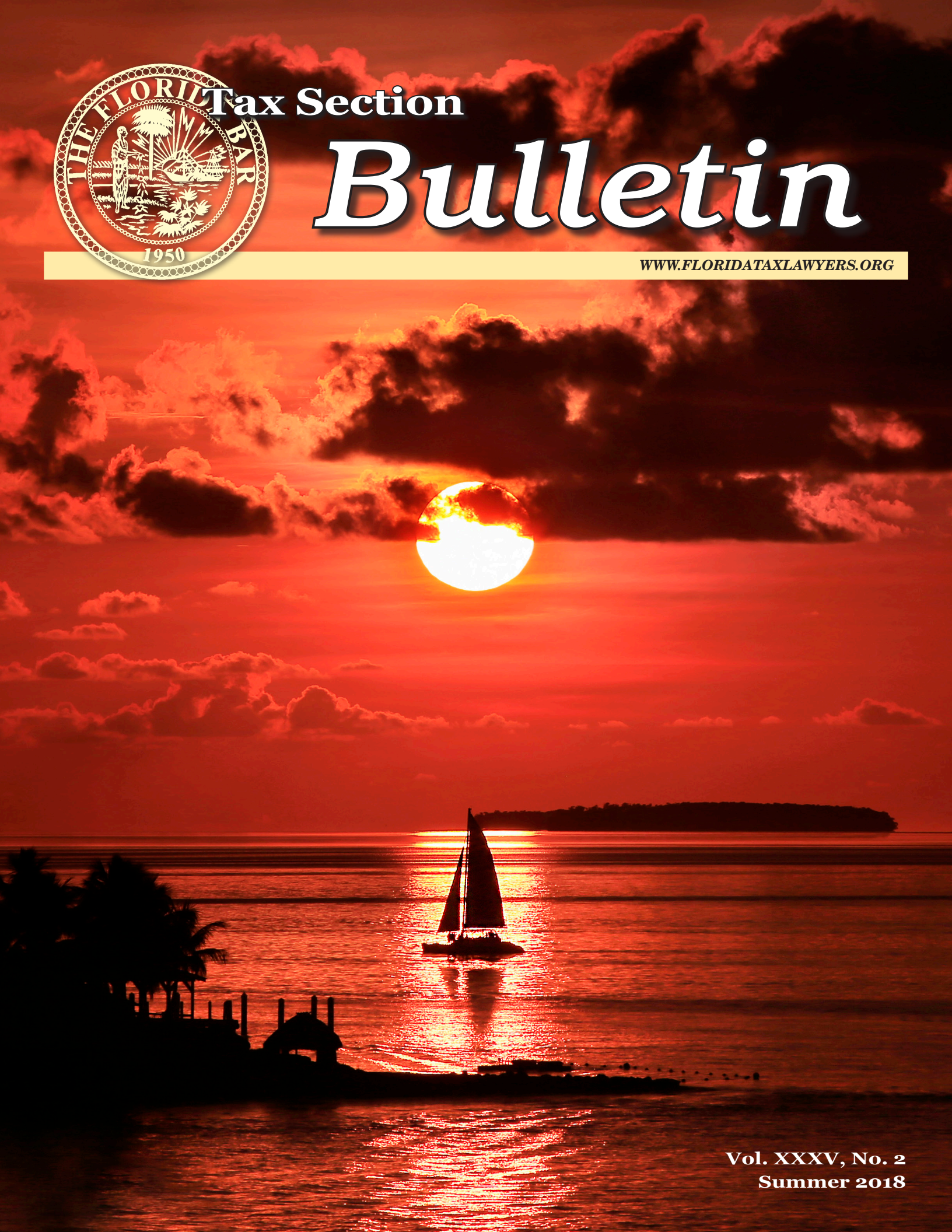

# Tax Section Bulletin

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THE FLORIDA BAR

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## IN THIS ISSUE:



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## The Florida Bar Tax Section Meeting Locations and Dates

***2018 Fall Meeting***
*JW Marriott Washington, DC – September 19 - 22, 2018*

***2019 Annual Meeting***
*Rosen Shingle Creek Orlando – May 2 - 4, 2019*

***2019 Organizational Meeting***
*Amelia Island Plantation Resort – July 3 - 6, 2019*

# Chair's Message

**By Michael D. Minton**
**Chair, Florida Bar Tax Section 2018-2019**

Dear Colleagues:

The summer of 2018 has officially begun, as has my year as Chair of The Florida Bar Tax Section. For the better part of the last 30 years, summer hasn't officially begun for the Minton Family until we attend the Tax Section's annual Organizational Meeting held at Amelia Island Plantation in Fernandina Beach. What better way to start your summer than with fun in the sun amongst friends and family at such a beautiful resort! Frankly, I believe that attending the Organizational Meeting religiously is part of the glue that binds the members of the Section. We have each matured and watched one another's families grow over the past 30 years. For our new members, I encourage you to make every effort to attend the Organizational Meeting. The relationships you establish will last a lifetime. In addition, your participation signals your commitment and leads to future leadership positions within the Section. Just ask one of the seventeen (17) new tax lawyers that joined us this year, which may be an all-time record!

We kicked off the meeting with a BANG since the 4th of July was the first day of our scheduled time together. Mixed in with our various planning meetings and our annual Ullman Year in Review CLE, we also enjoyed putt-putt golf that attracted 60 entrants (parents and children), a family fishing tournament that attracted 40 entrants, and enjoyed some laughs during the murder mystery dinner "Murder on the Orange Blossom Special." Our membership was treated to a performance by our own Joshua Doyle, Executive Director of The Florida Bar, who was a great sport and made a very effective g-man as the good guys figured out "whodunit."

