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BY EMAIL

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Copies as indicated at the end of the letter

Re: **Impact of the COVID-19 Pandemic on Tax Residence Rules**

Dear Jim, Sarah and Ryan:

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This letter is sent to you to follow up on a recent meeting of the members of the Tax Residence and Coronavirus Working Group, which you were gracious enough to address. The letter sets out comments on Rev. Proc. 2020-20, two FAQs published on the IRS website entitled "Information for Nonresident Aliens and Foreign Businesses Impacted by COVID-19 Travel Disruptions", and Rev. Proc. 2020-27, collectively referred to as the "April 21 Guidance".

The group consists of lawyers and certified public accountants who practice in the international tax area. A full list of members is set out in the Appendix. Members of the group who contributed to this letter include: Andreas Apostolides, Cynthia Brittain, Polina Chapiro, Megan Ferris, Zvi Hahn, Megan Jones, Michael Karlin, Bianca Ko, Jay Rubinstein, Stanley Ruchelman, Karen Sam, and Paul Sczudlo. Other members of the group also made comments and suggestions, including during Zoom conferences held over the past few weeks. We also express our appreciation to the Florida Bar Tax Section and, in particular, Jennifer Wioncek and Alfredo Tamayo, for their efforts with respect to this issue, including with respect to the Tax Section's comments on the April 21 Guidance.

Although many members of the group or their respective professional firms have clients whose tax position may potentially be affected by the subject matter of the April Guidance, no such member or firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

Questions related to this letter can be addressed to Michael Karlin, whose contact information is as follows:

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1. Introduction

The April 21 Guidance addresses various consequences of the coronavirus epidemic. Rev. Proc. 2020-20 is primarily concerned with the application of the substantial presence test and treaty tiebreaker rules in relation to the determination of whether an alien is a resident for purposes of section 7701(b).[1] The FAQs deal with the question of whether a foreign person (individual or corporate) is engaged in a trade or business (including through a permanent establishment) as a result of services or other activities conducted by one or more individuals temporarily present in the United States if, but for COVID-19 Emergency Travel Disruptions, those services or other activities would not have been conducted in the United States. Rev. Proc. 2020-27 is concerned with whether an individual can be treated as a "qualified individual" for purposes of section 911 where such individual was prevented from traveling to a foreign country by reason of the travel disruptions.

We welcome the prompt action of the government in addressing the consequences of the COVID-19 Emergency Travel Disruptions. The purpose of this letter is to suggest improvements and clarifications with respect to the April 21 Guidance.

This letter does not address questions concerning the interpretation of the so-called "medical condition exception" to the substantial presence test of section 7701(b)(3) that go beyond the scope of the April 21 Guidance. Members of the group will submit an additional set of comments concerning broader issues relating to the exception and, in particular, whether the exception can apply to individuals who do not themselves suffer from a medical condition but may nevertheless be prevented from leaving the United States because of a medical condition affecting others. We understand that the Florida Bar Tax Section included a comment on this point, with which we agree.

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[1] All unprefixed references to sections in this letter are to the Internal Revenue Code of 1986, as amended (the "Code"). All unprefixed references to regulations are to regulations under the Code promulgated by Treasury and the IRS.

2. Summary of Recommendations

2.1 COVID-19 Emergency Period.

In light of continuing worldwide travel restrictions and travel industry reductions in service, the 60-day period should be extended to 120 or 150 days. If it is not extended, the government should at least allow an alien individual the ability to elect a longer period subject to being required to provide specific facts regarding his or her personal circumstances that caused him or her to need additional time beyond the 60 days provided in the Revenue Procedure.

2.2 Documentation and Recordkeeping

We request the government to provide additional guidance on documents and records to be retained to demonstrate entitlement to the benefits of Rev. Proc. 2020-20. We recommend that the IRS specifically approve use of the information available on the U.S. Customs & Border Patrol Form I-94 website regarding arrivals and departures of non-immigrants.

2.3 Individuals Who Were Resident in 2019 or Become Resident in 2020

We recommend that individuals who were residents in 2019 or who become residents with a residency start date in 2020 should be allowed to elect a COVID-19 Emergency Period. In particular, we believe that the election should be made available to dual residents entitled to claim to have been nonresidents in 2019 by virtue of the residence article of a treaty, as well as individuals who were residents in 2019 only by virtue of an election under section 6013(g).

2.4 Clarifications Regarding the Closer Connection Exception

We request the government to clarify that days excluded under the COVID-19 Emergency Period do not count toward the 183-day limit for claiming the application of the closer connection test of section 7701(b)(3)(B).

We also request that you clarify that days during the COVID-19 Emergency Period in 2020 excluded under Rev. Proc. 2020-20 will not be taken into account for purposes of applying the "substantial presence test" for the years 2021 and 2022.

