

**CON UN PIE DENTRO DE LOS**  
**EE.UU. – OBLIGACIONES**  
**TRIBUTARIAS DE**  
**EXTRANJEROS**

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**Presentación Patrocinada por International Wealth Planners**

Packman Neuwahl & Rosenberg

The following outline provides a very general discussion of a number of the different planning alternatives for a foreign investor's ownership of a USRPI or other U.S. business asset. Please note that this outline is intended to review only those circumstances where the structure in question is the original acquirer of such an interest, as numerous complex rules (a discussion of which is outside the scope of this outline) apply to transfers of existing interests to one or more of these structures.

Each different type of investment and business structure has its own advantages and disadvantages. Planning opportunities may be different based upon the age and health of the person(s) in question.

THIS OUTLINE IS NOT INTENDED AS A COMPLETE ANALYSIS OF ALL POSSIBLE TAX CONSIDERATIONS IN ACQUIRING, HOLDING AND DISPOSING A MEMBERSHIP INTEREST IN A FLORIDA LLC OWNING ONE OR MORE USRPIs. EACH INVESTOR IS RESPONSIBLE FOR HIS, HER, OR ITS OWN TAX PLANNING DECISIONS, PARTICULARLY SINCE THE POTENTIAL RELATED FEDERAL, STATE, LOCAL AND POSSIBLY THIRD COUNTRY TAX ISSUES AND CONSEQUENCES MAY NOT BE THE SAME FOR ALL INVESTORS. INVESTORS SHOULD THEREFORE CONSULT THEIR OWN U.S. AND THIRD COUNTRY TAX ADVISORS FOR SPECIFIC GUIDANCE REGARDING THE MATTERS DISCUSSED HEREIN.

## LEGEND OF SELECTED ABBREVIATIONS

**BLIT**—the U.S. branch level interest tax (see, e.g. IRC § 884). In circumstances where a borrower is a foreign corporation engaged in a USTB, which status can result through, for instance, an LLC which has a USRPI-related trade or business or gains treated as such, the interest paid may be subject to the U.S. 30% flat tax subject to certain exemptions (for example, the PIE) and/or U.S. income tax treaty benefits.

**BPT**—the U.S. branch profits tax (see, e.g. IRC § 884). If a foreign corporation does not reinvest its annual U.S. trade of business earnings and profits (i.e., its effectively connected earnings and profits) in accordance with certain specific IRS regulations, those earnings and profits not so reinvested will be treated as if they had been distributed as a dividend to the foreign corporation's shareholders, and subject to a 30% flat tax with payment responsibility placed on the foreign corporation.

**ECI**—effectively-connected income, generally income derived from a USTB, or income from the sale of a USRPI which is treated as ECI

**E&P**—earnings and profits

**ECE&P**—effectively-connected earnings and profits (for BPT purposes)

**FC**—foreign (non-U.S.) corporation. The corporation could be established in any non-U.S. jurisdiction, with the most desirable place of formation to be determined in part depending upon each person’s individual situation.

**FIRPTA**—Foreign Investment in Real Property Tax Act of 1980, as amended (see, e.g., 897 and 1445). This complex law and the Treasury Regulations interpreting these statutes have governed the U.S. income tax law relating to transfers of USRPIs since it became law.

**IRC**—Internal Revenue Code of 1986, as amended (the U.S. tax law)

**IRS**—Internal Revenue Service (the federal tax authority)

**LLC**—limited liability company (a type of legal entity that, among other uses, is commonly formed to hold USRPIs—depending upon various factors, it can be treated as either a pass-through entity or as a corporation for U.S. tax purposes.

**NOL**—net operating loss

**NRA**—nonresident alien individual for U.S. income tax purposes

**PIE**—portfolio interest exemption, which enables interest to be paid free of U.S. tax to a foreign lender under certain circumstances

**USCO**—domestic (for example, Florida) corporation

**USRPI**—United States real property interest (throughout this outline, it is presumed that the Florida LLC in which each foreign investor may invest holds only USRPIs and that an interest in the Florida LLC is itself a USRPI)

**USTB**—United States trade or business

# Classification of Individual

## U.S. Person

- U.S. citizen, or
- U.S. lawful permanent resident or
- Other U.S. tax resident based on days present in the United States.

## Non-U.S. Person

Non-U.S. citizen and  
Not a U.S. lawful permanent resident, and  
Does not violate the substantial present test.

# Classification of Foreign Entities

Check the Box Election Regime

Corporations

Partnerships/Other

Trusts & Estates

Pass-Through

Entities

-See “Per Se List”-Unlimited liability

-Limited liability  
entities that do  
not elect.

entities that do  
not elect.

-Limited liability  
entities that  
elect.