We honored Mark A. Prater with the 2018 Marvin C. Gutter Outstanding Public Service Award for almost 30 years of public service in Washington, D.C. We plan to visit with Mark again at our Fall Meeting scheduled in Washington, D.C.

I also had the pleasure of announcing co-recipients of the Gerald T. Hart Outstanding Tax Attorney Award. They are Leslie J. Barnett, who served as Chair 30 years ago in 1988-89, and Bruce H. Bokor, who served the year prior to Les as Chair in 1987-88. These two legends of the Section will receive their long overdue recognition at the Annual Meeting scheduled to take place at Rosen Shingle Creek Resort in Orlando on May 2-4, 2019. We are also looking forward to having both Les and Bruce join us for the Washington, D.C. trip.

Our next meeting is scheduled for Washington, D.C. (September 20-22, 2018). With the recent enactment of the Tax Cuts and Jobs Act of 2017, there has been no better time to be a tax lawyer than right now, and there is no better place to visit than Washington, D.C. Our membership will have the opportunity to meet with members of the Florida Legislative Delegation at an evening reception at The Florida House on Thursday, September 20. In addition, we have meetings scheduled with the IRS, U.S. Department of the Treasury, U.S. Department of Justice, U.S. Tax Court, U.S. House Committee on Ways and Means, and U.S. Senate Committee on Finance. (LINK: Fall Meeting Registration). I encourage you to register as soon as possible while there is still room available.

Mixed among our business meetings, we have arranged for some extraordinary opportunities to see Washington, D.C. in a way that most never experience. We will tour the Washington monuments at night and enjoy their splendor under the lights in the cool, autumn evening air. Behind-the-scenes tours are scheduled with The Smithsonian to tour their Marine Research Department, Native American Museum and African-American Museum. We have also arranged for tours of both the East and West Wing of the White House, but the West Wing tours are completely filled.

We have put forth a very aggressive Program of Work for 2018-2019 which may be viewed on the Section's website by following this link (LINK: 2018-2019 Program of Work). Once again, we shall endeavor to produce 12 free phone CLE programs for our membership. The programs this fall will feature what our members learned from the trip to Washington, D.C. so we may share this inside the beltway knowledge with our membership.

As always, we owe much of our continued success to our sponsors. Thank you to our platinum sponsor, MPI, for their decades of support and their Presidential Level of support for our D.C. trip. Other sponsors assisting with the D.C. trip are Jones Lowry, at the Representative Level, and Alliance Bernstein and Coral Gables Trust at the Ambassador Level. In addition, I would like to thank our sponsors for the balance of our programs this year, including those listed above as well as Wilmington Trust, MRW Consulting Group, Kaufman Rossin and Business Valuation Analysts.

Michael D. Minton, Chair

# Tax Section Active in Protecting Tax and Business Planning From Effects of Comments to UVTA

**By Gerard "J.J." Wehle**
**Drummond Wehle, LLP**
**Tampa, Florida**

In July of 2014 the National Conference of Commissioners on Uniform State Laws (NCCUSL) revised the Uniform Fraudulent Transfer Act ("UFTA") and renamed it Uniform Voidable Transactions Act ("UVTA"). Changes to the UFTA were accompanied by extensive new and revised Official Comments. In addition, the UVTA adds a new Section 10 that provides that the law of an individual's principal residence at the time a transfer is made or obligation is incurred is to be the governing law to determine whether such individual has made a voidable transfer. The impetus for new Section 10 seems to be the disapproval of "forum shopping" by individuals, their families and businesses to seek and obtain the legal and tax benefits of utilizing another state's trust, estate, and business entity laws. The Business Law Section (BLS) supports the adoption of the UVTA in Florida.

The Official Comments to the UVTA have a major, and adverse, impact on many "mainstream" estate planning and business entity structure planning transactions in Florida. These include asset substitution powers within grantor trusts, business entity formation and conversion, and choice of jurisdiction. Comments to Uniform Acts have a significant impact on the judicial interpretation of uniform laws, and the potential impact of the UVTA Official Comments are no exception. Therefore, the Florida Bar Tax Section opposed the adoption of the UVTA in Florida. The Tax Section felt that opposition to the adoption of the UVTA in Florida was so important, that it hired a lobbyist to oppose its adoption in Florida.

The Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL) also opposes adoption of the UVTA without modifications. Over the past two legislative sessions, representatives of the Tax Section, the RPPTL Section, and BLS have extensively debated BLS's proposed legislation to adopt the UVTA in Florida.

The sticking point has been how to handle the additions to certain Official Comments. Although BLS continues to say the comments are not law and, therefore, not important, they continue to reject proposals from the Tax and RPPTL Sections to add provisions confirming that the comments cannot be used to interpret the Act, which is the approach taken by Arkansas and Indiana when they adopted the UVTA.

During the 2018 legislative session, BLS submitted language to the legislature in the form of HB 979 sponsored by Representative George Moraitis adopting the UVTA as promulgated by the Uniform Law Commission. A companion bill was submitted in the Senate by Senator David Simmons. Countless hours were spent working with our lobbyist and legislators to try to broker a compromise to include language disavowing certain unfavorable comments to the UVTA similar to what had been adopted by Arkansas and Indiana. BLS did not approve of the language and, as a result, the bills did not progress and no legislation was passed in the 2018 session.

We would like to thank Sen. David Simmons and Rep. George Moraitis for working with the Tax Section, RPPTL Section, and our lobbyists throughout the 2018 Legislative Session in trying to find an acceptable compromise. It is possible that a proposal to adopt the UVTA in Florida may be proposed during the 2019 legislative session. If it does, Tax Section representatives will again work diligently to add protections to preserve well-settled tax and business planning opportunities for Florida residents, and defeat any legislation that attempts to unreasonably expand the ability of future, unknown creditors to attack these legitimate plans.

