.S. situs assets (with some generous exceptions)[10] and "effectively connected income" (ECI).[11]

Beneficiaries' Perspective

Beneficiaries view some of these situations from different angles. U.S. beneficiaries generally have no reason to bring a FGT onshore while the foreign settlor is alive. As with a U.S. revocable grantor trust, the FGT enables them to avoid taxes on income or gains in the trust before the settlor's death, even when they receive distributions from the trust.[12] However, they generally favor immediately bringing it onshore when the settlor dies and the trust becomes a FNGT. Were it to remain a foreign trust, the trustee would need to distribute all income annually or be subject to the confiscatory throwback tax on accumulated income, or Undistributed Net Income (UNI). See our article "Wealth Planning for the Multinational Family With U.S. Connections" for more details.

Upon the settlor's death, some restructuring may be in order if there are U.S. beneficiaries depending on the assets of the trust. Frequently, the FGT terminates at the death of the settlor and the trust assets are distributed to the beneficiaries. This in itself does not give rise to taxation in the U.S. (although a U.S. person receiving distributions from

[5] See footnote 2 for details on CRS, Registries of Beneficial Owners and the comparatively less intrusive FATCA rules.

[6] See FL professional responsibility conduct rule 4-1.2(d) and NY Bar rules of Professional Conduct rule 1.2.

[7] See In Re Lawrence, 251 BR 630 (SD Fla. 2000): Stephen Jay Lawrence spent six years in prison for contempt when he refused to repatriate assets from a foreign asset protection trust over which the court ruled he had de facto control. See also FTC V Affordable Media LLC 179 F. 3d. 1228 (9th Cir. 1999) in which the Andersons were jailed after refusing to arrange for a way to comply with a U.S. District Court order to repatriate funds representing “ill gotten gains" from their Cook Islands trust.

[8] On May 21, 2018, the IRS added foreign trust information reporting to its “compliance campaigns," signaling that the IRS sees a “compliance risk" in this area. U.S. settlors of foreign trusts now officially face increased audit risk. https://www.martindale.com/legal-news/article_caplin-drysdale-chartered_2509067.htm.

[9] Reporting includes IRS Forms 3520 and possibly 3520-A, and potentially the FINCEN Report of Foreign Bank and Financial Accounts (FBAR) and IRS Form 8938 (FATCA). Also possible inclusion in publicly or only mildly restricted registries of beneficial owners.

[10] Non-U.S. persons, including settlors of FGTs, are exempt from U.S. income tax on capital gains and “portfolio interest", which includes interest from most U.S. government and corporate debt in registered form.

[11] ECI is a tax term referring to income incurred in connection with a U.S. trade or business.

[12] Provided a FGT is revocable by the foreign settlor solely or with the consent of a related party, current beneficiaries are not restricted to settlors and their spouses. IRC Section 672(f).

a foreign trust will have reporting obligations).[13] However, if the trust's assets were owned by an underlying private investment company (PIC) incorporated offshore,[14] there may be a period of time during which the U.S. beneficiaries will be taxable on income and gains under the controlled foreign corporation (CFC) rules. Given its potential for significant tax liabilities for U.S. beneficiaries, this is certainly something to keep in mind. To learn more about CFC rules, see our article "Pre-Immigration Planning: Foreign Trusts."

A FGT may also successfully continue as a FNGT upon the death of the settlor if there are no U.S beneficiaries. This is often attractive for non-U.S. beneficiaries as it allows the trust to grow without U.S. income or capital gains taxes. However, beneficiaries who were not U.S. persons may later become U.S. persons. Further, it is not always easy to determine whether there are any U.S. beneficiaries. The U.S. Treasury may include U.S. persons named in written and oral agreements, including letters of wishes and memoranda, as beneficiaries of foreign trusts despite there being no mention of them in the trust itself.[15] In these cases, the U.S. beneficiaries would generally prefer to onshore the trust. Given the taxes on accumulation distributions from foreign trusts with U.S. beneficiaries, it is more tax efficient to convert the trust to a U.S. trust. This also minimizes the additional U.S. reporting applicable to these kinds of trusts.[16]

Exhibit 1: What Makes a Trust Foreign?

