February 2018 Update from Benesch's **International Private Client** Practice Group

U.S. Tax Reform: Key Considerations for Non-U.S. Families with Connections to the United States

The Tax Cuts and Jobs Act (the Act) was signed into law on December 22, 2017. The Act is without a doubt the most impactful reform to the Internal Revenue Code since the tax reform of 1986. While it does not appear that the Act was specifically put forth to affect the private client industry, it has done so in a significant way. The International Private Client Group of Benesch has prepared this comprehensive Client Bulletin to identify and highlight the most relevant considerations for non-U.S. families with connections to the United States.

Importantly, in light of the significant changes made by the Act, it is advisable that all of a non-U.S. family's investment structures be reviewed on a holistic basis to ensure not only that they maintain the efficacy of the original planning, but also that they continue to be compliant with any applicable U.S. reporting and/or tax obligations.

We have made this Client Bulletin practical in its application to enable families to identify changes in the law that may affect them. Accordingly, we (1) identify key considerations for families, (2) provide high-level summaries of the relevant changes, (3) provide information to help families identify whether such changes are relevant to them and their structures, (4) explain how such changes may affect such families, and (5) detail when and for how long such changes may affect such families. The key changes include:

- The reduction in corporate tax rates
- The reduction in noncorporate tax rates
- New rules applicable to dispositions of partnership interests
- Certain changes in the "CFC" rules, including (1) the elimination of the 30-day rule, (2) new downward attribution rules, (3) the establishment of the new "GILTI" regime, and (4) changes to the definition of "United States shareholder"
- The relaxation of certain "ESBT" rules
- An increase in the lifetime gift and estate tax exemption amount
- A new anti-hybrid rule focused on related party debt and royalty arrangements
- New limitations on the deductibility of interest

We plan to deliver additional Client Bulletins to provide further detailed analysis on a variety of key considerations and planning strategies.

Before we get started, a few notable points:

- Some of the changes are permanent, while others are temporary.
- Many of the changes take effect for tax year 2018, but there are some changes that affect tax year 2017.
- The overall effect of the changes will vary from family to family, as some of the changes are beneficial, but others are detrimental.
- Many of the changes will require swift action to restructure current family ownership models and structures to either (1) take advantage of more favorable tax rate structures or (2) avoid the imposition of harsh U.S. tax liabilities and/or onerous reporting obligations.

We fully expect that the IRS and the U.S. Treasury Department will issue guidance and regulations with respect to the changes discussed below. We plan to deliver additional Client Bulletins to identify and highlight any such relevant guidance and regulations.

Please note that this Client Bulletin only addresses the effects of the Act on U.S. federal tax law. It does not address any state or local tax systems or rules.

REDUCTION IN CORPORATE TAX RATES

Summary: The Act has reduced the tax rate on corporate net income from 35 percent to 21 percent. Notwithstanding this change, the "second layer" of corporate tax still applies at a rate of 30 percent (potentially reduced by treaty) on (1) earnings distributed from a U.S. corporation to a non-U.S. shareholder or (2) in the case of distributions from a non-U.S. corporation, on the so-called "dividend equivalent amount" under the branch profits tax regime.

Who does this affect?

Non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested, or making new investments, in U.S. real estate and/or certain U.S. businesses. Also, non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested, or making new investments, in private equity funds that are themselves invested in the United States (more specifically, such funds that allocate "effectively connected income"-or ECI-to investors).

How does this affect you?

The Act's reduction of the corporate tax rate substantially streamlines non-U.S. investment structures into U.S. assets. That is, a non-U.S. family's investment structure into U.S. real estate and/or certain U.S. businesses is generally determined by balancing three key factors: (1) keeping U.S. income tax exposure on gains and operating income as low as possible, (2) preventing the application of the U.S. estate tax, and (3) managing, or wholly avoiding, U.S. tax filing obligations arising with respect to non-U.S. family members. Prior to the Act, use of corporate structures was exceedingly inefficient from a U.S. income tax perspective. Accordingly, many non-U.S. families would opt for a "flow-through" structure (e.g., use of LLCs and partnerships) as opposed to a corporate structure. While use of a flow-through structure did create U.S. income tax efficiencies, it also opened the non-U.S. family members (generally the patriarch or matriarch establishing the structure) to U.S. tax filing obligations. These reporting obligations could be managed through certain trust structures, but such management was not optimal and at times very cumbersome. Further, use of a flow-through structure offered up debate as to the structure's effectiveness as a "blocker" for U.S. estate tax purposes.

With a tax rate of 21 percent on corporate income, use of a structure consisting of a non-U.S. corporation (e.g., BVI, Cayman, HK) owning a U.S. corporation to make an investment in a U.S. asset can achieve: (1) an overall U.S. income tax rate of 21 percent on operating income and capital gain (likely lower on an effective rate basis), (2) prevent any U.S. reporting obligations from arising with respect to the non-U.S. family member establishing the structure, and (3) if properly structured and maintained, eliminate any U.S. estate tax exposure to such non-U.S. family member. The "second layer" of corporate tax (as high as 30 percent), while it remains, can generally be managed, and in most cases wholly eliminated, by reducing distributions of earnings and properly liquidating the structure following exit of the underlying U.S. investment. Notably, the same benefits can generally be achieved by utilizing a structure solely consisting of a non-U.S. corporation, but many families may find it more manageable in certain cases to also utilize a U.S. corporate owner. Non-U.S. families who are currently invested in U.S. assets through flow-through structures can, in most cases, achieve these benefits by simply making certain "check-the-box" elections for the appropriate entities.

A non-U.S. family invested, or making a new investment, in U.S. real estate should consider how the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) may be applied with respect to its investment. That said, if properly advised, FIRPTA is easily avoidable.

Importantly, while no restructuring may be needed, we want to point out that non-U.S. families may see an immediate substantial net decrease in their overall U.S. tax liability associated with their U.S. private equity fund investments (specifically, private equity funds that allocate ECI) to the extent they are or have been made through corporate structures. These ECI funds can be formed outside the United States (e.g., in Cayman) or formed in the United States (e.g., in Delaware). Private equity funds allocate a variety of U.S. income, such as dividends, interest, rent, ECI, etc. Use of non-U.S. corporations to own a non-U.S. family's fund portfolio has been made exceedingly more efficient by the Act, as the U.S. federal tax withheld by the funds on ECI allocations to such corporate investors should be reduced from 35 percent (before the Act) to 21 percent (beginning in 2018). Additionally, as has always been the case, most capital gain and interest allocable from a fund to a non-U.S. corporation should not be subject to any U.S. income tax (subject to certain exceptions).

