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THE USE OF **ENTITIES** IN STRUCTURING Foreign Invest

International political uncertainty has continued to lead foreign investors to the U.S. The U.S. is politically and economically more stable, legally and fiscally transparent, and it imposes no currency controls. Various entity choices exist for investors. ■ Foreign investors share certain common concerns, all of which play into structuring and entity selection. First, they may seek privacy. For example, a member of the Communist Party of China may have concerns about political exposure, a Russian oligarch about his competition, and a Brazilian industrialist for his physical safety after an increase in kidnappings and other crimes. This could mean that entities should be used to obfuscate or camouflage title, or to keep the foreign individual's name off U.S. tax returns. Second, foreigners usually desire to shield themselves and their U.S. holdings from creditor claims. Different entity types would afford a different degree of liability protection. Third, foreign investors need to minimize their worldwide income and estate tax liability. Here, concepts such as the branch profits tax, FIRPTA, withholding, and others (all discussed below), come into play to determine the proper entity choice.

The privacy, liability, and tax concerns of foreign investors in the U.S. require consideration of alternative ownership structures.

Privacy

Foreign investors, for cultural or political reasons, are often more concerned about privacy than U.S. investors. Privacy is attainable if the U.S. business or real estate is acquired by a legal entity. If using a trust to acquire real estate, remember that the name of the trustee and the name of the trust must appear on the recorded deed. The investor thus should not be the trustee, and the trust name should not include the investor's name. Lawyers commonly use a client's last name as the trust name, but there is no such requirement.

Similarly, if using a legal entity, a generic name should be used. Ownership information for legal entities is never public, but almost all jurisdictions require the disclosure of corporate officers, the manager of a limited liability company (LLC), or the general partner of a limited partnership. This may be avoided by incorporating as a Delaware or a New Mexico LLC. Both states do not require the manager's identity to be disclosed.[1]

When an entity has to be registered locally, and the manager's identity has to be disclosed, consider a two-tier structure, with a local LLC to own the U.S. business or real estate, and a Delaware or a New Mexico LLC to act as the manager of the local LLC. Care should be exercised so that the Delaware or New Mexico LLC is not deemed to be doing business locally, otherwise it would also have to register.[2]

If the U.S. real estate will be encumbered by debt, then even if title is taken in the name of a trust or an LLC, the borrower's name will appear on the recorded deed of trust. The author has had success in preventing the disclosure of the borrower's name by having the trust act as the borrower, with the investor personally guaranteeing the loan. This ensures that the investor's name does not appear on any recorded documents.

Liability Protection

Corporations, limited partnerships, and LLCs will afford their individual owners a shield for any liability arising from the assets or the business of the entity.[3] However, limited partnerships and LLCs are not required to maintain certain corporate formalities (like holding annual meetings of shareholders and maintaining annual minutes) affording creditors fewer bases for piercing the corporate veil.[4]

Interests in limited partnerships and LLCs are not attachable by creditors, making them a more effective asset protection vehicle than corporations.[5] Thus, for example, when a creditor obtains a judgment against an individual who owns an apartment building through a corporation, the creditor can force the debtor to turn over the stock of the corporation, resulting in the loss of all corporate assets.[6] Had the debtor owned the apartment building through an LLC or a limited partnership, the creditor's remedy would be limited to a charging order—a court order that places a lien on distributions actually made from the LLC or limited partnership.[7] The charging order limitation is an evolving area of the law. In 2010 the Florida Supreme Court held that the charging order limitation does not apply to Florida single-member LLCs.[8] Florida's charging order statute provides that "Unless otherwise provided in the articles of organization or operating agreement, an assignee of a limited liability company interest may become a member only if all members other than the member assigning the interest consent."[9] Given that in a single-member LLC there are no other members who may withhold consent, the Florida Supreme Court appears to have been correct in its ruling. This ruling appears to be unique to Florida, as most states provide that the charging order is the creditor's exclusive remedy.[10]

In an apparent direct response to the *Olmstead* ruling, Nevada has amended the language of its charging order limitation to read as follows:

> This section ... [p]rovides the exclusive remedy by which a judgment creditor of a member may satisfy a judgment out of the member's interest of the judgment debtor, *whether the limited liability company has one member or more than one member.*[11] [Emphasis added.]