2.5 Issues with the FAQs

We recommend that the government adopt a more comprehensive solution to the problems only partially addressed by the FAQs. In particular, we request that (a) the government clarify that income not treated as ECI by reason of Question 1 will not be treated as FDAP income having a U.S. source and will not be subject to U.S. social security taxes (FICA (Federal Insurance Contributions Act), FUTA (Federal Unemployment Taxation Act) and Self-Employed Contributions Act (SECA)) purposes either in the hands of the employer or in the hands of the employee or other service provider; (b) the government clarify the responsibilities of

withholding agents with respect to income covered by the FAQ; and (c) the government give guidance on how to claim the treatment provided for by the FAQ.

2.6 Rev. Proc. 2020-27

We request that the government permit taxpayers to show reasonable cause why they could not leave the United States by July 15, 2020 and can therefore not jeopardize their claim to be qualified individuals for the purposes of the foreign earned income exclusion of section 911.

We ask that the government consider what relief it can give to individuals who are forced to maintain a second home in the United States during an extended stay required by the COVID-19 Emergency.

We suggest that the government clarify that services performed in the United States are not exempt as a result of Rev. Proc. 2020-27, even if they would have been performed outside the United States had the taxpayer not been prevented from leaving by the COVID-19 Emergency Travel Disruptions.

3. COVID-19 Emergency Period

The IRS addressed the tax residency issue that arose for foreign individuals who were unable to leave the United States due to the COVID-19 pandemic in the new Revenue Procedure 2020-20 by expanding the medical condition exception of section 7701(b)(3)(D) based on the "COVID-19 Medical Condition Travel Condition." This exclusion allows a qualifying alien (an "Eligible Individual" as defined in Section 3.04 of Revenue Procedure 2020-20) who intended to leave the United States during the individual's "COVID-19 Emergency Period," but was unable to do so due to the current "COVID-19 Emergency Travel Disruptions," to exclude the individual's COVID-19 Emergency Period from their day-count under the substantial presence test. This excluded COVID-10 Emergency Period extends for a period of up to 60 calendar days of continuous presence in the United States beginning on any day between February 1 and April 1, 2020. Further, "an Eligible Individual will be presumed unable to leave the United States for purposes of the substantial presence test on any day during the individual's COVID-19 Emergency Period." The COVID-19 Emergency itself is considered a medical condition, but not a pre-existing one.

Thus, the date on which the nonresident alien must leave the United States in 2020 is extended up to 60 consecutive days beyond the date he or she would otherwise have to leave in order to avoid resident alien status for the year (assuming no disqualifying return to the United States for the alien in the balance of 2020 and that he or she has not applied or otherwise taken steps to become a lawful permanent resident of the United States).

We believe that this 60-day period, while indeed very helpful, should be expanded to address the continuing uncertainty with regards to travel disruptions and related health risks arising out

of COVID-19. Even with the benefit of the relatively short COVID-19 Emergency Period, it may already be getting too late for some aliens to leave and avoid being treated as residents.[2]

Under Rev. Proc. 2020-20, the latest date by which a COVID-19 Emergency Period must end is May 30, 2020 and as of this writing in early May there is no indication that international travel will be widely available. The ability to plan even at this time is not realistic in a very large number of cases. The practical reality is that much of the United States is still required to shelter at home, airlines have not resumed their full schedules and many other countries will not admit those who are trying to enter. It is also possible that the taxpayer's personal situation may make travel dangerous or inadvisable, such as a preexisting medical condition or being of vulnerable age, or close family members actually having COVID-19. The difficulty can be acute in the case of individuals who are not citizens or permanent residents of the country where they normally work because they may be unable to return to that country due to restrictions on entry.

We therefore suggest that the number of days of the COVID-19 Emergency Period be increased from the current 60 days. If the government determines otherwise, we suggest that taxpayers be allowed to elect to claim a longer exclusion period that it is necessitated by the emergency. A taxpayer electing a longer period could then be required to provide specific facts regarding his or her personal circumstances that caused him or her to need additional time beyond the 60 days provided in the Revenue Procedure, as further discussed below.

Here are some illustrative factors related to the difficulty or danger of travel due to COVID-19, all of which continue to remain uncertain and the purpose underlying Rev. Proc. 2020-20:

(a) Ability to plan. Our understanding is that the 60-day period granted under Rev. Proc. 2020-20 was based on a variety of factors but was chosen in large part to allow people the ability to plan their departure dates. We assume such factors included travel restrictions and predictions for the spread of the virus, both of which have continued to evolve since the date of the Revenue Procedure. Extending the 60 days granted would reflect the continuing varying realities faced by people from different parts of the world, each facing specific restrictions, as they try to plan their return. If needed, the extension could be granted only for those who could demonstrate that travel was impossible, impractical or dangerous due to COVID-19.

