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COVID-19 tax policy updates

Congress has approved, and President Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a massive tax-and-spending package intended to provide additional economic relief to address the impact of the COVID-19 pandemic. *COVID-19 stimulus: A taxpayer guide*, a Deloitte Tax LLP publication, looks at the tax provisions in the new legislation and their potential implications for business and individual taxpayers.

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/covid-19-tax-policy-updates.html?id=us:2em:3na:usic:awa:tax:042020&sfid=70110000001xmU2QAI>

Additional Resources

- **Combating COVID-19 with resilience:** A collection of Global Deloitte Insights to help businesses manage and mitigate the risk associated with COVID-19
URL: <https://www2.deloitte.com/global/en/pages/about-deloitte/topics/combating-covid-19-with-resilience.html?id=us:2em:3na:usic:awa:tax:042020&sfid=70110000001xmU2QAI>
- **Deloitte COVID-19 Tax & Fiscal Measures:** Deloitte is offering two free digital resources which can help you keep track of tax and financial measures introduced around the world and review the measures by country.

URL: <https://www2.deloitte.com/global/en/pages/tax/solutions/tax-atlas-signal.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011O000001xmU2QAI>

- Daily email alerts called Signal Topic Alerts on COVID-19 tax measures announced by governments and discussed in the world's media and the Weekly Topic Alert Digest
- A reference microsite COVID-19 Tax & Financial Measures in its proprietary Tax Atlas application which provides summaries of the measures.
- **IRS FAQs: Employee Retention Credit under the CARES Act**
URL: <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>

Land of the Free and Home of the...40% Estate Tax: Inbound Estate and Gift Tax Considerations

Various events (*e.g.* employment, business ventures, education, family transitions, and sudden windfalls) present opportunities for US non-residents to move to the US on a temporary or permanent basis. Interestingly, the “temporary” or “permanent” intentions of the move can morph very quickly after moving to the US. One could prefer the pace of life in the French countryside or fall in love with NYC during a temporary work assignment – never to return to their home country.

Being unprepared when it comes to the US Estate and Gift tax regimes may introduce unexpected tax consequences. Deloitte's Private Wealth professionals provide consultative services to hundreds of executives, business owners, and wealthy families who are considering a move to the US, to increase knowledge, plan for global tax implications, and most importantly, avoid costly surprises.

The first step to avoiding surprises is to understand the basics. Let's define some of the terms necessary to understand the Estate and Gift Tax Considerations for US Inbound persons.

US Resident:

- US citizen
- Green card holder, or a
- Person meeting the substantial presence test
 - To meet the substantial presence test for the calendar year, you must be physically present in the US for at least:
 - 31 days during the current year, and
 - 183 days during the 3-year period that include the current year and the 2 years immediately before that
- Certain facts and circumstances can override an individual's status as a US resident, so it is important to review your specific situation with an experienced advisor to determine if any exceptions are available.
- **US Non-resident (“nonresident alien”):** Any individual who is not a US resident. *It is important to understand that residency for US income tax purposes does not mean domiciliary for US estate and gift tax purposes.*
- **US Domiciliary:** Person residing in the US who intends to live the remainder of their life in the US. “Domicile” is a legal term and based on facts and circumstances specific to each individual. Factors considered by the IRS when determining domicile include; statements of intention, length of stay in the US, green card status, style of worldwide living, citizenship, locations of business interests, day-to-day club and religious affiliations, where someone is registered to vote, and locale of drivers' licenses. A person can only have one domicile at any given point in time. However, because the concept of domicile is subjective, different taxing authorities may simultaneously assert that the same taxpayer is domiciled in their respective jurisdictions. The US has estate and/or gift tax treaties with 15 countries to help define domicile and resolve dual taxation issues.
- **Non-US Domiciliary:** An individual who is not a US domiciliary.
- **US situs tangible assets:** Real property, business assets, and tangible personal property located in the US.
- **US situs intangible assets:** Most commonly, stock of US corporations, but this category is not limited to just stock.

Next, let's highlight the general rules applicable to US domiciliaries and non-US domiciliaries.

