

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301 and 602

[TD 8813]

RIN 1545-AU74

Residence of Trusts and Estates--7701

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance regarding the definition of a trust as a United States person (domestic trust) or a foreign trust. This document also provides guidance regarding the election for certain trusts to remain domestic trusts for taxable years beginning after December 31, 1996. The regulations incorporate changes to the law made by the Small Business Job Protection Act of 1996 and by the Taxpayer Relief Act of 1997. The final regulations affect the determination of the residency of trusts as foreign or domestic for federal tax purposes.

DATES: Effective Date: These regulations are effective February 2, 1999.

Dates of Applicability: See §301.7701-7(e).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, James A. Quinn at (202) 622-3060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1600.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these final regulations are in §301.7701-7(d)(2)(ii) and (f). This information is required by the IRS to assure compliance with the provisions of the Small Business Job Protection Act of 1996 and by the Taxpayer Relief Act of 1997 for trusts seeking to retain their residency as domestic or foreign trusts in the event of an inadvertent change and for trusts electing to remain domestic trusts. The likely respondents are trusts. The estimated average annual burden per respondent is 0.5 hours.

Comments concerning the accuracy of this burden estimate should be sent to the **Internal Revenue Service**, Attn.: IRS Reports Clearance Officer. OP:FS:FP, Washington, DC 20224, and to the **Office of Management and Budget**, Attn.: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax

returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On June 5, 1997, the IRS published in the **Federal Register** a notice of proposed rulemaking (62 FR 30796) to provide guidance on the definition of a foreign trust and a domestic trust under section 7701(a)(30) and (31), as amended by section 1907 of the Small Business Job Protection Act of 1996 (SBJP Act), Public Law 104-188, 110 Stat. 1755 (August 20, 1996).

Written comments responding to the notice of proposed rulemaking were received, and a public hearing was held on September 16, 1997. After consideration of the comments received, the proposed regulations are adopted as revised by this Treasury decision.

Section 1161(a) of the Taxpayer Relief Act of 1997 (TRA 1997), Public Law 105-34, 111 Stat. 788 (August 5, 1997), provides that, to the extent prescribed in regulations by the Secretary of the Treasury or his delegate, a trust that was in existence on August 20, 1996 (other than a trust treated as owned by the grantor under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code of 1986 (Code)), and that was treated as a United States person on August 19, 1996, may elect to continue to be treated as a United States person notwithstanding the enactment of section 7701(a)(30)(E). Notice 98-25 (1998-18 I.R.B. 11) provides guidance regarding the

election to remain a domestic trust. The IRS and the Treasury Department are incorporating the guidance contained in Notice 98-25 concerning the election to remain a domestic trust in these final regulations. The final regulations also provide guidance regarding the circumstances that cause a termination of the election and guidance concerning revocation of the election to remain a domestic trust.

In addition, section 1601(i)(3)(A) of TRA 1997 amended section 7701(a)(30)(E)(ii) by striking the word "fiduciaries" and inserting "persons" in its place. The final regulations have been drafted consistent with this change.

Explanation of Provisions

A. Court Test and Safe Harbor Issues

1. Foreign classification bias and safe harbor. Some commentators point out generally that the Code and the proposed regulations are biased in favor of trusts being treated as foreign trusts. The commentators recommend that the regulations should reduce the bias in favor of foreign treatment. The safe harbor in the proposed regulations provides that a trust is a domestic trust if, pursuant to the terms of a trust instrument, the trust has only United States fiduciaries, such fiduciaries are administering the trust exclusively in the United States, and the trust is not subject to an automatic migration provision. One commentator recommends that the safe harbor be made clearly

applicable in the case of any trust if a majority of the trustees are United States persons and the other requirements are met.

The IRS and the Treasury Department agree with the commentator that the safe harbor should not be limited to trusts with only United States fiduciaries. Since the primary concern addressed by the safe harbor is the difficulty in determining whether the court of a particular state would assert primary supervision over the administration of a trust if that trust had never appeared before a court, the final regulations provide a safe harbor only for the court test. A trust that satisfies the safe harbor, therefore, would also need to meet the control test in order to be a domestic trust. In addition, an example has been added to the control test illustrating that the control test is satisfied if United States persons control all substantial decisions by a majority vote.

Commentators note that many trust instruments do not direct where the trust is to be administered. Therefore, they suggest that a trust should satisfy the safe harbor if the trust is in fact administered in the United States (regardless of whether this is mandated by the trust document).

The IRS and the Treasury Department believe that, if a trust is administered exclusively in the United States, it is not necessary that the trust instrument actually direct that the trust be administered in the United States. Accordingly, the final regulations provide that a trust satisfies the safe harbor

if the trust instrument does not direct that the trust be administered in a jurisdiction outside the United States, and the trust is in fact administered in the United States.

These changes in the final regulations will allow more trusts to fall within the safe harbor.

2. Automatic migration or flee clauses. The proposed regulations provide that a trust will not satisfy the court test if the trust instrument contains an automatic migration clause that would cause the trust to migrate from the United States if a United States court attempts to assert jurisdiction or otherwise supervise the administration of the trust. Commentators argue that the rule in the proposed regulations concerning automatic migration clauses is too broad. They argue that an automatic migration clause should not cause a trust to be treated as a foreign trust if migration is triggered only by events that are not particular to a given trust, its trustees, beneficiaries, or grantors. For example, if a trust will migrate because of foreign invasion of the United States, the residency of the trust should not be affected.

