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**From:**

**Sent:** Monday, April 28, 2014 7:40:45 AM

**To:**

**Cc:**

**Subject:** RE: Domestication of Foreign Trust –

In answer to your questions posed below, § 301.7701-7(a)(1) provides that 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). In order to be a domestic trust, the trust must meet the court test and the control test based on the terms of the trust itself and the applicable law. See § 301.7701-7(b).

When applying the court test, 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. § 301.7701-7(c)(3)(iii). Primary supervision means a court has the authority to determine substantially all issues regarding the administration of the entire trust. § 301.7701-7(c)(3)(iv). Administration of the trust means carrying out 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. § 301.7701-7(c)(3)(v).

The regulation also provides a safe harbor. A trust will satisfy the court test if: (i) the trust instrument does not direct that the trust be administered outside of the United States; (ii) the trust is administered exclusively in the United States; and (iii) the trust is not subject to an automatic migration provision. § 301.7701-7(c)(1).

With respect to the \_\_\_\_\_ (which will be the only trust document described in this email, the \_\_\_\_\_ includes these same provisions), a court within the United States is able to exercise primary supervision over the administration of the trust, thus the court test is met.

Trust Agreement explains that the intent of the Settlers is that the trust not constitute a “foreign trust” as defined in § 7701(a)(31)(B). To that end, \_\_\_\_\_ provides that the place of administration shall be the state of residence of the “First Trustee,” who is a United States person living in \_\_\_\_\_. Pursuant to this provision, the First Trustee administered the Trust in \_\_\_\_\_. The paragraph continues that if that person is no longer a Trustee, the place of

administration shall be the state of residence or domicile of the longest-serving Trustee who is a resident in the same country as a majority of the Beneficiaries. In addition, there is no automatic migration provision in the trust document, as defined by § 301.7701-7(c)(4)(ii). Because a United States court is able to exercise primary supervision of the administration of the trust, the court test is met.

In order to meet the control test, one or more United States persons (within the meaning of § 7701(a)(30)) must have the authority to control all substantial decisions of the trust. 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. § 301.7701-7(d)(1)(ii). Substantial decisions include, but are not limited to, decisions such as whether and when to distribute income or corpus, the amount of any distribution, and whether to remove, add, or replace a trustee. Id. 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 U.S. 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. § 301.7701-7(d)(1)(iii).

When created, the Trust had two trustees, a United States person trustee and a foreign trustee. You informed us that the foreign trustee was effectively fired in \_\_\_\_\_ when the trustee fees that were being paid to the foreign trustees were no longer paid. No other foreign trustee was named as a replacement. The only trustee at that point forward was the United States person trustee. As such, United States persons are the only persons who have the power to make the substantial decisions of the trust from \_\_\_\_\_ forward.

Furthermore, even prior to \_\_\_\_\_, United States persons controlled all the substantial decisions of the trust. There were only two trustees named, the United States person and the foreign trustee.

Trust document provided that a majority of the trustees must agree to decisions, but if there are only two acting, the joinder of both is required “unless at such time one (1) of the Trustees is a resident of or domiciled in the same country as Settlor and the other of the Trustees is not a resident of or domiciled in the same country as Settlor, in which case the determination of the Trustee who is a resident of or domiciled in the same country as Settlor shall govern.” Effectively, the United States person trustee could make decisions without the input of the foreign trustee. In addition, \_\_\_\_\_ Trust document provides the Protector (who is the Settlor and a United States person) with a veto power over any decisions to be made by the trustees. As such a United States person (the United States trustee) has the power to make all of the substantial decisions of the trust and another United States person (the Settlor) has the power to veto any of those substantial decisions. All powers of control over substantial decisions rest in United States persons under § 301.7701-7(d)(1)(iii). See also § 301.7701-7(d)(i)(v) Example 4.

Disclaimer: This discussion only applies to the trust documents we reviewed and cannot be applied to trust documents governing different trusts. The analysis under § 301.7701-7 depends on the terms of the trust and the applicable law.