KPMG

2022 Nonprofit Symposium

Going Global! Managing Risks Associated with International Initiatives

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Notices

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The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

Speakers

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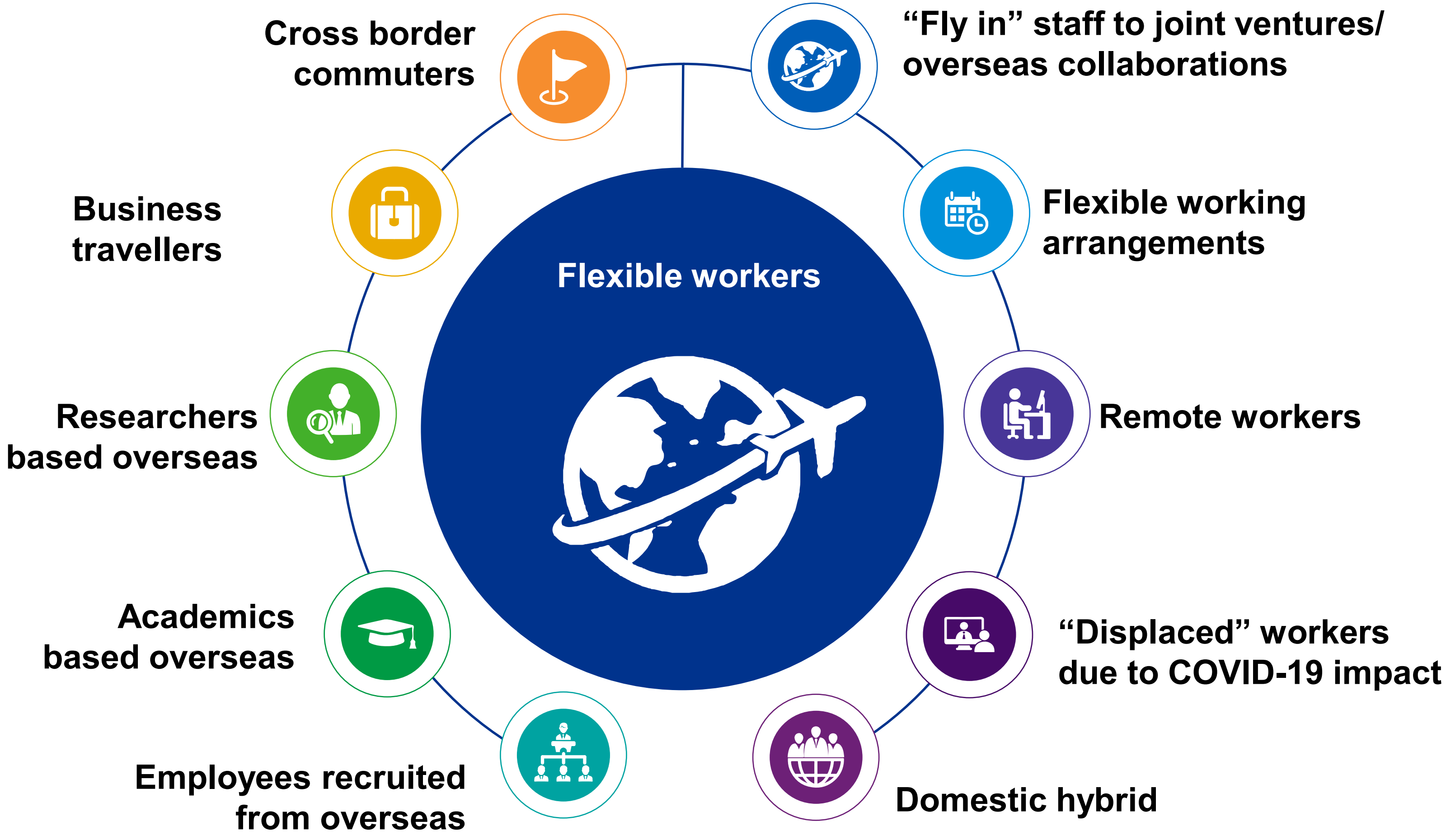
Topics outline