The final regulations adopt the suggestion and provide that a trust will not fail the court test if the trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.

3. Clarify that the list of specific situations for meeting the court test is not an exclusive list. Commentators recommend that the regulations be clarified to provide that the situations set forth in §301.7701-7(d)(2) of the proposed regulations that meet the court test are not the exclusive ways to meet the court test.

The purpose of setting forth specific situations that meet the court test was to provide bright-line rules that would give taxpayers certainty of treatment to the extent possible. These rules, however, are not exclusive. The court test will also be satisfied by meeting the requirements set forth in the final regulations in §301.7701-7(c).

4. Disregard state law. A commentator recommends that the regulations should establish bright-line rules for the court test without reference to state law.

The IRS and the Treasury Department believe that the proper interpretation of section 7701(a)(30)(E) requires that state law be applied under the court test. In addition, the proposed regulations provide bright-line rules for both the court test and the control test to the extent permitted by the statute. For example, the regulations provide a safe harbor and provide for specific cases where the court test is satisfied. Therefore, the final regulations remain unchanged in this regard.

5. Court test excessively broad. One commentator argues that the court test is excessively broad because many trusts that are, in the commentator's view, foreign trusts will potentially

be deemed domestic trusts. Specifically, the commentator is concerned about a trust in which the only domestic aspect is a single United States trustee who controls all substantial decisions of the trust. Another commentator recommends that the regulations should make clear that trustee meetings and other trustee activities in the United States will not cause the court test to be met.

The IRS and the Treasury Department do not believe that there is statutory authority for modifying the court test as suggested and, therefore, the final regulations remain unchanged. Furthermore, trustee meetings and activities in the United States may be a relevant factor to be taken into account in determining whether the court test has been met.

6. Petition of court by a single beneficiary. A commentator recommends that §301.7701-7(d)(2)(iii) of the proposed regulations should be clarified to provide that the court test is met only if either (i) a court within the United States actually exercises primary supervision over the trust, or (ii) a majority of beneficiaries take steps to cause a United States court to exercise primary supervision. The commentator expresses concern about a possible situation where, under the commentator's interpretation of the regulations, a single beneficiary of a foreign trust takes steps with a United States court petitioning it to assume primary supervision of the trust and, regardless of

whether the court does in fact exercise primary supervision of the trust, the foreign trust becomes a domestic trust.

While §301.7701-7(d)(2)(iii) of the proposed regulations permits the trustees and/or beneficiaries of a trust to take steps to ensure that the court test is satisfied, taking preliminary steps with a United States court without in fact causing the administration of the trust to be subject to the primary supervision of the United States court would not satisfy the court test. Thus, the concern about a single beneficiary altering the residence of the trust by merely taking preliminary steps is unwarranted.

B. Control Test Issues

1. Who counts for purposes of the control test. The proposed regulations provide that substantial decisions do not include decisions exercisable by a grantor or by a beneficiary of the trust that affect solely the beneficiary's interest in the trust, unless the grantor or beneficiary is acting in a fiduciary capacity. The proposed regulations provide this rule because the statute prior to amendment by TRA 1997 provided that United States fiduciaries must control all substantial decisions of a domestic trust. Therefore, the proposed regulations exclude decisions by those who are not holding powers in a fiduciary capacity.

As noted, TRA 1997 substituted "persons" for "fiduciaries" in the control test. In light of the change in the statute,

commentators point out that there is no statutory basis for ignoring the powers held by grantors and beneficiaries for purposes of the control test.

Therefore, the final regulations change the rule set forth in the proposed regulations and, for purposes of the control test, count all powers held by grantors and powers held by beneficiaries including those that affect solely the portion of the trust in which the beneficiary has an interest. Accordingly, all persons with any power over substantial decisions of the trust, whether acting in a fiduciary capacity or not, must be counted for purposes of the control test.

Under the proposed regulations, excluding grantors (and beneficiaries) from the control test would have allowed certain individual retirement accounts (IRAs) and other tax-exempt trusts to continue to be treated as domestic trusts and thus retain their tax-exempt status even if the grantor/beneficiary of the trust is a foreign person. The IRS and the Treasury Department believe that Congress did not intend the TRA 1997 changes to affect the tax-exempt status of IRAs and other tax-exempt trusts whose tax-exempt status depends on their being domestic trusts. Because these trusts are required to be created or organized in the United States, and are subject to other detailed requirements for qualification under the Code, the final regulations provide that these trusts satisfy the control test, provided that United States fiduciaries control all of the substantial decisions of

the trust that are made by trust fiduciaries. This provision of the final regulations generally reaches the same result as the provision in the proposed regulations.

2. Time to correct inadvertent changes in fiduciaries. The proposed regulations provide that in the event of an inadvertent change in the fiduciaries that would cause a change in the residency of a trust, the trust is allowed six months from the date of change in the fiduciaries to adjust either the fiduciaries or the residence of the fiduciaries so as to avoid a change in the residence of the trust.

Commentators recommend that trusts be given more time to take corrective action to avoid a change in residency or, alternatively, the regulations should give the IRS discretionary authority to continue treating a trust that inadvertently fails the control test as a domestic trust even if the control test is not met within six months.