# Considering Expatriating? Now Might be the Perfect Time

**Jonathan E. Gopman, Esq.**
**Akerman, LLP**
**Naples, Florida**

**Paul J. D'Alessandro, Jr., Esq.**
**Akerman, LLP**
**Miami, Florida**

On December 22, 2017, legislation commonly referred to as the Tax Cuts and Jobs Act (the "Tax Act") was enacted into law. The Tax Act fundamentally changed the landscape for US taxpayers with cross-border business activities. What did not change, however, are the US tax laws governing expatriations. This article provides an overview of the expatriation rules and explains why now may be an opportune time to expatriate in light of the new laws under the Tax Act.

## EXPATRIATION BASICS

The US has experienced a significant increase in the number of individuals who have expatriated since calendar year 2008. For example in 2015, almost 4,300 individuals expatriated, and in 2016, more than 5,400 individuals expatriated. More than 5,100 individuals expatriated in 2017, and while this is a decrease from 2016, it is the first time since 2012 that there has been a decrease from the previous year.

In tax jargon, an "expatriate" refers to an individual who has either relinquished US citizenship or who has ceased being a lawful permanent resident of the US (e.g., by formally abandoning his or her green card). In the latter case, expatriation only presents an issue for an individual who has held a green card in at least 8 of the preceding 15 years leading up to the expatriation.[1] If an expatriate meets any one of three tests, he or she is classified as a "covered expatriate" and is generally subject to negative US tax results. An individual is considered a covered expatriate if either: (A) his or her average annual net income tax liability for the 5 years preceding the expatriation exceeds a specified threshold ($165,000 for 2018); (B) his or her net worth as of expatriation is $2 million or more; or (C) he or she fails to certify under penalty of perjury that he or she has complied with all US federal tax obligations for the 5 years preceding the expatriation.

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Classification as a covered expatriate leads to two negative US tax results. The first is the imposition of the exit tax under Code § 877A.[2] Generally, a covered expatriate is deemed to have sold all of his or her property the day before the expatriation date for fair market value.[3] The individual pays US income tax on the net gain at generally applicable US tax rates based on the character and holding period of the asset. Additionally, US family members and other US individuals who receive property from a covered expatriate are subject to a special transfer tax under Code § 2801.[4] If a US person receives a gift or bequest from a covered expatriate, such person generally pays tax at the highest US gift or estate tax rate (currently 40%) on the receipt of a so-called "covered gift or bequest." Thus, expatriating can affect not only the individual leaving, but also the people left behind.

## CHANGES MADE BY THE TAX ACT

The Tax Act represents a comprehensive reform to US tax laws, but it may have been the international provisions of the Code that were changed the most. Prior to the Tax Act, it was possible, with proper planning, for a US taxpayer to defer paying US income tax on foreign earnings by operating a foreign business through a foreign corporation. After the Tax Act, deferral opportunities are much more restricted.

First, and perhaps most jarring, a one-time US income tax, known as the "transition tax" or mandatory "repatriation tax," has already been imposed retroactively on the untaxed foreign earnings accumulated inside certain foreign corporations. In general, Code § 965 requires certain US taxpayers with ownership interests in these foreign corporations to pay tax on a deemed inclusion of income from that foreign corporation. The exact amount of tax owed depends on the type of assets that generated the earnings (but generally, earnings attributable to cash are taxed at a higher rate than all other earnings).

Future earnings of the foreign business will also most likely be subject to US income tax on a current basis. Code § 951A creates a new category of income known as "global intangible low-taxed income" (referred to as "GILTI"). Subject to limited exclusions and exceptions,[5] GILTI essentially includes any foreign earnings of a controlled foreign corporation ("CFC") not already subject to current US income taxation.[6] In effect, the new GILTI regime acts as a global minimum tax for US shareholders of CFCs.

As if the foregoing was not enough, US individuals are treated much harsher under these new rules than US corporations.[7] It should first be noted that under the Tax Act, US corporations are taxed at a flat rate of 21%. US individuals, on the other hand, are subject to graduated tax rates, ranging from 10% to 37%. The additional 3.8% Medicare tax continues to apply to certain types of investment income for certain high-income individuals as well. Although the Tax Act may have decreased the individual tax rates (the top US income tax rate was previously 39.6%), the rates are scheduled to revert to their pre-Tax Act levels in 2026. The tax rate cut for corporations, however, was made permanent by the Tax Act.

Individuals are also subject to higher tax rates than US corporations on inclusions under Code § 965. Additionally, US corporations receive numerous benefits under the new GILTI regime that individuals do not. For example, a US corporation is currently entitled to a deduction of 50% of the GILTI inclusion, resulting in an effective US corporate income tax rate of 10.5%. A US corporation can also claim a foreign tax credit for 80% of the foreign taxes paid or accrued by the foreign corporation attributable to GILTI. Individuals receive neither of the foregoing benefits.[8]

The Tax Act also added new rules that permit certain US corporations to receive a 100% deduction for the foreign source portion of dividends received from a foreign corporation.[9] Individuals do not receive any deduction for such dividends.

## WHAT TO DO?

US individuals who directly own foreign business interests may be the group of taxpayers hardest hit by the Tax Act. US individuals already living abroad with minimal ties to the US (other than citizenship or residency) may find the new tax rules especially burdensome. Accordingly, these people may be ideal candidates for expatriation.

Nothing can be done, prospectively, to avoid the transition tax. Although the total tax liability may be paid in installments, such tax has already been imposed under the Tax Act, and all that remains now for many affected US taxpayers is calculating the amount of US income tax owed.[10] Planning can still be done, however, to avoid the harmful US tax consequences of expatriating.

