



An educational guide for individuals and families



Preserve your legacy




**With estate planning
options for foreign nationals**

If you or your spouse have financial or other ties to the United States, but are not a US citizen or resident, you face special challenges when it comes to your estate planning strategy.

Every situation is unique, but there are ways to identify and plan for the potential estate and gift tax exposure that can reduce the value of your estate.¹ This guide can help you address your estate and tax strategy needs with options that can help preserve your legacy.

Questions for you to consider

A few questions can help you discover if you could benefit from learning about certain estate planning strategies:

-  If you or your spouse is not a US citizen, do you know that you won't be able to use the unlimited marital deduction?
-  Have you heard of a Qualified Domestic Trust and how it can help you? Did you know there's another tool that can help you even more than this type of trust?
-  If you or your spouse is not a US citizen, do you know that your US tangible assets will be subject to US estate taxes¹ at your or your spouse's death — and have you begun planning for this tax?



What you need to know

Determining your residency status under the federal gift and estate tax rules is important as there's a significant difference in tax treatment, depending on how you are classified. Before you can begin creating your estate planning strategy, you should identify what type of foreign national you are — and/or your spouse is.

The two types of foreign nationals

In the US, foreign nationals (non-citizens) fall into two primary categories: resident and nonresident.

Resident

You are classified as a resident if you are domiciled in the US, even if you are a non-citizen married to a US citizen spouse or green card holder. "Domiciled" generally refers to a person who lives in the US with the intention of remaining permanently.² Some of the criteria used to determine residency are: location of principal residence or place of business, location of property, membership in organizations, governmental licenses, having a green card, and location of financial holdings.

The two types of foreign nationals:

- 1 Resident
- 2 Nonresident

Nonresident

Your status is defined by the US Internal Revenue Service (IRS) based on the type of tax:

- **For income tax purposes**, there are clear-cut rules to define you as a nonresident. You are classified as a nonresident if you are a foreign national who does not have a green card and you do not satisfy the "substantial presence" test.³
- **For transfer tax purposes**, you are classified as a nonresident if you are not "domiciled" in the US at the time of your gift or death. "Domiciled" means "living within a country with no definite present intent of leaving." So, if it can be established that you intended to return to the US, you may be considered a resident foreign national.

How foreign nationals are subject to US income taxes⁴

As a foreign national, you are only subject to US income tax on income the IRS considers "US source income." Income is generally considered "US source income" if the location of the activity for which the payment is made is in the US.

| US source income | Not US source income |
|--|--|
| Dividends from US corporations | Interest on deposits at US banks (e.g., savings, checking, CDs, etc.) |
| Rent from US real property | Amounts held by an insurance company with an agreement to pay interest |
| Salary for services performed in the US | Interest on obligations of a state or political subdivision (e.g., city, town, county, etc.) |
| Capital gain on sale of US real property | |

How foreign nationals are subject to US transfer taxes⁵

As a foreign national, you are only subject to US transfer tax on "US situs assets."

For gift tax purposes only, as a non-citizen, you are not subject to gift tax on gifts of intangible US situs assets, such as the stock of US corporations or US life insurance policies.

For estate tax purposes only, as a non-citizen, cash on deposit at a US bank is not subject to the US estate tax. And if you own a US life insurance policy on your life, the death proceeds are not subject to the US estate tax.



Your estate planning

Planning challenges as a non-citizen resident

While the tax rules that apply to you as a non-citizen resident are very similar to those that apply to a US citizen, a few key differences can lead to drastically different results:

- Like US citizens, as a non-citizen resident you will be taxed at death on all your worldwide income during your lifetime, and your worldwide assets at death.
- Like US citizens, as a non-citizen resident you get an unlimited marital deduction, meaning you can leave at your death, or transfer during your life, an unlimited amount of money to your US citizen spouse, without having to pay transfer taxes. Additionally, as a non-citizen resident you may annually gift up to \$17,000 (for 2023) to any number of non-spousal beneficiaries.⁶
- A US citizen may only gift a non-citizen resident spouse up to \$175,000 annually. While that may sound like a lot, it doesn't compare to the unlimited amount you could transfer if your spouse were a citizen. This amount can easily be exceeded in certain instances, such as when adding your non-citizen spouse to the deed of a house after marriage.

The current applicable exclusion amount is \$12,920,000 in 2023. In 2026, absent new legislation, it will return to \$5M, adjusted for inflation.