The final regulations extend the period of time to 12 months from the date of the change to complete corrective action. The final regulations also provide that the district director may grant an extension of time to make the modification if the failure to make the modification within the 12-month period was due to reasonable cause. In addition, the final regulations define the term inadvertent change to mean a change with respect to a person who has a power to make a substantial decision of the trust, if such change (if not corrected) would cause an

unintended change to the foreign or domestic residency of the trust.

3. Effect of power to veto decisions. The proposed regulations define control to mean having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. Thus, if United States fiduciaries have the power to make all the substantial decisions of the trust, but a foreign person could veto one of the decisions, the trust would fail the control test and would be a foreign trust. A commentator disagrees with the conclusion that the power to veto decisions may be determinative of who has control.

The final regulations retain the definition of control set forth in the proposed regulations. The effect of a veto power is specifically noted in the legislative history. H.R. Rep. No. 542, Part 2, 104th Cong., 2d Sess. 31 (1996). Furthermore, control should be defined to mean full power over the trust consistent with a trustee's traditional role in trust administration. Accordingly, if a United States person only has the power to veto the decisions of a foreign trustee, the control test is not satisfied. Likewise, if a foreign person has the power to veto the decisions of a United States trustee, the control test is not satisfied. Thus, in both cases, the trust would be a foreign trust.

4. Power to remove, add, or replace a trustee. Some commentators disagree with treating a decision to remove, add, or replace a trustee as a substantial decision. Commentators also argue that the proposed regulations are not consistent with the rules that apply for determining the ownership of grantor trusts or with the rules for determining whether property is included in a decedent's estate for estate tax purposes. A commentator recommends that the final regulations provide that a decision to appoint a trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, without the power to remove the trustee, is not a substantial decision.

The IRS and the Treasury Department believe that the purpose of the control test is to determine the residence of a trust and therefore is different from the purpose of the rules for grantor trusts and for estate taxes. The final regulations continue to treat the decision to remove, add, or replace a trustee as a substantial decision. In addition, the final regulations provide that the decision to appoint a successor fiduciary to succeed a fiduciary who has died, resigned, or otherwise ceased to act as a trustee, even if it is not accompanied by an unrestricted power to remove a trustee, is a substantial decision, unless this power is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa.

5. Investment decisions. Commentators argue that investment decisions should not be treated as substantial decisions.

The final regulations continue to treat investment decisions as substantial decisions. However, the final regulations provide that if a United States fiduciary contracts for the services of an investment advisor, and the advisor's power to make investment decisions can be terminated at the will of the United States fiduciary, the United States fiduciary will be treated as retaining control over the investment decisions made by the investment advisor, whether the investment advisor is foreign or domestic.

C. Transition Rule and Grandfathering Issues

1. Pre-existing foreign trusts. Commentators recommend various grandfathering rules for pre-existing foreign trusts that would allow them to remain treated as foreign trusts. A commentator recommends that a trust would be deemed to be a foreign trust prior to the effective date of section 7701(a)(30) and (31), as amended by the SBJP Act (new law), if the trust is treated as a foreign trust under the new law. In particular, the commentator expresses concern that some trusts believed to be foreign trusts under section 7701(a)(30) and (31), prior to amendment by the SBJP Act (prior law), may have in fact been domestic trusts under prior law. If such trusts qualify as foreign trusts under the new law, they will be considered to have changed their classification from domestic to foreign on January 1, 1997.

Trusts that change from domestic to foreign may be subject to tax for the deemed transfer to a foreign trust under section 1491 (as in effect prior to its repeal by TRA 1997) and subject to penalties for failure to report such transfer under section 6677 if they continue to treat themselves as foreign trusts.

In addition, a commentator recommends that trusts that were formed prior to August 20, 1996, as group trust arrangements exempt from tax under sections 501(a) and 408(e) and described in Rev. Rul. 81-100 (1981-1 C.B. 326) not be subject to section 7701(a)(30) and (31) as amended by the SBJP Act, but should be subject to section 7701(a)(30) and (31) as in effect prior to August 20, 1996.

The IRS and the Treasury Department do not believe that there is statutory authority for adopting the requested grandfathering rules for pre-existing foreign trusts or for applying prior law to group trust arrangements described in Rev. Rul. 81-100. The election provision included in TRA 1997 provides specific transition relief only for trusts that treated themselves as domestic trusts prior to August 20, 1996, not for trusts that treated themselves as foreign trusts. Therefore, the final regulations do not include the recommended transition rules.

2. Foreign trust safe harbor. A commentator recommends that newly-created trusts established under foreign law should benefit from a foreign trust safe harbor. The commentator suggests a

safe harbor that would provide that a trust established under foreign law, which does not by its terms provide for administration in the United States, and which does not file United States federal income tax returns as a United States trust will fail the court test and will be treated as a foreign trust unless the trust is described in §301.7701-7(d)(2)(i) or (ii) of the proposed regulations (situations that meet the court test).

Given the statutory bias towards foreign trust classification, the IRS and Treasury Department do not agree that a safe harbor for foreign trusts is necessary because sufficient guidance is given as to the circumstances that will cause a trust to be foreign. Therefore, the final regulations do not include the recommended rules.

D. Puerto Rico Trusts

The statute uses the term the United States in a geographical sense and thus, for purposes of the court test, the United States includes only the States and the District of Columbia. See Section 7701(a)(9). Accordingly, a court within a territory or possession of the United States is not a court within the United States and all trusts subject to the supervision of such a court are thereby foreign. That rule was stated explicitly in the proposed regulations.