Global Initiatives – What are we seeing

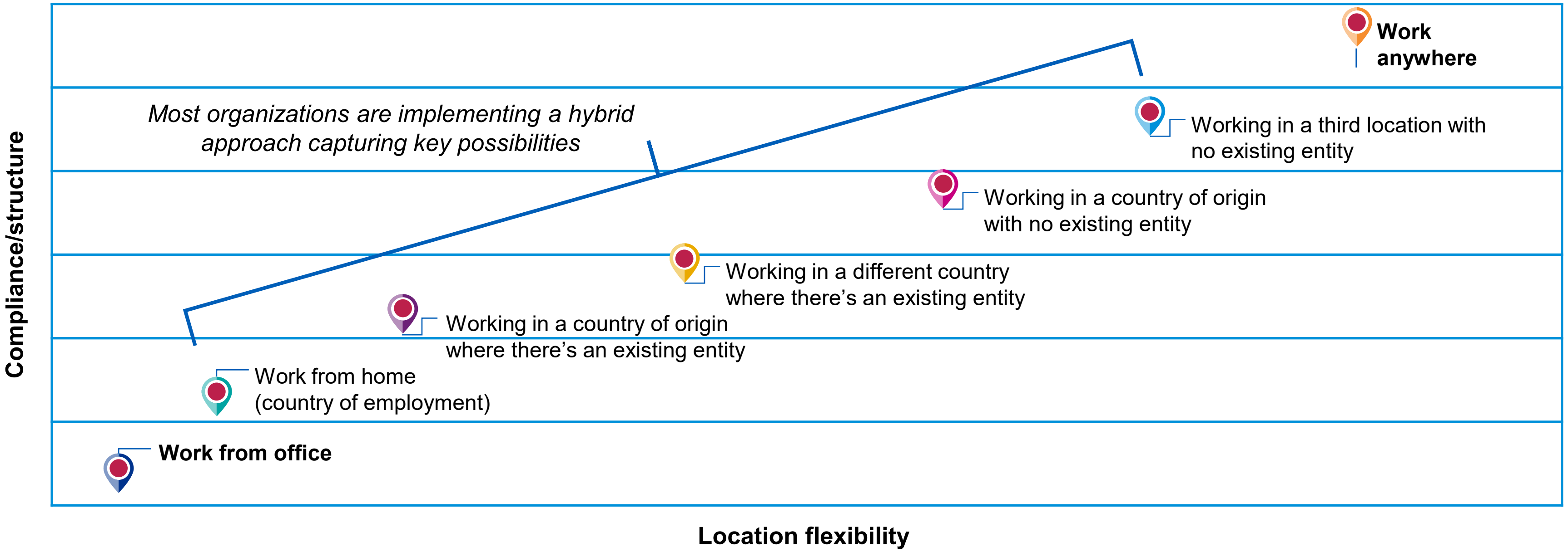
Evolution of mobile employees



Workplace of the future – Flexibility spectrum

The COVID-19 pandemic has accelerated and embedded new ways of working that had been predicted to occur over a much longer period. Across all industries, organizations are considering the flexibility they wish to offer to their employees in the longer term.

When determining the policy and approach to take, consideration must be given to the compliance and regulatory implications of each work arrangement.



Mobility trends

- Increased awareness of risks and costs of managing compliance
- Increased flexible and remote working arrangements
- Aligning strategy and governance
- International Strategy
- Key stakeholder involvement and decision-making
- Policy and process for managing an increasing globally mobile workforce

What are the compliance challenges?

Key issues of a domestic remote and globally mobile workforce

Our ways of working have changed for good; we need to build a robust operating and risk management model for today and tomorrow.