# U.S. Withholding Tax on Passive U.S. Source Income

- A foreign taxpayer is taxed at a flat 30% rate (the “flat tax”) on certain U.S. source investment type income (often called “FDAPI” or “fixed or determinable annual or periodical income”) not effectively connected with the conduct of a U.S. trade or business
- FDAPI includes (but is not limited to) interest [other than portfolio interest and § 1273 original issue discount (OID)], dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments under §§ 871(a)(1)(A) and (h), 881(a)(1) and (c)

# U.S. Withholding Tax on Passive U.S. Source Income

- IRS Forms W-8BEN and W-8IMY
- IRS Forms 1042 and 1042S
- Withholding liability can exist even without an actual payment, as FDAPI includes income deemed paid by one related party to another under § 482, see Central de Gas de Chihuahua, S.A., 102 T.C. 515 (1994)
- **The withholding agent is liable for unpaid tax under § 1461**—a very common problem for U.S. corporations and partnerships with foreign ownership, and foreign owned U.S. rental properties

# The Portfolio Interest Exemption— A Great Planning Opportunity

- Foreign lenders may receive tax-free interest when paid by an “unrelated” U.S. borrower
- No limitations on terms, except the U.S. borrower and the foreign lender must use typical arm’s-length loan agreements
- Family members are “unrelated” for direct loan purposes, but check the complex attribution rules for entity borrowers and lenders
- Contingent interest taxed at regular 30% rate
- Form W-8BEN must be received by the borrower before any payments are made to the lender

# What Type of Entity Is The Foreign Entity?

- Another very common international tax practice issue—individuals with interests in foreign entities
- For U.S. tax purposes, they could be corporations, partnerships, trusts, or disregarded entities
- U.S. tax and compliance rules vary substantially depending upon the type of entity
- Facts, circumstances, and applicable foreign laws may control entity treatment

# Form 8832

- A foreign eligible entity may adopt a classification different from its default classification by filing Form 8832
- The effective date can generally be 75 days prior to the date Form 8832 is filed, with certain procedures available to extend the ability to make a “retroactive election.” Please note, although some of these procedures are “automatic” (e.g., see Rev. Proc. 2009-41 allowing a late election up to 3 years and 75 days of the requested effective data) one might need to apply for a Private Letter Ruling to obtain relief if you are “very late”
- **NOTE:** the election to treat an entity classified as a corporation into an entity that is classified as a partnership or disregarded entity constitutes a liquidation of that entity and may have associated U.S. income tax consequences

# Does Your Foreign Client Have a U.S. Trade or Business with Effectively Connected Income?

- Having a U.S. office, employee, or dependent agent can have severe, unexpected related consequences for a foreign business
- Title passage test applies for inventory sales to determine source
- Foreign (as well as U.S.) sales income can be taxable by the U.S. if there is too much of a U.S. presence and there are ongoing U.S. contract negotiations and sales—if at all possible, keep these activities offshore
- Services performed in the U.S. are subject to tax, but **NOT** services performed outside of the U.S.

# Does Your Client Have a U.S. Trade or Business with Effectively Connected Income?

Things to avoid if practically possible :

- **Don't** have business cards or a web site with a U.S. address
- **Don't** have salesmen of the foreign business negotiate and conclude contracts while in the U.S.—  
"please send e-mail orders to my foreign office and it can help you"
- Have title to goods sold pass **outside** of the U.S. (for example, "F.O.B. Guayaquil")
- For a **service business**, only perform work while not present in the U.S., and prepare an appropriate written service agreement that confirms this

# Inbound Use of U.S. Income Tax Treaties

- The U.S. has an extensive network of income tax treaties which may provide extensive benefits to U.S. persons and treaty country residents—use Form 8833 for “treaty-based positions” or W-8BEN as applicable
- Reduced or eliminated withholding tax on passive income
- Higher standard than regular U.S. tax law for treaty country residents conducting business in the U.S.—the “permanent establishment” with attributable “business profits”

# **Inbound Use of U.S. Income Tax Treaties (continued)**

- Special rules for determining income tax residence—the “treaty tiebreaker test” may provide substantial planning opportunities
- Reduced U.S. branch profits tax rates and special exclusions
- 15% “qualified dividend” rule has resulted in treaty-shopping attempts by rearranging existing “bad” structures—will they work?

# Inbound Use of U.S. Income Tax Treaties (continued)

- “Limitation of benefits,” “business purpose” and other anti-treaty shopping rules to prevent “third country party” use of treaties—see, e.g., Aiken, Del Commercial Properties
- “Savings clauses” prevent treaties from overriding general U.S. tax rules for U.S. citizens
- Exchange of information between the “competent authorities” of each country—automatic, simultaneous, spontaneous, specific

# Form W-7, Application for IRS Individual Taxpayer Identification Number

- New form revised January, 2012
- An ITIN is a nine-digit number issued by the IRS to individuals who are required for U.S. tax purposes to have a U.S. taxpayer identification number but who do not have and are not eligible to get a social security number (SSN)
- Form W-7 does not apply if you have an SSN or you are eligible to get an SSN as a U.S. citizen, U.S. green card holder or admitted for U.S. employment

**Application for IRS Individual  
 Taxpayer Identification Number**

► For use by individuals who are not U.S. citizens or permanent residents.  
 ► See instructions.