Some commentators argue that adverse tax consequences result from this rule. Therefore, they recommend that the final regulations provide, contrary to what the statute implies, that

Puerto Rico courts are "courts within the United States" for purposes of section 7701(a)(30)(E)(i) and, therefore, that Puerto Rico trusts will meet the court test.

The final regulations do not adopt the suggestion. Rather, the final regulations continue to provide that a trust that is subject to the primary supervision of the Puerto Rico courts will be treated as a foreign trust for federal tax purposes.

E. Effective date

The proposed regulations provide that the regulations would be applicable to trusts for taxable years beginning after December 31, 1996, and to trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the SBJP Act.

The final regulations modify the effective date in the proposed regulations. Except for §301.7701-7(f) of the final regulations, which applies beginning February 2, 1999, the final regulations are applicable to trusts for taxable years ending after February 2, 1999. In addition, trusts may rely on the final regulations (i) for taxable years of the trusts beginning after December 31, 1996, and (ii) for taxable years ending after August 20, 1996, in the case of trusts electing under section 1907(a)(3)(B) of the SBJP Act.

If a trust is created after August 19, 1996, and before April 3, 1999, and the trust satisfies the control test set

forth in the proposed regulations published under section 7701(a)(30) and (31) (62 FR 30796, June 5, 1997), but does not satisfy the control test set forth in the final regulations, the trust may be modified to satisfy the control test of the final regulations by December 31, 1999. If the modification is completed by December 31, 1999, the trust will be treated as satisfying the control test of the final regulations for taxable years beginning after December 31, 1996 (and for taxable years ending after August 20, 1996, if the election under section 1907(a)(3)(B) of the SBJP Act has been made for the trust).

Effect on Other Documents

Notice 98-25 (1998-18 I.R.B. 11) is obsolete as of February 2, 1999.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collections of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that the estimated average burden per trust in complying with the collection of information in §301.7701-7(d)(2)(ii) and (f) is 0.5 hours. In addition, each trust will only have to file the election statement to remain a domestic trust once. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility

Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is James A. Quinn of the Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 301 and 602 are amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§301.7701-5 [Amended]

Par. 2. The last sentence of §301.7701-5 is removed.

Par. 3. Section 301.7701-7 is added to read as follows:

§301.7701-7 Trusts--domestic and foreign.

(a) In general. (1) A trust is a United States person if--

(i) A court within the United States is able to exercise primary supervision over the administration of the trust (court test); and

(ii) One or more United States persons have the authority to control all substantial decisions of the trust (control test).

(2) A trust is a United States person for purposes of the Internal Revenue Code (Code) on any day that the trust meets both the court test and the control test. For purposes of the regulations in this chapter, the term domestic trust means a trust that is a United States person. The term foreign trust means any trust other than a domestic trust.

(3) Except as otherwise provided in part I, subchapter J, chapter 1 of the Code, the taxable income of a foreign trust is computed in the same manner as the taxable income of a nonresident alien individual who is not present in the United States at any time. Section 641(b). Section 7701(b) is not applicable to trusts because it only applies to individuals. In addition, a foreign trust is not considered to be present in the United States at any time for purposes of section 871(a)(2), which deals with capital gains of nonresident aliens present in the United States for 183 days or more.

(b) Applicable law. The terms of the trust instrument and applicable law must be applied to determine whether the court test and the control test are met.

(c) The court test--(1) Safe harbor. A trust satisfies the court test if-

(i) The trust instrument does not direct that the trust be administered outside of the United States;

(ii) The trust in fact is administered exclusively in the United States; and

(iii) The trust is not subject to an automatic migration provision described in paragraph (c)(4)(ii) of this section.

(2) Example. The following example illustrates the rule of paragraph (c)(1) of this section:

Example. A creates a trust for the equal benefit of A's two children, B and C. The trust instrument provides that DC, a State Y corporation, is the trustee of the trust. State Y is a state within the United States. DC administers the trust exclusively in State Y and the trust instrument is silent as to where the trust is to be administered. The trust is not subject to an automatic migration provision described in paragraph (c)(4)(ii) of this section. The trust satisfies the safe harbor of paragraph (c)(1) of this section and the court test.

(3) Definitions. The following definitions apply for purposes of this section:

(i) Court. The term court includes any federal, state, or local court.

(ii) The United States. The term the United States is used in this section in a geographical sense. Thus, for purposes of the court test, the United States includes only the States and the District of Columbia. See section 7701(a)(9). Accordingly, a court within a territory or possession of the United States or within a foreign country is not a court within the United States.

(iii) Is able to exercise. The term is able to exercise means that a court has or would have the authority under applicable law to render orders or judgments resolving issues concerning administration of the trust.

(iv) Primary supervision. The term primary supervision means that a court has or would have the authority to determine

substantially all issues regarding the administration of the entire trust. A court may have primary supervision under this paragraph (c)(3)(iv) notwithstanding the fact that another court has jurisdiction over a trustee, a beneficiary, or trust property.

(v) Administration. The term administration of the trust means the carrying out of the duties imposed by the terms of the trust instrument and applicable law, including maintaining the books and records of the trust, filing tax returns, managing and investing the assets of the trust, defending the trust from suits by creditors, and determining the amount and timing of distributions.

