



Orange County Estate Planning Council

INTERNATIONAL TAX MATTERS

July 25, 2023

BDO USA, LLP, a Delaware limited liability partnership, is the U.S. member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms.



1

With You Today



JACK NUCKOLLS
Technical Tax Leader
National Tax Office
Private Client Services

(415) 490-3393
jnuckolls@bdo.com

2 Orange Country Estate Planning Council



2

LEARNING OBJECTIVES

After this program, you will be able to

- 1 Explain how to apply U.S. gift and estate tax rules to non-U.S. citizens and describe the importance of expatriation (pre-arrival or pre-departure) planning, as well as the rules of foreign trust taxation.
- 2 Describe filing requirements for Forms 3520/3520-A and the need for specialist review.
- 3 Identify five questions to ask all clients, especially trust clients and trustees, to surface opportunities for providing international tax consulting and compliance.

3

Orange Country Estate Planning Council



3

International Estate Planning - A World of Opportunities

- BDO has an international footprint
- More than ever BDO professionals need to be prepared to assist clients with global issues including estate and inheritance taxes
- In most local markets the ability to address international trust and estate issues will distinguish you from your peers
- BDO has a very robust Global Private Client Services practice that can service client needs around the world

4

Orange Country Estate Planning Council



4

Background: Dealing with Global Mobility

- Foreign nationals who come to the U.S. to work, to invest or for family reasons.
- U.S. citizens or residents with international investments, businesses, or family members.
- High net worth, high income, ownership of assets through trusts or entities.
- Presence in U.S. could be temporary or long-term.

Did you ask every client if they are a U.S. citizen???

5

Orange Country Estate Planning Council



5

Agenda

1. U.S. Gift and Estate Tax for non-U.S. Citizen
 - a) Domiciled in the U.S.
 - b) Non-domiciled in the U.S.
2. Foreign Trust Taxation
3. Immigration Planning
4. Expatriation Planning

6

Orange Country Estate Planning Council



6

U.S. GIFT AND ESTATE TAX FOR NON-U.S. CITIZENS

7

Orange Country Estate Planning Council



7

U.S. Citizen

- Gift Tax: Worldwide gifts are subject to tax
- Estate Tax: Worldwide estate is subject to estate tax
- Generation Skipping Tax: Applies to worldwide generation-skipping transfers

Domicile or residence is irrelevant!

8

Orange Country Estate Planning Council



8

Non-U.S. Citizen

The application of the U.S. gift and estate tax to a non-citizen depends on:

- Domicile
- Situs of assets
- Application of Treaty

9

Orange Country Estate Planning Council



9

Domicile: What does it mean?

- Domicile: Treas. Reg. 20.0-1(b)(1)
- Physical presence + intent to remain indefinitely
- Subjective test
- Different than the federal income tax test of substantial presence

10

Orange Country Estate Planning Council



10

Domicile: Factors

- Place of residence
- Length of time at residence
- Social and community contacts
- Declarations of intent
- Green card or visa
- Bank accounts
- Physicians
- Motives of changing residence
- Rent vs. own a home
- Place of business

11

Orange Country Estate Planning Council



11

Non-U.S. Citizen Domiciled in U.S.

- Gift tax on worldwide gifts
- Estate tax on worldwide estate
- Same unified credit as U.S. citizen
- No marital deduction for gifts or bequests to non-U.S. citizen spouses

12

Orange Country Estate Planning Council



12

Non-U.S. Citizen Domiciled in U.S.

- Gifts to non-citizen spouse eligible for \$100,000 (indexed to \$175,000 for 2023) annual exclusion
 - Must be a present interest
 - Would qualify for the marital deduction if made to U.S. spouse
- Qualified Domestic Trust (QDOT) for estate tax purposes will qualify bequests to spouse for marital deduction
- Section 2040(b) dealing with qualified joint interests between spouses will not apply if surviving spouse is not a U.S. Citizen. IRC Section 2056(d)(1)(B)

13

Orange Country Estate Planning Council



13

Non-U.S. Citizen Domiciled in U.S.

Example Gift Tax

Ms. Executive, who is not a U.S. citizen, has her green card and has been living in the United States for 20 years with her U.S. Citizen husband, Mr. Executive. She gives \$10 million of cash to her son and \$10 million to her husband via foreign bank accounts.

Answer:

Ms. Executive would be domiciled in the U.S. The gift to her U.S. Citizen husband would be eligible for the marital deduction. She would need to file a gift tax return and pay gift tax on the transfer to the son since she is taxed on worldwide gifts.