A trust is considered foreign for U.S. income tax purposes if it fails either the court or the control test of IRS Code Section 7702-7. The court test says that a U.S. court must have primary jurisdiction over the trust. The trust must be administered exclusively in the U.S. and the trust instrument cannot direct the trust to be administered outside the U.S. The trust cannot be subject to an automatic migration provision that would move it outside the U.S. were a U.S. court to attempt to assert its jurisdiction over the trust. The control test says that one or more U.S. persons must control all of the "substantial decisions" within the trust. Such decisions include replacing the trustee, terminating the trust or making investment decisions.

This means that as long as their trusts satisfy the requirements of the court test, settlors could domesticate their foreign grantor trusts for U.S. income tax purposes by entrusting all decision-making control to U.S. persons.

What are the Practical Aspects of Onshoring a Trust to the U.S.?

The approach to onshore a trust will depend on various factors such as the terms of the trust, the laws of the jurisdiction in which the trust has been established, the U.S. state where it seeks to go, the trust assets and the interests of the settlor and/or beneficiaries.

Terms of the Trust Agreement

The trust agreement may include a provision automatically removing a foreign trustee when certain conditions are present (for instance, at the death of a foreign settlor when there are only U.S. beneficiaries). Alternatively, the trust may give the trustee or a trust protector ("protector") the power to remove a trustee and appoint a new U.S. trustee and change the governing law of the trust. By eliminating the foreign trustee(s), the protector could effectively onshore the trust for U.S. income tax purposes (provided there are no other non-U.S. persons in positions of control). Note, however, that changing the trustee will not automatically change the governing law to the jurisdiction where the trustee is resident and it will be important to do both in order to avoid any uncertainty as to which trust law will govern the administration of the trust.

If there are no provisions addressing a change in trustee and governing law that would allow for migration, the trust document may give the trustee the discretion to appoint assets of the trust to (or for the benefit of) some or all of the U.S. beneficiaries in trust. This power of appointment in the hands of a trustee is commonly referred to as "decanting."

It is important to draft trusts in a flexible manner to take into account changing circumstances, such as a change in

[13]Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, must be filed for receipt of any distribution from a foreign trust.
[14]Using a PIC to hold the assets of a FGT is common practice to block application of the U.S. estate tax on U.S. situs assets.
[15]U.S. Treasury Regulation 1.679-2(a)(4).
[16]See footnote 13.

nationality of a beneficiary. If it is known from the outset that the trust will have U.S. beneficiaries or remaindermen, it is a good idea to insert "self-migrating" or decanting provisions. These will enable the trust to either automatically move to the U.S. upon the occurrence of an event (like the death of the settlor of a FGT when the trust would otherwise become a FNGT for U.S. beneficiaries) or provide the trustee or a protector with the tools to move the assets into a different trust.

Onshoring via Statute

If the trust does not include provisions that allow for migrating or decanting, trust statutes or case law in the jurisdiction where the trust has been established may achieve the same result. Many offshore jurisdictions such as the Cayman Islands, Bermuda and other British Overseas Territories, as well as the British Commonwealth countries, follow English Common Law principles that have historically supported a trustee establishing a new trust for the benefit of the beneficiaries.[17] Another option if the trust is silent as to migration or decanting and the trustee does not have discretion under the instrument, is for the parties to petition the court to obtain a modification allowing the trust to be onshored.

While migrating and decanting can both enable onshoring, there are important differences between the two that are worth noting. One may be a better choice over the other depending on the circumstances.

Migration

A migrated trust can be defined as one that has been created under the laws of a jurisdiction outside of the U.S. and, through employment of any of the mechanisms discussed, it will end up being administered in, and governed by, the trust laws of a state in the U.S.