(4) Situations that cause a trust to satisfy or fail to satisfy the court test. (i) Except as provided in paragraph (c)(4)(ii) of this section, paragraphs (c)(4)(i)(A) through (D) of this section set forth some specific situations in which a trust satisfies the court test. The four situations described are not intended to be an exclusive list.

(A) Uniform Probate Code. A trust meets the court test if the trust is registered by an authorized fiduciary or fiduciaries of the trust in a court within the United States pursuant to a state statute that has provisions substantially similar to Article VII, Trust Administration, of the Uniform Probate Code, 8 Uniform Laws Annotated 1 (West Supp. 1998), available from the

National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611.

(B) Testamentary trust. In the case of a trust created pursuant to the terms of a will probated within the United States (other than an ancillary probate), if all fiduciaries of the trust have been qualified as trustees of the trust by a court within the United States, the trust meets the court test.

(C) Inter vivos trust. In the case of a trust other than a testamentary trust, if the fiduciaries and/or beneficiaries take steps with a court within the United States that cause the administration of the trust to be subject to the primary supervision of the court, the trust meets the court test.

(D) A United States court and a foreign court are able to exercise primary supervision over the administration of the trust. If both a United States court and a foreign court are able to exercise primary supervision over the administration of the trust, the trust meets the court test.

(ii) Automatic migration provisions. Notwithstanding any other provision in this section, a court within the United States is not considered to have primary supervision over the administration of the trust if the trust instrument provides that a United States court's attempt to assert jurisdiction or otherwise supervise the administration of the trust directly or indirectly would cause the trust to migrate from the United States. However, this paragraph (c)(4)(ii) will not apply if the

trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.

(5) Examples. The following examples illustrate the rules of this paragraph (c):

Example 1. A, a United States citizen, creates a trust for the equal benefit of A's two children, both of whom are United States citizens. The trust instrument provides that DC, a domestic corporation, is to act as trustee of the trust and that the trust is to be administered in Country X, a foreign country. DC maintains a branch office in Country X with personnel authorized to act as trustees in Country X. The trust instrument provides that the law of State Y, a state within the United States, is to govern the interpretation of the trust. Under the law of Country X, a court within Country X is able to exercise primary supervision over the administration of the trust. Pursuant to the trust instrument, the Country X court applies the law of State Y to the trust. Under the terms of the trust instrument the trust is administered in Country X. No court within the United States is able to exercise primary supervision over the administration of the trust. The trust fails to satisfy the court test and therefore is a foreign trust.

Example 2. A, a United States citizen, creates a trust for A's own benefit and the benefit of A's spouse, B, a United States citizen. The trust instrument provides that the trust is to be administered in State Y, a state within the United States, by DC, a State Y corporation. The trust instrument further provides that in the event that a creditor sues the trustee in a United States court, the trust will automatically migrate from State Y to Country Z, a foreign country, so that no United States court will have jurisdiction over the trust. A court within the United States is not able to exercise primary supervision over the administration of the trust because the United States court's jurisdiction over the administration of the trust is automatically terminated in the event the court attempts to assert jurisdiction. Therefore, the trust fails to satisfy the court test from the time of its creation and is a foreign trust.

(d) Control test--(1) Definitions--(i) United States person.

The term United States person means a United States person within

the meaning of section 7701(a)(30). For example, a domestic corporation is a United States person, regardless of whether its shareholders are United States persons.

(ii) Substantial decisions. The term substantial decisions means those decisions that persons are authorized or required to make under the terms of the trust instrument and applicable law and that are not ministerial. Decisions that are ministerial include decisions regarding details such as the bookkeeping, the collection of rents, and the execution of investment decisions. Substantial decisions include, but are not limited to, decisions concerning-

(A) Whether and when to distribute income or corpus;

(B) The amount of any distributions;

(C) The selection of a beneficiary;

(D) Whether a receipt is allocable to income or principal;

(E) Whether to terminate the trust;

(F) Whether to compromise, arbitrate, or abandon claims of the trust;

(G) Whether to sue on behalf of the trust or to defend suits against the trust;

(H) Whether to remove, add, or replace a trustee;

(I) Whether to appoint a successor trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, even if the power to make such a decision is not accompanied by an unrestricted power to remove a trustee, unless

the power to make such a decision is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa; and

(J) Investment decisions; however, if a United States person under section 7701(a)(30) hires an investment advisor for the trust, investment decisions made by the investment advisor will be considered substantial decisions controlled by the United States person if the United States person can terminate the investment advisor's power to make investment decisions at will.

(iii) Control. The term control means having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. To determine whether United States persons have control, it is necessary to consider all persons who have authority to make a substantial decision of the trust, not only the trust fiduciaries.

(iv) Treatment of certain employee benefit trusts. Provided that United States fiduciaries control all of the substantial decisions made by the trustees or fiduciaries, the following types of trusts are deemed to satisfy the control test set forth in paragraph (a)(1)(ii) of this section-

- (A) A qualified trust described in section 401(a);
- (B) A trust described in section 457(g);
- (C) A trust that is an individual retirement account described in section 408(a);

(D) A trust that is an individual retirement account described in section 408(k) or 408(p);

(E) A trust that is a Roth IRA described in section 408A;

(F) A trust that is an education individual retirement account described in section 530;

(G) A trust that is a voluntary employees' beneficiary association described in section 501(c)(9);

(H) Such additional categories of trusts as the Commissioner may designate in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b)).