14

Orange Country Estate Planning Council



14

Non-U.S. Citizen Domiciled in U.S.

Example Estate Tax

Ms. Executive, who is not a U.S. citizen, had her green card and had been living in the United States for 20 years with her U.S. Citizen husband, Mr. Executive. On her death, she left her entire \$10 million estate to her Husband.

Answer:

Since Ms. Executive is domiciled in the U.S. at the time of her death she would subject to estate tax on her worldwide estate. The bequest to her U.S. Citizen husband is eligible for the unlimited marital deduction and no estate tax would be due.

15

Orange Country Estate Planning Council



15

Non-U.S. Citizen Not Domiciled in U.S.

- Generally will be subject to U.S. estate tax only on assets of the decedent that have a situs in the U.S.
- Generally will be subject to U.S. gift tax only on gifts of tangible assets with situs in the U.S.
- Distinction between gift tax and estate tax as to what is subject to the tax.
- Treaty may cause a different result.
- Former U.S. citizens and former long term green card holders will be subject to different rules depending on when expatriation occurred.
- Gifts are eligible for the gift tax annual exclusion and the tuition and medical exclusion. No exemption or unified credit amount to apply against the gift in excess of the annual exclusion. In other words, the exemption for gift tax is zero!

16

Orange Country Estate Planning Council



16

Non-U.S. Citizen Not Domiciled in U.S.

- Limited tax base: U.S. -situs assets
- U.S. situs assets:
 - **Gift tax**, limited to
 - U.S. real estate
 - U.S. tangible personal property (e.g. artwork)
 - **Estate tax**, somewhat broader
 - U.S. real estate
 - U.S. tangible personal property
 - Shares in US corporations
 - Pensions payable by U.S. corporations
 - Query: partnership interests

17

Orange Country Estate Planning Council



17

Non-U.S. Citizen Not Domiciled in U.S.

Estate tax computation:

- Exemption \$60,000
- Marital deduction only if Qualified Domestic Trust (QDOT).
- Charitable deduction only available for bequests to U.S. charities.
- Administrative expenses and debts are only deductible based on ratio of U.S. situs assets to worldwide assets. Thus, disclosure of worldwide assets would be required to take deduction.
- Non-recourse mortgage may be deducted in full.
- Credit for foreign estate tax is NOT available to non-U.S. citizen not domiciled in the U.S.

18

Orange Country Estate Planning Council



18

Non-U.S. Citizen Not Domiciled in U.S.

Example Gift Tax

Ms. Executive, who is not a U.S. citizen, is living in the U.S. on temporary assignment for a multi-national corporation on an L-1 Visa. She has been in the U.S. two years and expects to return to Australia at the end of her four year assignment. She rents her home in the U.S. and has a residence in Australia. She gave \$10 million of Microsoft stock to her son.

Answer:

There is no U.S. gift tax because she is not domiciled in the U.S. and she gave an intangible asset.

19

Orange Country Estate Planning Council



19

Non-U.S. Citizen Not Domiciled in U.S.

Example Estate Tax

Ms. Executive, was not a U.S. citizen, and was living in the U.S. on temporary assignment for a multi-national corporation on an L-1 Visa. She had been in the U.S. two years and had expected to return to Australia at the end of her four year assignment. She was renting her home in the U.S. and had a residence in Australia. Ms. Executive died in a boating accident. Her estate consisted of the Australia real estate worth \$500,000, cash on deposit in U.S. banks \$100,000, life insurance of \$5 million and Microsoft stock of \$10 million. She left the entire estate to her husband, an Australian citizen, also living in the U.S.

20

Orange Country Estate Planning Council



20

Non-U.S. Citizen Not Domiciled in U.S.

Example Estate Tax

Answer:

Since Ms. Executive was not domiciled in the U.S. her estate would only be subject to estate tax on her U.S. situs assets

- Real Estate in Australia => no U.S. situs
- Cash deposit in U.S. bank => no U.S. situs (not effectively connected with a U.S. trade or business)
- Life insurance proceeds => no U.S. situs
- Microsoft stock => U.S. situs (domestic stock)

21

Orange Country Estate Planning Council



21

FOREIGN TRUST TAXATION

22

Orange Country Estate Planning Council



22

Is it a trust?