A migrated trust continues under the original trust agreement and typically most, if not all, of the provisions aside from those changed in the migration (such as the governing law, etc.) remain the same. It may be possible to make certain amendments to the trust once it has been moved onshore. In Delaware, for example, amendments to certain provisions in a trust may be accomplished via a nonjudicial settlement agreement or the consent of the parties.

Decanting

A trust that is decanted is one where the trust assets are poured from one trust into another trust. Decanting can be accomplished by either creating a new trust with new terms and distributing the assets of the old trust to the new trust, or distributing the assets of the old trust to a trust already in existence for the benefit of the beneficiary(ies). This can generally be accomplished because the original trust specifically allows the trustee to distribute or appoint the assets to another trust for the benefit of one or more of the beneficiaries, or the original jurisdiction has a decanting statute. These statutes are basically a codification of a trustee's common law right to make distributions for the benefit of the beneficiaries with the rationale that if the trustee has the discretionary power to appoint trust property, then that discretion can be utilized to create a second trust for the beneficiaries.[18]

Decanting has the advantage of moving the assets to a new trust that may have more favorable terms. Among other things, it is a way to amend the terms and correct any drafting errors. The new trust can be a clean slate, although some provisions may need to remain the same (e.g., beneficiaries, perpetuities period, etc.).[19]

When decanting from an offshore trust to a U.S. trust, the U.S. trustee must file a Form 3520 for the distribution received from the foreign trust in the year of funding. The U.S. trustee in a migration should not have to file a Form 3520; however, there may be differing views on this between practitioners, and professional advice should be sought.

Exhibit 2: The Decision to Onshore

Consider a settlor who establishes a trust with an underlying PIC in a year before CFC rules came into effect in his home country. As long as undistributed profits generated in the PIC prior to the year the CFC rules came into effect are not distributed, a tax liability has not yet

[17] See Pilkington v. Inland Revenue Comm'rs (1962) H.L. 612 at 615.

[18] Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940).

[19] For instance, some jurisdictions may require that no beneficiaries can be deleted when a trust is decanted, while others may permit this but preclude adding any new beneficiaries.

arisen to the settlor. Therefore, in order to preserve the tax deferral, it is important that any change in situs of the trust not be deemed to be a liquidation of the structure. A migration of the trust would not be deemed a liquidation, but the decanting of the trust assets to a new trust would arguably be a liquidation of the original trust, thus causing immediate taxation. It is critical to consult experienced counsel in both the home country and the new country before jumping into the process of onshoring.

Other important considerations when onshoring:

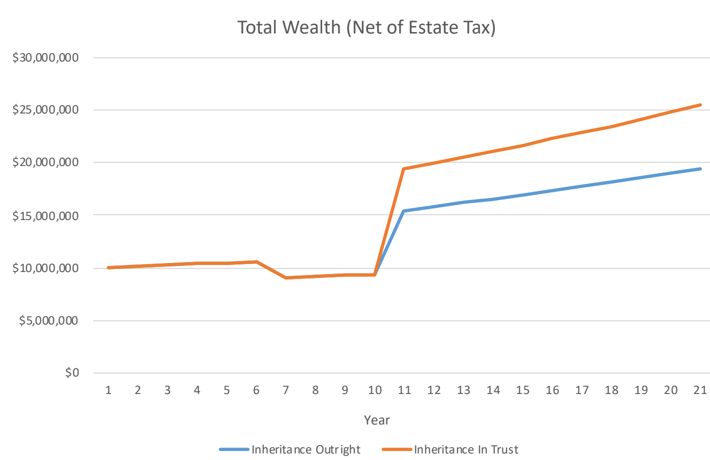
Will the entire trust or just a portion be onshored?