Nevada law now also provides that the charging order limitation applies to Nevada close corporations (i.e., not more than 75 shareholders).[12]

U.S. Income Taxation

For federal income tax purposes, a foreigner is referred to as a "nonresident alien" (NRA). An NRA is defined as a either a foreign corporation or a person who satisfies all of the following requirements:

1. Is physically present in the U.S. for less than 183 days in any given year.
2. Is physically present less than 31 days in the current year.

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3. Is physically present for less than 183 total days for a three-year period (using a weighing formula).
4. Does not hold a green card.[13]

Income tax rules applicable to NRAs can be quite complex. As a general rule, an NRA pays a flat 30% tax on U.S.-source "fixed or determinable, annual or periodical" (FDAP) income that is not effectively connected to a U.S. trade or business,[14] and which is subject to tax withholding by the payor.[15] The rate of tax may be reduced by an applicable treaty. The income is taxed on a gross basis, with almost no offsetting deductions.

FDAP includes interest, dividends, royalties, and rents. For example, if an NRA receives interest income from U.S. sources, it is subject to a 30% tax. Other miscellaneous categories of income included within FDAP are certain insurance premiums, annuity payments, gambling winnings, and alimony.

NRAs, however, are generally not taxable on their capital gains from U.S. sources unless:

1. The NRA is present in the U.S. for more than 183 days.
2. The gains are effectively connected to a U.S. trade or business.
3. The gains are from the sale of certain timber, coal or domestic iron ore assets.

When these exceptions apply, the NRA is taxed on U.S.-source capital gains at the rate of 30%.[16]

An NRA is taxed on income effectively connected to a U.S. trade or business under the same rules as all other U.S. taxpayers. Income may be reduced by appropriate deductions (connected to the U.S. trade or business) and standard tax rates apply.[17] Because traditional tax rules apply, this discussion is necessarily limited to two issues:

1. What constitutes a U.S. trade or business?
2. What constitutes "effectively connected"?

The Code does not define the term "U.S. trade or business." However, the term has been held to include providing personal services in the U.S., selling products in the U.S. directly or through an agent, soliciting orders from the U.S. and then exporting merchandise outside the U.S., manufacturing, and maintaining a retail store or corporate offices in the U.S.[18] "Effectively connected" is a complex tax concept and is beyond the scope of this article.[19]

An NRA is engaged in a U.S. trade or business if the NRA is a general or limited partner in a U.S. partnership engaged in a trade or business.[20] Similarly, a beneficiary of a U.S. estate or trust is engaged in a trade or business if the estate or trust is so engaged.[21]

For U.S. real estate, the critical inquiry concerns the nature of the rental income—is it passive, or from a trade or business? Rental income is passive if it is generated by a triple-net lease or from lease of unimproved land. Passive rental income is taxed on a gross basis (i.e., no deductions) at a flat rate of 30%, with the applicable withholding.[22]

The loss of deductions is often tax-prohibitive, and investors should consider electing to treat their passive real property income as income from a U.S. trade or business.[23] However, the election can be made only if the property is generating income.[24] Consequently, an NRA who owns unimproved land that will be developed in the future should consider leasing the land for some purpose in an attempt to generate income. This will give the NRA the ability to claim deductions from the property and possibly generate a loss carryforward that will offset income in future years.

A popular planning tool to avoid taxation of real estate-related income, and even business income, is the use of portfolio interest rules. Portfolio interest is interest payable only to a foreigner on a debt instrument. It is not subject to taxation or withholding and does not carry a U.S. tax return filing obligation.[25] NRAs often try to fit into the portfolio interest rules by lending through equity participation loans or loans with "equity kickers."[26] These provisions usually increase interest rates on a contingent basis to mimic equity participation. Be aware, however, that in two cases the IRS has successfully argued that such "loan" structures were in reality equity investments, producing income subject to taxation and withholding.[27]

If a foreign individual or a foreign corporation owns a U.S. corporation, there are two levels of tax. The U.S. corporation will be subject to the regular income tax on its profits, and there will be a tax on dividends paid to the foreign shareholders, subject to 30% withholding. The "branch profits" tax replicates this double tax when the U.S. business is owned by a foreign corporation, either directly or through a disregarded entity, or through a pass-through entity. The foreign corporation is taxed on its effectively connected income, and is also taxed on a deemed dividend, which is a tax on any profits not reinvested in the U.S.[28] The branch profits tax applies at the rate of 30%,[29] but may be reduced by an applicable treaty. The U.S. has treaties covering the branch profits tax with

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1 Del. Code Ann. 6 § 18-201; N.M. Stat. Ann. § 53-19-8.

