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Cross-Border Private Client

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I. Expatriation—New Law

A. American Jobs Creation Act of 2004

The American Jobs Creation Act of 2004 ("2004 Act")[1] makes substantial changes to the law of individual expatriation. The new rules are best understood as responses to dissatisfaction with a number of provisions in the 1996 rules. Under the 1996 rules, the alternative ten-year tax regime applied to a person who gave up U.S. citizenship only if the taxpayer had a principal purpose of avoiding taxes.[2] There was a presumption that taxpayers with a certain amount of wealth had that intention.[3] Individuals in certain categories with strong ties to other countries were allowed, after having given up U.S. citizenship, to request a ruling that they did not have such an intention.[4] The Internal Revenue Service apparently found it too difficult to administer all of the tests based on intention. In addition, some advisors had counseled clients on methods of "losing" U.S. citizenship without formally and publicly "renouncing" it. The 2004 Act addresses these issues.

B. Permanent Residents Still Affected

The 2004 Act does not change the 1996 amendment that brought those green card holders who had turned in their green cards within the coverage of the expatriation pro-

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1. Portions of this material are also included in the 2004 update to Barbara Hauser, INTERNATIONAL ESTATE PLANNING: A REFERENCE GUIDE, (2002 Supp. 2004) (on file with author).
2. I.R.C. § 877 (1996).
3. *Id.* § 877(a)(2).
4. *Id.* § 877(c)(1)(B).

visions. Lawful permanent residents who qualify as "long-term" residents continue to be subject to the expatriation provisions if they give up their residency. Long-term residents are defined as those who were lawful permanent residents of the United States in "at least 8 taxable years during the period of 15 taxable years ending with the taxable year during which the event described in subparagraph (A) or (B) of paragraph (1) occurs."[5] Those events are either: (1) ceasing to be a lawful permanent resident,[6] or (2) beginning to be treated as a resident of a foreign country under a tax treaty with the United States and not waiving the treaty benefits available to residents of the foreign country.[7]

C. Wealthy Persons—Motive is No Longer Relevant

The 1996 legislation included a presumption that certain "wealthy" individuals must have had the avoidance of taxes as a principal purpose of giving up citizenship. The "wealth" presumption applied if:

> (A) the average annual net income tax (as defined in section 38(c)(1)) of such individual for the period of 5 taxable years ending before the date of the loss of United States citizenship is greater than $100,000, or
> (B) the net worth of the individual as of such date is $500,000 or more.[8]

After expatriation became effective, "wealthy" individuals in the following categories were entitled to request a ruling that the presumption of tax avoidance did not apply to them: (1) those individuals who at birth became citizens of both the United States and another country and continue to be citizens of that other country;[9] (2) those individuals who, within a reasonable time after renouncing U.S. citizenship, became a citizen of a country in which (a) the individual was born, (b) the individual's spouse was born, or (c) either of the individual's parents were born;[10] (3) those long-term permanent residents who were present in the United States thirty days or less during each of the ten years preceding the expatriation;[11] and (4) those who renounced citizenship prior to attaining the age eighteen and one-half.[12]

The single biggest change made by the 2004 Act is the adoption of an objective test for determining who will be taxed under the alternative ten-year tax regime. Everyone who is "wealthy" will be under the alternative ten-year tax regime, regardless of motive.[13] Someone who is not "wealthy" will not be taxed under the alternative ten-year tax regime even if he or she expatriated for the sole purpose of avoiding U.S. taxes.[14] The definition of "wealthy"

