GLOBAL PLANNING FOR WEALTH STRADDLING THE U.S.-CANADA BORDER

In today’s global economy and mobile society, it is increasingly common for individuals to own assets internationally, for executives to have international assignments and for families to have members who live abroad or who are citizens of various countries. As advisors, we see the impact of these cross-border relationships in a variety of circumstances — investment of capital in the respective countries, acquisitions of vacation homes and international marriages. Each of these instances has the potential to impact one’s tax and estate plan, not only in their home country, but in the foreign country with which they have developed a nexus.

One country that generates immense cross-border activity is our neighbor to the north, Canada. In addition to sharing one of the longest and most accessible borders in the world, Canada and the U.S. also share one of the world’s largest and most comprehensive trading relationships. This close proximity creates many cross-border opportunities for work, for investment and for personal or retirement purposes. Although there is no “one size fits all” approach, this article will highlight some of the Canada and U.S. tax and estate planning considerations that arise in the context of three general scenarios:

<table>
<thead>
<tr>
<th>SCENARIO 1</th>
<th>INBOUND CONSIDERATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>What issues arise when a Canadian individual purchases a vacation home in the United States, establishes a U.S.-based bank account to fund home and living expenses and opens a U.S. investment management account to hold investments in U.S.-based currency?</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SCENARIO 2</th>
<th>OUTBOUND CONSIDERATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>What if the prior situation is reversed and a U.S. person acquires a vacation property and other financial assets in Canada?</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SCENARIO 3</th>
<th>INTERNATIONAL MARRIAGES</th>
</tr>
</thead>
<tbody>
<tr>
<td>What issues arise when a U.S. citizen marries a Canadian citizen? Are there any ramifications if the Canadian spouse emigrates to the U.S.?</td>
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</tr>
</tbody>
</table>
This article will also provide a broad overview of the very basics of the Canadian tax system, as it applies to individuals and an overview of the key components of the U.S. foreign reporting system. Understanding the key differences that exist between Canada and the U.S. from a tax perspective, and understanding the importance of the U.S. foreign reporting rules, will help to highlight some of the traps for the unwary, whether one is involved with a U.S. inbound situation or a Canadian outbound issue.

CAUTIONARY TALE

When addressing any cross-border issue involving the U.S. and another country, including Canada, it is imperative that legal and tax advice be sought on each side of the border. This is an incredibly complex area of the law, irrespective of which countries are involved and the multi-country lens must be worn at all times.

A PRIMER ON THE CANADIAN INCOME TAXATION SYSTEM

Despite the vast similarities between Canada and the U.S., each is based on a fundamentally different tax regime. As noted above, failing to identify the critical differences between the Canadian and the U.S. tax systems, and failing to plan accordingly, can lead to unanticipated and unnecessary taxation and reporting requirements in each jurisdiction.

Exhibit 1 on page 4 highlights some of the key differences between the Canadian and U.S. individual taxation systems and these issues are summarized below. Note that this list is by no means intended to be exhaustive or conclusive — it merely highlights some of the commonly discussed attributes:

- **Basis of Taxation:** Unlike the U.S. system of income taxation which is based on citizenship and residency, the Canadian system of income taxation for individuals is based primarily on the concept of residency; citizenship is irrelevant. Note that nonresidents of Canada are subject to tax in Canada on any income generated in Canada and on the disposition of certain types of property in Canada.