2 See, Stein, "California Registration Requirements for Foreign LLCs," 17 Calif. Tax Lawyer 41 (Summer 2008), for a general discussion of foreign entity registration requirements.

3 See, e.g., Erkenbrecher v. Grant, 187 Calif. 7 (1921); ULLCA § 303(a).

4 ULLCA § 304(b).

5 See, e.g., ULLCA § 503, Cal. Corp. Code § § 15673 and 17302. See, Stein, "A Practical Take on Charging Orders," 8 BET 28 (September/October 2006) for a general discussion of the charging order limitation.

6 See, e.g., Calif. Unif. Com. Code § 8112, Tex. Rev. Civ. Stat. Ann. Art. 3827a.

7 ULLCA § 503, Cal. Corp. Code § 17302.

8 Olmstead v. F.T.C., 44 So. 3d 76 (Fla. 2010).

9 Fla. Stats. § 608.433(1).

10 See, e.g., Cal. Corp. Code § 17302(e).

11 Nev. Rev. Stat. § 86.401.2(a).

12 Nev. Rev. Stat. § 78.746.

13 Section 7701(b).

14 Sections 871(a) and 881. Rental income is sourced to where the property is located. Section 861(a)(4).

15 Section 1441(a).

16 Section 871(a)(2).

17 Sections 871(b) and 882.

18 See, IRS Publication 519, Chapter 4; Garelick, "What Constitutes Doing Business Within the U.S. by a Non-Resident Alien Individual or a Foreign Corporation, "18 Tax L. Rev. 423 (1963); Isenbergh, "The 'Trade or Business' of Foreign Taxpayers in the United States," 61 Taxes 972 (1983).

19 See Sections 864(c)(2) and (3) for the "force of attraction" rule and "asset-use" and "business-activities" tests.

20 Section 875(1).

21 Section 875(2).

22 Section 871(a)(1); Reg. 1.871-7(a)(3).

23 Section 871(d); Rev. Rul. 92-74, 1992-2 CB 156.

24 Rev. Rul. 91-7, 1991-1 CB 110.

25 Sections 871(h) and 881(c)(1).

26 An equity kicker is an addition to a fixed-income security (like a loan) that allows the lender to participate in equity appreciation. This may be accomplished in the form of a conversion option, allowing the lender to convert debt into equity.

27 See, e.g., Farley Realty Corp., 279 F.2d 701, 5 AFTR2d 1646 (CA-2, 1960), Portage Plastics Co., 470 F.2d 308, 30 AFTR2d 72-5229 (CA-7, 1972).

most of the European nations, reducing the tax to between 5% and 10%. The 30% tax is onerous, as it applies to a "dividend equivalent amount," which is the corporation's effectively connected earnings and profits for the year, less investments the corporation makes in its U.S. assets (money and adjusted bases of property connected with the conduct of a U.S. trade or business). The tax is imposed even if there is no distribution.

As if the preceding simplified summary is not enough to confound most practitioners, rules applicable to the tax on the disposition of real estate are found in a separate regime known as FIRPTA (the Foreign Investment in Real Property Tax Act of 1980).[30] Generally, FIRPTA taxes the disposition of an interest in U.S. real property (USRPI)[31] as if the NRA were engaged in a U.S. trade or business.[32] This means that the traditional income tax rules that apply to U.S. taxpayers will also apply to the NRA. Purchasers who acquire a USRPI from an NRA are obligated to withhold 10% of the amount realized on the disposition.

An interest in real property includes any ownership of land, buildings, mineral deposits, crops, fixtures, or personal property used to:

1. Exploit natural resources.
2. Construct improvements.
3. Operate a lodging facility.
4. Provide a furnished office to a tenant, improvements, leaseholds, or options to acquire any of the above.[33]

Ownership interests include fee ownership, co-ownership, leasehold, timeshare, a life estate, a remainder, a reversion, or a right to participate in the appreciation of real property or in the profits from real property.[34]

A partnership interest is treated as a USRPI if (1) 50% or more of the value of partnership gross assets consists of USRPIs, *and* (2) 90% or more of the value of partnership gross assets consist of USRPIs plus cash and cash equivalents.[35] The disposition of such partnership interest is subject to FIRPTA to the extent such partnership owns USRPIs and is subject to withholding.