Planning challenges as a nonresident

The first challenge here is determining your resident versus nonresident status

The US classifies you as a nonresident typically if you live in another country, own some US property (real estate, stock, etc.), or may have family in the US. You may also be classified as a nonresident if you come to the United States regularly, but only for brief periods of time. You cannot be “substantially present” in the US if you wish to retain your nonresident status. Whether or not someone is domiciled in the US requires a facts and circumstances inquiry that may take into consideration the time an individual spends in a location, the location and size of her/his residences, the location of her/his family members, etc. The general presumption is that a person is domiciled where they reside, but that can be rebutted by the actual facts and circumstances.

Unlike residents, nonresidents only have tax exposure on their income and assets that are tied to the US:

- **For income tax purposes**, as a nonresident you owe taxes on dividends from US companies, rental income from US real estate, salary from services performed in the US, and capital gains on the sale of US property. On the other hand, interest paid on deposits from US banks, insurance companies, or states is not considered US source income.
- **US life insurance on non-citizens** is subject to the same rules as US citizens: income tax-free loans, withdrawals up to cost basis, and an income-tax free death benefit.⁷ Withdrawals over cost basis are considered US source income and are subject to US taxation.
- **For transfer tax purposes**, the situation is somewhat complex. While foreign nationals are only subject to US transfer tax on US situs assets, what is considered a situs asset can vary, based on whether it is an estate or gift tax:
 - **For gift tax purposes only**, a nonresident is not subject to gift tax on gifts of intangible US situs assets, like the stock of US corporations or US life insurance policies. There is some disagreement over whether gifts of cash on deposit at US bank accounts are subject to the US gift tax.⁸ However, there is some authority that suggests gifts of cash from a foreign bank account to a US person or trust are not subject to the US gift tax.
 - **For estate tax purposes only**, cash on deposit at a US bank is not subject to the US estate tax.
 - Nonresidents have an estate tax exemption of only \$60,000, compared to the current \$12.92M for US citizens. This can be problematic for you if you own real estate in the US.

One planning option

The Qualified Domestic Trust (QDOT)

A QDOT is a planning tool that allows assets to be left to someone who is not a US citizen, without immediate estate taxation. Instead, estate taxes are paid as the principal is distributed and on the remainder of the QDOT assets at the non-citizen's death.

It's important to keep in mind that a QDOT merely delays the payment of US estate tax — and it has some other provisions that many find unattractive:

- Every time principal is distributed to the surviving non-US citizen spouse from a QDOT (except in cases of hardship), US estate taxes must be withheld from the distribution.
- At the surviving non-US citizen spouse's death, the remainder of the QDOT will be subject to the US estate tax. The tax will also be imposed whenever the trust fails to meet the QDOT requirements.

A QDOT can be used if you are a US citizen married to a non-citizen, or if you and your spouse are both non-citizens with US residency. However, because QDOTs have limitations in their transfer tax-free distribution potential, many non-citizens also choose to incorporate life insurance in their estate planning — with or without a QDOT.



Another planning option

Life insurance

Life insurance from a US carrier can provide a surviving non-citizen spouse with a source of funds that avoids the complications of a QDOT. And US whole life insurance on non-citizens can be particularly advantageous. Life Insurance is generally subject to most of the same rules as US citizens, and offers the same benefits:

- Income tax-efficient loans through access to the policy's cash value.⁹
- Withdrawals up to cost basis.
- An income tax- and estate tax-free death benefit.
- Can be held in trust for creditor protection.¹⁰

In addition, US life insurance owned by a foreign national on his/her own life is not subject to estate taxes at death. As a result, if owned by a properly drafted trust, it may be possible for you to access the cash value of the life insurance while still enjoying creditor protection and avoiding estate taxation.

The life insurance can also provide the liquidity needed to pay any estate taxes or settlement costs that might arise, and furnish your survivors with a supplemental source of income.

Life insurance is not considered a US asset for gift and estate tax purposes.



How life insurance for residents works

Insurance on the life of the citizen spouse can normally be owned by the non-citizen spouse or by a life insurance trust. If ownership is established in this manner at policy issue (or later, by transferring an existing policy to the non-citizen spouse, and the insured then lives for at least three years), the insurance proceeds will not be included in the citizen spouse's gross estate, and the surviving spouse can consume, gift, or expatriate all of the proceeds without exposing any of this money to US estate taxes.

The insurance proceeds may even completely replace the assets that the decedent citizen spouse may have wished to leave to the non-citizen spouse. The insurance can also provide the liquidity needed to pay any estate taxes or settlement costs that might arise, and provide the surviving spouse with a supplemental source of income.