(v) Examples. The following examples illustrate the rules of paragraph (d)(1) of this section:

Example 1. Trust has three fiduciaries, A, B, and C. A and B are United States citizens and C is a nonresident alien. No persons except the fiduciaries have authority to make any decisions of the trust. The trust instrument provides that no substantial decisions of the trust can be made unless there is unanimity among the fiduciaries. The control test is not satisfied because United States persons do not control all the substantial decisions of the trust. No substantial decisions can be made without C's agreement.

Example 2. Assume the same facts as in Example 1, except that the trust instrument provides that all substantial decisions of the trust are to be decided by a majority vote among the fiduciaries. The control test is satisfied because a majority of the fiduciaries are United States persons and therefore United States persons control all the substantial decisions of the trust.

Example 3. Assume the same facts as in Example 2, except that the trust instrument directs that C is to make all of the trust's investment decisions, but that A and B may veto C's investment decisions. A and B cannot act to make the investment decisions on their own. The control test is not satisfied

because the United States persons, A and B, do not have the power to make all of the substantial decisions of the trust.

Example 4. Assume the same facts as in Example 3, except A and B may accept or veto C's investment decisions and can make investments that C has not recommended. The control test is satisfied because the United States persons control all substantial decisions of the trust.

(2) Replacement of any person who had authority to make a substantial decision of the trust--(i) Replacement within 12 months. In the event of an inadvertent change in any person that has the power to make a substantial decision of the trust that would cause the domestic or foreign residency of the trust to change, the trust is allowed 12 months from the date of the change to make necessary changes either with respect to the persons who control the substantial decisions or with respect to the residence of such persons to avoid a change in the trust's residency. For purposes of this section, an inadvertent change means the death, incapacity, resignation, change in residency or other change with respect to a person that has a power to make a substantial decision of the trust that would cause a change to the residency of the trust but that was not intended to change the residency of the trust. If the necessary change is made within 12 months, the trust is treated as retaining its pre-change residency during the 12-month period. If the necessary change is not made within 12 months, the trust's residency changes as of the date of the inadvertent change.

(ii) Request for extension of time. If reasonable actions have been taken to make the necessary change to prevent a change

in trust residency, but due to circumstances beyond the trust's control the trust is unable to make the modification within 12 months, the trust may provide a written statement to the district director having jurisdiction over the trust's return setting forth the reasons for failing to make the necessary change within the required time period. If the district director determines that the failure was due to reasonable cause, the district director may grant the trust an extension of time to make the necessary change. Whether an extension of time is granted is in the sole discretion of the district director and, if granted, may contain such terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries. If the district director does not grant an extension, the trust's residency changes as of the date of the inadvertent change.

(iii) Examples. The following examples illustrate the rules of paragraphs (d)(2)(i) and (ii) of this section:

Example 1. A trust that satisfies the court test has three fiduciaries, A, B, and C. A and B are United States citizens and C is a nonresident alien. All decisions of the trust are made by majority vote of the fiduciaries. The trust instrument provides that upon the death or resignation of any of the fiduciaries, D, is the successor fiduciary. A dies and D automatically becomes a fiduciary of the trust. When D becomes a fiduciary of the trust, D is a nonresident alien. Two months after A dies, B replaces D with E, a United States person. Because D was replaced with E within 12 months after the date of A's death, during the period after A's death and before E begins to serve, the trust satisfies the control test and remains a domestic trust.

Example 2. Assume the same facts as in Example 1 except that at the end of the 12-month period after A's death, D has not been replaced and remains a fiduciary of the trust. The trust

becomes a foreign trust on the date A died unless the district director grants an extension of the time period to make the necessary change.

(3) Automatic migration provisions. Notwithstanding any other provision in this section, United States persons are not considered to control all substantial decisions of the trust if an attempt by any governmental agency or creditor to collect information from or assert a claim against the trust would cause one or more substantial decisions of the trust to no longer be controlled by United States persons.

(4) Examples. The following examples illustrate the rules of this paragraph (d):

Example 1. A, a nonresident alien individual, is the grantor and, during A's lifetime, the sole beneficiary of a trust that qualifies as an individual retirement account (IRA). A has the exclusive power to make decisions regarding withdrawals from the IRA and to direct its investments. The IRA's sole trustee is a United States person within the meaning of section 7701(a)(30). The control test is satisfied with respect to this trust because the special rule of paragraph (d)(1)(iv) of this section applies.

Example 2. A, a nonresident alien individual, is the grantor of a trust and has the power to revoke the trust, in whole or in part, and revest assets in A. A is treated as the owner of the trust under sections 672(f) and 676. A is not a fiduciary of the trust. The trust has one trustee, B, a United States person, and the trust has one beneficiary, C. B has the discretion to distribute corpus or income to C. In this case, decisions exercisable by A to have trust assets distributed to A are substantial decisions. Therefore, the trust is a foreign trust because B does not control all substantial decisions of the trust.

Example 3. A trust, Trust T, has two fiduciaries, A and B. Both A and B are United States persons. A and B hire C, an investment advisor who is a foreign person, and may terminate C's employment at will. The investment advisor makes the investment decisions for the trust. A and B control all other decisions of the trust. Although C has the power to make investment

decisions, A and B are treated as controlling these decisions. Therefore, the control test is satisfied.