In light of the reduction of corporate rates, it is advisable that all of a non-U.S. family's investment structures into the United States be reviewed on a holistic basis to ensure that they maintain the efficacy of the original planning.

Duration/Effective Date

This change is permanent (unless changed by law) and effective beginning in 2018.

REDUCTION IN NONCORPORATE TAX RATES

Summary: The top effective tax rate bracket for non-U.S. individuals, trusts and estates has been reduced from (1) 39.6 percent to 37 percent on (a) "effectively connected income" that does not otherwise qualify as "qualified business income" and (b) certain income earned from employment in the U.S. and (2) 39.6 percent to as low as 29.6 percent on "effectively connected income" that qualifies as "qualified business income" (the rate reduction is achieved through a new "qualified business income" deduction) (and, remaining unchanged by the Act, a 20 percent rate on certain long-term capital gain). In order to utilize the qualified business income deduction, the income must qualify as "qualified business income," which, in general terms, is income generated from true, active business operations in the United States. However, even if the income qualifies as qualified business income, the deduction may still be limited if the business's employee payroll or investment in certain depreciable tangible property falls below a specified threshold. The deduction is also unavailable for businesses within certain service industries (e.g., financial and investment management services, consulting, accounting and legal).

Who does this affect?

Non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested, or making investments, in certain U.S. businesses, certain U.S. real estate and certain private equity funds. The reduction in rates also affects non-U.S. individuals employed in the United States (i.e., working in the United States but not resident sufficient to satisfy the substantial presence test).

How does this affect you?

The reduction in the noncorporate effective tax rates will allow non-U.S. family members (directly or via their non-U.S. trust or investment structures) to enjoy a reduced effective tax rate on their income earned from investments utilizing flow-through structures (e.g., LLCs treated as partnerships for U.S. tax purposes) and from employment in the United States. In some cases, the reduction will be slight (from 39.6 percent to 37 percent). However, non-U.S. family members earning "effectively connected income" that qualifies as "qualified business income" may enjoy significantly reduced effective tax rates (to rates as low as 29.6 percent and, remaining unchanged by the Act, a 20 percent rate on certain long-term capital gain).

Stepping back for a moment, non-U.S. individuals and trusts are subject to tax in the United States with respect to (1) certain types of portfolio income at a rate of 30 percent (with a variety of exceptions beyond the scope of this Client Bulletin) and (2) income that is effectively connected to a U.S. business (so-called "effectively connected income" or "ECI"). ECI can be, and most often is, allocated from flow-through structures that have investments in U.S. businesses. As detailed above, the Act has reduced the top effective tax rate for ECI to somewhere between 29.6 percent and 37 percent (unchanged by the Act is the 20 percent rate on certain long-term capital gains). The determination of the actual effective tax rate to use with respect to a particular investment will depend on the extent to which the income from such investment qualifies as "qualified business income." That is, while it appears that all "qualified business income" should qualify as ECI, it does not appear that all ECI should qualify as "qualified business income." Accordingly, non-U.S. investors should be cautious to assume that their returns on their "business" investments in the United States will always enjoy the lower 29.6 percent tax rate. The nature of certain investments (e.g., investments in businesses without employees and lacking substantial depreciable tangible property) will simply prevent a non-U.S. family (or its investment structure) from qualifying for a full 20 percent deduction under the qualified business income rules.

Therefore, the effective tax rate for such an investment may be somewhere between 29.6 percent and 37 percent (and 20 percent on certain long-term capital gain).

Importantly, however, we believe that the effective tax rate reduction for ECI from 39.6 percent to somewhere between 29.6 percent and 37 percent is largely a red herring for non-U.S. investors, with one notable caveat. That is, non-U.S. individuals (directly or via their non-U.S. trust or investment structures) invested in, or investing in, U.S. businesses and/or U.S. real estate should, in almost all cases, restructure (or structure) into a corporate structure to take advantage of the substantial reduction in U.S. corporate tax rates (addressed above) and to more effectively manage U.S. tax filing and reporting obligations. The caveat is that flow-through structures may still offer a lower U.S. income tax rate for investments in U.S. business (which are organized as flow-through entities themselves) that both (1) generate significant amounts of distributable after-tax profit and (2) actually distribute the same to family members. In such cases, corporate structures may be inefficient from a U.S. income tax perspective, as significant returns of U.S. operating income out of corporate structures will significantly implicate the "second layer" tax on corporations (i.e., as high as 30 percent withholding, which increases the effective tax rate up to 44.7 percent). One can quickly ascertain how such a cash-flow model becomes more and more inefficient from an income tax perspective if organized as a corporation as opposed to a partnership/flow-through structure. As with most structures, and an understandable source of frustration to clients, there is no "one size fits all" solution. Thus, non-U.S. families must examine (along with their advisors) all factors to determine the most appropriate structure for any new or existing investment in the United States.

A non-U.S. family member's investments (whether direct or indirect through trust or investment structures) in private equity funds allocating ECI may be currently structured as noncorporate flow-through entities. While we would likely recommend restructuring these flow-through structures into non-U.S. corporate form, even these structures should see some reduction in overall effective tax rates through application of the lower 37 percent rate on ECI and 29.6 percent rate on "qualified business income"-that is to the extent either exists within the fund.

Duration/Effective Date

This change is temporary (absent further changes in law). The change is effective for taxable years beginning after 2017, and will expire for taxable years beginning after 2025.

DISPOSITION OF PARTNERSHIP INTERESTS

Summary: The Act requires that gain arising from the disposition or redemption of a non-U.S. taxpayer's interest in a U.S. or non-U.S. partnership be treated as ECI to the extent that the underlying assets of the partnership are themselves used in a U.S. business. Additionally, and perhaps more impactful, the Act imposes a 10 percent withholding tax on the proceeds of such dispositions/redemptions.

Who does this affect?

Non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested in (1) private equity funds or (2) LLCs or partnerships owning U.S. business assets.

How does this affect you?