OMB No. 1545-0074

**An IRS individual taxpayer identification number (ITIN) is for federal tax purposes only.**

**Before you begin:**

- **Do not submit** this form if you have, or are eligible to get, a U.S. social security number (SSN).
- **Getting an ITIN does not change your immigration status or your right to work in the United States and does not make you eligible for the earned income credit.**

FOR IRS USE ONLY				

**Reason you are submitting Form W-7.** Read the instructions for the box you check. **Caution:** If you check box **b, c, d, e, f, or g, you must file a tax return with Form W-7 unless you meet one of the exceptions** (see instructions).

- a  Nonresident alien required to get ITIN to claim tax treaty benefit
  - b  Nonresident alien filing a U.S. tax return
  - c  U.S. resident alien (**based on days present in the United States**) filing a U.S. tax return
  - d  Dependent of U.S. citizen/resident alien } Enter name and SSN/ITIN of U.S. citizen/resident alien (see instructions) ► \_\_\_\_\_
  - e  Spouse of U.S. citizen/resident alien } \_\_\_\_\_
  - f  Nonresident alien student, professor, or researcher filing a U.S. tax return or claiming an exception
  - g  Dependent/spouse of a nonresident alien holding a U.S. visa
  - h  Other (see instructions) ► \_\_\_\_\_
- Additional information for a and f: Enter treaty country ► \_\_\_\_\_ and treaty article number ► \_\_\_\_\_

<b>Name</b> (see instructions)	<b>1a</b> First name	Middle name	Last name
	<b>1b</b> First name	Middle name	Last name

Name at birth if different . . . ► \_\_\_\_\_

**Applicant's mailing address**

**2** Street address, apartment number, or rural route number. **If you have a P.O. box, see separate instructions.**

City or town, state or province, and country. Include ZIP code or postal code where appropriate.

**Foreign (non-U.S.) address**  
(if different from above)  
(see instructions)

**3** Street address, apartment number, or rural route number. **Do not use a P.O. box number.**

City or town, state or province, and country. Include ZIP code or postal code where appropriate.

**Birth information**

**4** Date of birth (month / day / year) Country of birth City and state or province (optional) **5**  Male  Female

**Other information**

**6a** Country(ies) of citizenship **6b** Foreign tax I.D. number (if any) **6c** Type of U.S. visa (if any), number, and expiration date

**6d** Identification document(s) submitted (see instructions)  Passport  Driver's license/State I.D.  
 USCIS documentation  Other \_\_\_\_\_ Date of entry into the United States (MM/DD/YYYY) / /

Issued by: No.: Exp. date: / /

**6e** Have you previously received a U.S. temporary taxpayer identification number (TIN) or employer identification number (EIN)?  
 **No/Do not know.** Skip line 6f.  
 **Yes.** Complete line 6f. If more than one, list on a sheet and attach to this form (see instructions).

**6f** Enter: TIN or EIN ► \_\_\_\_\_ and  
 Name under which it was issued ► \_\_\_\_\_

**6g** Name of college/university or company (see instructions) \_\_\_\_\_  
 City and state \_\_\_\_\_ Length of stay \_\_\_\_\_

**Sign Here**

Under penalties of perjury, I (applicant/delegate/acceptance agent) declare that I have examined this application, including accompanying documentation and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I authorize the IRS to disclose to my acceptance agent returns or return information necessary to resolve matters regarding the assignment of my IRS individual taxpayer identification number (ITIN), including any previously assigned taxpayer identifying number.

Keep a copy for your records.	Signature of applicant (if delegate, see instructions)	Date (month / day / year)	Phone number
	Name of delegate, if applicable (type or print)	Delegate's relationship to applicant	<input type="checkbox"/> Parent <input type="checkbox"/> Court-appointed guardian <input type="checkbox"/> Power of Attorney
<b>Acceptance Agent's Use ONLY</b>	Signature	Date (month / day / year)	Phone
	Name and title (type or print)	Name of company	Fax
			EIN
			Office Code

# Form W-7, Application for IRS Individual Taxpayer Identification Number

- Acceptance Agents (AAs) are persons (individuals or entities such as colleges, financial institutions, accounting firms, etc.) who have entered into formal agreements with the IRS that permit them to assist applicants in obtaining ITINs
- Certifying Acceptance Agents (CAAs) are individuals or entities who are also authorized to verify the applicant's claim of "identity" and "foreign status" through a review of appropriate documentation, as well as verifying the authenticity, accuracy and completeness of the supporting documentation

# **Form W-7, Application for IRS Individual Taxpayer Identification Number**

- AAs may submit Form W-7, attached U.S. Federal income tax return, and any supplemental documentation to the IRS, but only facilitate the application, as they are not authorized to issue the ITIN directly
- Once the ITIN is issued, the AA receives the applicant's number directly from IRS
- AAs/CAAs may charge a fee for their services
- A list of authorized Acceptance Agents is available on the IRS website