Income and social tax

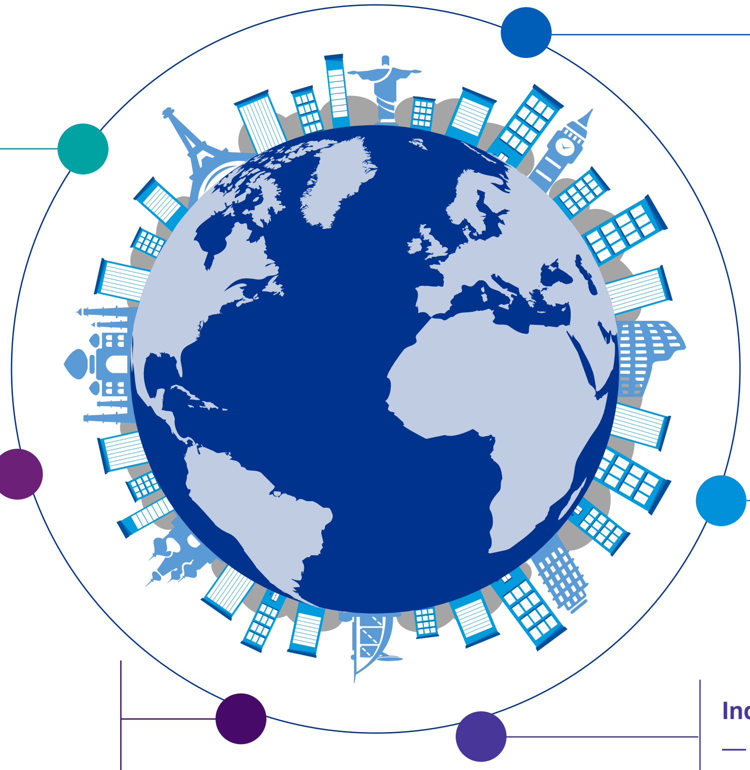
— Tax payment and fling support to employees due to increased liability due to remote work
— Certificate of Coverages
— Management of potential mismatch in social security benefits
— Tracking and identification
— Income tax residency/tax home determination

Employment and payroll tax

— Employment tax, state and local taxes
— Domestic and international payroll reporting and withholding
— Documentation maintenance

Organizational

— Reputational risk
— Operational risk
— Talent and employee experience risks
— Business continuity and sustainability
— Environmental, social, and governance risks



Corporate tax, SALT, and transfer pricing

— Corporate structure and entity characterization
— Permanent establishment and state nexus
— Value attribution and profit allocation
— Accounting and reporting considerations (i.e., FIN 48, FAS5)
— Governance and controls (e.g., intercompany contracts, policies)
— Location and substance-based positions (e.g., tax rulings, Subpart F)
— Ongoing compliance management, risk monitoring, and assessment

Regulatory insurance and licensing

— Licensing and regulatory considerations
— Exchange control regulations
— Immigration and employment law
— Employment/assignment documentation
— Data privacy and cyber considerations
— Works councils and trade unions
— Health and safety