Prior to the Act, many non-U.S. taxpayers were able to take the position that the sale of a partnership interest, regardless of the fact that the partnership may have owned U.S. businesses, was the sale of personal property and, thus, not subject to U.S. tax. The IRS in Revenue Ruling 91-32 disagreed with this approach, and for years there was lack of certainty on the treatment of such sales. The Act has eliminated this uncertainty by codifying the IRS's position in Revenue Ruling 91-32. Pursuant to the Act, a proportionate amount of tax must now be paid on the sale/redemption of an interest in a partnership that owns U.S. business assets. Accordingly, many non-U.S. investors may see an increase in their tax burden on such transactions.

The Act also creates a withholding requirement for sales/redemptions of interests in partnerships that hold U.S. business assets. Similar to FIRPTA withholding, the 10 percent withholding tax applies to the gross proceeds on any such sale or redemption, including loss transactions. That is, even if there is no gain on the sale/redemption of a partnership interest to which the withholding would apply (e.g., a sale by a non-U.S. taxpayer of a partnership doing business in the U.S.), the buyer (or fund/partnership, as applicable) must withhold 10 percent on gross proceeds and remit the same to the IRS on behalf of the non-U.S. investor. Importantly, the 10 percent withholding applies to the entire sale/redemption proceeds-it is not limited to the sale/redemption proceeds that represent the proportionate share of the underlying U.S. business assets. Accordingly, it is quite possible that the 10 percent gross withholding will be in excess of the U.S. tax that the non-U.S. investor actually owes with respect to the sale/redemption. In such case, the non-U.S. investor will have to seek a refund from the IRS to reclaim such amount (or the appropriate amount). This can be very burdensome and undesired by many non-U.S. investors.

Duration/Effective Date

The characterization as ECI of certain gain arising from dispositions/redemptions of partnership interests applies to dispositions/redemptions occurring on or after November 27, 2017. However, the 10 percent withholding requirement applies to dispositions/redemptions occurring after December 31, 2017. Both changes are permanent (unless changed by law).

CHANGES IN CFC RULES

A non-U.S. corporation that has a sufficient concentration of U.S. ownership may be classified as a "controlled foreign corporation" (a CFC) for U.S. tax purposes. Certain attribution rules apply to determine whether a U.S. person "owns" stock in a CFC. Generally speaking, these rules work to attribute ownership through structures, i.e., partnerships, corporations, LLCs and trusts (both U.S. and non-U.S. alike). Accordingly, a U.S. family member included within a class of beneficiaries of a trust, where the trust owns a direct or indirect interest in a non-U.S. corporation, may cause the non-U.S. corporation to be classified as a CFC.

Prior to the Act, use of CFCs by U.S. individuals and U.S. companies had proven very effective (and perfectly within the parameters of the then-current U.S. tax law) to defer tax on certain types of income earned outside of the United States (typically business and other active types of income). The Act provides for a variety of changes that affect, in a significant way, the ongoing viability of this type of "CFC planning," such that these type of offshore deferral structures may no longer be useful.

Importantly, the impact of these CFC changes on non-U.S. families should not go overlooked. That is, certain changes may immediately cause additional reporting requirements and/or additional tax liability with respect to existing investment structures (e.g., the new downward attribution rules, discussed below), while others may necessitate revised planning techniques to properly avoid future adverse tax consequences (e.g., the elimination of the 30-day rule, discussed below). With respect to those changes that implicate future adverse tax consequences, it is quite common for a predominantly non-U.S. family to have at least one U.S. family member. For example, a non-U.S. patriarch/matriarch may fund a structure with a variety of companies and assets (perhaps even all non-U.S. companies and assets) with the idea that the structure will eventually succeed to the younger generations of U.S. family members (children, grandchildren, etc.). Often, and in order to reduce U.S. income tax exposure to the non-U.S. family members and non-U.S. assets, the structures will make use of so-called "grantor" trusts to own the companies and assets that comprise the family ownership structure. This planning is known as "foreign grantor trust" planning.

It may be the case that non-U.S. corporations owned within a foreign grantor trust structure will escape classification as CFCs while the settlor of the structure (e.g., the non-U.S. patriarch or matriarch) is alive. However, even to the extent this holds true for a particular investment structure (which is now less of a certainty given the new downward attribution rules), the death of the settlor will nonetheless cause a change in the "ownership" of such non-U.S. corporations for CFC purposes. That is, at death the "ownership" of the stock of the underlying non-U.S. corporations shifts from being "owned" by the settlor to being owned by the family members included within the beneficiary class. There are a variety of factors that lend to this analysis, but usually there is little to no way around this conclusion. Once this occurs, these non-U.S. corporations (if the prerequisites for CFC status are otherwise satisfied) will qualify as CFCs (if they have not already), with the result that the U.S. family members must start to report their ownership in them and the so-called "Subpart F income" generated from them (generally under a highly inefficient income tax system). As the passing away of a settlor of a trust (or an owner of stock of a non-U.S. corporation) is impossible to predict, a well-reasoned global planning strategy must contemplate the inevitable implications of the CFC rules on U.S. family members, even if the CFC rules are inapplicable while the non-U.S. settlor is alive and well. To do otherwise would leave the family's wealth subject to substantial and inevitable U.S. tax exposure.

Accordingly, and while non-U.S. family clients are often in disbelief that they have "CFC issues," the reality is that they usually do. The Act has significantly affected and amplified the potential CFC issues facing non-U.S. families.

CFC RELATED—ELIMINATION OF THE 30-DAY RULE

Summary: Prior to the Act, Subpart F income (the "bad" CFC income that is taxable to U.S. shareholders) would only need to be taken into account by a U.S. person if the non-U.S. corporation qualified as a CFC for at least 30 consecutive days within a year. The Act removes this rule and causes Subpart F inclusion to U.S. shareholders immediately upon a non-U.S. corporation's qualification as a CFC.

Who does this affect?

This change has an immediate and substantial impact on non-U.S. families utilizing foreign grantor trust planning where younger U.S. generations are intended to succeed to the stock in the respective family's corporations. The problem may be at bay while the settlor is alive, but-because the passing of a settlor can never be predicted-families utilizing this planning are well advised to seek immediate advice to prevent any disruption in their overall planning.

How does this affect you?