5. I.R.C. § 877(e)(2) (2005).
6. *Id.* § 877(e)(1)(A). For purposes of this section, "lawful permanent resident" is defined within the meaning of I.R.C. § 7701(b)(6).
7. I.R.C. § 877(e)(1)(B) (2005).
8. *See* I.R.C. § 877(a)(2) (1996).
9. *Id.* § 877(c)(2)(A)(i).
10. *Id.* § 877 (c)(2)(A)(ii).
11. *Id.* § 877(c)(2)(B).
12. *Id.* § 877(c)(2)(C). Note that the title of this provision is "Renunciation upon reaching age of majority." While it depends on the jurisdiction, the age of majority is often eighteen, leaving only a short time to accomplish the renunciation. The text of the provision, however, merely states that the renunciation must be prior to age eighteen and one-half.
13. I.R.C. § 877(a)(1) (2005).
14. *Id.*

has been updated to mean any person as to whom "the average annual net income tax (as defined in section 38(c)(1)) of such individual for the period of 5 taxable years ending before the date of the loss of United States citizenship is greater than $124,000" and also any person whose net worth "as of such date is $2,000,000 or more."[15] For calendar years after 2004, the income tax amount of $124,000 is increased by the cost-of-living adjustment under section 1(f)(3), substituting "2003" for "1992."[16] There is no similar adjustment for the net worth amount of $2,000,000.

D. Exceptions: Certain Wealthy Dual Citizens and Certain Wealthy Minors

The 2004 Act has two categories of exceptions to the automatic treatment of wealthy individuals.[17] The first is for a wealthy dual citizen who at birth became both a U.S. citizen and a citizen of another country and who has no "substantial" contacts with the United States. Someone who has no "substantial" contacts for this purpose

(i) was never a resident of the United States (as defined in section 7701(b)),
(ii) has never held a United States passport, and
(iii) was not present in the United States for more than 30 days during any calendar year which is 1 of the 10 calendar years preceding the individual's loss of United States citizenship.[18]

The second exception is for certain wealthy minors and applies if, and only if, all of the following conditions are met:

(A) the individual became at birth a citizen of the United States,
(B) neither parent of such individual was a citizen of the United States at the time of such birth,
(C) the individual's loss of United States citizenship occurs before such individual attains age 18 1/2, and
(D) the individual was not present in the United States for more than 30 days during any calendar year which is 1 of the 10 calendar years preceding the individual's loss of United States citizenship.[19]

The 2004 Act adds a certification of tax compliance for all individuals. Any expatriate will now be subject to the ten-year alternative tax regime if such individual "fails to certify under penalty of perjury that he has met the requirements of [the Internal Revenue Code] for the 5 preceding taxable years or fails to submit such evidence of such compliance as the Secretary may require."[20]

The 2004 Act also adds that no relinquishment of citizenship or termination of lawful permanent residency will be effective for federal tax purposes until such person "(1) gives notice of an expatriating act or termination of residency (with the requisite intent to relin-

15. *Id.* § 877(a)(2).
16. *Id.*
17. *Id.* § 877(c).
18. *Id.* § 877(c)(2)(B).
19. *Id.* § 877(c)(3).
20. *Id.* § 877(a)(2)(C).

quish citizenship or terminate residency) to the Secretary of State or the Secretary of Homeland Security, and (2) provides a statement in accordance with section 6039G."[21]

In addition, the 2004 Act amends Internal Revenue Code section 6039G to require annual filings during the ten-year period of the following information:

(1) the taxpayer's TIN [taxpayer identification number],
(2) the mailing address of such individual's principal foreign residence,
(3) the foreign country in which such individual is residing,
(4) the foreign country of which such individual is a citizen,
(5) information detailing the income, assets, and liabilities of such individual,
(6) the number of days during any portion of which that the individual was physically present in the United States during the taxable year, and
(7) such other information as the Secretary may prescribe.[22]

The penalty for not filing the statement required under section 6039G(a) is revised in the 2004 Act to include a $10,000 fine, per year, for failing to report complete and accurate information.[23]

E. New Thirty Day Limit

The 2004 Act includes new provisions that apply if an expatriate is physically present in the United States "on more than thirty days in the calendar year."[24] During any such year, the individual will be treated as a U.S. citizen or resident for federal tax purposes. A gift made during such a year will be fully subject to the U.S. gift tax (without regard to the location or categorization of the property), and a death during such a year will result in worldwide estate taxation by the United States.