(b) Intent. The original medical exception under section 7701 and related regulations, as written, applies to those who intended to leave the United States but were prevented from

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[2] For example, consider an individual who was in the United States for 120 days in 2018 and 180 days in 2019 (but were not resident in 2019 due to the closer connection test). If such came to the United States on January 1, expecting stay for 60 days, they would have a total of 140 days. Suppose they were unable to leave until June 15. Their stay in the United States in 2020 would be 167 days less the 60 days, or 107 and their three-year total would be 187. If they were unable to rely on the closer connection test or a treaty, they would become U.S. residents. This is not an extreme example.

doing so due to a medical condition that arose while they were in the United States. Rev. Proc. 2020-20 creates a presumption that during the COVID-19 Emergency Period, the alien had an intent to leave and was unable to do so. Many individuals will be able to demonstrate such an intent and inability to travel beyond 60 days and it would be reasonable, if the 60-day period is not extended, to permit them to do so.

(c) Public policy. The travel restrictions and shelter in place mandates have been promulgated by U.S. federal, state and local governments (and the governments of many countries) for public policy purposes. We do not want people who might be sick travelling and spreading COVID-19 further. Forcing those possibly sick or silent carriers, or those at risk of getting sick, to travel to avoid becoming resident aliens is against public policy and could further spread COVID-19.

(d) Travel bans. President Trump announced the first U.S. travel ban for visitors from China on January 31, 2020. Many other countries began announcing travel bans, border closings and automatic quarantines in February 2020. The U.S. ban on travel from continental Europe was made effective on March 13; from the United Kingdom on March 17. Many travel bans, both for entering and leaving the United States are ongoing with no end date made public. For example, China will not allow non-citizens to enter China as we write this piece. On May 4th, in an article published by USA Today, the U.S. Treasury Secretary Steve Mnuchin encouraged Americans to focus on domestic travel this year as the international travel outlook for the rest of 2020 remains uncertain amid the coronavirus pandemic. In response to a question from Maria Bartiromo on Fox Business Network Monday about whether international travel will be opened up this year, he responded: 'Too hard to tell at this point.'" Clearly the Secretary is fully aware of the difficulties in arranging international travel. These difficulties affect nonresident aliens who are in the United States in the same way as Americans and are thus likely to prevent those whom the Revenue Procedure intended to assist from benefiting due to the very limited period of time provided.

(e) Progression and impact of the vary greatly by region and by personal situation. The timing of the impact of the virus continues to be regionally based and is still largely unpredictable. We cannot predict if new hotspots will arise, shutting down travel to or from that region for a longer time period. As the United States begins to re-open as a country, it is not possible to predict with any accuracy the availability of flights, especially given that people will need to sit farther apart on an airplane than they were in the past. The airlines have seen their business drop up to 95% and are financially strapped due to the shutdown. Already, one U.S. airline, Alaska Airlines, has filed for bankruptcy. Therefore, even those individuals with the intent to leave might find doing so impossible for the foreseeable (but still short-term) future depending on their country of residence. Several of the members of the group have clients who cannot currently book a flight to their country of residence as no flights are scheduled. Other clients are blocked from entering their home country as the nation will not allow entry. Further complications can arise when a country is only allowing its own citizens entry and one spouse is not a citizen of that country. Personal considerations that would not normally be a travel

issue have become important due to the unique nature of the COVID-19 crisis. For example, certain persons may have individual extenuating situations, such as a preexisting medical condition or vulnerable age, which make travel in the current environment medically dangerous even if physically possible. In other words, the reason they cannot or should not travel may not be the pre-existing medical condition or vulnerable age by itself but the combination of the pre-existing condition or vulnerable age and the continued dangers of exposure to the coronavirus. Relatives could be sick with Covid-19, or in quarantine, who cannot be abandoned while sick (nor, frankly, do we want them to be abandoned with no one to care for them, potentially adding an additional strain on our already stretched medical system).

One option is to address these realities on a collective basis. However, having different stated rules for different geographical locations and personal situations to account for the evolving realities of such travel shutdowns would be administratively burdensome for the IRS (as would dealing with a rush of new U.S. tax "residents" asking for relief due to COVID-19). Thus allowing individuals to provide detail of specific facts that restricted their ability to depart for their country of residence in a manner similar to filing pursuant to the residence articles of treaties, where facts are provided to specifically explain why an individual should be treated as a resident of one country versus another, would allow the IRS to evaluate such situations as appropriate.

(f) Medical condition determined under a facts and circumstances test. In assessing whether a nonresident alien can claim the medical exception for days past the 60 days of the COVID-19 Emergency Period for extra days spent in the United States due to COVID-19, a facts and circumstances test, as described in the regulations under section 7701, could be used. The regulations that address the substantial presence test mention a facts and circumstances test a number of times, including in the context of the medical exception (26 CFR § 301.7701(b))-3(c)(2)). Allowing for such facts and circumstances explanation as to extra days spent in the United States due to COVID-19 and its resulting complications would not encourage those merely desirous of staying in the United States, but would apply relief for those who wanted to leave but were truly unable to do so.