Within the foreign grantor trust strategy, it is very common for a family to own a variety of assets within one, or many, non-U.S. corporations. This is done for a variety of reasons, but is often done to "block" U.S. estate tax exposure with respect to the underlying investments (most commonly, stock in U.S. public companies) in the event of the settlor's death. Prior to the Act, foreign grantor trust planning generally required the making of a "check-the-box" election on the non-U.S. corporations immediately following the death of the settlor of the trust. Although there would generally be substantial gain in the companies' underlying assets, such gain (if structured properly) would be free from U.S. tax. Specifically, because a timely check-the-box election would prevent a non-U.S. corporation from being a CFC for 30 consecutive days, such gain would not be so-called "Subpart F" income allocable to the U.S. family members (who, following the settlor's death, would be the likely deemed "owners" of the non-U.S. corporation). Even though no U.S. tax would be due upon the making of a check-the-box election, it would still cause the U.S. tax basis in the non-U.S. corporation's underling assets to be stepped up to the then fair market value, thereby reducing any future taxable gain required to be recognized by the U.S. family members or the investment structure.

The Act's elimination of the 30-day rule requires a rethinking of the now "old" planning within the foreign grantor trust strategy. That is, if the effective date of the check-the-box election is made following the death of the settlor, then all of the gain within the company's underlying assets will be taxable to the U.S. beneficiaries to the extent that they have sufficient "ownership" to be treated as "U.S. shareholders" for CFC purposes. If instead the effective date of the check-the-box election is made prior to the death of the settlor, then (1) all of the gain is free from U.S. tax (as it is attributable to the settlor prior to his/her death), (2) the underlying assets will receive an uplift in basis for the U.S. beneficiaries to enjoy, and (3) the non-U.S. corporation will be treated as a disregarded entity or partnership (depending on the number of shareholders) for U.S. tax purposes at the time of the death of the settlor, thereby avoiding application of the CFC regime. While this potential solution of checking-the-box effective prior to the settlor's death may work for certain families and structures, it can, in certain structures, give rise to a debate as to whether disregarded entities or partnerships are effective "blockers" for U.S. estate tax purposes. According to such debate, the settlor may be deemed to have owned at death any "U.S. situs" assets owned by a disregarded entity or partnership, such as stock in U.S. companies.

Fortunately, there are other solutions. For example, a multitiered holding company structure with properly coordinated check-the-box elections accompanying so-called "Section 645 planning" techniques, if done properly, can achieve similar intended results, namely they can: (1) achieve an uplift in the tax basis of the underlying assets, (2) properly avoid the bulk, if not all, of Subpart F inclusion, and (3) shield the non-U.S. patriarch/matriarch from U.S. estate tax exposure. In order to deploy this solution, changes to current structures will be required in most cases. Importantly, if a chosen solution requires any changes to current structures, they must be made before the death of a settlor or else these intended results will be lost (and significant tax liabilities will arise).

It should be noted that check-the-box elections are not always advisable. Specifically, non-U.S. families will generally want to avoid checking-the-box on any companies that own U.S. assets that would produce significant taxable gain. For example, it may not be advisable for a family to make a check-the-box election on a non-U.S. corporation that owns appreciated U.S. real estate because such election will cause taxable gain recognition. The recognized gain will be subject to U.S. income tax at a rate ranging from 21 percent to 44.7 percent, depending on the circumstances. In such case, it may be more advisable to restructure the ownership of such U.S. assets in a tax-free manner (rather than make a check-the-box election), which (1) preserves the gain, (2) potentially reduces the overall tax liability on the eventual gain recognition, and (3) still avoids the CFC status of such companies.

Ultimately, the selection of the "best" solution may vary from family to family, and, within a family, may vary by asset class. Indeed, most non-U.S. or global families are invested (generally on a global basis) in a variety of asset classes. For example, common asset classes of large global families include: (1) diversified portfolios, including public stock in U.S. and non-U.S. companies, (2) U.S. commercial real estate, (3) U.S. residential/personal use real estate, (4) fund investments, some allocating ECI, and (5) a variety of asset classes having no connection to the United States (e.g., shopping malls in Venezuela, personal residences in Spain, etc.). Significantly, the optimal solution for a particular non-U.S. company may depend, in large part, on the type of assets held by such non-U.S. company and, more specifically, whether any of the underlying assets are "U.S. situs" assets for U.S. estate tax purposes.

Accordingly, while the elimination of the 30-day CFC rule has sent a bit of a shockwave through the international private client community, we do not believe its impact will be as pervasive as originally feared. Ultimately, the proper solution can only be achieved upon a thorough and thoughtful analysis between advisor and client.

Duration/Effective Date

This change is permanent (unless changed by law). It is effective for taxable years of non-U.S. corporations beginning after December 31, 2017.

CFC RELATED—DOWNWARD ATTRIBUTION

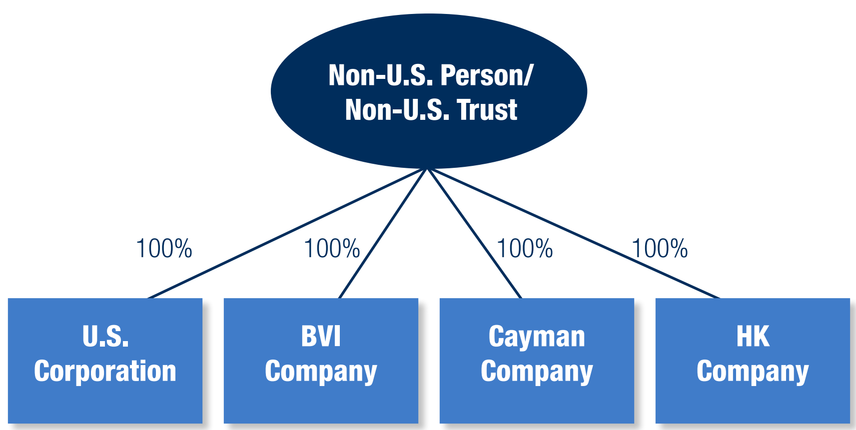
Summary: For a CFC to be relevant to a U.S. person (e.g., Subpart F inclusion or reporting obligations), the U.S. person must qualify as a "United States shareholder." There also must be sufficient concentration of ownership of a non-U.S. corporation by "United States shareholders" for such company to qualify as a CFC. In order to make these determinations, the CFC rules require attribution of ownership through certain related entities and individuals. Despite these attribution rules, prior to the Act, any shares in a non-U.S. corporation that were owned by a non-U.S. person were not attributed down to any U.S. partnership, corporation, trust, or estate in which such non-U.S. person held an interest. The Act has eliminated this limitation on "downward attribution." As a result, a U.S. partnership, corporation, trust or estate will be deemed to own any stock in a non-U.S. corporation that is owned by a non-U.S. partner, shareholder or beneficiary, respectively.