Indirect tax and subsidies

— VAT, GST, service tax
— Location-based subsidies and credits
— Other credits

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International tax issues

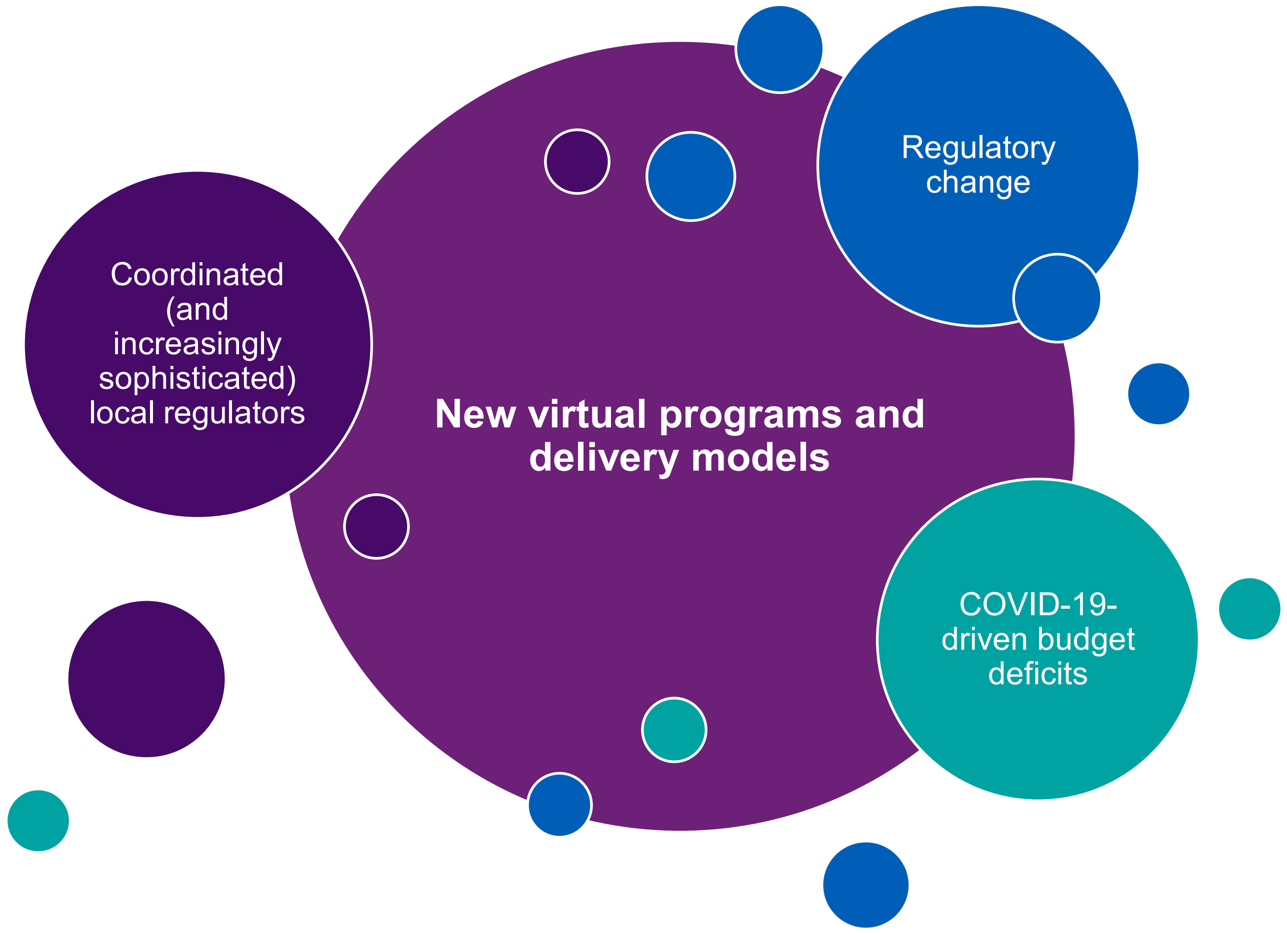
Key risk drivers

Grants and sponsored research	In-country relationships and use of name	Property and asset ownership and rentals	Local audit and regulatory requirements	Global workforce and worker classification (local and expatriate)	In-country legal status	“Business” activities in country (e.g., teaching/learning), both virtual and in person

Potential exposure

Multiple activities and elements combine to potentially increase exposure beyond what may be the “known” exposure; this exposure should be mitigated.