As one means of providing such explanation, Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition* could be filed, in which the individual describes the factors which led to them expanding their days in the United States beyond the 60-day period of Rev. Proc. 2020-20. Such form and process is already provided for in the regulations, allowing the Revenue Procedure to continue utilizing the medical exception regulation.

Extending the COVID-19 Emergency Period to 120 or 150 days (instead of the current 60 days) is consistent with the Revenue Procedure as written, and also takes into account the evolving realities which postdate its release. We believe that extending the period outright will be easier to administer for the IRS. The government should also consider adding a facts and circumstances test to allow for specific issues which may arise in certain regions and taxpayer circumstances. By extending the days in the COVID-19 Emergency Period and providing more

flexibility, those intending to leave but still facing barriers to departure, some of the examples of which were provided above, will be more able to comply.

4. Documentation and Recordkeeping

Rev. Proc. 2020-20 indicates that any individual claiming the COVID-19 Medical Condition Travel Exception should be prepared to produce documentation demonstrating that the individual was physically present in the United States during the entirety of the individual's COVID-19 Emergency Period. However, it does not provide guidance regarding such documentation. We have some suggestions.

Any individual who is not a lawful permanent resident (green card holder) or a citizen of the United States can access his or her U.S. arrival and departure history for the past five years from the U.S. Customs and Borders Protection's I-94 website (https://i94.cbp.dhs.gov/). In our experience, these records have generally been reliable, but some of us have noticed that they occasionally miss departure dates. If an individual's I-94 records indicate two arrival dates within the COVID-19 Emergency Period, then there is an assumption that the individual left the United States and subsequently returned. In such a case, the individual would be able to exclude days during either the period before he or she left the United States or the period after he or she returned, but not both. If the individual chooses to exclude days during the period before he left the United States, then additional documentation would be required to be provided to substantiate his or her departure date.

Such additional documentation may be an arrival stamp on the individual's passport evidencing entry into another country. However, if the individual does not have such an arrival stamp (e.g., because he or she entered his or her home country with a government-issued identification card), then it may be possible to use records that are not necessarily government-issued, such as a plane ticket.

Arrival and departure information based on passports and CBP records may be the primary method of establishing presence in the United States. Individuals who can produce such records should not be required to do more. However, it would be helpful if the government would provide guidance with regard to other forms of documentation and information that would normally satisfy the documentation and recordkeeping requirements and how much detail they would have to contain. This is particularly necessary because documentation and records, such as credit card receipts for personal expenditures, may not be the kind that would be preserved in the ordinary course of living. The sooner additional guidance can be provided, particularly in the form of a non-exclusive list of examples, the easier it will be for individuals to gather and maintain documentation.

5. Application to Individuals Who Were Resident in 2019 or Become Resident in 2020

5.1 2019 Residents

Section 3.04 of Rev. Proc. 2020-20 excludes individuals who were U.S. residents at the end of 2019 from the definition of "Eligible Individual" for purposes of the COVID-19 Medical Condition Travel Exception.

We believe the government should reconsider this exclusion. Rev. Proc. 2020-20 does not explain the rationale for the exclusion but perhaps it is intended to prevent an individual from using the COVID-19 Medical Condition Travel Exception to avoid continuing to be a resident in 2020 when they might otherwise have done so. The rationale might be even stronger if the government adopted our suggestion to extend the COVID-19 Emergency Period.

(a) In general. We consider that this limitation on use of the COVID-19 Medical Condition Travel Exception is unnecessary and should be eliminated or moderated. The concern about abuse can be addressed by providing that an individual can qualify if, without regard to the travel exception, the individual meets the conditions for treating any day in 2020 as his or her last day of residence under section 7701(b)(2)(B).

If the government is unwilling to adopt this suggestion, there are specific situations in which the use of the travel exception by an individual who was a resident in 2019 would not be abusive and at the very least the government should consider allowing the use of the travel exception by such an individual.

(b) 2019 Treaty Dual Residents. During the meeting of the Tax Residence and Coronavirus Working Group, you indicated that an individual who met the substantial presence test for 2019 but was resident of one of our treaty partners under the terms of an applicable income tax treaty (typically article 4) is not eligible for the COVID-19 Medical Condition Travel Exception. We believe nevertheless that such an individual should be eligible.