- **Determination of Residency:** Canadian residents are subject to Canadian income tax on their worldwide income, but residence for Canadian purposes is not defined in the Canadian Income Tax Act (the “Canadian Tax Act”). Rather, Canadian residence is deemed to be a question of fact. Generally, an individual who spends more than 183 days in any year in Canada is considered to be a resident, as is an individual who does not meet this 183-day requirement but is found to customarily live in Canada.
• **Estate Tax, Gift Tax and Generation-Skipping Transfer Tax:** Canada does not have estate tax, gift tax or generation-skipping transfer tax. Canada’s “transfer” tax system is built around the concept of deemed dispositions and capital gains. Very generally, whenever an individual (i) makes a transfer to another person during lifetime (where person is defined to include individuals, corporations and trusts), (ii) dies or (iii) emigrates from Canada, he or she is deemed to have disposed of, (and immediately reacquired in the case of emigration), the property in question for fair market value and therefore, to the extent there are any accrued but unrealized gains in the property, a capital gain (or income gain depending on the nature of the property) and corresponding income tax will result. Note that this deemed disposition and reacquisition rule also applies to certain property held by certain trusts every 21 years.5

Generally, Canada does not have exemption or de minimis thresholds and therefore, these rules apply to all individuals, irrespective of the amount of the transfer or the value of their estate on death. Note that in most instances transfers of assets between spouses both during lifetime and on death are exempt from the deemed disposition rule.

• **Income Tax Rates:** Like the United States, all individuals in Canada are subject to federal income tax, which is based on a graduated rate system. In addition, each province levies an income tax on its residents; residency for provincial purposes is determined as of December 31 of each year.

• **Capital Gains Tax:** Canada does not have a separate capital gains tax but rather, one half of capital gains are included in ordinary income and subject to taxation. Practically speaking, this means that the full capital gain is subject to tax at roughly ½ of the ordinary income rates. Certain types of capital gains are excluded from taxation in Canada including the gain on the sale of a “principal residence” (irrespective of amount) as are capital gains, up to certain limits, realized from the sale of certain types of business, farming and fishing interests.

• **The Canada-U.S. Tax Treaty:** The U.S. has tax treaties with a number of countries, including Canada. The *Convention Between Canada and the United States of America with Respect to Taxes on Income and Capital Gains* (the “Canada-U.S. Tax Treaty”) can resolve a number of issues that arise in cross-border planning, including relief from potential double taxation, determination of the authority to tax and elections for efficient tax planning.
### EXHIBIT 1 — Comparison of Select Tax Attributes Between the U.S. and Canada

<table>
<thead>
<tr>
<th>Basis of the Tax System and Tax Criteria</th>
<th>U.S.</th>
<th>CANADA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citizenship and residency relevant.</td>
<td></td>
<td>Citizenship is irrelevant; residence is determinative factor.</td>
</tr>
<tr>
<td>Residence Tests for Income Tax</td>
<td>Green card status, substantial presence test (unless closer connection exception applies), or election.</td>
<td>General rules only — 183-day test or where an individual “customarily lives.”</td>
</tr>
<tr>
<td>Estate Tax</td>
<td>Yes; estates beyond 2019 lifetime exclusion amounts of $11.4 million per individual and $22.8 million per married U.S. couple are subject to tax at 40%.</td>
<td>No estate tax, but deemed disposition of property at death; resultant capital gains tax.</td>
</tr>
<tr>
<td>Gift Tax</td>
<td>Yes; gifts beyond 2019 annual exclusion of $15,000 or lifetime exclusion amount subject to tax.</td>
<td>No gift tax, but most transfers of property subject to deemed disposition rule and resultant capital gains tax; some protected transfers.</td>
</tr>
<tr>
<td>Generation-skipping Transfer Tax (GSTT)</td>
<td>Yes; transfers, terminations, distributions to/for skip person beyond exemption amount subject to tax.</td>
<td>No GSTT, but certain trusts have a 21-year deemed disposition rule regarding property and, therefore resultant capital gains tax.</td>
</tr>
<tr>
<td>Capital Gains Tax</td>
<td>All capital gains included in income; numerous modifications could apply, for example: preferential capital gain tax rates; $250,000 exclusion available for gain on “primary residence” ($500,000 per married U.S. couple); certain gains from sale of small business stock excluded.</td>
<td>One-half of capital gains included in certain types of income; all gains from “principal residence” excluded; 2019 CDN$866,912 capital gain from sale of qualifying small business corporation shares and qualified farm and fishing properties are excluded.</td>
</tr>
</tbody>
</table>
| 2019 Top Combined Federal and State (Provincial) Individual Income Tax Rates | Top federal rate: 37% and 3.8% net investment income tax  
**Example — Combined federal & state rates:**  
California — 50.3% + 3.8% net investment income tax  
New York — 45.82% + 3.8% net investment income tax | Top federal rate: 33%  
**Example — Combined federal & provincial rates:**  
British Columbia — 49.8%  
Ontario — 53.53% |
THE U.S. PERSPECTIVE