It is not always the case that the entire foreign trust will seek to move to the U.S., particularly if the trust also has non-U.S. beneficiaries. If the trust is a FNGT, converting it to a taxable USNGT may not be efficient for those beneficiaries who could benefit from the trust remaining in a low or no tax jurisdiction. If a trust has both U.S. and non-U.S. beneficiaries, the trustee may want to split the trust shares and onshore only the portion applicable to U.S. beneficiaries. Factors such as the size of the trusts after the split will be important, however, as maintaining two family trusts may be more expensive than maintaining one, and the two smaller trusts may not have the investment power they had as one. Furthermore, the choice of investments for the trust may be complicated by having beneficiaries who are not all U.S. or vice versa.[20]

However, it is increasingly common that a foreign settlor create a FGT in the U.S. even if the trust has both U.S. and non-U.S. beneficiaries. The tax implications are the same for the settlor and the beneficiaries as with an offshore FGT (i.e., the settlor is responsible for all of the income taxes) on the trust property, and upon the death of the settlor distributions can be made outright or in further trust offshore to the non-U.S. beneficiaries.

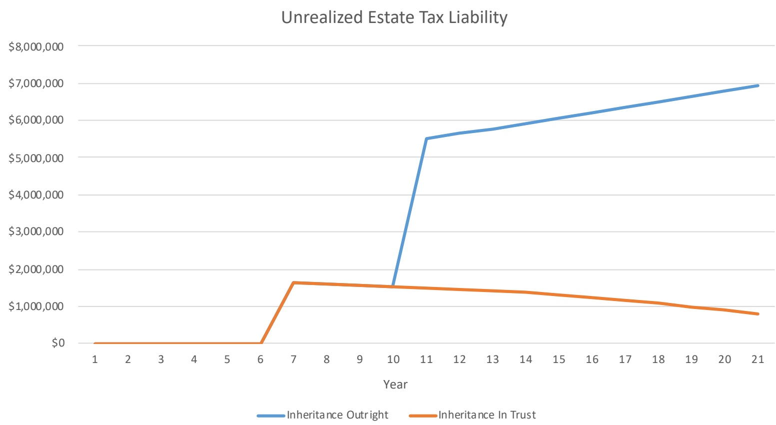
If consideration were being given to making outright distributions to U.S. beneficiaries instead of continuing their shares of the trust onshore, the trustee should think twice before wasting an opportunity to do some estate tax planning on behalf of the U.S. beneficiaries. If the U.S. beneficiaries have sufficient assets in their own names such that their estates would already be in a taxable position, or would be thrust into a taxable position upon the receipt of a large trust distribution, it is more tax efficient to avoid making outright distributions to those beneficiaries of all or a portion of their shares. Instead, their shares of the trust could be onshored to a U.S. NGT composed of any amounts in excess of the estate tax exemption available at the time.[21]

As an example, consider Joe, a 60-year-old beneficiary with a net worth of $10 million. He is the sole beneficiary of an offshore trust valued at $20 million. How much should the trustee consider keeping in trust for Joe and his descendants' benefit rather than distribute outright, and what is the potential U.S. estate tax savings? As illustrated in the graphs below, if we assume Joe spends $300,000 per year adjusted for inflation, the assets he currently holds in his own name will attract an estate tax starting in year 2026. If the settlor of the offshore trust dies in year 10 of the trust and Joe's share continues in an onshore trust until he passes at age 80, his estate will potentially save $6 million. While it is difficult to predict what the U.S. estate tax exemption will be at the time of Joe's death, it can be a missed planning opportunity to terminate the trust upon the death of the settlor given the significant tax savings obtained by continuing the trust.



[20]Regulation S of the Securities Act of 1933, for example, limits the sale of certain unregistered securities to U.S. persons.

[21]With the U.S, federal estate tax at an all-time high of $11.58 million in 2020 this may not be as relevant for many. However this is scheduled to sunset in 2026 and may be decreased even earlier depending on actions of the U.S. legislature.