First, we think it is not advisable to increase the number of situations in which treaty nonresidents are nevertheless treated as residents for certain purposes of our tax laws. Without rehearsing all the arguments why limiting the effect of treaties is undesirable, in the particular case of Rev. Proc. 2020-20,[3] the government's position is not consistent with its own regulation, Treas. Reg. section 301.7701(b)-7(a)(3). That regulation provides that "[g]enerally, for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident." Rev. Proc. 2020-20 is concerned with whether an individual will be a resident in 2020 for all purposes, but particularly the computation of the individual's tax liability in 2020. Therefore,

[3] See Menzie and Karlin, Requesting Guidance for Treaty Nonresidents, Tax Notes, September 7, 2015, p. 1115.

treating a person treated as nonresident in 2019 by reason of a treaty as resident for purposes of Rev. Proc. 2020-20 plainly affects the computation of that person's tax liability.

Second, there seems to be no policy served by denying the travel exception in 2020 to someone who was a nonresident in 2019 only by virtue of a treaty. If anything, it would unnecessarily deny the benefit of the exception to individuals who were resident in 2019 in one of our treaty partner countries and may indeed be resident there again in 2020. Particularly in this latter case, the only effect will be to force these individuals to rely on the treaty in 2020 but still be subject to all the reporting requirements (except under section 6038D) and, possibly, FBAR filing requirements. The government has acknowledged, at least in the case of section 6038D, that these reporting requirements are "closely associated" with determination of tax liability and compliance is not required for this purpose.[4]

(c) Residence by Virtue of Section 6013(g) Election. The 2019 residence exclusion from relief should not apply to individuals who would not have been U.S. residents in 2019 but for having previously made an election under section 6013(g) to file a joint U.S. income tax return with their U.S. citizen or resident alien spouse. The election might have first been made in 2019 or in an earlier year.[5] Such an individual may not have been present in the United States at all in 2019 or may only have been present for a short time. There doesn't seem to be any compelling reason why such an individual who is permitted by the statute to revoke the election for 2020, [6] should not also be allowed to make use of the travel exception. The government could also provide a procedure for individuals who made the section 6013(g) election for 2019 to amend their 2019 return to allow the spouses to file their returns as married filing separately.[7]

5.2 2020 Residents

Rev. Proc. 2020-20 by its terms does not apply to an individual who is otherwise resident in the United States at some point in 2020.[8]

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4 In crafting the section 6038D exception, the government stated:
"The Treasury Department and the IRS have concluded that reporting under Section 6038D is closely associated with the determination of an individual's income tax liability. Because the taxpayer's filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify the individuals in the category and take follow-up tax enforcement actions when considered appropriate, reporting on Form 8938, 'Statement of Specified Foreign Financial Assets,' is not essential to effective IRS tax enforcement efforts relating to this category of U.S. residents." T.D. 9706, 79 F.R. 73817-73832 (Dec. 12, 2014).

5 Section 6013(g)(3).

6 Section 6013(g)(4)(A); Treas. Reg. § 1.6013-6(b)

7 This would require waiving the rule that after a joint return has been filed, a separate return may not be filed after the due date for filing the return.

8 Rev. Proc. 2020-20 sec. 3.04(2).

We think this limitation is unnecessary and should be eliminated. An individual who satisfies the substantial presence test in 2020 should be allowed a residency starting date that ignores days excluded under the COVID-19 Medical Condition Travel Exception.

6. Clarifications Regarding the Closer Connection Exception

Section 4.01 of Rev. Proc. 2020-20 provides:

> An Eligible Individual who intended to leave the United States during the individual's COVID-19 Emergency Period, but was unable to do so due to COVID-19 Emergency Travel Disruptions, may exclude the individual's COVID-19 Emergency Period (up to 60 calendar days of presence in the United States, as explained in section 3.02 of this revenue procedure) for purposes of applying the substantial presence test.

We believe that this language allows an alien to exclude days of presence not only for purposes of determining if the substantial presence test of section 7701(b)(3)(A) is met but also whether the individual was present in the United States on fewer than 183 days for purposes of section 7701(b)(3)(B)(i), as required to qualify for the closer connection exception. It is consistent with the language of the statute, which provides that an individual shall not be treated as present if he or she meets the requirements of the medical condition exception and the language of the regulations, specifically Reg. section 301.7701(b)-3, which provides that ". . . for the purposes of section 7701(b) . . . " days are excluded if they meet the exempt individual or medical condition exceptions, among others. However, it would be helpful if you would confirm the exclusion of the individual's COVID-19 Emergency Period as some members of our group and others have expressed concern that the Revenue Procedure appears unclear or at least ambiguous on this point.

Please also clarify that days during the COVID-19 Emergency Period in 2020 excluded under Rev. Proc. 2020-20 will not be taken into account for purposes of applying the "substantial presence test" for the years 2021 and 2022 (where 1/3rd and 1/6th of such days, respectively, would otherwise have been counted).