Although U.S. citizens and U.S.-domiciled persons are subject to certain U.S. transfer taxes on their worldwide assets, foreign persons, such as Mary, are subject to certain transfer taxes on assets that are considered situated in the U.S. Several key distinctions should be made when comparing U.S. income taxes with U.S. transfer taxes, particularly as these taxes apply to foreign persons:

- The determination of whether an individual is a U.S. or foreign person is different for income tax purposes, than it is for transfer tax purposes. Although residency is the determinative factor for income tax purposes, domicile is the determinative factor for transfer tax purposes. Residence alone without a present intention to remain does not establish domicile and conversely, an intention to relocate without an actual move will not change domicile. The test for determining U.S. domicile is based on intent. An individual who has moved to the U.S. indefinitely with no current intentions of leaving is deemed to be U.S. domiciled. On the other hand, an individual who has no intentions of remaining in the U.S. is deemed to be non-U.S. domiciled. Mary is not considered to be domiciled in the U.S. because she has no intentions of remaining in the U.S. considering her position as a Canadian business owner and her home in the U.S., which she uses when traveling for business, is only temporary.

- For estate tax purposes, all U.S.-situs tangible and intangible assets (as defined) are included, while for gift tax purposes, only U.S. tangible assets (as defined) are subject to U.S. gift tax upon transfer; U.S. intangible assets, such as stocks, bonds and mutual funds, are excluded.

- The U.S. estate tax exclusion granted to foreign individuals for their U.S.-situated assets is $60,000 (a $13,000 tax credit), rather than the much higher exemption granted to U.S. persons. Note that this limited exemption for foreign individuals can be increased by an applicable treaty, and is in fact increased by the Canada-U.S. Treaty.

On Mary’s death in 2019, her U.S. home and U.S. stock portfolio will be included for U.S. estate tax purposes, while her U.S. bank account will be excluded. Therefore, $3 million of U.S. situated assets will be subject to U.S. estate tax, subject to relief under the Canada-U.S. Treaty.

SCENARIO 1 — INBOUND CONSIDERATIONS

Mary is a Canadian business owner with an estimated net worth of U.S. $15 million, which includes a $1.5 million home in the U.S. that she uses when traveling for business, a $1.5 million U.S. stock portfolio and a $1 million U.S. bank account. She is considered a non-domiciliary for U.S. transfer tax purposes, but is concerned about the application of the U.S. transfer taxes and in particular the U.S. estate tax.
The Canada-U.S. Treaty increases the standard U.S. $60,000 exclusion afforded to foreign persons and allows Mary’s estate to potentially claim two credits against U.S. estate tax otherwise determined (which in this instance, assuming a basic tax rate of 40%, with no exemption, would amount to $1.2 million):

- **Prorated Unified Credit:** Mary is entitled to a prorated U.S. estate tax unified credit that is based on the proportionate value of Mary’s U.S. situs assets ($3 million) over her worldwide assets ($15 million), which in this case amounts to 20%. Therefore, Mary can reduce her initial $1.2 million U.S. estate tax liability by $901,160 (20% x 2019 U.S. estate tax unified credit of $4,505,800, i.e. the credit equivalent of the $11.4 million exemption)) to render a revised estate liability of $298,840.