A major benefit that is provided to individuals under the Tax Act is the increase in the combined estate and gift tax exclusion amount (from a base amount of $5,000,000 to $10,000,000, with annual inflation adjustments). In 2018, the exclusion amount, adjusted for inflation, is $11,180,000. This provides individuals who are considering expatriating a powerful planning tool. For example, a common planning technique involves

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making bona fide, completed gifts prior to expatriating to reduce an individual's net worth below $2,000,000. With an increased exclusion amount, individuals can now make larger lifetime gifts without incurring US gift tax liability, thus providing a tax-free method of significantly reducing their net worth.[11] This opportunity will not last forever though, as the increased amount sunsets in 2026, when it is scheduled to revert to its previous level of $5,000,000 (indexed for inflation).

## CONCLUSION

The Tax Act made a number of fundamental changes to the international provisions of the Code, many of which harshly affect US individuals with foreign business interests. Not all is lost for individuals, however, as they now receive double the exclusion amount for US gift and estate tax purposes until 2026. This combination means that now may be the perfect time to expatriate for those Americans living abroad.

### Endnotes:

1 These individuals are referred to as "long-term residents."

2 All section ("§") references are to the Internal Revenue Code of 1986, as amended (the "Code"), or the Treasury regulations thereunder, unless otherwise specified.

3 Certain assets, such as "deferred compensation items," are taxed under different rules.

4 While beyond the scope of this article, it should be noted that the definition of a US resident for Code § 2801 purposes is determined in accordance with US transfer tax principles (*i.e.*, residence is based on "domicile") and not the objective tests used in determining residency for US income tax purposes (*e.g.*, the lawful permanent residence test).

5 For example, a deemed routine return, defined generally as 10% of the foreign corporation's tangible business property (referred to under the new law as "qualified business asset investment" or "QBAI"), is not subject to tax under the GILTI rules.

6 In general, Code § 957(a) defines a CFC as a foreign corporation more than 50% owned (by vote or value) by US shareholders. Under revised Code § 951(b), a "US shareholder" means a US person who owns 10% or more of the vote or value of the stock in a foreign corporation (prior to the Tax Act, the definition was based solely on voting power). In applying each of the foregoing definitions, various indirect and constructive ownership rules apply.

7 Any reference to a "US corporation" is to a "C" corporation only.

8 An election can be made under Code § 962, however, that entitles an individual to be taxed as a corporation for certain purposes.

9 Code § 245A. This new provision may not provide as large of a tax benefit as a headline reading would suggest, due in large part to the new GILTI rules.

10 The IRS did announce, however, that it would waive certain late-payment penalties for individuals who missed the first installment payment deadline, provided payment is made by the due date for the individual's 2018 US income tax return. IR-2018-131 (June 4, 2018). The relief is available only if the individual's net tax liability under Code § 965 is less than $1,000,000, and taxpayers will remain liable for interest.

11 Gifts can also be made in trust, but care must be taken to ensure that the trust is appropriately structured.

TAX SECTION
of The Florida Bar

# Fall Meeting


## September 20 - 22, 2018
## Washington, DC

**Visit the Florida Bar Members Portal**

# Taxpayer Rights in Florida: *New Opportunity for Meaningful Reform*

**By Mark E. Holcomb**
**Dean Mead & Dunbar**
**Tallahassee, FL**

The 2018 Florida Legislature granted greater independence and authority to the Department of Revenue's office of Taxpayer Rights Advocate. Oversight of the Taxpayer Rights Advocate will shift from the Department of Revenue to the Governor's office; the Taxpayer Rights Advocate will also be responsible for recommending administrative and legislative changes to the Governor and legislative leadership to resolve problems encountered by taxpayers. These changes provide a new opportunity for the Taxpayer Rights Advocate to become a voice for all taxpayers (not just those in dire straits) and spur meaningful reforms protecting taxpayer rights in Florida. This article explains key aspects of the new law and suggests a few of the many reforms that should be considered.

### *Florida Taxpayers' Bill(s) of Rights*

Florida voters amended the state constitution in 1992 to require the legislature to adopt a "Taxpayers' Bill of Rights" that "in clear and concise language, sets forth taxpayers' rights and responsibilities and government's responsibilities to deal fairly with taxpayers under the laws of this state."[1]

Two statutes have been adopted summarizing these rights: one for state taxes administered by the Florida Department of Revenue (DOR);[2] and the other for local property taxes.[3] Labeling either of these statutes a 'bill of rights' is something of a misnomer. While these statutes purport to "guarantee that the rights, privacy, and property of Florida taxpayers are adequately safeguarded and protected,"[4] in reality these statutes merely compile and summarize rights granted under *other* state laws and DOR regulations, and are "available only insofar as they are implemented in other parts of the Florida Statutes or rules."[5] The statutes serve as a convenient reference point rather than a self-executing source of substantive protection (such as the Bill of Rights to the U.S. Constitution), although that distinction may not always be recognized in the courts.[6]

That is not to suggest that either Bill of Rights is unimportant. The rights listed are central to the integrity of a state tax system heavily dependent upon voluntary taxpayer compliance. These rights reflect basic due process (the right to notice and an opportunity to be heard before taxes are assessed), the right to maintain confidentiality over taxpayer information, and the right to simple and nontechnical explanations of audit adjustments and refund denials.[7] But these rights remain subject to conditions and limitations contained in the cited implementing statutes and regulations. The stated "guarantee" of taxpayer rights is largely idealized; the devil is in the details.