- Code does not define a trust.
- The title/heading on document is IRRELEVANT.
- A trust is a relationship in which one person holds title to property, subject to an obligation to keep or use the property for the benefit of another
- Document may establish a trust in a non-U.S. jurisdiction that is not a trust in the U.S. or vice versa.
- It may be some other type of entity, such as a business trust that is taxed as a corporation.
- Consult a specialist when dealing with non-U.S. documents. The document must be reviewed to determine whether trust elements are present.

23

Orange Country Estate Planning Council



23

Determine Trust Treatment

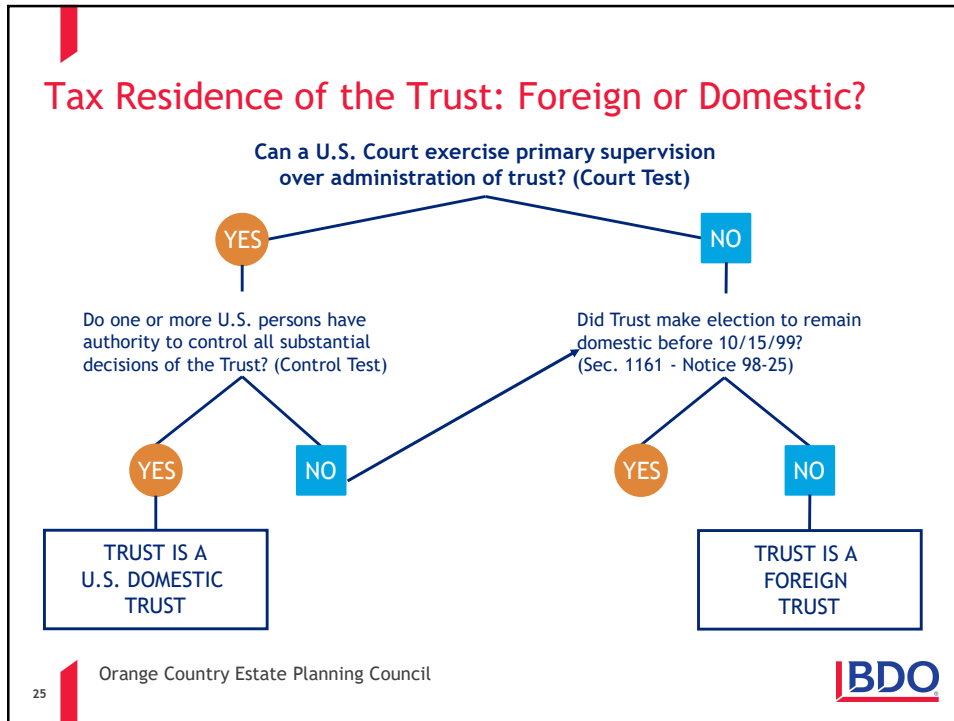
- Tax residence of the trust: Foreign or domestic?
- Classification of foreign trust:
 - Grantor or non-grantor trust?
 - If grantor trust, with U.S. or non-U.S. owner?