- **Marital Credit:** If Mary is married to a Canadian or U.S. resident spouse, and she leaves her U.S. situs assets to this spouse, the estate tax liability may be further reduced, thus rendering the estate tax liability, at least at Mary’s death, to zero. Under the Canada-U.S. Treaty, this credit is the lesser of the pro-rated unified credit calculated above (i.e. $901,160) and the U.S. estate tax otherwise payable (i.e. $1.2 million).

**THE CANADIAN PERSPECTIVE**

In addition to the U.S. estate tax considerations, Mary’s estate will also be subject to the Canadian income tax rules that apply on death. Mary will be deemed to have disposed of all her assets, including her U.S.-situated assets, immediately prior to death for fair market value and will be taxed on any capital gains arising. However, per the terms of the Canada-U.S. Treaty, Canada will allow a foreign tax credit to the extent of any U.S. estate tax paid.

**PRACTICE POINTS**

The example above is merely an illustration of some of the issues that arise. In addition to retaining advisors on both sides of the border with expertise in this area, the following should be kept in mind:

- The Canada-U.S. Treaty does not recognize state estate taxes that might be payable. Therefore, the individual may be subject to the full extent of those state estate taxes, without relief.

- If a Canadian individual’s worldwide estate is less than the U.S. estate tax exclusion afforded to its citizens for a particular year, U.S. estate tax will not be triggered, irrespective of what percentage of assets are situated in the U.S. However, if the value of a Canadian individual’s U.S. situs property is greater than $60,000, a U.S. estate tax return must be filed although there is no estate tax liability.

- Using gifting strategies to reduce the size of an individual’s estate must be approached with extreme caution when dealing with a Canadian individual, given the Canadian deemed disposition rules.

- In addition to being subject to annual tax filing requirements in each jurisdiction for any income earned, the Canadian individual must be sure not to run afoul of the U.S. residency rules, which will have implications from both the U.S. and Canadian perspectives. Practitioners should be mindful of the “closer connection exception” under the Code to alleviate any issues.
THE U.S. PERSPECTIVE

From the U.S. perspective, a home that is owned under individual title, and not through a partnership, corporation, trust or other legal entity, and that is used strictly for personal enjoyment, with no affiliated rental income, should not trigger U.S. income tax implications unless and until the property is sold for a gain. In many ways, the property, from a U.S. perspective, is treated similarly to U.S. owned property:

- Mortgage interest paid on a foreign home can be deducted in the U.S. and is subject to the same limits as a domestic residence. For the years 2018 to 2025, the interest on up to $750,000 of principal is deductible on either a foreign residence or U.S. domestic residence if the debt was used to “acquire, construct or substantially improve” a primary residence or one other secondary residence.

- Foreign real estate taxes on foreign residences are not deductible for the 2018 to 2025 tax years but itemized deductions for these amounts are scheduled to return in 2026.

THE CANADIAN PERSPECTIVE

As previously noted, nonresidents of Canada are subject to tax in Canada on any income earned in Canada, and on the disposition of any taxable Canadian property, which includes real property. Therefore, the following must be considered from the Canadian perspective:

- **Ownership Structure:** There are numerous ways in which vacation property can be held, each with its affiliated implications. Extreme care must be taken in this area to ensure that inadvertent tax consequences are not triggered in either Canada or the U.S. For example, Canadian resident trusts are deemed to dispose of all their capital property (which includes real property) every 21 years and personal use property (including vacation homes), owned by certain corporations will result in deemed shareholder benefits.

- **Sale of Property:** If Mary sells this property at some future point, the withholding taxes and reporting obligations become more significant. A nonresident seller of taxable Canadian property must apply for a clearance certificate from the Canadian taxation authorities in advance of the sale and once obtained, provide a copy to the purchaser of the property.