Undistributed Net Income (UNI)

If the trust is a FNGT and has had U.S. beneficiaries for an extended period of time, then the trust may have UNI[22] if at any point in time it was accumulating income for U.S. beneficiaries. This UNI does not disappear simply because the trust becomes a U.S. trust,[23] but the UNI will stop growing if the trust migrates. Future distributions of the UNI pool of funds will be subject to the throwback tax, but the new income accumulated while the trust is U.S. will not be. This makes sense as the trust itself will become a U.S. income taxpayer and will pay tax on the undistributed income every year, thus eliminating the rationale for the application of the throwback tax. Caution should be applied, however, in decanting a trust with UNI as it may be construed as a termination of the trust as opposed to a continuation, and become immediately taxable.[24]

Underlying PICs and Controlled Foreign Corporations (CFCs)

It is common for FGTs to own shares of a PIC or CFC that holds U.S. situs assets. Historically, a "check the box" election would be made soon after a foreign grantor's death to treat CFCs and PICs held under their FGTs as disregarded entities while still benefiting from a posthumous step up in cost basis. After the passage of the Tax Cuts and Jobs Act in December 2017, there is no longer a window of opportunity to make this election without triggering ordinary income tax on the appreciated assets in the CFC.[25]

However, once a trust is onshored for the benefit of U.S. persons, it is no longer necessary, or advisable, to maintain the CFCs in place under the trust given the onerous taxation and reporting obligations that will arise. It will be important to engage a professional U.S. tax advisor familiar with cross-border issues to unwind the CFC and make the appropriate tax and information filings.

Passive Foreign Investment Companies (PFICs)[26]

It is commonplace for a foreign investor (i.e., through a FGT, FNGT or PIC) to invest in the kinds of investments that are classified as PFICs in the hands of a U.S. investor. Most foreign mutual, hedge or equity funds will qualify as PFICs and, even if structured as a foreign partnership, may invest in underlying assets classified as PFICs. It is important to keep in mind that trust investments may therefore need to change in order to avoid PFIC treatment. However, once the trust becomes a U.S. trust, the investment may not be easy to unwind. Certain hedge funds or private equity funds may have lock-up periods and are not readily sold on the secondary market without a deep discount on the sales price. Furthermore, the practical problem may exist that the fund does not allow transfers to U.S. owners and the offshore PIC may have to be maintained until the fund terminates. Generally, the trustee should consider filing a Qualifying Electing Fund (QEF) election, if possible, to avoid the application of PFIC taxation, which is computed in a manner very similar to the throwback tax for UNI.[27] The QEF election will require the fund to provide detailed reporting, which may also be expensive to obtain depending on the fund.

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[22] IRC Section 665(a) defines UNI as the amount by which the distributable net income (DNI) of the trust exceeds the sum of the amount of income required to be distributed currently, amounts properly paid or credited or required to be distributed, and the amount of taxes imposed on the trust attributable to the DNI.

[23] Rev. Rul. 91-6, 1991-1 CB 89.

[24] See Notice 2011-101; See NYSSCPA letter to IRS dated April 19, 2012 re: IRS Notice 2011-101, Transfers By A Trustee From an Irrevocable Trust to Another Irrevocable Trust (Sometimes Called "Decanting"); Requests For Comments; See also ACTEC comments dated April 2, 2012 on Transfers by a Trustee from an Irrevocable Trust to Another Irrevocable Trust (Sometimes Called "Decanting") (Notice 2011-101) Released December 21, 2011

[25] See "Pre-Immigration Planning – Foreign Trusts" by Joan K. Crain and Myriam Soto, BNY Mellon Wealth Management.

[26] A PFIC is a foreign-based corporation where 50% or more of the assets held by the entity produce passive income or 75% or more of its gross income is passive income. There is no ownership threshold for the PFIC rules to apply. IRC Section 1297.

[27] IRC Section 1295(b).