A domestic corporation is treated as a United States Real Property Holding Corporation (USRPHC) if USRPIs equal or exceed 50% of the sum of such corporation's USRPIs, foreign real estate and trade and business assets.[36] Disposition of an interest in a USRPHC is subject to the FIRPTA tax and withholding, but is not subject to state income tax.[37] Contrast this with the disposition of a USRPI owned directly, which is subject to the lower federal capital gains rate, but is also subject to the state income tax.

The disposition of an interest in a domestic corporation is not subject to these rules if on the date of the disposition the corporation had no USRPIs and all of the gain was fully recognized (no installment sales or exchanges) on the sale of any USRPIs sold within the past five years.[38]

Witholding. Any NRA (individual or corporation) selling a USRPI is subject to withholding of 10% of the amount realized; withholding applies even if the property is sold at a loss.[39] The withholding obligation is imposed on the purchaser, who must report the withholding and pay over the tax using Form 8288 within 20 days of the purchase. If the purchaser fails to collect the withholding tax from the foreigner, the purchaser will be liable for the tax, plus any applicable penalties and interest. The withheld taxes are later credited against the total tax liability of the foreigner.

Withholding is not required if:

1. The seller provides a certificate of non-foreign status.
2. Property acquired by the purchaser is not a USRPI.
3. The transferred property is stock of a domestic corporation and the corporation provides a certificate that it is not a USRPHC.
4. The USRPI acquired will be used by the purchaser as a residence and the amount realized by the foreigner on the disposition is $300,000 or less.
5. The disposition is not subject to tax (a tax-free exchange).
6. The amount realized by the foreigner on the disposition is zero.[40]

Estate and Gift Taxes

For estate tax purposes, the test is completely different in determining who is an NRA—the inquiry centers around the decedent's domicile.[41] This is a more subjective test, one that looks primarily at intent,[42] and will also consider factors such as the length of stay in the U.S., frequency of travel, size and cost of a home in the U.S., location of family, participation in community activities, participation in U.S. business, ownership of assets in the U.S., and voting.

A foreigner can be a U.S. resident for income tax purposes, but not be domiciled for estate tax purposes. For simplicity in explaining the estate and gift

28 Section 884(a).
29 *Id.*
30 FIRPTA is codified in Sections 897, 1445 and 6039C.
31 A USRPI is defined as any interest in (i) real property located in the U.S., or (ii) a domestic corporation that is a "United States real property holding corporation." Section 897(c)(1).
32 Section 897.
33 Section 897(c) and Reg. 1.897-1(b).
34 Reg. 1.897-1(d)(2)(i).
35 Temp. Reg. 1.897-7T.
36 Section 897(c)(2).
37 Section 897(a)(1). There are no state law equivalents to FIRPTA, and under state law a sale of an interest in a domestic corporation (even if it is a USRPHC for federal income tax purposes) by a foreigner is not taxable, following the general rule of Section 892.
38 Section 897(c)(1)(B) and Reg. 1.897-2(c).
39 Section 1445.
40 *Id.*; Reg. 1.1445-2(d)(2)(i).
41 Regs. 20.0-1(b)(1) and 25.2501-1(b).
42 For example, if the foreigner was in the U.S. on a nonimmigrant visa, as opposed to an immigrant visa, that supports lack of intent to make the U.S. a permanent domicile.
43 Section 2103.
44 Section 2102(b)(1).
45 This includes estate and or gift tax treaties with Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Sweden, Switzerland, and the U.K.
46 Section 2104.
47 Reg. 20.2104-1(a).
48 Rev. Rul. 55-163, 1955-1 CB 674.
49 Section 2105.
50 Reg. 20.2105-1(f).
51 Sections 2105(a)(1) and (2).
52 Reg. 20.2053-7. If the mortgage is nonrecourse, only the net value of the property is included in the estate.
53 Reg. 20.2106-2. Apportionment is also possible only if world-wide assets are disclosed on the estate tax return.
54 Notice 97-34, 1997-1 CB 422.
55 Section 2501(a)(2).
56 Reg. 25.2511-3(b).
57 Section 2505(a).
58 See, e.g., Jackson, 233 F. 2d 289, 49 AFTR 1208 (CA-2, 1956).
59 For a partnership, the interest is an intangible if the partnership is a distinct legal entity and survives the death of its partners. Sanchez v. Bowers, 70 F. 2d 715, 13 AFTR 1074 (CA-2, 1934). For the application of this rule to an LLC, see Pierre, TCM 2010-106.
60 Section 1(h).