Who does this affect?

Non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested, or making new investments, in structures that own, or will own, interests in (1) at least one non-U.S. corporation (e.g., a BVI, Cayman or HK company), and (2) at least one U.S. entity that is regarded for U.S. tax purposes (e.g., a U.S. partnership, corporation, trust, estate or multimember LLC). Whether or not downward attribution will cause a non-U.S. corporation to be classified as a CFC will depend on the facts and circumstances of the particular structure, including the structure's percentage interests in the applicable entities.

How does this affect you?

The Act's new downward attribution rules substantially broaden the scope of the definitions of a U.S. shareholder and a CFC. For example, consider the following global structure owned by a non-U.S. person:



Assuming that each of the above-pictured entities is classified as a corporation for U.S. federal tax purposes, then the new downward attribution rules would cause BVI Company, Cayman Company and HK Company to each be classified as CFCs (each would be deemed to be owned by U.S. Corporation, a "United States shareholder"). This is a very onerous change for non-U.S. families in particular.

The new downward attribution rules apply retroactively, beginning for the 2017 tax year. Indeed, the downward attribution rules can cause an existing non-U.S. corporation (such as BVI Company, Cayman Company and HK Company in the above example) to be immediately and retroactively reclassified as a CFC, even to the extent the non-U.S. corporation is ultimately owned by non-U.S. individuals, entities or trusts. Thus, unlike the elimination of the 30-day rule, there may be limited opportunity for prospective planning to properly avoid U.S. shareholder and CFC status as a result of the downward attribution rules, at least for tax years 2017 and 2018.

Classification as a CFC can-and often does-expose the U.S. shareholder(s) of the CFC to adverse U.S. tax consequences, including additional U.S. tax and reporting obligations. Indeed, U.S. shareholders of a CFC are generally required to annually file a Form 5471 (Information Return of U.S. Persons With Respect To Certain Foreign Corporations), and may be subject to U.S. tax on the CFC's non-U.S. earnings (e.g., as a result of Subpart F income inclusion, the new GILTI tax (discussed below) or the new forced repatriation tax).

All structures must be meticulously examined in light of the new downward attribution rules to determine whether any non-U.S. corporations should now be properly classified as CFCs, and to ensure compliance with any applicable reporting and/or tax obligations associated with such classifications. As noted in the Instructions for Form 5471, a U.S. shareholder of a CFC may be assessed a $10,000 penalty for each failure to file a Form 5471 for each accounting period.

Duration/Effective Date

This change is permanent (unless changed by law). Significantly, this change is retroactive to the last taxable year of the non-U.S. corporation beginning before January 1, 2018. For example, in the case of calendar year taxpayers, the change is retroactively effective to January 1, 2017, which means that any required Form 5471s must be filed in 2018 by the applicable due date. It is unclear if the IRS will issue guidance providing a grace period for such filings.

CFC RELATED—THE NEW GLOBAL INTANGIBLE LOW-TAXED INCOME (GILTI) REGIME

Summary: The Act adds a new foreign anti-deferral regime that operates alongside the Subpart F rules for CFCs. Pursuant to the new regime, a U.S. shareholder of a CFC that directly or indirectly owns stock in the CFC on the last day of the CFC's tax year is subject to U.S. income tax on the CFC's global intangible low-taxed income (GILTI), in a manner similar to Subpart F income. Notwithstanding its name, the scope of the GILTI regime is not limited to income derived from intangible property or low-taxed income generated outside of the United States. Rather, the GILTI regime was designed to tax the income of a CFC that is not otherwise subject to U.S. tax as effectively connected income (ECI) or Subpart F income, to the extent that such income exceeds a benchmark return of 10 percent of the CFC's adjusted tax basis in certain tangible depreciable property (generally, plant and equipment, but not real property). There are, however, exceptions to GILTI, including an exception for certain "high-taxed" income. As a result of the GILTI regime, the use of CFCs to defer U.S. tax on what used to be "good" CFC income has lost most, and in some cases all, of its previous benefit.

Like Subpart F income, GILTI is taxable to a U.S. shareholder in the year it is earned by the CFC, regardless of whether the U.S. shareholder receives a distribution from the CFC during such year. Also like Subpart F income, GILTI is generally considered previously-taxed income and, thus, is generally not subject to U.S. income tax when distributed.

Because U.S. shareholders that are corporations qualify for a GILTI deduction, their tax rate on GILTI is 10.5 percent for tax years 2018 through 2025, and 13.125 percent for tax years 2026 and later. Corporate U.S. shareholders are also able to claim a credit for certain non-U.S. taxes paid by the CFC. On the other hand, noncorporate U.S. shareholders (i.e., individuals, trusts and partnerships) do not qualify for a GILTI deduction and are, thus, subject to ordinary income tax rates (e.g., as high as 37 percent). Noncorporate U.S. shareholders also generally cannot claim a credit for non-U.S. taxes paid by the CFC. The result of these rules is that noncorporate U.S. shareholders (i.e., individuals, trusts and partnerships) have a significantly higher tax cost under the GILTI regime, as compared to U.S. shareholders that are corporations. However, the exceedingly high tax cost to a noncorporate U.S. shareholder may be mitigated by an affirmative election to be treated as a corporate U.S. shareholder for certain purposes.

Who does this affect?

Global families utilizing CFC planning-whether currently or prospectively in the context of foreign grantor trust planning-to achieve U.S. income tax deferral for non-U.S. structures.

How does this affect you?

Prior to the Act, CFCs could be utilized by U.S. families, individuals and companies to properly defer tax on certain types of income earned outside of the United States (typically business and other active types of income, so-called "good income"). Because of this potential planning opportunity, proper foreign grantor trust planning generally included analysis and advice regarding which entities within the trust structure could and should be classified as CFCs following of the death of the settlor. That is, non-U.S. companies with substantial business operations outside the United States would have been ripe to take advantage of the "old" CFC planning techniques. In such cases, it may have made sense to keep such companies as CFCs following the death of the settlor (i.e., at the time that shares in the non-U.S. companies within the structure may be deemed to be owned by U.S. family members).