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**SCENARIO 2 — OUTBOUND CONSIDERATIONS**

What if the situation above is reversed and Mary, a U.S. person purchases a vacation home in Canada, establishes a Canadian investment account and opens a Canadian bank account?
Without a clearance certificate, the purchaser of the property is entitled to withhold up to 50% of the sale price from the U.S. individual to safeguard against any subsequent taxes Canada may levy against the property. Mary must file a Canadian income tax return to report the disposition of the taxable Canadian property.

- **Investment Account and Bank Account:** Any income generated from these accounts, including dividends and interest, are subject to tax in Canada and Canadian withholding tax may apply, subject to any relief under the Canada-U.S. Treaty.

- **Location Specific Issues:** There may be a number of non-income tax issues to consider depending on where Mary purchases her vacation home. For example, in addition to a “property transfer tax” (which is a provincial tax that is levied on every transfer of real property, irrespective of the residency or citizenship status of the purchaser) many geographic regions have implemented additional taxes on those who are not Canadian citizens or permanent residents, in an effort to cool their unaffordable housing markets. These include (i) the Foreign Buyers Tax/Speculative Tax in specified locations in Ontario and British Columbia which can be as high as 20% of the purchase price; (ii) a Vacancy Tax of 2% of the property’s assessed value in certain areas of British Columbia where the property is not occupied or otherwise rented; and (iii) an Empty Home Tax of 1% of the property’s assessed value in the Greater District of Vancouver irrespective of an owner’s residency or citizenship status. Given the fluid nature of these taxes, it is critical that any U.S. purchaser seek advice on every aspect of the home purchase.

**PRACTICE POINTS**

The above commentary is not meant to provide a comprehensive view of the issues to consider, but rather, is intended to highlight some relevant components. Again, it is imperative that cross-border expertise be sought. It is also helpful to keep the following in mind:

- **Residency:** As with Scenario 1 above, U.S. individuals must be mindful of the Canadian residency rules to ensure such are not inadvertently triggered, which of course carry both U.S. and Canadian tax implications.

- **Foreign Reporting:** Mary, as a U.S. person, will be subject to the U.S. foreign reporting rules regarding her financial interests in Canada, which include her bank account and investment account. This issue is discussed in more detail at page 12 of this article.

- **Treaty Resolution:** To the extent issues arise regarding double taxation or residency status, the Canada-U.S. Treaty may offer relief.
THE U.S. PERSPECTIVE
Interestingly, while the U.S. income tax rules for an international marriage (U.S. citizen married to a non-U.S. citizen) resemble much of the familiar rules for U.S. married couples, significant differences arise with such international marriages when the gift and estate tax rules are considered. 19

Exhibits 2 and 3 on page 11 summarize some of these key differences which are as follows:

• The Gift Tax Rules: The annual gift tax exclusion for foreign persons is the same as for U.S. persons ($15,000 per donor per donee in 2019) but, foreign persons are not afforded any lifetime gift exclusion amounts. In addition, gifts to a non-U.S. citizen spouse by a U.S. spouse do not benefit from the unlimited marital deduction but rather, these gifts qualify for only an augmented annual gift tax exclusion of $100,000, indexed for inflation ($155,000 for 2019). Note that the commonly used tactic of gift-splitting between spouses is only permitted when both spouses are U.S. citizens.

• The Estate Tax Rules: Generally, transfers between U.S. citizen spouses at death are eligible for a 100% marital deduction, in effect deferring the estate tax that would otherwise be due when the first spouse dies, to the death of the second spouse. However, where the surviving spouse is not a U.S. citizen, the unlimited estate tax marital deduction will only apply if the estate plan includes the use of a qualified domestic trust (QDOT) or if a timely transfer is made to a QDOT by the surviving spouse. 22

The commonly used tactic of gift-splitting between spouses is only permitted when both spouses are U.S. citizens.