Potentially, one of the most meaningful provisions of the state-level Taxpayer's Bill of Rights is the last one:

> The right to fair and consistent application of the tax laws of this state by the Department of Revenue.[8]

This right embodies the constitution's acknowledgement of government's responsibility to deal fairly with taxpayers.[9] A taxpayer's right to equal protection of the tax laws has long been recognized in case law[10] (reflected in the right to "consistent" application of the tax laws), but the right to "fair" application of the tax laws has not received the same level of attention. What is "fair" in any given circumstance is certainly open to debate, and the scope of that right remains unsettled.[11]

Notably, even though the 1992 constitutional mandate broadly applies to "government's responsibilities to deal fairly with taxpayers under the laws of this state," the state-level Taxpayer's Bill of Rights does not, in fact, protect taxpayers in the assessment and collection of *all* state taxes. The statute does not apply to taxes administered by state agencies other than DOR, such as the Department of Business and Professional Regulation (*e.g.*, alcoholic beverage, tobacco and pari-mutuel wagering taxes) or the Department of Highway Safety and Motor Vehicles (*e.g.*, interstate motor carrier fuel taxes). Only selected portions of the Taxpayer's Bill of Rights apply to DOR's administration of the state's reemployment assistance tax.[12] There is also no taxpayer bill of rights for tourist development and tourist impact (or local "bed") taxes that are locally administered under authority of state law.[13]

### *Taxpayer Rights Advocate Program*

DOR's office of Taxpayer Rights Advocate was created in 1992 to assist taxpayers in situations where

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the agency's tax assessment and collection procedures threaten imminent and irreparable harm.[14] The Taxpayer Rights Advocate is currently appointed by and reports directly to DOR's Executive Director.[15]

Circumstances may arise in which DOR's normal tax assessment and collection process is inadequate to protect a taxpayer's interests from imminent and irreparable harm[16] or from unprofessional treatment by DOR employees. In those circumstances, the taxpayer may seek assistance from the Taxpayer Rights Advocate.[17] The Taxpayer Rights Advocate has the power to issue taxpayer assistance orders that suspend or stay DOR actions when a taxpayer suffers or is about to suffer a significant hardship as a result of a tax determination, collection or enforcement process.[18] The order may provide relief only as an extraordinary measure, and not as a means to contest the merits of a tax liability or as a substitute for normal procedures for review of a tax assessment, collection proceeding or refund denial.[19]

### *Empowering the Taxpayer Rights Advocate*

The 2018 Legislature enacted two important changes to the Taxpayer Rights Advocate program. First, effective July 1, 2018, the Taxpayer Rights Advocate will report directly to the Chief Inspector General in the Executive Office of the Governor, who will have sole responsibility for appointing and removing the Taxpayer Rights Advocate.[20] The Chief Inspector General is responsible for promoting accountability, integrity and efficiency in state agencies under the Governor's jurisdiction.[21] Although the Taxpayer Rights Advocate remains under the DOR Executive Director's general supervision for administrative purposes (such as adequately staffing the program), insulating the Taxpayer Rights Advocate from direct control of the state's primary revenue collection and enforcement agency is a distinct move toward independence.

Second, while its fundamental statutory duties remain unchanged, the Taxpayer Rights Advocate will now have an annual reporting obligation to the Governor, Senate President and House Speaker.[22] Among the information required to be included are "[r]ecommendations for administrative or legislative action as appropriate to resolve problems encountered by taxpayers" and "[o]ther information as the taxpayers' rights advocate may deem advisable."[23] That report must contain a complete and substantive analysis, not just statistical information.[24]

### *The Opportunity for Meaningful Reform*

The Taxpayer Rights Advocate had a limited mission under prior law. The hope here is that, with fresh oversight from the Chief Inspector General, the Taxpayer Rights Advocate will assume an expanded role to more broadly champion reforms that strengthen taxpayer rights and improve tax administration for the benefit of all taxpayers, not just those whose rights or property are imperiled. The National Taxpayer Advocate within the Internal Revenue Service, for example, seeks to improve service to and reduce burdens on all taxpayers, one component of which is resolving taxpayer problems.[25] That broader mandate provides a model for Florida's Taxpayer Rights Advocate to emulate. Expanding the Taxpayer Rights Advocate's authority to include other revenue-collecting government agencies (such as the Department of Business and Professional Regulation and the Department of Highway Safety and Motor Vehicles),[26] or requiring those agencies to adopt their own taxpayer rights advocate programs, would also help ensure that those agencies "deal fairly" with taxpayers as directed by the constitution.

The Taxpayer Rights Advocate's new reporting obligations to the Governor, Senate President and House Speaker expand its platform for advancing taxpayer rights. There will be no shortage of good ideas to improve taxpayer protections and administration of the state's taxes.[27] One starting point would be fulfilling the 1992 constitutional mandate by extending the existing Taxpayer's Bill of Rights to include *all* taxes administered by state agencies (such as the Department of Business and Professional Regulation and the Department of Highway Safety and Motor Vehicles), not just those administered by DOR. Including taxes that are locally administered pursuant to state law would also reasonably implement the constitution. Adding detail to the scope of guaranteeing taxpayers the right to "fair" administration of the tax laws would be beneficial. Finally, enacting a self-executing bill of rights, not subject to external limitations and conditions, would demonstrate the State's commitment to taxpayer's rights that voters approved back in 1992.

Whatever the outcome, the important first step is to begin floating ideas for reform. The National Taxpayer Advocate publishes the *Purple Book*, a compilation of 50 recommendations for Congressional action to strengthen taxpayer rights and improve tax administration.[28] Florida's Taxpayer Rights Advocate would do well to similarly exercise its new reporting opportunity to the Governor and legislative leaders.

### *Conclusion*

The 2018 legislature granted new independence to DOR's Taxpayer Rights Advocate program and empowered that office to champion needed improvements to

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better protect the rights of Florida taxpayers. There are plenty of opportunities for meaningful reform. For the benefit of all Florida taxpayers, the Taxpayer Rights Advocate should strive to fulfill this newfound potential.