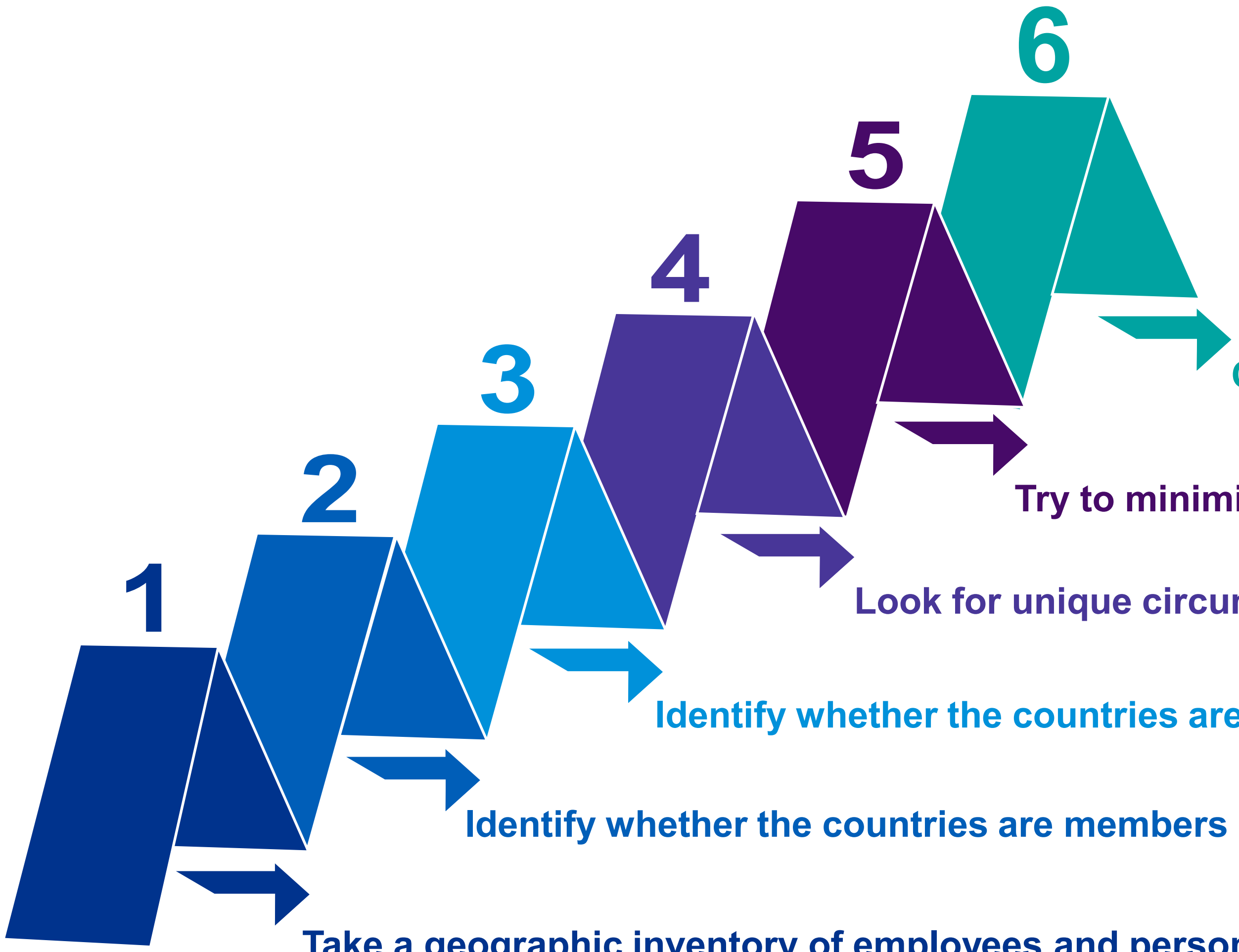
A perfect storm



Issues with remote working

Personal income and corporate tax considerations	— Personal income tax and social security obligations may arise due to working elsewhere. — An employee may end up having a tax liability if withholdings are not adjusted. — Organizations may be responsible for additional payroll and withholding responsibilities. — These responsibilities may occur where the institution does not currently operate. — This can lead to corporate tax obligations and permanent establishment (PE) risk.
Organization and HR policy considerations	— An approval process should be in place so the organizations knows where employees are located. — Compensation and benefits structures may be impacted with movement to different regions. — HR policy (including talent and mobility) should align with the organization’s strategies and expansion plans. — Current policies may need to be modified to support health and safety considerations.
Work arrangement (technology and home logistics) considerations	— The right infrastructure is needed to support the new strategy while managing risk. — Investments may be necessary to achieve the vision and goals of the organization. — Employees should have access to the tech needed to effectively collaborate and work. — Sufficient data security and confidentiality is needed while working remotely.