Example 4. G, a United States citizen, creates a trust. The trust provides for income to A and B for life, remainder to A's and B's descendants. A is a nonresident alien and B is a United States person. The trustee of the trust is a United States person. The trust instrument authorizes A to replace the trustee. The power to replace the trustee is a substantial decision. Because A, a nonresident alien, controls a substantial decision, the control test is not satisfied.

(e) Effective date--(1) General rule. Except for the election to remain a domestic trust provided in paragraph (f) of this section, this section is applicable to trusts for taxable years ending after February 2, 1999. This section may be relied on by trusts for taxable years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the Small Business Job Protection Act of 1996, (the SBJP Act) Public Law 104-188, 110 Stat. 1755 (26 U.S.C. 7701 note).

(2) Trusts created after August 19, 1996. If a trust is created after August 19, 1996, and before April 3, 1999, and the trust satisfies the control test set forth in the regulations project REG-251703-96 published under section 7701(a)(30) and (31) (1997-1 C.B. 795) (See §601.601(d)(2) of this chapter), but does not satisfy the control test set forth in paragraph (d) of this section, the trust may be modified to satisfy the control test of paragraph (d) by December 31, 1999. If the modification is completed by December 31, 1999, the trust will be treated as

satisfying the control test of paragraph (d) for taxable years beginning after December 31, 1996, (and for taxable years ending after August 20, 1996, if the election under section 1907(a)(3)(B) of the SBJP Act has been made for the trust).

(f) Election to remain a domestic trust--(1) Trusts eligible to make the election to remain domestic. A trust that was in existence on August 20, 1996, and that was treated as a domestic trust on August 19, 1996, as provided in paragraph (f)(2) of this section, may elect to continue treatment as a domestic trust notwithstanding section 7701(a)(30)(E). This election is not available to a trust that was wholly-owned by its grantor under subpart E, part I, subchapter J, chapter 1, of the Code on August 20, 1996. The election is available to a trust if only a portion of the trust was treated as owned by the grantor under subpart E on August 20, 1996. If a partially-owned grantor trust makes the election, the election is effective for the entire trust. Also, a trust may not make the election if the trust has made an election pursuant to section 1907(a)(3)(B) of the SBJP Act to apply the new trust criteria to the first taxable year of the trust ending after August 20, 1996, because that election, once made, is irrevocable.

(2) Determining whether a trust was treated as a domestic trust on August 19, 1996--(i) Trusts filing Form 1041 for the taxable year that includes August 19, 1996. For purposes of the election, a trust is considered to have been treated as a

domestic trust on August 19, 1996, if: the trustee filed a Form 1041, "U.S. Income Tax Return for Estates and Trusts," for the trust for the period that includes August 19, 1996 (and did not file a Form 1040NR, "U.S. Nonresident Alien Income Tax Return," for that year); and the trust had a reasonable basis (within the meaning of section 6662) under section 7701(a)(30) prior to amendment by the SBJP Act (prior law) for reporting as a domestic trust for that period.

(ii) Trusts not filing a Form 1041. Some domestic trusts are not required to file Form 1041. For example, certain group trusts described in Rev. Rul. 81-100 (1981-1 C.B. 326) (See §601.601(d)(2) of this chapter) consisting of trusts that are parts of qualified retirement plans and individual retirement accounts are not required to file Form 1041. Also, a domestic trust whose gross income for the taxable year is less than the amount required for filing an income tax return and that has no taxable income is not required to file a Form 1041. Section 6012(a)(4). For purposes of the election, a trust that filed neither a Form 1041 nor a Form 1040NR for the period that includes August 19, 1996, will be considered to have been treated as a domestic trust on August 19, 1996, if the trust had a reasonable basis (within the meaning of section 6662) under prior law for being treated as a domestic trust for that period and for filing neither a Form 1041 nor a Form 1040NR for that period.

(3) Procedure for making the election to remain domestic--

(i) Required Statement. To make the election, a statement must be filed with the Internal Revenue Service in the manner and time described in this section. The statement must be entitled "Election to Remain a Domestic Trust under Section 1161 of the Taxpayer Relief Act of 1997," be signed under penalties of perjury by at least one trustee of the trust, and contain the following information--

(A) A statement that the trust is electing to continue to be treated as a domestic trust under section 1161 of the Taxpayer Relief Act of 1997;

(B) A statement that the trustee had a reasonable basis (within the meaning of section 6662) under prior law for treating the trust as a domestic trust on August 19, 1996. (The trustee need not explain the reasonable basis on the election statement.);

(C) A statement either that the trust filed a Form 1041 treating the trust as a domestic trust for the period that includes August 19, 1996, (and that the trust did not file a Form 1040NR for that period), or that the trust was not required to file a Form 1041 or a Form 1040NR for the period that includes August 19, 1996, with an accompanying brief explanation as to why a Form 1041 was not required to be filed; and

(D) The name, address, and employer identification number of the trust.