7. Issues with the FAQs (Information for Nonresident Aliens and Foreign Businesses Impacted by COVID-19 Travel Disruptions)

7.1 Limitations of the FAQs

The FAQs consider the provision of services or other activities by individuals temporarily present in the United States, specifically those activities that would not have been conducted in the United States but for COVID-19 Emergency Travel Disruptions.

Question 1 asks whether such activities will cause an NRA or foreign corporation, not otherwise engaged in a U.S. trade or business ("USTB"), to be treated as engaged in a USTB. Under the FAQ, an NRA or foreign corporation (or a partnership in which either is a partner) may choose

an uninterrupted period of up to 60 days between February 1, 2020, and April 1, 2020 ("the COVID-19 Emergency Period"). Activities performed during the COVID-19 Emergency Period will not be taken into account in determining whether the NRA or foreign corporation is engaged in a USTB, provided that the activities would not have been conducted in the United States but for COVID-19 emergency Travel Disruptions.

What if an NRA or foreign corporation is deemed to be engaged in a USTB after taking into account the answer to Question 1? Question 2 asks whether the NRA or foreign corporation, not otherwise carrying on a USTB through a Permanent Establishment ("USPE"), will then be treated as conducting business through a USPE. The IRS adds that activities performed during the COVID-19 Emergency Period will not be taken into account in determining whether the NRA or foreign corporation has a USPE, provided that the activities would not have been conducted in the United States but for COVID-19 Emergency Travel Disruptions.

(a) Substantive Issues. The FAQs appear to be intended to provide relief to both nonresident individuals and their foreign employers (or other service recipients) due to the conduct of services or other activities by individuals temporarily present in the United States. These activities are performed in the United States only because of COVID-19 emergency travel restrictions. While we appreciate the desire of the government to provide relief to such persons, we are concerned that the FAQs do not deal with a variety of related issues and the relief they do provide may be insufficient, particularly in the case of aliens who are not qualified residents of treaty countries.

This can be illustrated by a straightforward example. Consider an individual employee of a foreign corporation that elects the COVID-19 Emergency Period and, as a result, is not regarded as engaging in a USTB. The employee's income may nevertheless be U.S. source income, because the services were performed in the United States.[9] There is an exception, under which compensation for labor or personal services performed in the United States is not U.S.-source income, provided, *inter alia*, that the NRA is present for 90 days or less and receives compensation of $3,000 or less.[10] However, the $3,000 limitation was established in 1966 and is so low that the exception is practically a dead letter for any stay beyond a week or two.[11] It follows that the employee's income during his or her COVID-19 Emergency Period may be U.S. source income. Income from, among others, "salaries, wages . . . compensations, remunerations, emoluments" not connected with U.S. business but "received from sources within the United States" are forms of fixed or determinable annual or periodical income ("FDAPI"). Such income is taxed at 30% on a gross basis which may result in a tax liability actually higher than if net income were taxed at the graduated rates for ECI, which top out at

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9 Section 861(a)(3)

10 Section 861(a)(3)(A)-(C).

11 The value of $3,000 in 1966 would be approximately $23,700 in 2019 dollars, based on the Consumer Price Index for All Urban Consumers – (CPI-U).

37%.[12] Such income may be exempt under a treaty but for residents of non-countries, this hardly counts as relief and we wonder if it was intended.

The position may be less problematic where the service provider is a resident of a treaty country. (Note, it is the residence of the service provider that determines the availability of treaty relief, not the residence of the service recipient.) In the case of employees, treaties often exempt employees who are present in the United States for less than 183 days within a 12-month period and whose remuneration is borne by a foreign employer (and not by the foreign employer's U.S. permanent establishment – Question 2 will help in this regard).[13] In the case of independent contractors, some treaties have a separate provision for independent services; others simply refer to the business profits article. Either way, a service provider resident in the treaty country will be exempt from tax if services are not provided through a fixed base (independent services article) or a permanent establishment (business profits article).[14]

Similarly, the FAQs do not exempt such amounts from U.S. social security taxes, which are generally imposed on non-U.S. citizens on a territorial basis (based on where the services are performed), and are not addressed by income tax treaties (but rather by totalization agreements, which the U.S. has with only a limited number of countries).

(b) Compliance. The example also brings out compliance issues that Question 1 does not address. First, the service provider will be required to file a return and pay the 30% tax if the employer, or some other paying agent, fails to withhold. In an easily foreseeable situation, a foreign employer who continues to pay the employee's salary abroad through its usual foreign payroll system will not withhold the U.S. tax – in fact, it may not even be aware that it has a withholding responsibility Therefore, the employee will have to file a U.S. tax return and pay U.S. tax, for which he or she may or may not get a tax credit in the home country.