- US Domiciliaries are subject to the same US Federal estate and gift tax rules as US citizens.
 - At death, Estate Tax (40% in 2020) is imposed upon the fair market value of worldwide assets.
 - \$11.58M lifetime estate and gift tax exemption is available, per person, as of 2020.
 - \$15K annual gift tax exclusion is available, per person, as of 2020.
- Non-US Domiciliaries are subject to more limited application of US federal estate and gift tax rules, but they also receive lower exemptions.
 - At death, estate tax (highest rate is 40% as of 2020) is imposed upon:
 - FMV of US situs tangible and intangible assets
 - In excess of \$60,000 exemption.
 - During life, gift tax (same rate table as for estate tax) is imposed on gifts of US situs tangible property. Gifts of intangibles, even if US situs, are not subject to US gift tax.

No lifetime exemption is available for gifts of US situs assets.

Finally, let's discuss some key events which could bring a non-US person within the realm of US Estate and Gift taxation:

- Significant liquidity events (*e.g.* sales of business interests, IPOs, corporate mergers).
 - Liquidity events giving rise to a large windfall offer opportunities for location changes, new investments, and estate and gift planning. An advisor should be consulted during the initial planning discussions. Decisions and action steps need to be made timely to be effective.
- Personal life events including marriage and divorce, new children and grandchildren.
 - Family dynamics such as additions of newborns (or divorce) play a significant role in planning and present key discussion points.
- Business succession planning.
 - Goals, valuations, and timing are critical factors in successfully planning a change in business ownership. For example, the next owner may have fresh ideas regarding business operations and want to bring a portion of the business to the US. A trusted advisor should be consulted to help guide the steps to hand off the baton in an efficient and effective manner.

Inbound Estate and Gift Tax matters are incredibly complex. Deloitte's Private Wealth professionals are experienced and knowledgeable in educating our clients on cross-border Estate and Gift Tax issues, working with taxpayers and their advisors to mitigate worldwide estate and gift taxes, and avoid surprises when it comes to the global complexities.

Additional materials

- Tax planning for US individuals living abroad—2018
[URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-planning-for-us-individuals-living-abroad.pdf](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-planning-for-us-individuals-living-abroad.pdf)
- Taxation of foreign nationals by the United States—2018
[URL: https://www2.deloitte.com/us/en/pages/tax/articles/taxation-of-foreign-nationals-by-the-us.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011000001xmU2QAI](https://www2.deloitte.com/us/en/pages/tax/articles/taxation-of-foreign-nationals-by-the-us.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011000001xmU2QAI)
- US estate and gift tax rules for resident and nonresident aliens
[URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-us-estate-and-gift-tax-rules-for-resident-and-nonresident-aliens.pdf](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-us-estate-and-gift-tax-rules-for-resident-and-nonresident-aliens.pdf)

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With US Nexus Comes Great Responsibility: Beyond tax considerations for non-US companies

Companies considering investing into the United States face complex tax and investment considerations unique to US inbound taxpayers, with deep tax planning needed to navigate the complex landscape. But what might not be so readily apparent are how US global trade laws and regulations may impact the global operations of multi-national enterprises. The US Government sometimes pursues foreign policy, national security, and other objectives through regulatory mechanisms, and increasingly so within the global trade context. US inbound taxpayers must consider the direct and indirect impact of US global trade laws and regulations across its global enterprise.

Overview of US trade controls

In order to preserve the national security, foreign policy, and global trade international agreement obligations, the US Government regulates trade using numerous mechanisms overseen by multiple government agencies. These mechanisms, collectively known as trade controls, include import and customs regulations administered primarily by the US Departments of Homeland Security, Treasury, Commerce, and International Trade Commission, as well as export controls and economic sanctions primarily administered primarily by the US Departments of Commerce, State, and Treasury. Broadly, import and customs regulations are responsible for collecting tariffs and controlling the flow of goods to protect economic and national security interests. Export controls and sanctions are designed to prevent US-origin goods, technologies, and financial assets from being involved in circumstances contrary to the objectives of the US Government.

Why do US trade controls matter for non-US companies?