The only days of physical presence in the United States that will *not* count are those during which a certain expatriate is performing services for a bona fide employer in the United States, and no more than thirty days in a calendar year may be disregarded.[25] The only expatriates who can use this provision are those who have strong ties to another country or who have had no more than the permitted minimal contact during each of the previous ten years.[26] The exact language is:

(B) Individuals with ties to other countries. An individual is described in this subparagraph if—
  (i) the individual becomes (not later than the close of a reasonable period after loss of United States citizenship or termination of residency) a citizen or resident of the country in which—
    (I) such individual was born,
    (II) if such individual is married, such individual's spouse was born, or
    (III) either of such individual's parents were born, and

21. *Id.* § 7701(n).
22. *Id.* § 6039G(b).
23. *Id.* § 6039G(c).
24. *Id.* § 877(g)(1).
25. *Id.* § 877(g)(2).
26. *Id.* § 877(g)(2)(B)-(C).

(ii) the individual becomes fully liable for income tax in such country.

(C) Minimal prior physical presence in the United States. An individual is described in this subparagraph if, for each year in the 10-year period ending on the date of loss of United States citizenship or termination of residency, the individual was physically present in the United States for 30 days or less. The rule of section 7701(b)(3)(D)(ii) [need arose for medical treatment while in the country] shall apply for purposes of this subparagraph.[27]

F. Expansion of Tax

The 2004 Act includes a somewhat minor expansion to gift taxes to cover cases where U.S. assets are held by a foreign corporation as to which:

(i) the [expatriate] donor owned (within the meaning of Code Section 958(a)) at the time of such transfer 10 percent or more of the total combined voting power of all classes of stock entitled to vote of the foreign corporation, and

(ii) such donor owned (within the meaning of section 958(a)), or is considered to have owned (by applying the ownership rules of section 958(b)), at the time of such transfer, more than 50 percent of—

(I) the total combined voting power of all classes of stock entitled to vote of such corporation, or

(II) the total value of the stock of such corporation.[28]

In cases covered by the amended statute, the expatriate donor is subject to the U.S. gift tax on the "U.S.-asset value" of the holdings of the corporation, determined on a pro rata basis—the amount which bears the same ratio to the fair market value of such stock at the time of transfer as—

(i) the fair market value (at such time) of the assets owned by such foreign corporation and situated in the United States, bears to

(ii) the total fair market value (at such time) of all assets owned by such foreign corporation.[29]

II. Definition of "Marriage"—An Update

A. United States

As most people are aware, the issue of same-sex marriages has become extremely political in the United States. Although marriage has been traditionally defined by each separate state, the federal Defense of Marriage Act (DOMA) (signed by President Clinton in 1996) adds a definition to the United States Code that states, for all federal purposes, that marriage shall refer only to the union of one man and one woman.[30] In a letter to a conservative, pro-family group, the Internal Revenue Service stated that same-sex couples who file joint

27. *Id.*
28. *Id.* § 2501(a)(5)(B).
29. *Id.* § 2501(a)(5)(C).
30. 1 U.S.C. § 7 (2005).

tax returns would be in violation of the DOMA.[31] In fact, the June 14, 2004 letter addressed to the Public Advocate of the United States stated that "[b]ecause of this statute [DOMA], only married individuals under this definition could elect to file a joint tax return."[32] Even when states legally recognize homosexual unions, "that recognition has no effect for purposes of federal law," said the letter signed by Frank Keith, Internal Revenue Service Communications and Liaison Chief.[33]

To date, only the state of Massachusetts has adopted same-sex marriages, which have been legal since May 17, 2004.[34] Massachusetts aside, the vast majority of states have now explicitly prohibited same-sex marriages.[35] Prior to the November 2004 elections, thirty-nine states had already passed laws either prohibiting same-sex marriages or defining marriage as between one man and one woman.[36] On November 2, 2004, eleven states passed constitutional amendments defining marriage as between one man and one woman.[37]