24

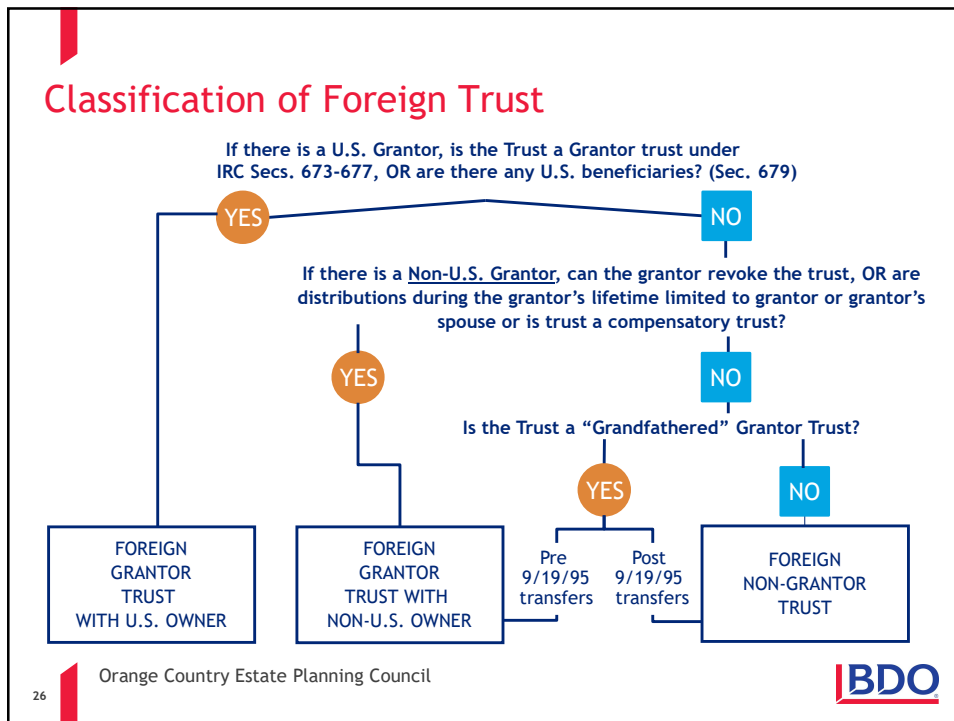
Orange Country Estate Planning Council



24

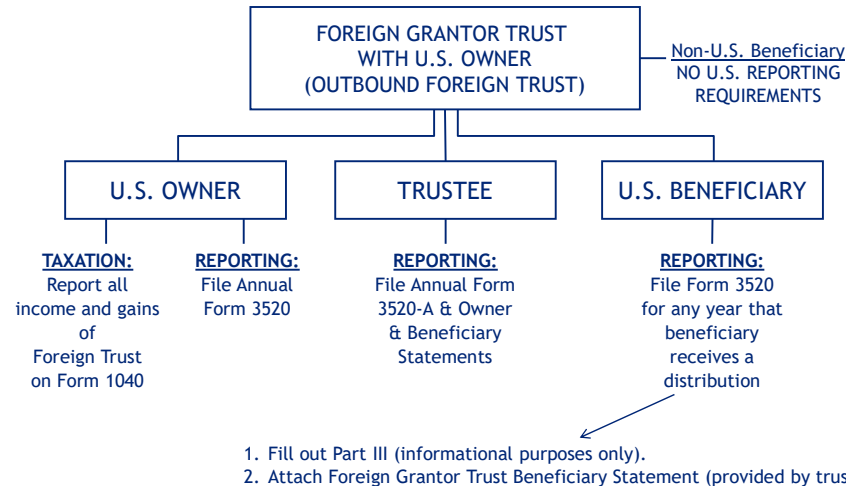


25



26

U.S. Tax Consequences & Filing Requirements



27

Orange Country Estate Planning Council



27

Foreign Trust Reporting Form 3520

Form 3520 required by all U.S. Persons who:

- Are treated as owners of a foreign trust
- Make a contribution to a foreign trust
- Receive a distribution from a foreign trust
- Engage in loan transactions with a foreign trust
- Receive certain gifts (not through trust) from foreign persons

Filing Due Date: Generally April 15

Penalties: 35% of property transferred / distributions, 5% of foreign gifts for each month of non-compliance (max 25%)

28

Orange Country Estate Planning Council



28

Foreign Trust Reporting Form 3520-A

- Form 3520-A must be filed by the trustee for each foreign grantor trust with a U.S. owner
- Filing Due Date: Generally March 15
- Fairly involved form because it requires income and balance sheet reporting
- Penalties: 5% of gross value of trust assets at the end of the year

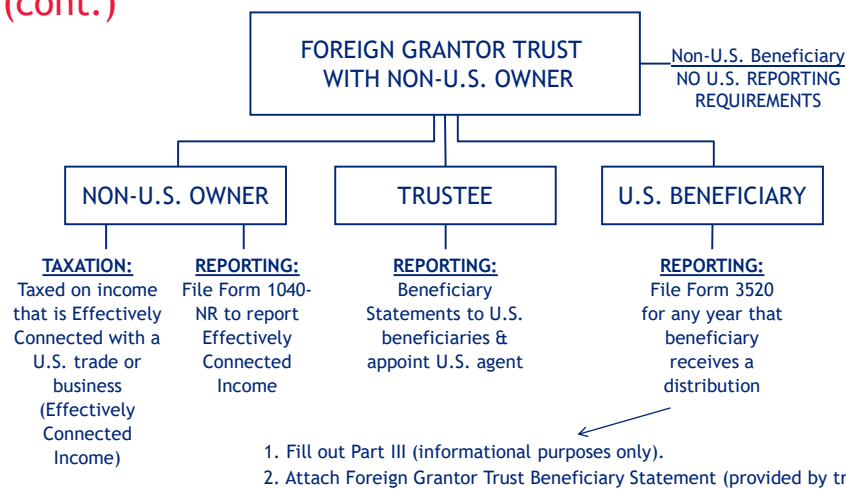
29

Orange Country Estate Planning Council



29

U.S. Tax Consequences & Filing Requirements (cont.)