The new GILTI regime has largely foreclosed the ability of global families to achieve the same level of U.S. income tax deferral through CFC planning (again, whether deploying such planning currently or prospectively in the context of foreign grantor trust planning). That is, the GILTI regime has generally eliminated U.S. tax deferral opportunities with respect to CFCs earning what used to be "good" income. As a result, non-U.S. families that have planned for certain non-U.S. corporations to remain CFCs following the death of a settlor must reexamine such conclusions and determine the most appropriate action given the GILTI regime (e.g., perhaps the best option is to make check-the-box elections on such entities to achieve basis uplift on these business assets).

Duration/Effective Date

This change is permanent (unless changed by law). It is effective for taxable years of non-U.S. corporations beginning after December 31, 2017.

CFC RELATED—CHANGE IN DEFINITION OF U.S. SHAREHOLDER

Summary: Prior to the Act, the term "United States shareholder" was defined as a U.S. person who owns (directly, indirectly or constructively) 10 percent or more of the voting stock of a non-U.S. corporation. The Act expanded the definition of "United States shareholder" with the result that a U.S. person will be considered a "United States" shareholder if he, she or it owns (directly, indirectly or constructively) 10 percent or more of the stock by vote or value.

Who does this affect?

U.S. persons (including U.S. entities included within a global structure and U.S. family members) who properly avoided CFC classification by holding only nonvoting stock or by arguing that he, she or it otherwise lacked control over the non-U.S. corporation in question.

How does this affect you?

Prior to the Act, a U.S. person (whether an entity within a global structure or a U.S. family member) may have been able to properly avoid U.S. shareholder and CFC status by limiting his, her or its shareholdings only to nonvoting stock, although there were anti-abuse regulations limiting this planning strategy. Further, a U.S. beneficiary of a foreign nongrantor trust that did not have any control over such trust may have been able to argue that he, she or it should not be deemed to own any shares in a non-U.S. corporation that were owned by the trust. However, both of these potential planning strategies have been foreclosed by the expansion of the definition of "United States shareholder." That is, a U.S. person can no longer avoid U.S. shareholder and CFC status by holding only nonvoting stock or by arguing that he, she or it lacks control over the non-U.S. corporation in question.

Preexisting structures should be examined in light of the new definition of "United States shareholder" to determine whether any U.S. persons (whether an entity within a global structure or a U.S. family member) should now be properly classified as U.S. shareholders of CFCs, and to ensure compliance with any applicable reporting and/or tax obligations associated with such classifications. As noted in the Instructions for Form 5471, a U.S. shareholder of a CFC may be assessed a $10,000 penalty for each failure to file a Form 5471 for each accounting period.

Duration/Effective Date

This change is permanent (unless changed by law). It is effective for taxable years of non-U.S. corporations beginning after December 31, 2017.

RELAXATION OF ESBT RULES

Summary: Only certain qualifying shareholders may own stock in an S corporation (usually this means U.S. people and certain trusts). Certain trusts meet this standard, including "electing small business trusts" (or ESBTs). Prior to the Act, nonresident aliens (i.e., individuals who are not U.S. citizens, U.S. green-card holders or individuals satisfying the substantial presence test) were not permitted to be included within the beneficiary class of ESBTs-even as "potential current beneficiaries." The Act relaxes these rules and now allows a nonresident alien to be a permitted member of the class of beneficiaries of an ESBT.

Who does this affect?

Non-U.S. family members whose families own businesses organized as S corporations. U.S. family members of predominantly non-U.S. families owning highly appreciated U.S. assets.

How does this affect you?

There are a variety of U.S. businesses that are organized in S corporation form. Usually, these businesses are founded and owned by U.S. families. At times, U.S. family members give up their U.S. citizenship and become nonresident aliens for tax purposes. Until now, this has required the expatriating family member to be excluded from the shareholding of the family business. With the change in the Act, such family members now have the option to remain owners, albeit indirectly, in the S corporation.

Additionally, ESBTs can be a useful tool in restructuring highly appreciated U.S. assets owned by a non-U.S. family. For example, a unique planning technique has been to restructure the ownership of appreciated U.S. real estate on a tax-free basis from a non-U.S. corporate structure into an S corporation. While the gain is preserved in the structure, the overall tax rate on the eventual sale of the real estate can be substantially reduced so long as the real estate is held within the structure for a period of time (current five years). It has historically been difficult to utilize such planning for predominantly or exclusively non-U.S. families because of the lack of family members who could be qualifying shareholders of an S corporation. With the change in the Act, an ESBT may be used to be a qualifying shareholder and the non-U.S. family members may now be included within the beneficiary class. In the right circumstances, these reorganizations can work well to achieve tremendous results.

Duration/Effective Date

This change is permanent (unless changed by law) and effective beginning January 1, 2018.

INCREASE IN LIFETIME EXEMPTION AMOUNT

Summary: Prior to the Act, U.S. citizens (and noncitizens who are "domiciled" inside the United States) were subject to U.S. federal estate and gift taxes on their worldwide assets at graduated rates up to 40 percent, but eligible for a unified credit that would have equated to a $5.6 million exemption for 2018. The Act doubled the exemption base used to calculate the lifetime gift and estate tax exemption for U.S. citizens/domiciliaries. The exemption base will continue to be inflation-adjusted, but by a less generous measure than was previously used. As a result of these changes, the lifetime exemption amount available for transfers made by U.S. citizens/domiciliaries in 2018 will be slightly less than $11.2 million. Absent a change in law, the exemption will return to pre-Act levels in 2026.

Who does this affect?

U.S. family members, as well as non-U.S. family members from certain treaty jurisdictions.

How does this affect you?

Because U.S. federal estate and gift taxes apply differently to U.S. citizens/domiciliaries and noncitizens domiciled outside of the United States, the increase of the lifetime exemption amount will likely affect members of a global family differently. Family members that are U.S. citizens/domiciliaries will see a temporary increase in their lifetime exemption amounts. On the other hand, family members that are noncitizens/nondomiciliaries may not be affected by the increased lifetime exemption.