B. Canada

Nearly all of Canada now allows same-sex marriages. In 2003 and 2004, five provinces and one territory issued decisions invalidating prohibitions against same-sex marriage.[38] In *EGALE Canada Inc. v. Canada (Att'y Gen.)*, the British Columbia Court of Appeals found that the common law definition of marriage violated same-sex couples' rights to equal protection and benefit of the law.[39] The court chose to suspend its declarations of invalidity to give the federal and provincial governments time to bring the laws into compliance with the Charter. In a subsequent decision, the court lifted the suspension of remedies, effectively ordering the government of British Columbia to begin immediately issuing marriage licenses to same-sex couples.[40] Courts also addressed the issue of same-sex marriage in the provinces of Manitoba,[41] Nova Scotia,[42] Quebec,[43] Saskatchewan,[44] and the Yukon Territory.[45]

31. Public Advocate of the United States, *IRS to Public Advocate: No Filing 'Married' for Same Sex Couples* (June 14, 2004), *available at* http://www.publicadvocateusa.org/news/article.php?article = 121.

32. *Id.*

33. *Id.* The letter was in response to an April 13, 2004 inquiry from Public Advocate President Eugene Delgaudio, who asked the tax agency to define its position on homosexuals filing returns as married couples.

34. The Massachusetts Supreme Court declared that same-sex marriages are constitutional in Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

35. For up to date reports, visit http://www.stateline.org.

36. Kavan Peterson, *50-State Rundown on Gay Marriage Laws* (Nov. 3, 2004), *at* http://www.stateline.org/live/ViewPage.action?siteNodeId = 136&languageId = 1&contentId = 15576.

37. At the time of this article, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah had passed constitutional amendments. For up-to-date reports, visit http://www.stateline.org.

38. With appreciation to Suzanne Thorpe, Head Librarian, and her excellent staff at the University of Minnesota Law School.

39. EGALE Canada Inc. v. Canada (Att'y Gen.), [2003] 13 B.C.L.R. (4th) 1.

40. EGALE Canada Inc. v. Canada (Att'y Gen.), [2003] 15 B.C.L.R. (4th) 226.

41. Vogel v. Canada (Att'y Gen.), [2004] M.J. No. 418.

42. Boutilier v. Canada (Att'y Gen.) [2004] N.S.J. No. 357.

43. Hendricks v. Québec (Att'y Gen.) [2002] R.J.Q. 2506. The court declared invalid the prohibition against same-sex marriages in Quebec, but stayed the declaration of invalidity for two years. In Hendricks v. Québec (Att'y Gen.), [2004] R.J.Q. 851, the court dismissed the appeal of the above decision by the Catholic Civil Rights League.

44. W. (N.) v. Canada (Att'y Gen.), [2004] 246 D.L.R. (4th) 345.

45. Dunbar v. Yukon Territory, [2004] 8 R.F.L. (6th) 235.

C. Spain

At the end of December 2004, the Spanish Cabinet approved a bill to legalize same-sex marriages. If the bill passes, the largely Catholic country would join the Netherlands, Belgium, most of Canada, and the state of Massachusetts in recognizing same-sex marriages. The bill is expected to be presented to Parliament in February for debate. Maria Teresa Fernandez de la Vega, Deputy Prime Minister, told a press conference after a Cabinet meeting that "[t]he right to marry is a right for everyone, without distinction. It cannot be understood as a privilege."[46] She further stated that, "[t]he recognition of homosexuals' rights eradicates an unjustified discrimination."[47] Under the bill, homosexuals would be allowed to adopt children and couples of the same sex would be able to inherit from one another and receive retirement benefits from their working spouses in the same way that heterosexual married couples do now.[48]

III. Income Tax Treaties and Protocols

A. Netherlands: Protocol

On November 17, 2004, the U.S. Senate approved a protocol, signed on March 8, 2004, and effective as of December 28, 2004, that amended the Netherlands-United States income tax treaty of 1992.[49] The extensive protocol brings the treaty into line with the 1996 U.S. model income tax treaty and the Organization for Economic Cooperation and Development's 1992 model treaty. The major revisions include completely revised articles 10 (Dividends), 11 (Branch Tax), 26 (Limitations of Benefits), 19 (Pensions, Annuities, and Alimony), 24 (Basis of Taxation), 30 (Exchange of Information), and 31 (Assistance and Support in Collection).[50]