Furthermore, the foreign employer will potentially be liable for failure to withhold. The Code does not differentiate between U.S. and foreign employers and the NRA's employer is technically subject to U.S. wage withholding requirements.[15] The Code provides that a person paying wages on behalf of a foreign person not engaged in a USTB is treated as the employer.[16]

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12 Section 871(a)(1).

13 See, e.g., U.K.-U.S. income tax treaty of 2001 ("U.K. treaty"), article 14

14 Compare U.S.-France income tax treaty of 1994, article 14 (independent personal services) with the U.K. treaty (no separate independent services article). The U.S. 2006 and 2016 Model Income Tax Treaties uses the approach of the U.K. treaty; their predecessor, the 1996 Model Income Tax Treaty has both dependent and independent personal service articles.

15 Under section 3402(a)(1), "every employer making payment of wages" is subject to U.S. wage withholding requirements.

16 Section 3401(d)(2). This is generally understood to refer to a U.S. paying agent but neither the Code nor the Regulations (Reg. section 31.3401(d)-1(e)) actually say this. What the regulations do make clear is that this provision is additive.

Similar issues arise for foreign taxpayers who are not employees and the persons who pay them. Service providers too may find that the relief offered by the FAQ is of limited value; service recipients are required to withhold on a service provider's U.S.-source income, whether it is FDAPI or ECI.[17]

While the substantive tax position of employees and independent contractors may be addressed by treaties and their position improved to some extent by the FAQs, the compliance issues remain. Such individuals may be subject to withholding if they do not provide a Form W-8BEN with a claim that withholding is not required due to application of a treaty. They may also be required to file a tax return although Form 8833 may not be required in some cases.[18]

Further complications will arise for any individual (and his or her employer or service recipient) as to whom the 60-day COVID-19 Emergency Period is not long enough. For those individuals, electing the application of Question 1 may result in different treatment for income attributable to the chosen COVID-19 Emergency Period and income attributable to any other period beyond the 60 days, even though departure may have continued to be practically impossible.

7.2 Recommendations.

We therefore recommend that the government adopt a more comprehensive solution to the problems only partially addressed by the FAQ.

(a) FDAPI. The government should clarify that income not treated as ECI by reason of Question 1 will not be treated as FDAP income as having a U.S. source. Assuming that the services in question would not have been rendered in the United States but for the COVID-19 Emergency Travel Disruptions, the services should be deemed to have been performed outside the United States. We understand that this can lend itself to abuse and therefore it would be appropriate to require that the service provider maintain records and be prepared to demonstrate that the services would have been rendered outside the United States, particularly outside the COVID-19 Emergency Period. This appears to be consistent with the requirements that would apply to an individual seeking to take advantage of Rev. Proc. 2020-20 in determining residence for purposes of the substantial presence test.

(b) Withholding. Wage and Chapter 3 withholding should be waived in the case of foreign employers and service recipients whose employees and independent contractors were unable to leave the United States as a result of the COVID-19 Emergency Travel Disruptions. Exceptions could be made where the foreign employer or service recipient is engaged in a

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[17] *See* sections 1441(a)-(c).

[18] Reg. section 1.6012-1(b)(1) and (2) (return required where foreign individual (i) is engaged in a USTB or (ii) has U.S. source income, except where tax fully paid at source); Reg. section 301.6114-1(c)(1)(iv) (reporting waived for dependent personal services; no similar exception for independent personal services).

USTB (no treaty) or has a USPE (treaty) with respect to compensation for which the foreign employer or service recipient takes a deduction.

The mechanism for this outcome could require the recipient to furnish an affidavit similar to a non-foreign affidavit that was typically provided to obtain relief from withholding under section 1445. The affidavit would address entitlement to relief under the FAQ.

(c) Procedure. The FAQ do not explain how to claim the benefit of the COVID-19 Emergency Period for the purposes of the relief provided by the FAQ. Rev. Proc. 2020-20 allows an NRA to choose the same 60 days as the FAQs in claiming a medical condition exception to the substantial presence test. We suggest that its procedures be adapted and adopted for the purposes of the FAQs.[19] At the minimum, NRAs and foreign corporations should retain all relevant records to support reliance on the FAQs (e.g., an employee's travel documents).

8. Clarification of Rev. Proc. 2020-27

Revenue Procedure 2020-27 provides a time waiver to assist individuals in satisfying the eligibility requirements set forth under section 911(d)(1), i.e., to be a "qualified individual."

Briefly, section 911(a) allows a "qualified individual" to elect to exclude from gross income his or her foreign earned income amount and a foreign housing cost amount. Section 911(d)(1) defines the term "qualified individual" as an individual whose tax home is in a foreign country and who is (A) a citizen of the United States and establishes to the satisfaction of the Secretary that the individual has been a bona fide resident of a foreign country or countries for an uninterrupted period that includes an entire taxable year, or (B) a citizen or resident of the United States who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days.