THE JOINT PERSPECTIVE — THE CANADA-U.S. TAX TREATY
For purposes of marriages between Americans and Canadians, the Canada-U.S. Treaty offers relief from the QDOT requirements — the treaty allows for individuals to claim an increased unified credit beyond that offered by the Internal Revenue Code and allows for further marital deductions where property is left to a Canadian spouse. 23

SCENARIO 3 — INTERNATIONAL MARRIAGES
What are some of the issues to consider if Mary, a U.S. citizen marries John, a Canadian resident and citizen? Are there any ramifications if John emigrates to the U.S.?
THE CANADIAN PERSPECTIVE

Should John decide to make the U.S. his permanent home, aside from the immigration process itself, there are numerous factors to be considered from the Canadian and U.S. tax perspectives. Examples of key considerations include the Canadian departure tax, the U.S. treatment of Canadian tax costs and tax and Treaty elections and filing requirements:

- On emigration from Canada, the deemed disposition concept is triggered and John will be generally deemed to have disposed of all of his capital property (with the exception of taxable Canadian property and other business properties — for which it may be possible to defer Canadian tax) for fair market value, thereby giving rise to a capital gain to the extent there has been any appreciation in the property’s value.  

- Although from a Canadian perspective the tax cost of John’s assets is adjusted to fair market value, the U.S. does not automatically recognize this step-up in basis unless John makes an election under the Canada-U.S. Treaty to claim that this deemed disposition has also occurred for U.S. purposes.  

- If John has any Canadian retirement plans, including registered retirement savings plans (RRSPs) special care must be taken. A one-time election under the Canada-U.S. Treaty must be made to ensure that any undistributed and accrued income is not subject to U.S. tax. In addition, knowledge of state tax laws is relevant since not all states recognize the U.S. federal position regarding the deferral of taxation of accrued and undistributed income from such plans. For example, California reserves the right to tax accrued and undistributed income in RRSPs.
### EXHIBIT 2 — Comparison of 2019 U.S. Estate and Gift Tax Exclusions

<table>
<thead>
<tr>
<th></th>
<th>EXCLUSION AMOUNTS GRANTED TO U.S. PERSONS</th>
<th>EXCLUSION AMOUNTS GRANTED TO FOREIGN PERSONS (UNLESS OTHERWISE INCREASED BY TREATY)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estate Tax</td>
<td>$10 million</td>
<td>Yes</td>
</tr>
<tr>
<td>Gift Tax – Annual Exclusion</td>
<td>$10,000</td>
<td>Yes</td>
</tr>
<tr>
<td>Gift Tax – Lifetime Exclusion</td>
<td>$10 million</td>
<td>Yes</td>
</tr>
</tbody>
</table>

### EXHIBIT 3 — Comparison of 2019 U.S. Estate Tax and Gift Tax Deductions/Exclusions for Spouses

<table>
<thead>
<tr>
<th></th>
<th>DEDUCTION/EXCLUSION FOR TRANSFER TO U.S. CITIZEN SPOUSE</th>
<th>DEDUCTION/EXCLUSION FOR TRANSFER TO NON-U.S. CITIZEN SPOUSE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lifetime Gift</td>
<td>Unlimited marital deduction</td>
<td>Limited annual gift exclusion; $100,000 base; indexed for inflation ($155,000 in 2019)</td>
</tr>
<tr>
<td>Transfer at Death</td>
<td>Unlimited marital deduction</td>
<td>No marital deduction unless to a QDOT</td>
</tr>
</tbody>
</table>

*Note: The marital deduction/exclusion is determined based on the citizenship of the receiving spouse.*
THE U.S. FOREIGN REPORTING RULES

When dealing with any U.S. citizen or U.S. resident that has foreign assets, special attention must be paid to the complex and often non-intuitive foreign reporting rules. The chart below summarizes the U.S. foreign reporting rules for the Report of Foreign Bank and Financial Accounts (FBAR) as mandated by the U.S. Bank Secrecy Act as well as Form 8938, otherwise known as the Statement of Specified Foreign Financial Assets, as mandated by the U.S. Foreign Account Tax Compliance Act (FATCA).