**Endnotes:**

1 Art. I, §25, Fla. Const. (eff. July 1, 1993)(proposed by the Taxation and Budget Reform Commission). The constitution refers to a "Taxpayers' Bill of Rights" (plural), but the statutes refer to a "Taxpayer's Bill of Rights" (singular). Each term is used here in the context of the authority cited.

2 Section 213.015, Fla. Stat. (2017).

3 Section 192.0105, Fla. Stat.

4 Section 213.015; Section 192.0105 substitutes "the taxpayers of this state" for "Florida taxpayers."

5 *Id*.

6 At least one appellate court has referred to the property tax bill of rights as granting substantive legal rights. *Nikolits v. Haney*, 221 So. 3d 725, 730 (Fla. 4th DCA 2017)(Section 192.0105 "gives to the taxpayer the right of due process in the assessment and tax collection process").

7 *See*, *e.g.*, Section 192.015(1), (2) and (4); and Section 213.015(3), (5), (6), (8), and (9), Fla. Stat.

8 Section 213.015(21), Fla. Stat. (with no citation to implementing law).

9 Art. I, §25, Fla. Const.

10 *See*, *e.g.*, *Regal Kitchens, Inc. v. Florida Dept. of Revenue*, 641 So. 2d 158, 164 (Fla. 1st DCA 1994) (acknowledging "the Department's duty to give equal treatment to similarly situated taxpayers" and the right of an aggrieved taxpayer to "raise an equal protection claim if the Department is engaging in any form of selective or discriminatory taxation").

11 Substantive due process should, at a minimum, guarantee that the application of the tax laws be rational and not discriminatory, arbitrary, capricious or oppressive. *See generally*, *Jackson v. State*, 191 So. 3d 423, 428 (Fla. 2016)(discussing parameters of substantive due process protections).

12 *See* Section 443.1316(2)(b), Fla. Stat.

13 Counties that levy the tourist development tax or the tourist impact tax may elect to locally administer these taxes rather than have them administered by DOR. Section 125.0104(10), Fla. Stat.

14 Sections 20.21(3) and 213.018, Fla. Stat.

15 *Id*. at(3). The Executive Director, in turn, is appointed by the Governor and Cabinet, Section 20.05(1)(g), who sit as the head of DOR. Section 20.21(1).

16 Such as in the collections process, in which DOR may (among other actions) garnish taxpayer bank accounts, revoke taxpayer registrations and issue warrants in an effort to satisfy delinquent tax debts. *See* Sections 213.67, 213.69 and 213.692, Fla. Stat.

17 The law does not currently require the creation of a taxpayer rights advocate for taxes administered by other state agencies or local governments.

18 Section 213.018(2).

19 *Id*. at (2)(a).

20 CS/HB 7087, Ch. 2018-118, §§1 and 39, Laws of Fla. (amending Sections 20.21(3) and 213.018(1), respectively).

21 Section 14.32(1), Fla. Stat.

22 CS/HB 7087, Ch. 2018-118, §1, Laws of Fla. (adding Section 20.21(3)(c)).

23 *Id*. (adding Section 20.21(3)(c)6 and 7).

24 *Id*.

25 *See* https://taxpayeradvocate.irs.gov (last visited April 13, 2018).

26 Both of these Departments are under the Governor's jurisdiction, and so within the ambit of the Chief Inspector General's authority. *See* Sections 20.165 and 20.24, Fla. Stat.

27 Groups such as the Tax Section of The Florida Bar have long advocated a series of taxpayer rights reform principles.

28 *See* https://taxpayeradvocate.irs.gov/reports/2017-annual-report-to-congress/NTA-Purple-Book (last visited April 13, 2018).

# Federal Income Tax Incentives Under the New Qualified Opportunity Zone Regime

**By Alexandre M. Denault**

The new qualified opportunity zone regime was enacted under the Tax Cuts and Jobs Act on December 22, 2017, which created new Sections 1400Z-1 and 1400Z-2 of the Internal Revenue Code of 1986, as amended (the "Code"). The purpose of this new law is to encourage economic growth, job creation and investment in distressed communities by providing federal tax incentives to investors in these areas. The qualified opportunity zone regime creates incentives for investors to sell or exchange appreciated property and reinvest the gain into entities with business operations in qualified opportunity zones. A qualified opportunity zone is defined under Section 1400Z-1 as a population census tract that is a low-income community and that is specifically designated as a qualified opportunity zone. On June 14, 2018, the Internal Revenue Service (the "IRS") and the Treasury Department announced the final list of designations of qualified opportunity zones in all 50 states, the District of Columbia and five U.S. possessions. Section 1400Z-2, which is the subject of this article, contains the federal income tax provisions under the new regime.

As with many new statutes, guidance is needed under Section 1400Z-2 in the form of Treasury Regulations, IRS Notices and the like, and technical corrections are

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needed to correct erroneous cross-references and to clarify other ambiguous provisions. The IRS has stated that it is currently working on guidance under Section 1400Z-2, including the procedure for certification of qualified opportunity funds and rules about which investments qualify as eligible investments. Prompt guidance is important especially because many of the provisions under Section 1400Z-2 are time limited.

## Federal Tax Benefits

Section 1400Z-2 establishes three main federal income tax incentives. In applying these three incentives, it is important to note that the qualified opportunity regime treats a taxpayer's initial basis in the investment as being zero.[1]

The first tax incentive is a deferral mechanism whereby a taxpayer may elect to defer the recognition of gain from the sale or exchange of property to an unrelated person to the extent that such gain is reinvested into a qualified opportunity fund (a "Fund") within 180 days of the sale or exchange. This deferral is temporary; the amount of deferred gain must be included in gross income on the earlier of the date that the investment in the Fund is sold or exchanged or December 31, 2026.[2] The amount of the inclusion at the end of the deferral period is the excess of (a) the lesser of the amount of the gain excluded from gross income or the fair market value of the investment at such time, over (b) the basis in the investment (which, as noted above, is initially zero, but may be increased by up to 15% of the amount of the deferred gain, as described below). The deferral provision is only available with respect to gain from the sale or exchange of property by a taxpayer on or before December 31, 2026.