How life insurance for nonresidents works

While QDOTs can be a useful option for non-citizen spouses of US citizens, a QDOT is often not as appealing an approach for nonresidents, as all the assets in the QDOT are eventually subject to US taxation. US life insurance can be a good alternative for nonresidents — and it can be owned by the insured or a trust.

Life insurance owned by the insured

- If the life insurance is owned by the insured or his/her spouse (assuming they both are non-citizens) the death proceeds will not be subject to US income taxation, nor will the interest (if any) paid by the US life insurance carrier.
- From a US estate tax perspective, a foreign national is not subject to US estate tax on the death proceeds of a US life insurance policy insuring her/his life. A non-citizen would be subject to US estate tax on the fair market value of a US life insurance policy insuring someone else's life.

Life insurance owned by a trust

If a US trust owns a life insurance policy on a nonresident, the policy should (with a properly drafted trust) be protected from creditors. Additionally, the death proceeds will be free from US income and estate taxes. It may even be possible to give the nonresident access to the policy's cash values, while still preserving the creditor protection provided by the trust. Even if the cash value access were an "incident of ownership," the proceeds would still not be subject to the US estate tax, because (as previously mentioned) insurance owned by a nonresident at death is not subject to US estate tax.

Important considerations for purchasing life insurance

- To be eligible to apply for a Guardian life insurance policy, you must demonstrate a financial connection to the United States (e.g., you work or reside in the US, own property in the US, etc.).
- By law, your life insurance purchase transaction must take place entirely within the confines of the United States. This includes completing the application, medical exam, and policy delivery.
- Your policy premiums must be paid in US dollars from a US bank account.
- If you are considering an ownership arrangement for your policy through any means other than a US irrevocable trust, your chosen ownership arrangement must receive prior approval from the insurance company; otherwise, the owner of your policy should be a US irrevocable trust with a US tax ID number.

If you have financial or familial ties to the United States, addressing your estate planning needs today can help protect your loved ones and preserve your legacy.

Contact a Guardian financial professional to learn more.

- ¹ Guardian, its subsidiaries, agents, and employees do not provide tax, legal, or accounting advice. Consult your tax, legal, or accounting professional regarding your individual situation.
- ² "Domicile" is a facts and circumstances inquiry that may take into consideration the time an individual spends in a location, the location and size of her/his residences, the location of her/his family members, etc. There is a rebuttable presumption that a person is domiciled where she/he resides.
- ³ A person is "substantially present" in the US if she/he is here for 31 days in the current year and 183 days (including the current year) over the past 3 years. The 183 days is determined by weighting 100% of the days of the current year, 1/3 of the days of the first year before the current year, and 1/6 of the days of the second year before the current year.
- ⁴ This section only addresses potential US income tax results. These results may be altered by a treaty between the US and the country of citizenship of the foreign national. Your client's advisor(s) should consult any applicable treaties to determine the client's actual tax liability.
- ⁵ This section only addresses potential US transfer tax results. These results may be altered by a treaty between the US and the country of citizenship of the foreign national. Your client's advisor(s) should consult any applicable treaties to determine the client's actual tax liability.
- ⁶ Residents may also owe taxes in the country of their citizenship, but that is beyond the scope of this document. Clients should consult their tax advisors for more information.
- ⁷ Policy benefits are reduced by any outstanding loan or loan interest and/or withdrawals. Dividends, if any, are affected by policy loans and loan interest. Withdrawals above the cost basis may result in taxable ordinary income. If the policy lapses, or is surrendered, any outstanding loans considered gain in the policy may be subject to ordinary income taxes. If the policy is a Modified Endowment Contract (MEC), loans are treated like withdrawals, but as gain first, subject to ordinary income taxes. If the policy owner is under age 59½, any taxable withdrawal may also be subject to a 10% federal tax penalty.
- ⁸ PLR 7737063 supports the view that gifts from a US bank account (savings, checking, certificate of deposit) are subject to the US gift tax.
- ⁹ All whole life insurance policy guarantees are subject to the timely payment of all required premiums and the claims-paying ability of the issuing insurance company. Policy loans and withdrawals affect the guarantees by reducing the policy's death benefit and cash values.
- ¹⁰ State creditor protection for life insurance policies varies by state. Contact your state's insurance department or consult your legal advisor regarding your individual situation.

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Pub11174 (10/23) 2023-164407 (Exp. 10/25) | New York, NY