(ii) Filing the required statement with the Internal Revenue Service. (A) Except as provided in paragraphs (f)(3)(ii)(E) through (G) of this section, the trust must attach the statement to a Form 1041. The statement may be attached to either the Form 1041 that is filed for the first taxable year of the trust beginning after December 31, 1996 (1997 taxable year), or to the Form 1041 filed for the first taxable year of the trust beginning after December 31, 1997 (1998 taxable year). The statement, however, must be filed no later than the due date for filing a Form 1041 for the 1998 taxable year, plus extensions. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated. If the trust filed a Form 1041 for the 1997 taxable year without the statement attached, the statement should be attached to the Form 1041 filed for the 1998 taxable year.

(B) If the trust has insufficient gross income and no taxable income for its 1997 or 1998 taxable year, or both, and therefore is not required to file a Form 1041 for either or both years, the trust must make the election by filing a Form 1041 for either the 1997 or 1998 taxable year with the statement attached (even though not otherwise required to file a Form 1041 for that year). The trust should only provide on the Form 1041 the trust's name, name and title of fiduciary, address, employer identification number, date created, and type of entity. The

statement must be attached to a Form 1041 that is filed no later than October 15, 1999.

(C) If the trust files a Form 1040NR for the 1997 taxable year based on application of new section 7701(a)(30)(E) to the trust, and satisfies paragraph (f)(1) of this section, in order for the trust to make the election the trust must file an amended Form 1040NR return for the 1997 taxable year. The trust must note on the amended Form 1040NR that it is making an election under section 1161 of the Taxpayer Relief Act of 1997. The trust must attach to the amended Form 1040NR the statement required by paragraph (f)(3)(i) of this section and a completed Form 1041 for the 1997 taxable year. The items of income, deduction and credit of the trust must be excluded from the amended Form 1040NR and reported on the Form 1041. The amended Form 1040NR for the 1997 taxable year, with the statement and the Form 1041 attached, must be filed with the Philadelphia Service Center no later than the due date, plus extensions, for filing a Form 1041 for the 1998 taxable year.

(D) If a trust has made estimated tax payments as a foreign trust based on application of section 7701(a)(30)(E) to the trust, but has not yet filed a Form 1040NR for the 1997 taxable year, when the trust files its Form 1041 for the 1997 taxable year it must note on its Form 1041 that it made estimated tax payments based on treatment as a foreign trust. The Form 1041 must be filed with the Philadelphia Service Center (and not with

the service center where the trust ordinarily would file its Form 1041).

(E) If a trust forms part of a qualified stock bonus, pension, or profit sharing plan, the election provided by this paragraph (f) must be made by attaching the statement to the plan's annual return required under section 6058 (information return) for the first plan year beginning after December 31, 1996, or to the plan's information return for the first plan year beginning after December 31, 1997. The statement must be attached to the plan's information return that is filed no later than the due date for filing the plan's information return for the first plan year beginning after December 31, 1997, plus extensions. The election will be effective for the first plan year beginning after December 31, 1996, and thereafter, until revoked or terminated.

(F) Any other type of trust that is not required to file a Form 1041 for the taxable year, but that is required to file an information return (for example, Form 5227) for the 1997 or 1998 taxable year must attach the statement to the trust's information return for the 1997 or 1998 taxable year. However, the statement must be attached to an information return that is filed no later than the due date for filing the trust's information return for the 1998 taxable year, plus extensions. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated.

(G) A group trust described in Rev. Rul. 81-100 consisting of trusts that are parts of qualified retirement plans and individual retirement accounts (and any other trust that is not described above and that is not required to file a Form 1041 or an information return) need not attach the statement to any return and should file the statement with the Philadelphia Service Center. The trust must make the election provided by this paragraph (f) by filing the statement by October 15, 1999. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated.

(iii) Failure to file the statement in the required manner and time. If a trust fails to file the statement in the manner or time provided in paragraphs (f)(3)(i) and (ii) of this section, the trustee may provide a written statement to the district director having jurisdiction over the trust setting forth the reasons for failing to file the statement in the required manner or time. If the district director determines that the failure to file the statement in the required manner or time was due to reasonable cause, the district director may grant the trust an extension of time to file the statement. Whether an extension of time is granted shall be in the sole discretion of the district director. However, the relief provided by this paragraph (f)(3)(iii) is not ordinarily available if the statute of limitations for the trust's 1997 taxable year has expired. Additionally, if the district director grants an extension of

time, it may contain terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries.

(4) Revocation or termination of the election--(i)

Revocation of election. The election provided by this paragraph (f) to be treated as a domestic trust may only be revoked with the consent of the Commissioner. See sections 684, 6048, and 6677 for the federal tax consequences and reporting requirements related to the change in trust residence.

(ii) Termination of the election. An election under this paragraph (f) to remain a domestic trust terminates if changes are made to the trust subsequent to the effective date of the election that result in the trust no longer having any reasonable basis (within the meaning of section 6662) for being treated as a domestic trust under section 7701(a)(30) prior to its amendment by the SBJP Act. The termination of the election will result in the trust changing its residency from a domestic trust to a foreign trust on the effective date of the termination of the election. See sections 684, 6048, and 6677 for the federal tax consequences and reporting requirements related to the change in trust residence.

(5) Effective date. This paragraph (f) is applicable beginning on February 2, 1999.

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (c) is amended by adding an entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part of section where
identified and described

Current OMB
control No.

* * * * *

301.7701-7 1545-1600
* * * * *

Robert E. Wenzel

Deputy Commissioner of Internal Revenue

Approved: January 13, 1999

Donald C. Lubick
Assistant Secretary of the Treasury