# Form W-7

Any individual who is not eligible for an SSN but who must furnish a taxpayer identification number must apply for an ITIN on Form W-7—examples:

- NRA eligible for reduced U.S. withholding tax benefits under a U.S. income tax treaty
- NRA required to file a U.S. tax return or filing only to claim a refund
- NRA who elects to file a joint U.S. tax return with a U.S. citizen or resident alien spouse
- U.S. substantial presence test resident alien who files a U.S. tax return
- Alien spouse claimed as an exemption on a U.S. tax return
- Alien individual eligible to be claimed as a dependent on a U.S. tax return
- NRA student, professor, or researcher who is required to file a U.S. tax return, or who is claiming an exception to the tax return filing requirement
- A dependent/spouse of an NRA U.S. visa holder
- Undocumented immigrants

# Form W-7

- Under the prior procedure, copies of the required documents could be submitted if they were notarized by a U.S. notary public legally authorized within his or her local jurisdiction to certify that the document was a true copy of the original. To do this, the notary had to see the valid, unaltered, original document and verify that the copy conforms to the original
- Notarizing Officers at U.S. Embassies and Consulates overseas could provide these notarial and authentication services
- Such copies could also be submitted if they were notarized by a foreign notary under the Hague Convention procedures for countries that have joined the Hague Convention
- Under these procedures, a certification is issued in the form of an “apostille” attached to the copy of the document
- If the document originated in a country that is not party to the Hague Convention, applicants were required to have the document certified by the issuing foreign authority

# New ITIN Rules Causing Havoc

- Effective June 22, 2012, the IRS made significant interim changes to the ITIN application process
- The IRS indicated that these changes were required due to substantial fraud occurring in the application process
- Unlike the Social Security Administration, which requires an individual to submit “original” documents to obtain a Social Security Number (SSN), the IRS has accepted notarized copies of documents for ITINs
- The IRS intended the interim procedures to apply only to applicants generally seeking ITINs for the purposes of filing U.S. individual income tax returns, but they actually have a much broader scope
- Because the April 17 filing deadline had passed, the IRS anticipated that a small number of taxpayers would need ITINs before the end of 2012, when new rules will supposedly be issued
- However, the IRS failed to take into account the lack of desire to send in original documents that practitioners and taxpayers fear will disappear into the proverbial bureaucratic black hole

# New ITIN Rules Causing Havoc

- The IRS now only issues ITINs when applications include original documentation, such as passports and birth certificates, or certified copies of these documents from the issuing agency
- ITINs will not be issued based on applications supported by notarized copies of documents
- In addition, ITINs will not be issued based on applications submitted through certified acceptance agents unless they attach original documentation or copies of original documents certified by the issuing agency

# New ITIN Rules Causing Havoc

- Persons who need ITINs to get their tax return processed can do so by submitting their original documentation or certified copies of their documentation by mail
- Documentation will be accepted at IRS walk-in sites but will be forwarded to the ITIN centralized site for processing
- Some categories of W-7 ITIN applicants are not impacted by these interim changes
- Military spouses and dependents without an SSN who need an ITIN, by providing a copy of the spouse or parent's U.S. military identification, or applying from an overseas APO/FPO address