<table>
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<tr>
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<th></th>
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</thead>
<tbody>
<tr>
<td>Specified individuals and specified domestic entities that have an interest in specified foreign financial assets and meet the reporting threshold.</td>
<td>U.S. persons, which include U.S. citizens, resident aliens, trusts, estates, and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold.</td>
<td></td>
</tr>
<tr>
<td>• Specified individuals include U.S. citizens, resident aliens, and certain non-resident aliens</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Specified domestic entities include certain domestic corporations, partnerships, and trusts</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Does the United States include U.S. territories?

<table>
<thead>
<tr>
<th></th>
<th>No.</th>
<th>Yes, resident aliens of U.S. territories and U.S. territory entities are subject to FBAR reporting.</th>
</tr>
</thead>
</table>

Reporting Threshold (Total Value of Assets)

<table>
<thead>
<tr>
<th>SPECIFIED INDIVIDUALS LIVING IN THE U.S.:</th>
<th>SPECIFIED INDIVIDUALS LIVING OUTSIDE THE U.S.:</th>
<th>Aggregate value of financial accounts exceeds $10,000 at any time during the calendar year. This is a cumulative balance, meaning if you have 2 accounts with a combined account balance greater than $10,000 at any one time, both accounts would have to be reported.</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Unmarried individual (or married filing separately): Total value of assets was more than $50,000 on the last day of the tax year, or more than $75,000 at any time during the year.</td>
<td>• Unmarried individual (or married filing separately): Total value of assets was more than $200,000 on the last day of the tax year, or more than $300,000 at any time during the year.</td>
<td></td>
</tr>
<tr>
<td>• Married individual filing jointly: Total value of assets was more than $100,000 on the last day of the tax year, or more than $150,000 at any time during the year.</td>
<td>• Married individual filing jointly: Total value of assets was more than $400,000 on the last day of the tax year, or more than $600,000 at any time during the year.</td>
<td></td>
</tr>
<tr>
<td>SPECIFIED DOMESTIC ENTITIES:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total value of assets was more than $50,000 on the last day of the tax year, or more than $50,000 at any time during the tax year.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>When do you have an interest in an account or asset?</td>
<td>Form 8938, Statement of Specified Foreign Financial Assets (FATCA)</td>
<td>FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR)</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>-------------------------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>If any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the account or asset are or would be required to be reported, included, or otherwise reflected on your income tax return.</td>
<td>Financial interest: you are the owner of record or holder of legal title; the owner of record or holder of legal title is your agent or representative; you have a sufficient interest in the entity that is the owner of record or holder of legal title.</td>
<td>Signature authority: you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account.</td>
</tr>
</tbody>
</table>

| What is reported? | Maximum value of specified foreign financial assets, which include financial accounts with foreign financial institutions and certain other foreign non-account investment assets. | Maximum value of financial accounts maintained by a financial institution physically located in a foreign country. |

| How are maximum account or asset values determined and reported? | Fair market value in U.S. dollars in accord with the Form 8938 instructions for each account and asset reported. Convert to U.S. dollars using the end of the taxable year exchange rate and report in U.S. dollars. | Use periodic account statements to determine the maximum value in the currency of the account. Convert to U.S. dollars using the end of the calendar year exchange rate and report in U.S. dollars. |

| When is it due? | Form is attached to your annual return and due on the date that return is due, including any applicable extensions. | Received by April 15 (6-month automatic extension to Oct 15). |

| Where to file? | File with income tax return pursuant to instructions for filing the return. | File electronically through FinCENs BSA E-Filing System. The FBAR is not filed with a federal tax return. |

| Penalties | Up to $10,000 for failure to disclose and an additional $10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of $60,000; criminal penalties may also apply. | Civil monetary penalties are adjusted annually for inflation. For civil penalty assessment prior to Aug 1, 2016, if non-willful, up to $10,000; if willful, up to the greater of $100,000 or 50 percent of account balances; criminal penalties may also apply. |

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**Chart adapted from IRS Comparison of Form 8938 and FBAR Requirements (2019)**

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**PRACTICE POINTS**

The foreign reporting thresholds are expressed in U.S. dollars, monitor the fluctuations in any foreign exchange rate, including the Canada-U.S. exchange rate if applicable, to ensure proper compliance.
CONCLUDING COMMENTS

As technological growth and innovation continue to dominate the economic and social landscape for the United States, Canada and beyond, having a worldview of international wealth planning is extremely beneficial, as is the importance of knowing one’s limits.