Section 911(d)(4) provides that an individual will continue to be a qualified individual with respect to a period in which the individual was a bona fide resident of, or was present in, a foreign country if the individual left the country during a period for which Treasury, after consultation with the Secretary of State, determines that such individual was required to leave because of war, civil unrest, or similar adverse conditions that precluded the normal conduct of business. Treasury, after consultation with the Secretary of State, has so determined that, for purposes of section 911(d), the COVID-19 Emergency is an adverse condition that has precluded the normal conduct of business (i) in the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau (China), as of December 1, 2019; and (2) globally, as of February 1, 2020. The period covered by this revenue procedure ends on July 15, 2020. Rev. Proc. 2020-27 provides a couple of helpful examples.

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[19] *See* Rev. Proc. 2020-20, section 5.01.

Considering that Treasury has determined the COVID-19 Emergency to be a global adverse condition, the following comments are provided for review and consideration:

The same concerns are relevant for this revenue procedure as are those provided above, related to Revenue Procedure 2020-20. The time waiver evinces a public policy intent to protect U.S. citizens and residents from unintended tax consequences arising from the COVID-19 Emergency that precludes the normal conduct of business.

(a) Addition of a Reasonable Cause Extension Based on Facts and Circumstances. The time waiver is helpful and is based on considered factors; however, circumstances may continue that will prevent a taxpayer from leaving the United States after the July 15, 2020 deadline. We believe that a taxpayer should be permitted to show that he or she had reasonable cause for not leaving the United States by that date.

The regulations that address the substantial presence test mention a facts and circumstances test a number of times, including in the context of the medical condition exception.[20]

Allowing for a reasonable cause or facts and circumstances test would not encourage those merely desirous of staying in the United States because a "qualified individual" while in the United States, ostensibly, is not generating foreign income, but fully-taxable U.S.-sourced income. In assessing reasonable cause or the facts and circumstances relevant to a U.S. taxpayer, should that individual fail to leave before July 15, 2020, certain determinative factors could indeed be present that prevents the necessary departure, such as the illness of a spouse or dependent, a travel ban or travel restrictions, or adverse conditions existing in the taxpayer's foreign tax home.

By adding such a facts and circumstances test, U.S. taxpayers will have the ability to plan as necessary, with a mechanism in place to advocate for their continued status as "qualified individuals" under section 911(d)(1).

(b) The Foreign Housing Allowance. In addition to the foreign earned income exclusion as provided under section 911(a)(1), a qualified individual may also make a separate election to exclude from his or her gross income, an amount equal to his or her housing cost amount, as defined.[21] In general, the expenses of only one foreign household are eligible to be excluded under section 911(c)(3). A qualified individual may exclude housing expenses with

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[20] Reg. section 301.7701(b)-3(c)(2).
[21] Section 911(a)(2).

respect to maintaining a second home outside the United States for a spouse and dependents if adverse living conditions exist at the individual's tax home.[22]

As noted in the revenue procedure, the Department of Treasury, in consultation with the Secretary of State, has determined that the COVID-19 Emergency is an adverse condition, existing globally. As a result, the qualified individual may have no safer place than inside the United States to shelter his or her family.

In such case, it is likely that the qualified individual will incur the expense of sustaining the foreign residence (required for the individual's work), and at the same time, incur the expense of a sustained residence in the United States as a second home for spouse and dependents who cannot return to the qualified individual's tax home because of the COVID-19 Emergency, but also cannot relocate to any foreign country, considering the adverse conditions globally, as evinced by declaration of the COVID-19 Emergency.

Under such adverse global conditions, the qualified taxpayer may be unable to relocate a spouse and dependents to either the foreign country where the individual works or a second foreign country (as required in order to have those housing cost amounts taken into account), as the adverse conditions are present worldwide. We ask that the government consider what relief it can give to individuals who are forced to maintain a second home in the United States during an extended stay required by the COVID-19 Emergency.

(c) Income for Services Performed in the United States. Only earned income that is from foreign sources is eligible to be excluded under section 911. Section 911 does not allow an individual to exclude from income compensation paid for services rendered in the United States. All it does is allow time spent in the United States to count toward satisfaction of the bona fide residence requirement or the requirement of 330 days of presence outside the United States. This can be seen from the two examples given in section 3.03 of Rev. Proc. 2020-27.

Although a reading of the statute makes this consequence reasonably plain, we would suggest that that the government clarify that compensation paid for services rendered in the United States is not exempt under section 911, even if the individual is prevented from leaving the United States due to the coronavirus pandemic and undertakes work that would otherwise have been performed outside the United States.

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Members of our group are at your disposal if you would like to discuss any of these matters or to elaborate further on our suggested alternatives.

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[22] Section 911(c)(3)(B); Reg. section 1.911-4(b)(5)(ii).

Sincerely,

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MJAK:abm

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