tax considerations, this article refers to foreigners who are both nonresident aliens and non-domiciliaries as NRAs.

An NRA is subject to a different transfer tax (estate and gift taxes) regime than a U.S. taxpayer. The estate tax is imposed only on the part of the NRA's gross estate that at the time of death is situated in the U.S.[43] The rate of NRA's estate tax is the same as that imposed on U.S. citizens and resident aliens, but the unified credit is only $13,000 (equivalent to about $60,000 of property value).[44] These harsh rules may be ameliorated by an estate tax treaty. The U.S. does not maintain as many estate tax treaties as income tax treaties, but treaties are in place with many of the major European countries,[45] Australia, and Japan.

The following assets are specifically included by the Code in the definition of property situated in the U.S.:

1. Shares of stock of a U.S. corporation.

2. Revocable transfers or transfers within three years of death of U.S. property or transfers with a retained interest (described in Sections 2035 to 2038).

3. Debt issued by a U.S. person or a governmental entity within the U.S. (e.g., municipal bonds).[46]

U.S. situs property also includes real estate in the U.S. (if debt is recourse, it is ignored—gross value is included, not just equity) and tangible personal property, like works of art, furniture, and cars (and even currency in a safety deposit box).[47] A beneficial interest in a trust holding U.S. property is also U.S. situs property.[48] U.S. situs property does not include life insurance proceeds paid on the life of the NRA, bank accounts (unless connected with a U.S. business), portfolio interest loans,[49] and shares of stock in a foreign corporation.[50]

The gross estate is reduced by various deductions relating to the U.S. situs property. The estate tax returns must disclose all of the NRA's worldwide assets, in order to determine the ratio that the U.S. assets bear to non-U.S. assets. This ratio determines the percentage of allowable deductions that may be claimed against the gross estate.[51]

When real estate is subject to a recourse mortgage, the gross value of the real estate is included, offset by the mortgage debt.[52] This distinction is irrelevant for U.S. taxpayers filing estate tax returns, but is very relevant for NRAs for whom debts are subject to apportionment between U.S. and non-U.S. assets, and therefore not fully deductible.[53]

Advance planning can eliminate or reduce the U.S. estate tax obligations of NRAs. For example, a U.S. business or real estate owned by the NRA through a foreign corporation is not included in an NRA's estate. This effectively converts a U.S. asset into a non-U.S. intangible asset. Even if the U.S. asset was not initially acquired through a foreign corporation, it may be beneficial to pay an income tax today on the transfer of the asset to a foreign corporation (usually treated as a sale) to avoid the estate tax in the future.

Gift taxes are imposed on the *donor.* A NRA donor is not subject to U.S. gift taxes on any gifts of non-U.S. situs property to any person, including U.S. citizens and residents. U.S. citizens and residents must report gifts from a NRA, in excess of $100,000 on Form 3520.[54]

Gifts of U.S. situs assets are subject to gift taxes, with the exception of intangibles, which are not taxable.[55] Tangible personal property and real property is sited within the U.S. if it is physically located in the U.S.[56] NRA donors are allowed the same annual gift tax exclusion as other taxpayers and are subject to the same rate schedule for gift taxes. However, the lifetime unified credit is not available to NRA donors.[57]

The primary thrust of estate tax planning for NRAs is through the use of (1) foreign corporations to own U.S. assets, or (2) the gift tax exemption for intangibles to remove assets from the U.S. If the NRA dies owning shares of stock in a foreign corporation, the shares are not included in the NRA's estate, regardless of the situs of the corporation's assets. It is important that the corporation have a business purpose and activity, lest it be deemed a sham designed to avoid U.S. estate taxes.[58] The gift of an intangible, wherever situated, by an NRA is not subject to gift tax. Shares in U.S. corporations and interests in partnerships or LLCs are intangibles.[59] Consequently, a U.S. business or real estate owned by the NRA through a U.S. corporation, partnership, or an LLC may be removed from the NRA's U.S. estate by gifting entity interests to foreign relatives free of gift tax.