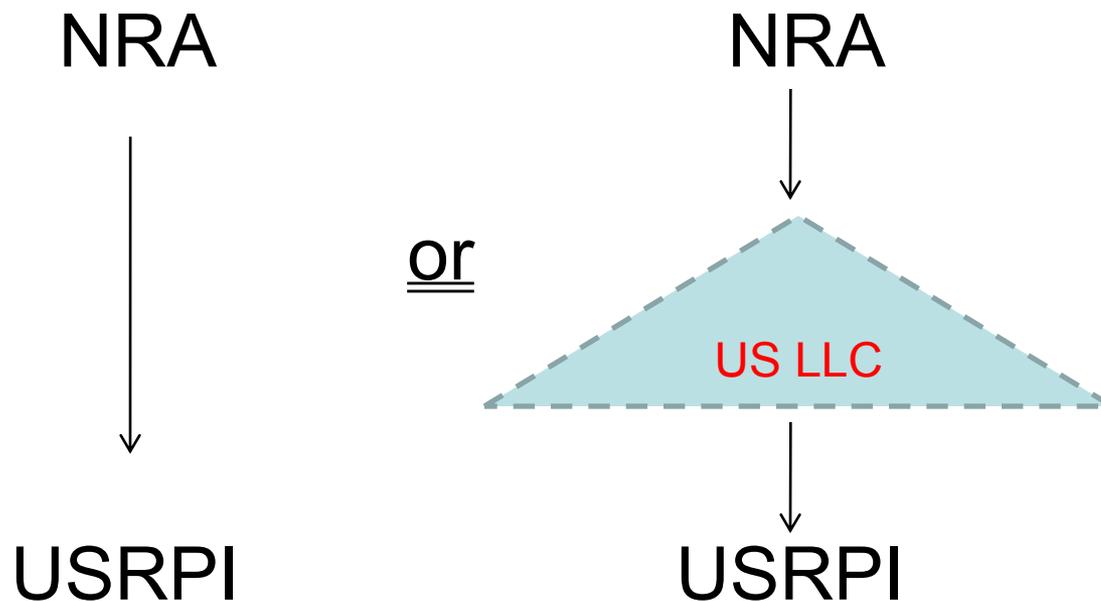
# New ITIN Rules Causing Havoc

- NRAs applying for ITINs for the purpose of claiming tax treaty benefits (use boxes a and h on Form W-7)
- New ITIN applications of this category that are accompanied by a US tax return are subject to the new interim document standards
- The key problem: NRAs often need ITINs for reasons besides filing a U.S. tax return—third-party withholding for various income, such as FIRPTA, certain gambling winnings or pension income, and for other information reporting purposes
- FIRPTA Forms 8288/8288-A/8288-B ITIN filing status and requirements are presently uncertain
- Existing documentation standards will be maintained only for these applicants, but IRS scrutiny of the documents will be heightened

# What Structure Should I Recommend to an NRA Investing in the U.S.?

- Income tax savings and estate tax avoidance—can a foreign investor enjoy both?
- Investment structures for many foreign persons now **MUST** be transparent—a complete switch from the way we used to practice!
- Many existing structures now need to be changed to become transparent—and it can have a significant U.S. income tax cost

**Alternative 1—NRA Directly Owns the USRPI**  
**or through a Single Member LLC Disregarded**  
**for U.S. tax purposes**



# **Alternative 1—NRA Directly Owns the USRPI or through a Single Member LLC Disregarded for U.S. tax purposes**

## **Advantages:**

1. This structure potentially results in the lowest overall U.S. income tax rate with respect to income earned from a taxable disposition of the USRPI (currently 15% capital gains if the USRPI is held more than one year; otherwise 35% maximum ordinary income). In addition, there is only one level of U.S. income tax imposed upon NRA.
2. This is the least complex and cheapest structure to form and maintain.
3. No BPT or BLIT.

# **Alternative 1—NRA Directly Owns the USRPI or through a Single Member LLC Disregarded for U.S. tax purposes**

## **Disadvantages:**

1. No anonymity potential except that if LLC is used, LLC would appear as the owner of the USRPI under the real estate public records—note, however, that planning should never be solely based upon a desire for anonymity, as it cannot be guaranteed, particularly where there is a tax treaty between the U.S. and the country of the investor’s residence or because of existing banking and money regulations.
2. The filing of an NRA individual U.S. income tax return (Form 1040NR) upon disposition or sooner if the

## **Alternative 1—NRA Directly Owns the USRPI or through a Single Member LLC Disregarded for U.S. tax purposes**

USRPI is a USTB property or a “net election” is made to treat it as a USTB property.

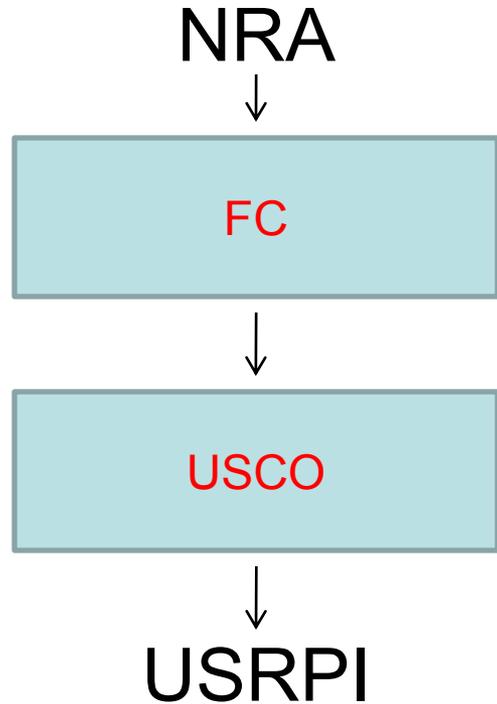
3. FIRPTA withholding applies to the NRA’s sale of the USRPI (generally, 10% of purchase price, credited against actual tax due). If the foreign seller knows that the seller’s U.S. income tax liability will be less than the gross 10% withholding tax, the seller can utilize certain procedures to request the reduction of the withholding tax.
4. No U.S. estate and gift tax protection.

# **Alternative 1—NRA Directly Owns the USRPI or through a Single Member LLC Disregarded for U.S. tax purposes**

## **Planning Notes:**

1. As a hedge against the U.S. estate tax, consider obtaining U.S. life insurance, which is a foreign situs asset exempt from U.S. estate tax where the insured is a nonresident alien decedent.
2. Check applicable U.S. tax treaties.
3. Can pay out U.S. tax-free foreign source interest on U.S. business related debt and obtain deduction where business assets secure such debt or where debt is “booked” to a U.S. trade or business, subject to a percentage limitation.