Unlike U.S. citizens/domiciliaries, noncitizens/nondomiciliaries are subject to U.S. estate and gift taxes (at rates up to 40 percent) only on their U.S. situs assets. Further, noncitizens/nondomiciliaries have no lifetime gift tax exemption (rather only a $15,000 annual exclusion per donee), and only have a limited estate tax exemption of $60,000. Some U.S. estate and gift tax treaties provide an increased estate tax exemption to noncitizens who are eligible treaty residents through a prorated credit based on the ratio of U.S. situs assets to worldwide assets. Although the Act leaves the estate and gift tax exemptions for noncitizens/nondomiciliaries unchanged, a non-U.S. family member domiciled in a treaty jurisdiction may be allowed an increased exemption on a prorated basis for so long as the increased exemption amount remains effective.

Because the increase in the lifetime exemption amount is temporary, affected family members should consult with their advisors regarding (1) the ability to take advantage of their increased exemptions through lifetime transfers and (2) how their estate plans may be affected if they die while the increased lifetime exemptions are in effect.

Duration/Effective Date

The increase in the lifetime exemption amount is effective for eight years, beginning in 2018. Absent a change in law, the exemption will return to pre-Act levels in 2026.

ANTI-HYBRID RULE

Summary: Under the new "anti-hybrid" rule, a taxpayer is no longer permitted to take a deduction for an interest or royalty payment to a foreign affiliate where such payment involves a hybrid entity (an entity treated as a flow-through in one jurisdiction but opaque in the other) or a hybrid transaction (a transaction treated as interest or royalties in one jurisdiction but treated as something else (e.g., as equity) in the other jurisdiction). Notably, the rule only applies if the interest or royalty payment (1) is not includible in the recipient's income for purpose of the recipient country's tax laws or (2) is offset by a deduction in the recipient's home country. The anti-hybrid rule does not apply to the extent the interest or royalty payment is included in the gross income of a U.S. shareholder of a CFC.

Who does this affect?

Non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested, or making new investments, in structures that utilize related-party debt or royalty transactions.

How does this affect you?

Previously allowed deductions for related-party interest and royalty payments may no longer be permitted because of the anti-hybrid rule. This rule is aimed at foreclosing taxpayers' ability to take advantage of differences across jurisdictions in order to minimize their global tax exposure. For example, the anti-hybrid rule may serve to disallow deductions for interest payments made with respect to existing shareholder debt. As a result, the new rule may significantly reduce the attractiveness for non-U.S. investors of using shareholder/partner debt to finance their investment structures, e.g., investments in U.S. real estate or U.S. businesses.

Whether related-party interest or royalty payments will continue to be deductible will depend on multiple factors, including the tax treatment and characterization of the applicable transaction and the entities involved under both U.S. and non-U.S. law. Accordingly, existing related-party debt and royalty arrangements should be reexamined in light of the new anti-hybrid rule to determine whether such arrangements continue to be tax-efficient and otherwise beneficial to the parties involved.

Duration/Effective Date

This change is permanent (unless changed by law) and effective for payments made or accrued during taxable years beginning after December 31, 2017. Significantly, the Act does not provide grandfathering provisions for arrangements that are already in place.

LIMITATION ON DEDUCTIBILITY OF INTEREST

Summary: The Act generally limits the deduction for net interest expense incurred by a business to the sum of its business interest income, plus 30 percent of its "adjusted taxable income" (ATI). For tax years beginning before 2022, ATI will generally equal the taxpayer's EBITDA. For tax years beginning after 2021, ATI will generally equal EBIT (which will disallow more interest expense). Any disallowed interest deductions may be carried forward indefinitely.

Unlike the prior interest deduction limitations, the new limitation (1) applies to partnerships and trusts (both U.S. and non-U.S.), in addition to corporations, (2) applies to related and unrelated party debt, (3) does not provide a safe harbor based on the taxpayer's debt-to-equity ratio, and (4) applies even where U.S. withholding tax is deducted from the interest payment. Significantly, businesses with average annual gross receipts of $25 million or less are exempt from this limit. The Act also allows a real property trade or business (e.g., a development, construction, acquisition, conversion, rental, operation, management, leasing or brokerage business) to elect out of the 30 percent limit, but making such an election will require the taxpayer to claim depreciation deductions for its real property over longer periods than otherwise would be available. Exemptions to the 30 percent limit are also available for certain farming and public utility businesses.

Who does this affect?

Non-U.S. family members (directly or via their non-U.S. trust or investment structures) invested, or making new investments, in structures that are or will be financed with any debt, whether from a related or unrelated party.

How does this affect you?

The 30 percent limitation-to the extent it applies-may significantly reduce the attractiveness for non-U.S. investors of using debt (whether related or unrelated party debt) to finance their investment structures. Significantly, however, many investment structures may be exempt from the 30 percent limitation, whether because the taxpayer taking the deduction qualifies for the small business exemption (with average annual gross receipts of $25 million or less) or elects to utilize the real property trade or business exception. Nevertheless, existing and prospective structures utilizing debt should be examined to assess the potential impact of the 30 percent limitation on its U.S. income tax exposure.

Duration/Effective Date

This change is permanent (unless changed by law) and effective for taxable years beginning after December 31, 2017. The Act does not provide grandfathering provisions for arrangements that are already in place.

CONCLUSION

Despite the variety and complexity of the significant changes by the Act, there is one key takeaway-all of a non-U.S. family's investment structures should be reviewed on a holistic basis to ensure not only that they maintain the efficacy of the original planning, but also that they continue to be compliant with any applicable U.S. reporting and/or tax obligations.

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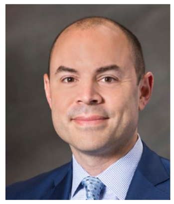

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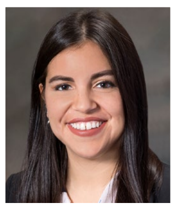

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ABOUT BENESCH'S INTERNATIONAL PRIVATE CLIENT GROUP

Benesch's International Private Client Group provides holistic, multidisciplinary legal services to wealthy, global families. Many of the clients of the International Private Client Group manage their own wealth (which can reach into the multibillions of dollars) and direct their own investments. Clients of the practice range from entrepreneurs wishing to establish a family office to established global families managing their own wealth in the multibillions to some of the world's most renowned trust companies. Our clients are "global" in scale because they often have family members, assets, companies and businesses in multiple jurisdictions throughout the world. We represent clients throughout the world, including clients resident in Latin American, Europe, the Middle East, Africa, Hong Kong, Southeast Asia and, of course, the United States.