Re-titling of Assets

With any method of onshoring, if trust assets are appointed to a new trust or the trustee of the trust changes in a migration, they will need to be re-titled into the name of the new U.S. trustee. This means that for banking, custody or investment accounts, new accounts will need to be opened. If the trust holds real estate assets, then re-titling could result in a stamp tax.

Rule Against Perpetuities (RAP)

Where an irrevocable offshore trust has a term limited by a perpetuity period that is shorter than that required in a U.S. state (many U.S. states have abolished, or greatly extended, the RAP), the original perpetuity period will attach to the assets transferred.[28] For example, the Cayman Islands has a 150-year RAP for conventional trusts, and the BVI RAP is 360 years. On the other hand, Delaware, South Dakota, Nevada, Wyoming and other U.S. states have abolished the RAP. Care must be taken not to violate the RAP or risk an ineffective migration or decanting.[29]

Changing Trustee

Ideally, the offshore trust company also has an onshore presence and can provide trustee services onshore. The institution will already have vetted and approved the important information, such as source of wealth. A smoother transition is much more likely where the Know Your Customer (KYC) and Anti-Money Laundering (AML) process is not required to be repeated (although inevitably some documentation may need to be updated, such as expired passports, proof of address or tax forms). In addition, it will also limit the need to provide yet another party with confidential information and minimize risks of leaks or hacks. Further, and often overlooked, is the fact that indemnities will not pose an issue or roadblock if the trust stays within the umbrella of the same institution. Otherwise, the outgoing foreign trustee will typically seek an indemnity from the incoming U.S. trustee. This will be negotiated and can delay a trust's transition significantly depending on the types of indemnification being sought. Conversely, if the trust is moving from a sister trust company offshore to onshore, a protracted negotiation involving indemnities would be unusual.

Choice of State Law

Any trust brought onshore to the U.S., whether through migration or decanting, must choose the governing law of a specific state within the U.S. as there is no federal trust law in the U.S. Trust statutes differ significantly among states and the choice of state will be very important depending on the goals of the settlor and beneficiaries, and on fulfilling the intent of the trust in the future.

Once the trust has been migrated or decanted to a new trust in a particular state in the U.S., it may be able to take advantage of that state's trust laws to amend the trust and include additional provisions that may be more beneficial. For example, if there are minor beneficiaries and the settlor does not want them to be aware of a large trust fund for their benefit, silent trust provisions can be added to the trust. If more control is desired over the trust investments or distributions, directed trust provisions can be added to the trust to give an independent investment or distribution advisor the power to direct investments or distributions.

The U.S. has become a premier trust jurisdiction and many states compete for trust business with favorable trust laws. A review of the state's trust laws and how they benefit the trust beneficiaries will be critical. Other factors that will go into the decision involve the location of existing professional relationships with legal and tax advisors or with a trust company or bank, where the beneficiaries or settlor reside, where the trust assets are situated and the existence of a sophisticated court system where trusts are well understood, such as the Delaware Chancery Court, which has a long history of jurisprudence.

[28] Wioncek, Jennifer J., The Ins and Outs of Domestication of Foreign Trusts, International Journal (BNA), June 8, 2018.
[29] Ibid.

Why Not Start Onshore to Begin With?

Of course, there will be no need to worry about migrating or decanting a trust if one simply begins with a U.S. law trust. This works very well for those families where the grantor is foreign but all of the trust beneficiaries are U.S. persons. Very simply, the trust can be foreign for U.S. tax purposes during the lifetime of the grantor, and upon the death of the grantor (assuming no other non-U.S. person will control a substantial decision of the trust), the trust will automatically convert to a U.S. trust.