Addressing International Activity



Take a geographic inventory of employees and persons served

Identify whether the countries are members of the OECD/G20 Inclusive Framework on BEPS

Identify whether the countries are U.S. treaty partners

Look for unique circumstances

Try to minimize long-term and/or permanent arrangements

Consider remote work/service policies

Practical considerations

Solutions typically discussed

- New policies and procedures (e.g., HR, finance) to help formalize decision-making
- Choosing a vehicle – e.g., professional employment organization (PEO) vs. in-country registration
- Prohibit services from being provided from outside the U.S.

Assessing what works for your institution

- Keep in mind the costs to outsource the compliance (such as with a PEO) vs. internal capacity.
- As teleworking becomes the “new normal,” restricting services may cause employee relations issues.
- Opportunities for growth as a result of online delivery or international expansion

Foreign Transactions and IRS Forms

U.S. Reporting of Foreign Activities – Commonly Used Forms

Form 926

Form 5471

Domestic Compliance

Form 8865

Form 8858

Form 926

Return by a U.S. Transferor of Property to a Foreign Corporation

Form 926

Who must file

- U.S. persons that make certain outbound transfers of property to foreign corporations pursuant to specified nonrecognition provisions
- If the transferor is a partnership (domestic or foreign), than the domestic partners are responsible for filing Form 926
  - Proportionate share of a partnership's contributions to a foreign corporation.

Due dates and penalties

- Due Date: Must be filed with the U.S. transferor's income tax return for the tax year that includes the date of the transfer
- Penalties
  - 10% of the FMV of the property at the time of the transfer (generally limited to $100,000)
  - Not applicable if the failure due to reasonable cause and not willful neglect.

Cash Transfers

- A U.S. person that transfers cash to a foreign corporation must report the transfer on Form 926 if:
  - Immediately after the transfer the person holds directly or indirectly at least 10% of the vote or value of the foreign corporation; or
  - The amount of cash transferred by the person to the foreign corporation during the 12-month period ending on the date of the transfer exceeds $100,000.
    - Not based on calendar or taxable year
    - At the end of taxable year, must (a) look at all cash transfers during the year, and then (b) look 12 months from each transfer to test for $100,000 threshold.

Form 5471

Information Return of U.S. Persons With Respect To Certain Foreign Corporations

Form 5471

Category 1 filer

- Previously reserved
- Now used by U.S. shareholders of specified foreign corporations ("SFCs") subject to the provisions of section 965
  - Applies regardless of whether section 965 applies to the foreign corporation, and regardless of whether the U.S. shareholder is subject to section 965.

Category 2 filer

- U.S. citizen or resident who is an officer or director of a foreign corporation is required to provide certain identifying information with respect to each U.S. person who, during his or her tenure in office, acquires:
  - Stock that increases the respective U.S. person's ownership in the FC to 10% (in vote or value), or
  - An additional 10% or more (in vote or value) of the FC's stock within that tax year
- Aggregate all transactions within a year to determine category 2 status

Form 5471

Category 3 filer

- Person making acquisition of interest in foreign corporation resulting in 10% or more of votes or value (e.g. 5% + 5% = 10%)
- 10% or more acquisition (votes or value), regardless of current ownership
- A person treated as a U.S. shareholder under section 953(c)
- Person who becomes U.S. person while owning 10% or more of votes or value
- U.S. person whose stock ownership falls below 10% of vote or value

Category 4 filer

- A U.S. person who had uninterrupted “control” of FC for at least 30 days during annual accounting period of the FC
- “Control” defined as ownership of more than 50% of votes or value
  - Direct, indirect, and constructive ownership
  - Section 6038(e)(2) “control” and “ownership” rules generally consistent with Subpart F “control” and “ownership” rules (see sections 957 and 958)
- Definition of a U.S. person is broadened to include certain nonresident aliens (“NRAs”) and certain NRAs who become residents