Ownership Structures

An NRA can acquire a U.S. business or real estate using several alternative ownership structures. The NRA's goals and priorities dictate the type of structure that is used. Each alternative has its own advantages and disadvantages—there is no perfect structure. Direct investment is simple, and subject to either no or only one level of tax on the disposition. If the asset sold is personal property, then no tax applies as NRAs are not taxed on capital gains (see discussion above). If the asset is real property and is held for at least one year, the sale is taxed at a 20% rate.[60] The disadvantages of direct investment are:

- No privacy.
- No liability protection.
- The obligation to file U.S. income tax returns.
- If the asset is owned at death it is subject to U.S. estate taxes.

Under an LLC/LP structure, the NRA acquires the U.S. business or real estate through an LLC or a limited partnership. The LLC may be a disregarded entity or a tax partnership for U.S. income tax purposes. This is an improvement over the direct ownership alternative, because this structure provides the NRA with privacy and liability protection, and allows for lifetime transfers that escape the gift tax. However, the obligation to file U.S. income tax returns, and the possibility for U.S. estate tax on death, remain.

Ownership of a U.S. asset through a domestic corporation (the corporation will always be a "C" corporation; having a foreign shareholder precludes "S" corporation)[61] will afford privacy and liability protection, allow lifetime gift tax-free transfers, and obviate the foreigner's need to file U.S. income tax returns. While engaging in a U.S. trade or business makes it necessary to file a U.S. tax return, ownership of stock will not trigger a return filing obligation. There are three disadvantages to the ownership of U.S. businesses or real estate through a domestic corporation:

1. Federal and state corporate income taxes at the corporate level add a second layer of tax.
2. Dividends from the domestic corporation to its foreign shareholder are subject to 30% withholding.
3. The shares of the domestic corporation are included in the U.S. estate of the foreign shareholder.

Further, on the disposition of the stock in the corporation that holds USRPIs, the foreign shareholder will be subject to FIRPTA, because the corporation will be treated as a USRPHC.[62] This will require the filing of a U.S. income tax return and 10% tax withholding by the purchaser of the shares.

Ownership of the U.S. asset may be by the U.S. corporation directly, or through a U.S. partnership or disregarded entity owned by the corporation. The corporation may even be an LLC that checks-the-box to be taxed as a corporation. In turn, the ownership of the U.S. corporation by the NRA may be direct, or through a foreign partnership or disregarded entity. Foreign corporation ownership offers the following advantages:

- Liability protection.
- No U.S. income tax or filing requirement for the foreign shareholder.
- Shares in the foreign corporation are non-U.S. assets and, therefore, not included in the U.S. estate.
- Dividends are not subject to U.S. withholding.
- No tax or filing requirement on the disposition of the stock.
- No gift tax on the transfer of shares of stock.

The disadvantages of using the foreign corporation are:

- Corporate level taxes (just like with the domestic corporation), because the foreign corporation will be deemed engaged in a U.S. trade or business.
- The foreign corporation will be subject to the branch profits tax discussed above, the largest disadvantage of ownership of a U.S. business or real estate through a foreign corporation.

Because the branch profits tax is often not reduced or eliminated by a treaty, the most advantageous structure for ownership of a U.S. business or real estate by an NRA is through the foreign corporation-U.S. corporation structure. In this structure the NRA owns a foreign corporation, which in turn owns a U.S. LLC taxed as a corporation. This structure affords privacy and liability protection, escapes U.S. income tax filing requirements, avoids U.S. estate taxes, allows for gift tax-free lifetime transfers and avoids the branch profits tax. Distributions from the U.S. subsidiary to the foreign parent are subject to the 30% FDAP withholding, but the timing and the amount of such dividend is within the NRA's control.

Conclusion

Multiple structures are available to foreign investors in U.S. businesses and real estate, and no structure is perfect. Each structure presents its own advantages and disadvantages that require analysis in light of the client's objectives and priorities. ■

61 Section 1361(b)(1)(C).

62 See FIRPTA and USRPHC discussion, above.