There are several advantages to beginning with a U.S. trust, not least of which is avoiding the expense of a decanting or migration, which will involve attorney fees and potential court interventions. Secondly, an offshore trustee may not have a counterpart in the U.S. who can accept the trust, so trustees will need to be changed. If there is a long history with a certain trust company, it can be painful to change and have to endure another KYC due diligence process with a new trustee who does not know the settlor or the beneficiary's history. Lastly, the income tax benefits are the same for an offshore FGT, but the transition onshore to a U.S. trust (for U.S. tax purposes) will occur automatically upon the happening of an event such as the death of the grantor. For the most part, there will be nothing proactive for beneficiaries or trustees to do, in particular during what could be a difficult and emotional time. If the trust will also have non-U.S. beneficiaries, it may be best to split the trust between U.S. and non-U.S. beneficiaries once it becomes a USNGT.

It would not be desirable to have a U.S. law trust that was treated as a FNGT for U.S. tax purposes if the trust will have U.S. beneficiaries, as all of the same issues regarding accumulated income and the throwback tax will be present in the same manner as if the trust were an offshore FNGT. However, a USFNGT for all foreign beneficiaries would not have these issues and is an increasingly popular succession vehicle which, if properly drafted, can enjoy minimal U.S. taxation.

Conclusion

The past few years have seen a significant change on the part of wealthy global families, reversing the trend from shunning to seeking a U.S. situs for their trusts. In addition to choosing a U.S. situs when creating trusts, a growing number of settlors and beneficiaries are interested in moving existing trusts from other jurisdictions to the U.S. There are many reasons behind this, especially when some or all of the trust beneficiaries are U.S. persons. However, as appealing as such onshoring may seem, whether doing so by decanting or migrating the trust, the devil is in the details. Experienced counsel is critical in order to avoid incurring unnecessary taxes, professional fees and even litigation among family members.

About the Authors

Joan K. Crain, CFP,® CTFA, TEP
Senior Director, Global Family Wealth Strategist

As a senior director and global family wealth strategist, Joan works closely with families and their advisors to provide comprehensive wealth planning. She specializes in multinational planning, business succession, family governance and philanthropy.

With more than 25 years of experience working with large, multi-generational families, she is frequently invited to speak to clients and professional groups such as the American Bar Association, the Hong Kong American Chamber of Commerce and numerous estate planning councils throughout the United States, Canada, the Middle East and Asia. She has recently been featured in various publications and broadcast media including The Wall Street Journal, Trusts & Estates magazine, the American Journal of Family Law and CNBC-Asia. Joan received her MBA (Finance) from Rollins College, her Bachelor of Education from Queens University, and her Bachelor of Music from McGill University.

She holds the designations of Certified Financial Planner, Certified Trust & Financial Advisor and the international trust and estate designation TEP. She was named 2017 Industry Thought Leader by Global Finance magazine and was a founding contributor to The GCC Governance Code of the Family Business Council-Gulf.

Myriam Soto
Head of International Wealth Planning and Fiduciary Services

As Head of International Wealth Planning and Fiduciary Services, Myriam works directly with clients across the world and provides oversight and leadership to BNY Mellon's Global Fiduciary Services teams based in the Cayman Islands, New York and Miami. Myriam leverages the broad capabilities of BNY Mellon to provide global families tailored wealth planning solutions. She frequently works in coordination with our clients' professional advisors to holistically approach the multijurisdictional issues impacting families and family offices.

Myriam has over 20 years of experience in financial services. She most recently served as a Sr. Wealth Advisor in the JP Morgan Latin America Private Bank where she worked with high and ultra-high net worth international individuals and families to develop and implement wealth transfer strategies.

Prior to this, Myriam spent the majority of her career with BNY Mellon where over a 16 year period in NY and Miami she held various roles within International Wealth Management with the most recent being Head of Global Fiduciary Planning and Development and the President and Chairman of the Board of the BNY Mellon Trust Company Cayman.

Myriam received her Bachelor's Degree in Liberal Arts from Hofstra University, Juris Doctor from Pepperdine University School of Law and LL.M Taxation from New York University School of Law. She is a full member of the Society of Trust and Estate Practitioners and is on the Board of Directors for the BNY Mellon Trust Company (Cayman) Limited.