One of the most widely understood impacts for US inbound taxpayers is the link between transfer pricing and customs valuation. While not the subject of this article, the link between a company's transfer pricing and customs valuation can have major impacts on its planning and strategy. Deloitte releases annually a comprehensive Country Guide that details the link between transfer pricing and customs valuation for over 50 countries, compiling essential information regarding the customs-related requirements and implication of related party pricing and retroactive transfer pricing adjustments. A link to the latest report can be found on Deloitte.com.

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/customs-and-global-trade-management-benchmarking-survey.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011000001xmU2QAI>

Tariffs can be based not only on the nature of a good but also on its Country of Origin ("COO"). Non-US companies who act as non-resident importers in the US may find themselves facing tariffs which do not apply in their jurisdiction based on COO determination. In cases of enforcement, if the US Government finds that foreign products imported into the country are being sold at an unfairly low or subsidized price, it may attempt to collect Antidumping and Countervailing Duties ("AD/CVD").

On the export side, it is not difficult for a non-US company to gain a US legal nexus, particularly if the company deals with the following:

- US-origin items;
- "US Persons" as defined in the applicable regulations;
- Non-US items with certain levels of US-origin content; and/or
- Non-US items based on or derived from US technology.

Can you give us an example?

Let us consider an export-focused example for how US global trade laws can impact a non-US company. Consider a hypothetical French technology manufacturer, Enterprise A, which has operations confined to the European Union. Enterprise A decides to create a US subsidiary to augment its supply chain and begins to manufacture powerful microprocessors and other items that use encryption technology in the US. Those items are now subject to US laws and regulations for export purposes, and would be controlled for export by the US Export Administration Regulations ("EAR").

Enterprise A has a loyal customer in Iran, and because France has no comprehensive embargo against Iran, it has historically been able to export, with appropriate French Government authorization, to its Iranian customer. The US, on the other hand, *does* have a comprehensive embargo against Iran; good may not be exported to Iran without some form of authorization from the Office of Foreign Assets Control (“OFAC”) within the Department of Treasury. Enterprise A’s US subsidiary, subject to US jurisdiction, must now take steps to remain compliant with US trade controls, and therefore cannot export its products to the Iranian customer without appropriate US government authorization.

That’s just in the US though, right?

Not quite. US trade controls are extraterritorial, meaning that they apply outside the physical borders of the US. This means that US-origin items already exported from the US are still regulated by US law if they are subsequently exported (“re-exported”) to another destination.

Suppose Enterprise A also has a Japanese subsidiary. Enterprise A’s US subsidiary previously exported the microprocessors manufactured in its US facility to its headquarters outside Paris with the appropriate US government authorization. It now needs to reexport those microprocessors to a warehouse outside Tokyo. Although the products have since left the US, they are still controlled for export and re-export purposes by the EAR. The export from France to Japan, considered a re-export from the US, must be treated as an independent transaction for the purposes of trade controls. Failure to obtain re-export approval could result in a violation of US law.

Secondary sanctions

Additionally, consider the implication of US Secondary sanctions. Secondary Sanctions under US law are considered to be the threat of US sanctions against non-US individuals, entities, or organizations for engaging in certain specific activities that may not have any US nexus at all – that is, not involving US products, US banking system, US dollars, US investments, US technology, etc. Through the use of secondary sanctions, the US is able to discourage non-US actors from conducting business with specified countries and can penalize actors for engaging with sanctioned targets even without the jurisdiction to make that engagement illegal.

Suppose Enterprise A never creates its US subsidiary and continues to export French-origin products to a customer in Iran, in full compliance with French and EU laws and regulations. US laws and regulations, and specifically the secondary sanctions resulting from certain US legislation targeted against Iran, would likely prohibit that transaction which was otherwise lawful under French law. In addition, OFAC could designate Enterprise A as a Specially Designated National (“SDN”), effectively cutting the company off from the US market. Thus, the secondary sanctions apply even in the absence of a clear nexus to the United States, though the presence of an Enterprise A subsidiary in the US would facilitate legal enforcement of US sanctions laws.

What about mergers and acquisitions?