# Alternative 2—NRA Owns FC Which Owns USCO Which Owns the USRPI



# **Alternative 2—NRA Owns FC Which Owns USCO** **Which Owns the USRPI**

## **Advantages:**

1. A 34/35% U.S. income tax rate applies, plus applicable state (for example, Florida) income tax, but only one level of U.S. income tax is imposed if USCO makes only a single liquidation distribution without paying dividends. It must be remembered, however, that to the extent USCO has annual E&P, the income resulting from retaining such E&P will result in additional annual gross income potentially subject to U.S. corporate income tax, subject to exceptions for certain tax-exempt investments.
2. No U.S. estate or gift tax.

## **Alternative 2—NRA Owns FC Which Owns USCO** **Which Owns the USRPI**

3. Limited legal liability at the FC and USCO levels.
4. Extra level of potential anonymity.
5. No BPT or BLIT.
6. No FIRPTA withholding would apply to the sale of USCO's USRPI because FIRPTA withholding does not apply to the disposition of a USRPI owned by a U.S. person. If FC sold or liquidated USCO, FIRPTA withholding would apply if USCO has not disposed of all of its USRPIs in taxable transactions, subject to FC's possibly having such withholding reduced as mentioned in Alternative 1.

# **Alternative 2—NRA Owns FC Which Owns USCO** **Which Owns the USRPI**

## **Disadvantages:**

1. U.S. income tax rate may be greater than individual rate.
2. A relatively expensive structure to create and maintain.
3. Interest-stripping limitation and the related foreign person guarantee rule. If FC or a party related to FC makes loans to USCO, and the interest USCO pays is otherwise exempt from or subject to a reduced rate or withholding under the PIE and/or a tax treaty, USCO may find its interest deduction limited if its debt to equity ratio exceeds 1.5 to 1.

## **Alternative 2—NRA Owns FC Which Owns USCO** **Which Owns the USRPI**

4. A 30% U.S. withholding tax applies to dividends paid by from USCO to FC unless a U.S. tax treaty provides a lower rate.