The second tax incentive provides that 10% of the gain that was deferred under the deferral provision may, in effect, be excluded from gross income if the investment in the Fund is held for at least five years, and an additional 5% of the deferred gain may, in effect, be excluded from gross income if the investment in the Fund is held for at least seven years.[3] Due to the zero initial basis construct, these 10% and 5% benefits are effectuated in the form of basis increases, such that at the end of the deferral period, the initial zero basis may be increased by up to 15% of the deferred gain. At the end of the deferral period, the basis in the investment (which may have already been increased by up to 15%) is increased by the amount included in gross income at that time.

The third tax incentive provides that if a taxpayer holds the investment in the Fund for at least 10 years, the taxpayer may elect to increase its basis in the investment to the fair market value on the date that the investment is sold or exchanged.[4] In effect, because a taxpayer who holds an investment in a Fund for 10 years would have already passed the end of the deferral period and included deferred gain in gross income, the taxpayer is able to permanently exclude only post-investment gain from the investment in the Fund itself from gross income. Importantly, this election only applies if and to the extent that a taxpayer reinvested gain and made the election to apply the deferral provision. If a taxpayer invests in a qualified opportunity fund with both deferred gain for which a deferral election was made as well as other funds for which a deferral election was not made or was unavailable (a so-called "mixed investment"), the tax incentives under Section 1400Z-2 only apply to the portion of the investment for which a deferral election was made.[5]

## Key Definitions

The remainder of Section 1400Z-2 is primarily definitional.[6] These definitions describe the types of entities and investments into which taxpayers may invest to obtain the federal tax benefits described above.

A Fund is defined an investment vehicle organized as a corporation or partnership formed for the purpose of investing in qualified opportunity zone property, other than another Fund, if at least 90% of its assets consist of qualified opportunity zone property. The 90% threshold is measured by reference to the average of the percentage of qualified opportunity zone property on the last day of the first six-month period of the taxable year of the Fund and the last day of the taxable year of the Fund. A Fund is subject to a penalty for each month that it fails to meet the 90% test unless there is reasonable cause for such failure. A Fund must be certified.[7]

Qualified opportunity zone property is defined as qualified opportunity zone stock, qualified opportunity zone partnership interests or qualified opportunity zone business property.

Qualified opportunity zone stock is defined as any stock in a domestic corporation if: (a) it was acquired by the Fund after December 31, 2017, at its original issue (directly or through an underwriter) from the corporation solely in exchange for cash; (b) as of the time of the stock issuance, the corporation was a qualified opportunity zone business (a "QOZ Business") or was being organized for the purpose of being a QOZ Business if it is a new corporation; and (c) during substantially all of the Fund's holding period of the stock, the corporation qualified as a QOZ Business.

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**INCENTIVES . . .**
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A qualified opportunity zone partnership interest is defined as a capital or profits interest in a domestic partnership if: (a) the interest is acquired by the Fund after December 31, 2017, from the partnership solely in exchange for cash; (b) as of the time the interest was acquired by the Fund, the partnership was a QOZ Business or was being organized for purpose of being a QOZ business if it is a new partnership; and (c) during substantially all of the Fund's holding period of the interest, the partnership qualified as a QOZ Business.

Qualified opportunity zone business property is defined as tangible property used in a trade or business of the Fund if: (a) the property was acquired by the Fund by purchase after December 31, 2017; (b) the original use of the property in a qualified opportunity zone commences with the Fund or the Fund "substantially improves" the property; and (c) during substantially all of the Fund's holding period of the property, substantially all of the use of the property was in a qualified opportunity zone. A substantial improvement of property occurs if during any 30-month period beginning after the date of acquisition, basis additions with respect to the property for the Fund exceed an amount equal to the adjusted basis of the property at the beginning of such 30-month period of the Fund.

A QOZ Business is defined as a trade or business: (a) in which substantially all of the tangible property owned or leased by the applicable taxpayer is qualified opportunity zone business property; (b) in which at least 50% of the total gross income is derived from, and a substantial portion of the intangible property is used in, the active conduct of the business, and less than 5% of the average of the aggregate unadjusted bases of the property is attributable to nonqualified financial property (generally meaning debt, stock, partnership interests, options, futures contracts, forward contracts, warrants, notional principal contracts, annuities, and other similar property); and (c) that is not a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

These definitions raise several important questions, such as whether a Fund operating a business directly with QOZ Property is subject to the requirements of a QOZ Business, as well as what types of tangible property can qualify for the "original use" or "substantial improvement" tests. In addition, it is not yet clear if a limited liability company may qualify as a Fund because a Fund must be "organized" as a domestic corporation or partnership. And it is also not yet clear what "substantially all" means.

## Closing Remarks

Overall, the federal income tax incentives under Section 1400Z-2 are significant and, as a result, the qualified opportunity zone regime has garnered the interest of many real estate investors and developers, as well as others seeking to invest in businesses in these zones. While the regime is primarily aimed at attracting new investment into qualified opportunity zones, taxpayers that already own property in these zones may be able to benefit as well. But for the regime to have a chance of accomplishing its stated goal, guidance is needed to clarify numerous important provisions of Section 1400Z-2.

**Endnotes:**

1 Section 1400Z-2(b)(2)(B)(i). The fiction of having an initial zero basis may create other tax issues for investors, such as applying the distribution provisions under subchapter C, subchapter S and subchapter K of the Code, respectively.