The International Private Client Group taps into resources across the firm to provide families, family offices and trust companies with a wide range of legal services tailored to their unique needs. Whether advising on a large cross-border real estate or other acquisition or developing a tax-efficient global plan to transfer family wealth to future generations, the International Private Client team has the knowledge, experience and resources to represent these clients in everything they do.

Key Strengths of the International Private Client Group

- Depth of knowledge. The International Private Client Group has advised on and managed a variety of very complex, global structures and its lawyers pride themselves on being able to compartmentalize and reduce the often challenging legal issues into manageable solutions for clients by delivering efficient, strategic and results-oriented solutions.
- The International Private Client Practice is versatile and focuses on delivering innovative, yet practical, legal strategies and solutions.
- Our lawyers understand the particular needs of our clients, especially families seeking best-in-class, sophisticated legal services. Accordingly, whether it is a complex international tax planning engagement, an IRS audit, a corporate/real estate acquisition or disposition or development and registration of intellectual property, our lawyers are geared and ready to work to satisfy our client's unique needs.
- Our lawyers work collaboratively with existing family advisers, including other legal counsel, trustees, accountants and other trusted advisers.

Representation of Families and Family Offices

The International Private Client Group represents U.S. and non-U.S.-based families and family offices, with deep experience advising these clients on their cross-border financial and personal interests involving the United States. With respect to non-U.S. families this may include family members possessing U.S. citizenship or residency, ownership of U.S.-based property (such as vacation properties, automobiles, yachts and aircraft), acquisition and disposition of U.S. businesses and real estate, establishing a U.S.-based family office or immigration to the United States. Similarly, for U.S. families, this may include acquisition and disposition of global investments (both businesses and financial assets), expatriation from the United States, ownership of global personal property, and establishment of family offices and global tax structuring.

Representation of Trust Companies

In addition to representing families, individuals and family offices, our International Private Client Practice represents the financial institutions that service these groups, including some of the world's most well-known and respected trust companies and private banks. We understand trust companies' role as fiduciaries and their need for first-class, multidisciplinary global legal service.

Tax and Private Wealth Services

Our team routinely develops global structures designed to holistically address U.S. gift and estate tax exposure, while also mitigating global income taxes. Our experience in this area includes leveraging global tax regimes to reduce global tax burden, use of tax treaties and strategic deployment of global investment structures, managing global tax reporting, global taxation of trusts and managing global information reporting, including counseling clients on compliance with the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) as they are adopted throughout the globe. The International Private Client team has deep experience assisting families to manage, and often minimize, their obligations under newly enacted tax reporting and information exchange regimes throughout the world.

Succession Planning and Wealth Management

Our attorneys regularly represent families in multigenerational asset transfers, income tax issues and charitable giving techniques, among numerous other areas. We offer planning services that integrate our clients' business interests, family estate planning goals, strategic tax needs and retirement plan objectives. We view succession planning as an investment in the future of our client's business and believe the existence of a succession plan underscores commitment to the long-term growth and success of a business. Our focus is in proactively designing and implementing a succession plan to preserve, protect and transfer assets.

Family Office Formation

When partnering with clients, our attorneys focus on understanding clients' goals and familiarizing ourselves with the specifics so that we can offer the most astute advice. For those looking to establish a family office, we initially help determine the best framework and structure. Family office formation and staffing starts with our advisors acquiring a detailed understanding of each family's short- and long-term goals. Our client's investment objectives, risk profiles, investment horizons, philanthropic goals and succession concerns are all part of the picture.

We work with families to form the entity, develop the documentation for its capital structure and governance, and suggest best practices for day-to-day management. We provide legal advice on employment and labor relations, providing counsel on benefits administration, executive contracts and compensation, confidentiality agreements and dispute resolution. Crafting agreements between family members, such as family constitutions, and succession planning are focal points of our practice.

Corporate and Direct Investing Services

Members of Benesch's corporate and business law teams are an integral part of the International Private Client Group. Our corporate lawyers specialize in representing families and family offices in all aspects of their business and investing needs. We help our clients navigate the complex cultural, legal, tax and business challenges posed by cross-border transactions. The International Private Client team routinely assists families and family offices to develop and execute direct investing plans involving all industries including real estate, hospitality, oil and gas, life sciences, technology and manufacturing.

Further, Benesch is known as a "deal shop"—we bring connectivity to the table. When desired, we link investors to sources of deal flow, capital to smart deals, and deals to management teams. When we see a relationship that we think will work harmoniously for two parties, we introduce the parties to each other. Over the years, our attorneys have represented investors who formed or invested in funds such as buyout, venture, mezzanine, distressed business, hedge, real estate, secondary, hybrids and fund of funds. Our successful track record in these transactions is directly translatable to family offices that want to invest.

We counsel clients in all aspects of transactions, including diligence, negotiation and documentation. Benesch has completed hundreds of purchase, sale and joint venture transactions over the past few years, and our attorneys thoroughly understand the importance of moving the process forward. Each transaction has a pace to it that must be maintained to preserve the momentum of negotiations and get a deal closed.

As we all know, family offices have taken the lead in many instances in leaving a blind pool investment and either relying on their own team to find the right investment or relying on independent sponsors. We understand that dynamic very well, and we also understand the terms that a family office should be negotiating with an independent sponsor that provides the family office with an attractive target.

Our family office representation also includes legal counsel on matters concerning federal and state securities laws, private securities offerings, investment advisory services, state filings and related registrations. Within the family, we are able to advise on creation of private trust companies, credit arrangements and business agreements among family members.

Real Estate Strategy and Management

The International Private Client Group clients are able to tap into our Real Estate & Environmental Practice Group that includes more than 30 professionals. This group is recognized throughout the country as a top advisor to buyers, sellers, developers, business owners, landlords, tenants, lenders and borrowers. Our services span the scope of real estate activity, from structuring complex deals to advising clients on daily portfolio management. Our family office representation includes real estate transactions on the investment side, as well as the ongoing maintenance of existing properties, including property acquisition, development, construction project management, leasing, property sales and ongoing operation of real estate assets.