

## Cross-Border Issues for Founders with U.S. Companies

We encounter many founders who have based their enterprises in the U.S., but who are not U.S. citizens or permanent residents, or who may have other significant cross-border ties such as close family living outside the U.S. These situations arise very frequently, as many would-be founders seek out U.S. educational opportunities and access to U.S. venture capital and labor markets for new ventures. Other founders may have family or other non-business reasons to be present in the U.S. While each situation presents differently, we have observed some key themes and opportunities where a founder has cross-border ties.

**Opportunities for founders with family abroad.** Many founders would benefit from planning during the seed stage. We often use trusts created by a founder's parents or other family members, such as a [GOAT Trust](#), for the purpose of seeding an investment in the founder's company stock. This ultimately allows the founder to benefit from the stock's future appreciation while preserving potential QSBS, estate tax, and other tax benefits for the founder. If the original source of the trust's seed money is a U.S. parent or other family member, the founder may have to relinquish a certain level of voting control over their company stock in order to obtain all of the desired U.S. tax benefits. But different U.S. tax rules apply when a trust's seed funding comes from a parent or other family member who is not a U.S. citizen or resident, and in those cases, a founder may be able to exercise a greater level of control over a fully tax-optimized trust. Occasionally, tax or reporting issues that are local to the foreign trust creator may make these strategies unworkable (such as for Canadian trust creators), but we have found these to be the exception.

It is also possible for a founder's parents or other family members who live abroad to make direct investments in the founder's company stock. For founders who wish to have family outside the U.S. benefit from their company's future appreciation, this can be tax advantageous if implemented at the right time.

**Opportunities for pre-immigration planning.** Founders who are not U.S. citizens usually become residents for purposes of their U.S. income tax filings based on their number of days present in the U.S. or obtaining a green card. But one becomes a resident for U.S. gift and estate tax purposes, if at all, based on a different "domicile" standard, which largely turns on the founder's presence and intent to remain in the U.S. indefinitely. The latter standard is more subjective, so it can sometimes be the case that a founder already pays U.S. income taxes as a resident, but arguably is not yet a domiciliary for U.S. gift and estate tax purposes. Herein lies a valuable "pre-immigration" planning opportunity: the founder can make unlimited gifts of their U.S. founder stock, without any U.S. gift tax consequences and without using any of the lifetime gift/estate tax exclusion that may later become valuable to them when they do acquire U.S. domicile. That means there is a potentially narrow time window to make gifts to employ [QSBS stacking](#) and engage in other related tax planning. This is a major opportunity not available to U.S. citizens and domiciliaries.

Because residency plans are often uncertain, certain trust structures can be employed that will allow for QSBS stacking and other tax benefits while permitting the founder or their spouse to later receive benefits from the trust. Making pre-immigration gifts using these trust structures can preserve tax optionality with little downside risk to the founder.

**Estate tax risks prior to establishing U.S. domicile.** While being a non-domiciliary founder can be beneficial for gift planning, it carries some U.S. estate tax risk. One's U.S. corporate stock generally becomes subject to U.S. estate tax at death, regardless of one's immigration or citizenship status. And, prior to establishing a U.S. domicile, a founder may have only a \$60,000 exclusion from U.S. estate taxes – far less than the \$13,610,000 exclusion available in 2024 to someone who is a U.S. citizen or domiciliary. U.S. federal estate tax applies at up to 40%, and state estate taxes may also apply. And although a handful of countries have favorable estate tax treaties alleviating this worry, most do not. Because founder stock can appreciate quickly, a non-domiciliary founder's family can be left exposed to major U.S. estate tax risk on the value of their equity in the event of an unlikely death, and without the liquidity to cover that tax.

Common estate tax structures employed by foreign investors in U.S. companies – such as holding their U.S. corporate stock in a foreign corporation – do not work well for stock that is or may become QSBS-eligible. However, certain trusts can fully avoid U.S. estate tax exposure while preserving QSBS eligibility and other tax benefits. Some founders or investors might also consider term life insurance to hedge against temporary estate tax exposure.

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For both pre-immigration planning and planning that involves family abroad, early action is key to maximizing potential U.S. tax benefits. Trusts in these situations need to be carefully designed to preserve optionality for someone who is highly mobile and uncertain of their future residency plans. We would be happy to discuss any of these opportunities with you.

Patterson Belknap has a multi-disciplinary team of lawyers who are focused on the legal needs of founders and entrepreneurs. A description of the full range of our services and attorney contacts can be found [here](#). Please visit the [Founder Focus Resource Center](#) for more content on a broad range of topics of interest to founders and their professional advisors.

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