Form 5471

Category 5 filer

- A U.S. shareholder who owns stock in a CFC for an uninterrupted period of 30 days or more AND owns the CFC stock on the last day of that tax year.
- "U.S. shareholder" of CFC is a U.S. person who owns:
  - Directly, indirectly, or constructively 10% or more of the vote or value of the CFC; or
  - Directly or indirectly any stock of a CFC that is a captive insurance company
    - Under section 953(c)(1)(B) and section 957(b) the CFC determination is based on 25% rather than 50%

Form 5471

What does it mean to own "Stock"

- Ownership of stock for U.S. tax purposes has been interpreted involve / require the right to:
  - (i) receive dividends from profits/operations,
  - (ii) receive liquidation proceeds upon dissolution,
  - (iii) to vote in the corporate affairs, and
  - (iv) to dispose of the interest in the corporation and keep the proceeds, if any
    - *See, e.g., Himmel v. Comr.*, 338 F.2d 815 (2d Cir. 1964)
- Charitable organizations formed in foreign countries may have rules restricting the right to distribute property (during operation or on dissolution) to other than beneficiaries or other charitable organizations

Form 5471

Annual accounting period

- Except for Schedule O, report information for the tax year of the foreign corporation that ends with or within the U.S. person's tax year.
- For Schedule O, report acquisitions, dispositions, and reorganizations that occurred during the U.S. person's tax year.

Due Date and Penalties

- Due date
  - Attached to the U.S. person's U.S. income tax return and due when the U.S. income tax return is due, including extensions
- Penalties
  - $10,000 penalty for failure to furnish required information for each annual accounting period for each entity
  - If failure-to-file continues for more than 90 days after IRS notice, IRS may impose an additional $10,000 penalty for each 30 day period (or fraction thereof), up to $50,000 maximum additional penalty for each entity

Form 8865

Return of U.S. Persons With Respect to Certain Foreign Partnerships

Form 8865

Category 1 filer

- A U.S. person who controlled the foreign partnership at any time during the partnership's tax year
- Control = more than 50% direct or constructive interest in the partnership
  - A 50% interest is equal to:
    - 50% capital,
    - 50% of profits, or
    - 50% of the deductions of losses
- For determining constructive ownership refer to the rules under section 267(c) (excluding section 267(c)(3))

Category 2 filer

- A U.S. person who at any time during the tax year of the foreign partnership owned a 10% or greater interest in the partnership while the partnership was controlled by U.S. persons each owning at least 10% interests
  - A 10% interest is equal to:
    - 10% of capital,
    - 10% of profits, or
    - 10% of the deductions or losses
  - The constructive ownership rules under section 267(c) apply (excluding section 267(c)(3))
- No filing requirement if the foreign partnership had a Category 1 filer at any time during the year.

Form 8865

Category 3 filer

- A U.S. person who contributed property during that person’s tax year to a foreign partnership in exchange for an interest in the partnership (section 721 transfer) if that person either:
  - Owned directly or constructively at least 10% interest in the foreign partnership immediately after the contribution, or
  - The value of the property contributed (when added to the value of any other property contributed to the partnership by such person, or any related person, during the 12-month period ending on the date of transfer) exceeds $100,000
- A subsequent sale of the appreciated property by the foreign partnership while the U.S. person contributing that appreciated property is a direct or indirect partner in the partnership can create a category 3 filing requirement.

Form 8865

Category 4 filer

- A U.S. person that had a reportable event
  - Acquisitions
    - As a result of the acquisition the U.S. person becomes a 10% or greater interest holder
    - Any subsequent acquisition of a 10% interest (e.g. from 11% to 21%) compared to the U.S. person's last reportable event.
  - Dispositions
    - A U.S. person who owned a 10% or greater interest in the partnership before the disposition and as a result of the disposition the person owns less than a 10% direct interest
    - Incremental dispositions of 10% (e.g. from 21% to 11%) compared to the U.S. person's last reportable event.
  - Change in proportional interests
    - Compared to the U.S. person's direct proportional interest the last time the person had a reportable event, the person's direct proportional interest has increased or decreased by at least the equivalent of a 10% interest in the partnership
    - A person can only have a reportable event with respect to a particular foreign partnership if that person owns a direct interest in the partnership