Trade control considerations can be overlooked in the M&A due diligence process, much to the detriment of both parties. In the case of a non-US company acquiring or investing in a US company, the former will inherit the trade compliance responsibilities of the latter under the legal principle of successor liability, in addition to its violations, whether discovered or not. The acquirer can be held liable for the target entity’s past violations. In addition, the potential acquisition or investment may be subject to review by the Committee on Foreign Investment in the United States (“CFIUS”), which examines acquisitions from the perspective of US national security. CFIUS takes a number of factors into account, including whether non-US persons will gain controlling positions in the future US entity and whether the US target deals in export-controlled goods and technologies.

So what?

Compliance with US trade controls is a serious matter. Regulatory violations can result in significant consequences including civil and criminal penalties, loss of import/export privileges, debarment, and even imprisonment.

Certain penalties were increased in January 2020. Check out some of most serious penalties below:

Regulations	Maximum Civil Penalty (per violation)	Maximum Criminal Penalty (per violation)
19 C.F.R. § 1497, Failure to Declare	1000 percent of goods value	N/A
18 USC. § 541, Entry of Goods	N/A	Fines vary; 2 years imprisonment; both
15 C.F.R. §§ 730 – 774, Export Administration Regulations (“EAR”)	\$300,000	\$1,000,000; 20 years imprisonment; or both
22 C.F.R. §§ 120 – 130, International Traffic in Arms Regulations (“ITAR”)	\$1,183,736	\$1,000,000; 20 years imprisonment; or both
31 C.F.R. Part 500, Foreign Assets Control Regulations (“FACR”)	\$302,804 or twice the amount of violating transaction	\$1,000,000; 20 years imprisonment; or both

In conclusion, non-US companies need to consider more than tax when a commercial nexus with the US arises. Global trade is another critical piece of the puzzle when navigating multiple legal jurisdictions.

How can Deloitte help?

Deloitte’s Global Trade Advisory (GTA) is a global practice group of over five hundred professionals, located in over 115 countries, with specialists in US trade laws and regulations located across the country. Our market-leading practice is experienced and one of the largest in our competitive arena, with a reputation for quality and experience in providing advice on trade planning, export controls, sanctions, and import/customs matters.

GTA has extensive experience assisting non-US companies with understanding their US trade compliance responsibilities as well as with strategizing and developing effective compliance programs that suit our clients’ individual needs.

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Calendars to watch

Each edition, be sure to mark your calendars for some of the more important events (recent and upcoming) as well as tax developments making in impact on businesses investing into the United States.

Upcoming activities

March 30
11:00 p.m. ET

Dbriefs archive: Special Edition | COVID-19: Accounting and reporting implications of the outbreak
Watch

URL: <https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/march/2020/dbriefs-covid19-accounting-reporting-implications-of-outbreak.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011000001xmU2QAI>

April 3
11:00 a.m. ET

Dbriefs archive: Special Edition | Controllershship's measured response to a crisis
Watch

URL: <https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/april/2020/dbriefs-controllershship-measured-response-to-crisis.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011O000001xmU2QAI>

April 6
1:00 p.m. ET

Dbriefs archive: Special Edition | Tax implications of the CARES Act for private companies and their owners
Watch

URL: <https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/april/2020/dbriefs-tax-implications-of-cares-act-for-private-companies-their-owners.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011O000001xmU2QAI>

April 9
10:00 a.m. ET

Dbriefs archive: Special Edition | CARES Act impacts on life sciences and health care organizations
Watch

URL: <https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/april/2020/dbriefs-cares-act-impacts-on-life-sciences-health-care-organizations.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011O000001xmU2QAI>

April 16
1:00 p.m. ET

Dbriefs archive: Tax technology update: Indirect tax edition
Watch

URL: <https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/april/2020/dbriefs-tax-technology-update-indirect-tax-edition.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011O000001xmU2QAI>

May 14
11:00 a.m. ET

Dbriefs: Global Economic update: US and China economic relations
Register

URL: <https://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/may/2020/dbriefs-global-economic-update-us-china-economic-relations.html?id=us:2em:3na:usic:awa:tax:042020&sfid=7011O000001xmU2QAI>

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