B. France: Protocols

1. *Income Tax*

On December 8, 2004, a protocol to the 1994 France-United States income tax treaty was signed, which expanded the definition of "residency" in article 4 of the treaty.[51] It thus brings within the treaty trusts, estates, partnerships, and other pass-through entities which are not organized or managed in the United States or France. Several requirements must be satisfied to qualify for the favorable treatment. The protocol will be effective for amounts paid after February 1, 1996. Note that through an amendment to article 18 of the treaty, the Protocol addressed the taxation of income from retirement benefits (pensions and the like) where a person resides in the treaty country but is not a citizen thereof.

46. *Spain Poised to Legalize Gay Marriage*, Calgary Herald, Jan. 1, 2005, at A10.
47. *Id.*
48. *Id.*
49. Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Mar. 8, 2004, U.S.-Neth., S. Treaty Doc. No. 108-25.
50. *Id.*
51. Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Fr., Dec. 8, 2004, RIA Int'l Tax Treaty 2110.

2. *Estate and Gift Tax*

A new protocol was also signed with respect to the 1978 France-United States estate and gift tax treaty.[52] Under the protocol, article 5 of the treaty is amended to provide that real property includes:

> shares, participations and other rights in a company or legal person the assets of which consist, directly or through one or more other companies or legal entities, at least 50 percent of real property situated in one of the Contracting States or of rights pertaining to such property. These shares, participations and other rights shall be deemed to be situated in the Contracting State in which the real property is situated.[53]

Note that other changes to the treaty were made by the protocol.

C. Sri Lanka: Senate Approves Treaty

In March 2004, the U.S. Senate approved an income tax treaty signed by Sri Lanka and the United States.[54] A time frame for the exchange of instruments of ratification has not yet been disclosed.

D. Barbados: Second Protocol

The Second Protocol to the 1984 Barbados-U.S. income tax treaty was signed on July 14, 2004, and instruments of ratification were exchanged on December 20, 2004.[55] The protocol concerns withholding taxes on amounts paid after February 1, 2005.

E. Switzerland: Competent Authorities

On December 10, 2004, an agreement was reached between Swiss and U.S. competent authorities regarding the qualification of certain retirement benefits for favorable withholding treatment under the Swiss-U.S. income tax treaty of 1996.[56] Qualifying Swiss plans receive favorable treatment when dividends are received from U.S. corporations, and, similarly, qualifying U.S. plans receive favorable treatment when dividends are received from Swiss corporations.[57]

IV. New Foreign Disregarded Entity Report

The Internal Revenue Service has issued its new Form 8858 (Information Return of U.S. Person with Respect to Foreign Disregarded Entities), which was first announced in December 2004. This informational return must be filed by a U.S. citizen who is considered

52. Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, and Gifts, U.S.-Fr., Dec. 8, 2004, RIA Int'l Tax Treaty 2306.

53. *Id.* at art. 3.

54. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasions with Respect to Taxes on Income, U.S.-Sri Lanka, Sept. 20, 2002, RIA Int'l Tax Treaty 3723.

55. Second Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, July 14, 2004, U.S.-Barb., S. Treaty Doc. No. 108-26.

56. Competent Authority Agreement, U.S.-Switz., Dec. 10, 2004, RIA Int'l Tax Treaty 1104.

57. *Id.*

the tax owner of a foreign disregarded entity (FDE).[58] A separate Form 8858 must be filed for each foreign disregarded entity.[59] The Form 8858 is due with the owner's income tax return and must be attached to the owner's Form 1040.[60]

V. Classification of Certain Foreign Entities

By Internal Revenue Service Notice 2004-68 issued on October 25, 2004, the Treasury Department and the Internal Revenue Service added to the "per se corporation list," under Section 301.7701-2(b)(8), the European Union's new business entity, the Sicuetas Europaea ("SE") (a public limited liability company).[61] Also added were the Estonian Aktsiaselts, the Latvian Akciju Sabiedriba, the Lithuanian Akcine Bendroves, the Slovenian Delniska Druzba, and the Lichtenstein Aktiengesellschaft.[62]