Estate planners and advisors must maintain a level of flexibility, not only because of the fluid nature of the changing U.S. tax system, but also because of the ramifications with the international client. Understanding the implications and exposure of cross-border activity at the outset is imperative in today’s globalized world.

FOR MORE INFORMATION

As a premier financial firm, Northern Trust specializes in Goals Driven Wealth Management backed by innovative technology and a strong fiduciary heritage. For 130 years we have remained true to the same key principles — service, expertise and integrity — which continue to guide us today. Our Wealth Planning Advisory Services team leverages our collective experience to provide financial planning, family education and governance, philanthropic advisory services, business owner services, tax strategy and wealth transfer services to our clients. It is our privilege to put our expertise and resources to work for you.

If you would like to learn more about these and other services offered by Northern Trust, contact a Northern Trust professional at a location near you or visit us at northerntrust.com.
ENDNOTES


2. The Free Trade Agreement (FTA) was agreed to in October 1987 and signed on January 2, 1988 and phased out a wide range of trade restrictions between Canada and the U.S. The FTA was superseded by the North American Free Trade Agreement (NAFTA) in 1994 which includes Canada, the U.S. and Mexico. The United States – Mexico – Canada Agreement is a free trade agreement between the U.S., Canada and Mexico intended to supersede NAFTA. It was signed on November 30, 2018.

3. Note that extreme caution must be exercised when considering any type of U.S.-based trust structure for an individual who is either a current or former resident of Canada due to the Canadian “nonresident trust rules.” Section 94 of the Canadian Tax Act contains an intricate set of rules that can deem a trust created in another jurisdiction, including the U.S., to be a resident of Canada for income tax and foreign reporting purposes. Consultation with an attorney who has expertise in this area is essential.

4. See Canada Revenue Agency, Canada Income Tax Folio SF-F1-C1: Determining an Individual’s Residence Status for an overview of the factors to be considered when determining residency which includes residential ties, personal ties, economic ties, and social ties. Where residency cannot be determined, case law and the tie breaker rules of any applicable tax treaty are relevant.

5. See Canada Revenue Agency, Dispositions of property, related to emigration, death and trusts for an overview of the deemed disposition rules.

6. If certain conditions are met, this tax can be deferred by a distribution by the Trust of its property to the Canadian resident beneficiaries of the Trust.

7. While U.S. income tax is imposed on its citizens and residents under the Internal Revenue Code, citizenship status is determined by the U.S. Constitution and resident status is determined by the Internal Revenue Code along with Treasury regulations, applicable tax treaty and related case law.


9. Internal Revenue Code § 2102(b)

10. Article XXIX B of the Canada-U.S. Treaty


12. See Internal Revenue Service Instructions for Form 706-NA.

13. Treasury Reg. 301.7701(b)-2


17. See Canada Revenue Agency, Disposing of or acquiring certain Canadian property to determine when a clearance certificate is required for acquiring or disposing of certain Canadian property.


20. Internal Revenue Code § 2503(b).

21. Internal Revenue Code § 2523(i)(2).


23. Although the U.S. Treasury Regulations and the Canada-U.S. Treaty may work together to eliminate the need for a QDOT in regards to a Canadian individual, the estate plan may still include a QDOT, particularly if the estate is significant.

24. See Canada Revenue Agency, Disposing of or acquiring certain Canadian property.


27. State of California, Franchise Tax Board Information Letter No. 2003-004