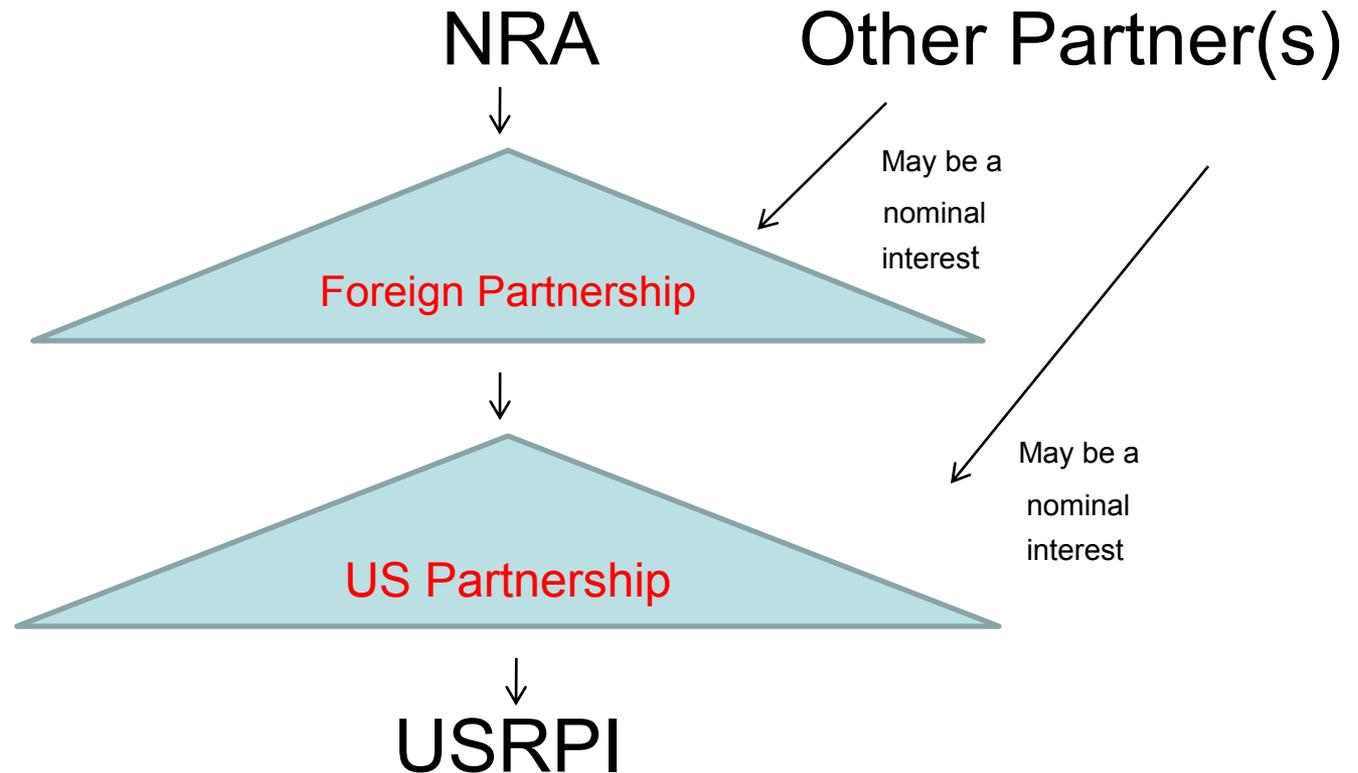
### **Planning Notes:**

1. When funding USCO consider the implications of equity versus debt as interest paid on a loan from USCO to FC could result in a less expensive alternative for returning capital plus some earning to FC.

## **Alternative 2—NRA Owns FC Which Owns USCO** **Which Owns the USRPI**

2. Other alternatives include structuring a loan from NRA or FC to qualify for the PIE or for reduced taxation under an applicable U.S. tax treaty.
3. Need to consider the effect of holding multiple USRPIs in one DC versus holding one USRPI per DC and possible effect of tax consolidation. Difficult to avoid second level tax if USCO cannot liquidate.

# Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI



## **Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI**

### **Advantages:**

1. This structure also potentially results in the lowest overall U.S. income tax rate with respect to income earned from a taxable disposition of the USRPI (currently 15% capital gains if the USRPI is held more than one year; otherwise 35% maximum ordinary income). In addition, there is only one level of U.S. income tax imposed upon NRA or other income, as the partnership is a “pass-through” entity for U.S. income tax purposes.

## **Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI**

2. If partnership is a limited liability company or a limited partnership where NRA is a limited partner, limited legal liability.
3. No BPT or BLIT considerations.
4. Arguably, no U.S. gift tax would be imposed upon a transfer of a partnership interest, but unclear, and maybe the same result regardless of whether the gift is of a U.S. or foreign partnership.

## **Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI**

### **Disadvantages:**

1. USTB or permanent establishment of partnership causes such status (and U.S. income tax return filing requirements) at NRA partner level.
2. No real anonymity.
3. No limited legal liability if NRA is a general partner in a limited partner except per a specific state law.
4. Potential U.S. estate tax, as the applicable law is not entirely clear, especially if the USRPI is treated as a USTB, although arguments to the contrary exist.

## **Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI**

5. Subject to special U.S. withholding tax rules for partnerships with foreign partners with regard to taxable ECI of any foreign partner but the regulations allow for a reduction based on a foreign partner's deductions and losses reasonably expected to be available.
6. Possibly U.S. gift tax upon a transfer by NRA of a partnership interest although potential arguments to the contrary exist.