Form 8865

Tax Year

- Category 1 or 2
  - Report information for the tax year of the foreign partnership that ends with or within the Category 1 or 2 filer's tax year
- Category 3 or 4
  - Report on Schedules O or P transactions that occurred during that filer's tax year (rather than during the partnership's tax year)

Due Date and Penalties

- Due date
  - Filed with the U.S. person's U.S. income tax return
  - If the U.S. person doesn't have to file a U.S. income tax return, then file Form 8865 with the IRS at the time and place that would be required to file an income tax return>
- Penalties
  - $10,000 penalty for failure to furnish required information for each annual accounting period for each entity
  - If failure-to-file continues for more than 90 days after IRS notice, IRS may impose an additional $10,000 penalty for each 30 day period (or fraction thereof), up to $50,000 maximum additional penalty for each entity

Form 8858

Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs)

Form 8858

Foreign Disregarded Entity

- An FDE is an entity that is not created or organized in the U.S. and is disregarded as an entity separate from its owner for U.S. income tax purposes.
- Generally, an entity must file a Form 8832 and make an election to be treated as a FDE.

Foreign Branch or Qualified Business Unit

- A foreign branch is an "integral business operation" carried on by a US person outside the U.S. This determination is based on a facts and circumstances analysis.
- In all cases, a permanent establishment in a foreign country (as determined under a treaty between the US and the foreign country) will be considered a foreign branch.
- A QBU is a separate and clearly identified unit of a trade or business and that has separate books and records.
  - Activities of a corporation or partnership may constitute a QBU

Form 8858

Who must file

- U.S. person that are tax owners of FDEs (directly, indirectly, or constructively) or that operate FBs.
  - CFCs
    - Certain U.S. persons required to file Form 5471 as to a CFC that is a tax owner of an FDE or that operates an FB at any time during the CFC's annual accounting period
    - Category 4 filer (>50% shareholder) – complete entire Form 8858 and the separate Sch. M.
    - Category 5 filer (10% shareholder subject to subpart F inclusion) – complete only identifying information on page 1 and Sch. G and H on page 2.

Form 8858

Who must file

- U.S. person that are tax owners of FDEs (directly, indirectly, or constructively)
  - Controlled foreign partnerships ("CFPs")
    - Certain U.S. persons required to file Form 8865 with respect to a CFP that is a tax owner of a FDE or that operate an FB at any time during the CFP's annual accounting period
    - Category 1 filer (U.S. person in control (50% or more) at any time) – complete entire Form 8858 and the separate Sch. M.
    - Category 2 filer (U.S. person owning 10% while CFP controlled by 10% U.S. persons) – complete only identifying information on page 1 and Sch. G and H on page 2.

Form 8858

Definitions

- Foreign disregarded entity (“FDE”)
  - A business entity that is not formed in the U.S. and is treated for U.S. tax purposes as disregarded as an entity separate from its owner pursuant to a “Check-the-Box”(CTB) election (Treas. Reg. 301.7701-2 and 3)
  - Tax Owner of the FDE
    - Person that is treated as owning the assets and liabilities of the FDE for U.S. federal tax purposes.
  - Direct Owner of the FDE
    - Legal owner of the FDE

Form 8858

Annual accounting period

- The annual accounting period of a FDE is the taxable year of the tax owner
- Generally the tax owner's annual accounting period is the annual period in which the tax owner regularly computes income and keeps its books

Due Date and Penalties

- Due date
  - Filed with the U.S. income tax return or information return, including extensions
  - If the tax owner is a CFC for which the U.S. shareholder is filing a Form 5471, then attach the Form 8858 to the Form 5471. Same for Form 8865.
- Penalties
  - $10,000 penalty for failure to furnish required information for each annual accounting period for each entity
  - If failure-to-file continues for more than 90 days after IRS notice, IRS may impose an additional $10,000 penalty for each 30 day period (or fraction thereof), up to $50,000 maximum additional penalty for each entity

Thank you

You may contact one of today's presenters directly:

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