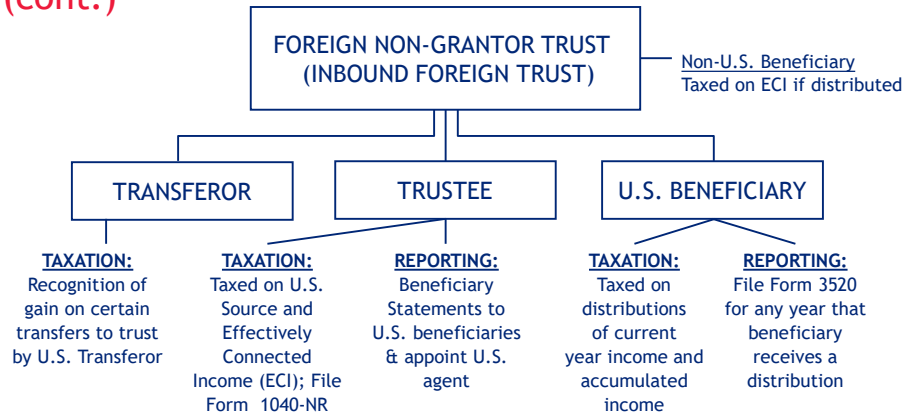
30

Orange Country Estate Planning Council



30

U.S. Tax Consequences & Filing Requirements (cont.)



31

Orange Country Estate Planning Council



31

Distributions from Foreign Non-grantor Trusts

- Current year income
 - Taxed on beneficiary's individual income tax return
 - Income retains character
- Accumulated income
 - Subject to throw-back tax & interest charge
 - Capital gains and qualified dividends lose their character
- Corpus: Not subject to tax

32

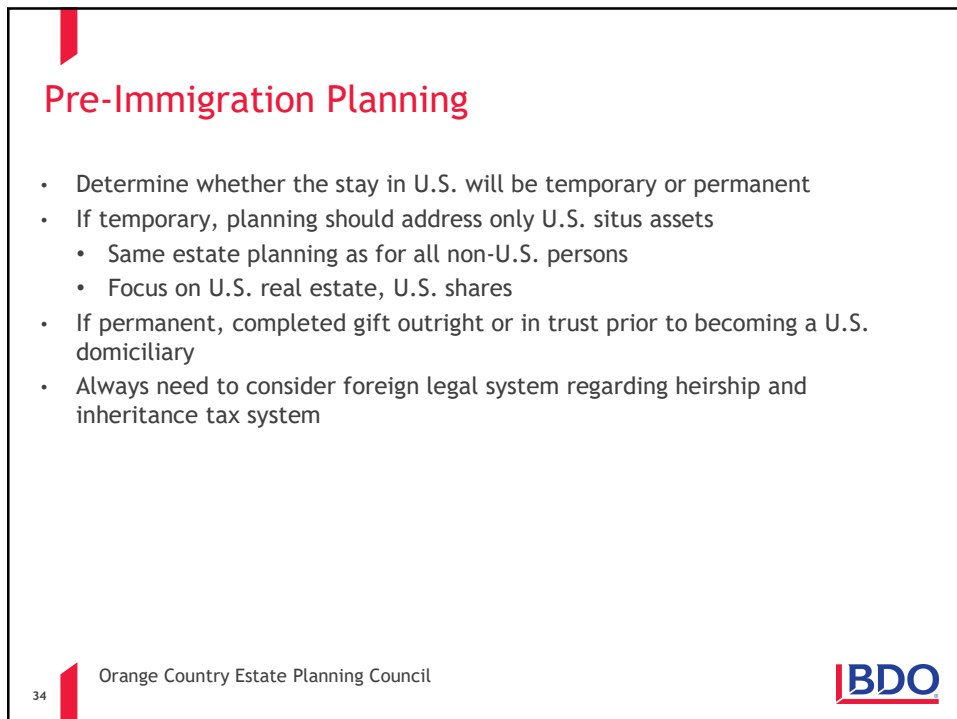
Orange Country Estate Planning Council



32



33



34

Pre-Immigration Planning

- Review existing revocable and irrevocable trusts established in client's home country.
 - Examine trusts for income and gift tax consequences.
 - Examine trusts to determine whether any powers retained would cause inclusion in the client's taxable estate after immigration.
 - Examine the status of corporations owned by trusts.
- Consider Pre-immigration Transfers/Agreements
 - Gifts to third parties (consider gifting non-U.S. situs assets)
 - Gifts to spouse pre-immigration
 - Gifts of U.S. situs property*
 - Establishing an irrevocable trust