# **Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI**

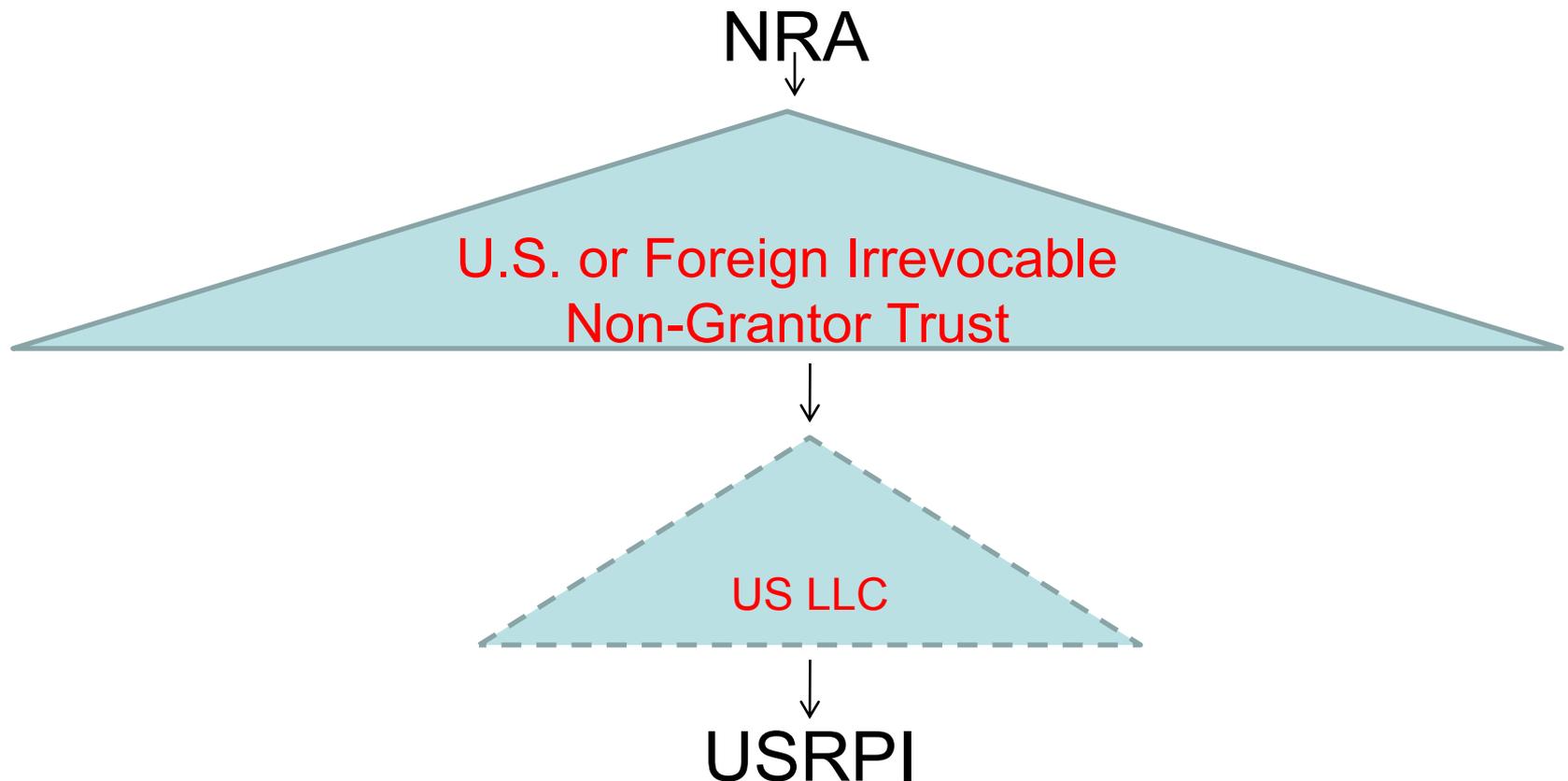
## **Planning Notes:**

1. Strong differences of opinion exist among tax practitioners regarding whether this structure in fact provides potential U.S. estate tax protection.
2. Consider PIE planning with respect to loans to be made to the partnership but be careful with certain rules limiting interest deduction or allocation in the case of a foreign partner.

## **Alternative 3—NRA is a Partner in a Foreign Partnership Which Owns a U.S. Partnership which Owns the USRPI**

3. Consider alternatives to reduce equity value of the partnership via funding through loans for U.S. estate tax purposes.
4. Be certain that partnerships take the form of eligible entities which may elect to become a corporation if desired and be alert of timing issues related thereto.

**Alternative 4—NRA Establishes U.S. or Foreign Non-Grantor Irrevocable Trust Which Owns the USRPI (NRA Retains No Tainted Rights, Powers, Benefits, Interest in or Control Over the Irrevocable Trust)**



## **Alternative 4—NRA Establishes U.S. or Foreign Non-Grantor Irrevocable Trust Which Owns the USRPI (NRA Retains No Tainted Rights, Powers, Benefits, Interest in or Control Over the Irrevocable Trust)**

### **Advantages:**

1. This structure also potentially results in the lowest overall U.S. income tax rate with respect to income earned from a taxable disposition of the USRPI (currently 15% capital gains if the USRPI is held more than one year; otherwise 35% maximum ordinary income) or other income. In addition, there is only one level of U.S. income tax imposed (upon either the trust or possibly a beneficiary, depending upon the terms of the trust).

**Alternative 4—NRA Establishes U.S. or Foreign Non-Grantor Irrevocable Trust Which Owns the USRPI (NRA Retains No Tainted Rights, Powers, Benefits, Interest in or Control Over the Irrevocable Trust)**

2. No BPT or BLIT considerations.

## **Alternative 4—NRA Establishes U.S. or Foreign Non-Grantor Irrevocable Trust Which Owns the USRPI (NRA Retains No Tainted Rights, Powers, Benefits, Interest in or Control Over the Irrevocable Trust)**

### **Disadvantages:**

1. USTB status or permanent establishment of trust creates such status at trust or beneficiary level, depending upon the trust's terms. This could result in beneficiary having a US tax filing obligation.
2. No real anonymity.
3. No limited liability for the trust, but potential liability protection for the trust's beneficiaries depending upon the trust's terms.

# **Alternative 4—NRA Establishes U.S. or Foreign Non-Grantor Irrevocable Trust Which Owns the USRPI (NRA Retains No Tainted Rights, Powers, Benefits, Interest in or Control Over the Irrevocable Trust)**

## **Planning Notes:**

1. This structure can have excellent overall U.S. tax-related benefits. However, for maximum potential benefits, the investor must truly be willing to give up control over the trust assets.
2. If a foreign trust, possible planning for U.S. income tax free payments of certain foreign source interest but be careful with certain rules limiting interest deduction or allocation in the case of a foreign partner.

**Alternative 4—NRA Establishes U.S. or Foreign Non-Grantor Irrevocable Trust Which Owns the USRPI (NRA Retains No Tainted Rights, Powers, Benefits, Interest in or Control Over the Irrevocable Trust)**

3. If a U.S. trust possible planning for U.S. income tax free payments of PIE interest.