VI. Foreign Tax Credit

In 2004, under Revised Rule 2005-03 the Internal Revenue Service ruled that the foreign tax credit may be claimed for taxes paid to Libya and Iraq, having permitted the credit to be claimed for Iraq earlier in the year.[63] Remaining on the "no credit" list are Cuba, Iran, North Korea, Sudan, and Syria.[64] It also removed the restrictions on the foreign earned income exclusion for Libya and Iraq.[65] Cuba remains the only country subject to the restrictions of Internal Revenue Code Section 911(d)(8).[66]

VII. Apportionment of Charitable Deductions Between U.S. and Foreign Source Income

In July 2004, the Internal Revenue Service proposed temporary regulations and issued final amendments affecting the apportionment of charitable deductions between U.S. and foreign source income.[67] The Internal Revenue Service stated that the intent was to promote charitable contributions by, generally speaking, permitting a taxpayer to allocate the charitable deduction to U.S. source income, thus preserving foreign source income and maximizing the taxpayer's use of the foreign tax credit.[68] When, however, a charitable deduction is gained through a tax treaty, the deduction must be allocated against treaty source income.[69]

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58. Announcement 2004-4, 2004-4 I.R.B. 357.
59. *Id.* at 358.
60. *Id.*
61. I.R.S. Notice 2004-68, 2004-43 I.R.B. 706.
62. *Id.*
63. Rev. Rul. 2005-3, 2005-3 I.R.B. 334-36.
64. *Id.*
65. *Id.*
66. *Id.*
67. Allocation and Apportionment of Deductions for Charitable Contributions, 69 Fed. Reg. 44,930, at 44,931 (July 28, 2004); Prop. Treas. Reg. § 1.861-8(e)(12), 69 Fed. Reg. 44,988 (July 28, 2004) (to be codified at 26 C.F.R. pt. 1).
68. Allocation and Apportionment of Deductions for Charitable Contributions, 69 Fed. Reg. 44,930, at 44,931 (July 28, 2004).
69. Prop. Treas. Reg. § 1.861-8(e)(12)(iii), 69 Fed. Reg. 44,988, at 44,990 (July 28, 2004) (to be codified at 26 C.F.R. pt. 1).

VIII. Contempt of Court (Again!) for Failure to Disclose Foreign Trust

When will the debtor learn? In *Eulich v. United States*[70] the Internal Revenue Service sought information from a Texan, John Eulich, regarding a Bahamian trust he had settled. Mr. Eulich claimed that under Bahamian law and the terms of the trust he was unable to obtain any information at all regarding the trust or its assets.[71] He thus raised the defense of impossibility to a contempt charge.[72] The court did not agree, stating that Mr. Eulich had created the impossibility himself and could not now benefit from it.[73] Moreover, there was no evidence that Mr. Eulich had attempted to petition the Bahamian court for production of the documents, or had made any true effort to comply.[74] As the $5,000 per day fines[75] mounted, Mr. Eulich saw the light and was able to obtain the documents requested by the Internal Revenue Service.[76]

70. Eulich v. United States, No. 3-99-CV-1842-L, 2004 U.S. Dist. LEXIS 9727 (N.D. Tex. Apr. 26, 2004).

71. *Id.* at *8-9.

72. *Id.* at *4-5.

73. *Id.* at *16.

74. *Id.* at *14-15.

75. Eulich v. United States, No. 3:99-CV-1842-L, 2004 U.S. Dist. LEXIS 16285, at *19 (N.D. Tex. August 18, 2004).

76. Jay D. Adkisson, *Efficacy of Foreign Asset Protection Trusts*, ADKISSON & RISER'S DEV. ASSET PROTECTION & WEALTH PRESERVATION (Mar. 2005), at 9, *at* http://risad.com/newsletters/Developments_03Mar05.pdf.