35

Orange Country Estate Planning Council



35

Planning for Executive Moving to U.S. - not domiciled

- Review treaty provisions
- If possible, make inter-spousal transfers to equalize the estates
- Consider transferring U.S. situs investments to a foreign corporation
- Consider using preferred stock and partnership freezes and split interest purchases with non-U.S. situs property
- Lease rather than buy a residence or automobile
- If a residence is purchased, consider maximum financing
- Avoid ownership of U.S. situs property

36

Orange Country Estate Planning Council



36

Planning for Executive Moving to U.S.

- not domiciled

- Avoid or limit intra-family transfers of tangible property and real estate
- Consider transferring cash in a brokerage account to a bank deposit
- Consider acquiring U.S. life insurance coverage to offset potential U.S. estate taxes
- Consider setting up a Qualified Domestic Trust (QDOT)
- Consider adopting a U.S. domicile

37

Orange Country Estate Planning Council



37

Planning for Executive Moving to U.S.

- domiciled

- If married, review marital property ownership and properly title property for U.S. purposes. (Avoid joint tenancies)
- Observe local law standards on property acquired after arriving in the U.S (common law property v. community property)
- Consider assigning life insurance to an irrevocable trust
- Draw a U.S. will to provide for a QDOT trust
- Consider adding a “by-pass” trust to both wills
- Avoid transfers (gifts) in excess of \$175,000 (adjusted by inflation) per year to a non-citizen spouse
- Make gifts before becoming a domiciliary

38

Orange Country Estate Planning Council



38

EXPATRIATION PLANNING

39 Orange Country Estate Planning Council BDO

39

Individual Expatriation Rules

Exit Tax of section 877A

- Covered expatriate = citizens and long-term permanent residents
- Exit tax applies if
 - Net worth > \$2M or
 - Average income tax > \$190,000 (for 2023) or
 - Individual fails to certify that he or she has met U.S. tax law requirements
- Expatriation process: Relinquish/renounce/treaty position
- Deemed sale or deemed liquidation of assets
 - Tax due immediately, can defer and pay interest
 - Special withholding provisions for certain deferred comp assets
 - Special withholding provisions for post-expatriation trust distributions
 - Exclusion: \$821,000 (for 2023) of deemed gain per taxpayer
- Inheritance Tax
 - Assessed on US recipient of gift/bequest from covered expatriate

40 Orange Country Estate Planning Council BDO

40

Expatriation Planning

- Assist clients that are non-compliant (e.g. information reportings)
- Pre-expatriation gifting
 - Exhaust U.S. lifetime gift/estate tax exclusion
 - May help to stay below the net worth threshold
 - Reduce exit tax by gifting appreciated assets
- Estate planning
 - If likely heirs are U.S. persons, U.S. inheritance tax under Sec. 2801(a) implications may be worse than regular U.S. gift and estate tax.
 - U.S. person receiving a gift from a covered expatriate is subject to inheritance tax at the highest applicable gift or estate tax rate.
 - Inheritance tax regimes extends to all assets of the covered expatriate (even if acquired post expatriation).

41

Orange Country Estate Planning Council



41

Checklist

1. Ask every individual client if they are U.S. citizens.
2. For every trust client:
 - a. Ask every trustee if they are U.S. persons.
 - b. Verify that a U.S. court is able to exercise primary supervision over the administration of the trust.
 - c. Verify that the beneficiaries of a trust or estate are U.S. persons.
3. Understand your client's / prospect's plans: Any client moving into or out of the U.S. must do pre-arrival or pre-departure planning.

42

Orange Country Estate Planning Council



42

Survey Says!

Please complete the survey questions in the conference app:

1. Launch the app
2. Click on either the 'Events' or the 'More > All Programs' button at the bottom of the main screen
3. Click on 'today' in the top navigation bar
4. Click on this session
5. Click on the "Session Survey" button/link and answer the questions

43

Orange Country Estate Planning Council



43

Questions?



44

Orange Country Estate Planning Council



44