2 Section 1400Z-2(a). Despite the title of Section 1400Z-2 ("Special rules for capital gains invested in opportunity zones") and the legislative history, under the current text of the statute, it appears that a taxpayer may reinvest any gain from the sale or exchange of any property under the deferral provision, not only capital gain.

3 Section 1400Z-2(b)(2)(B)(iii) and (iv).

4 Section 1400Z-2(c). This provision provides that upon the election being made, "the basis of such property shall be equal to the fair market value of such investment on the date that the investment is sold or exchanged." Guidance will be needed to clarify how this election works when a Fund sells property as well as when an investor sells an interest in the Fund.

5 Section 1400Z-2(e)(1).

6 The definitions discussed below are contained in Section 1400Z-2(d).

7 The IRS has stated in recent FAQs that in order to become a certified Fund, an eligible taxpayer self certifies and thus no approval or action by the IRS is required. To self-certify, a taxpayer merely completes a form (which will be released in the summer of 2018) and attaches that form to the taxpayer's federal income tax return for the taxable year. The return must be filed timely, taking extensions into account. The FAQs may be found at: https://www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions (last accessed June 14, 2018).

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# The New Participation Exemption: An Opportunity to Convert Ordinary Dividends into Qualified Dividends

**By Steven Hadjilogiou and Michael J. Bruno**

The Tax Cuts and Jobs Act introduced an important new benefit to U.S. corporations that own 10 percent or more of a foreign corporation. Specifically, a full participation exemption has been enacted that exempts certain foreign sourced dividends paid to 10 percent U.S. corporate shareholders from U.S. federal income tax. The participation exemption applies to foreign sourced income that is not considered Subpart F, Global Intangible Low Taxed Income (GILTI) or income paid from a passive foreign investment company (collectively, the Foreign Corporation Regimes). However, the participation exemption does not apply to "hybrid dividends," which are dividends paid from a controlled foreign corporation (CFC) that received a deduction (or other tax benefit) with respect to any income, war profits, or excess profits taxes imposed by any foreign country or possession of the United States. If the participation exemption applies, the U.S. corporate shareholder will not be entitled to claim foreign tax credits for any foreign tax imposed on the foreign sourced income.

U.S. individuals and U.S. trusts that own interests in foreign corporations, directly or through a partnership or S corporation, may find the participation exemption to be especially useful to the extent they own at least 10 percent of the shares in a foreign corporation located in a jurisdiction that does not have an income tax treaty with the United States (*e.g.*, Brazil, Hong Kong, Singapore). Under present law, if a U.S. individual or trust shareholder receives a dividend from a foreign corporation organized in a jurisdiction that has a tax treaty in effect with the U.S. or from a U.S. domestic corporation, the dividend income typically will be treated as a "qualified dividend," which is subject to the maximum federal income tax rate of 20 percent plus the 3.8 percent Medicare tax and applicable state and local tax. On the other hand, a dividend paid to a U.S. individual or trust from a foreign corporation organized in a country that has not entered a tax treaty with the U.S. will be taxed up to the highest individual federal rate of 37 percent plus the 3.8 percent Medicare tax and applicable state and local tax. Thus, a qualified dividend is taxed at a federal tax rate that is up to 17% less than an ordinary dividend. Furthermore, a U.S. individual or trust that owns an interest in a CFC would be provided an additional benefit by either contributing the CFC interest into a C corporation or by making a Code Section 962 election because the tax liability generated by the *so-called* GILTI would be reduced.

To convert what otherwise would be ordinary dividend income into qualified dividends, a U.S. non-corporate shareholder may consider contributing his or her shares in the foreign corporation into a newly formed or already existing U.S. C corporation in a tax-free contribution transaction. Later, when the foreign corporation pays a dividend to the U.S. corporate parent, the dividend should be exempt from U.S. federal tax provided it does not fall under the Foreign Corporation Regimes and is not considered a hybrid dividend. Please note that the participation exemption and the qualified dividend rules impose certain holding period requirements that must be satisfied to enable a U.S. non-corporate shareholder to qualify for such favorable tax treatment. When the foreign corporation is a CFC, some or all the corporation's income will likely be GILTI and some of the CFC's income may be Subpart F. A distribution of GILTI income and Subpart F income will also be exempt from U.S. federal income tax as *previously taxed income*. If the foreign corporation is not a CFC, it cannot generate GILTI or Subpart F income, so that all distributions from such entity likely would qualify for the participation exemption.

Therefore, the U.S. corporation can receive the dividend without incurring any U.S. income tax liability. The U.S. corporation may be able to reinvest the funds received in a business venture or other investment but should be wary of the so-called personal holding company rules and the accumulated earnings tax rules. Subsequently, when the U.S. corporation pays a dividend to the U.S. individual or trust shareholder, the dividend income should be considered qualified dividends.

# 2018-2019 ORGANIZATIONAL MEETING

## JULY 4 - 7, 2018

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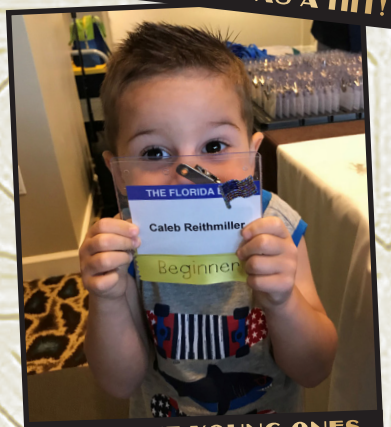
CHAIR MICHAEL D. MINTON AND FAMILY

MARK PRATER RECEIVES THE MARVIN C. GUTTER OUTSTANDING PUBLIC SERVICE AWARD

THE FAMILY DINNER WAS A HIT!

THREE "SUSPECTS" DURING THE MURDER MYSTERY FAMILY DINNER

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