[JOINT COMMITTEE PRINT]

REVIEW OF THE PRESENT-LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY

By the Staff
of the
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INTRODUCTION

In the Fall of 1999, then-Chairman of the House Ways and Means Committee, Representative William Archer, requested the staff of the Joint Committee on Taxation (the "Joint Committee") to review the tax rules related to tax-motivated citizenship relinquishment and residency termination that were enacted as part of the Health Insurance Portability and Accountability Act of 1996, as well as related rules enacted in 1996 restricting visas for tax-motivated former citizens. In particular, Chairman Archer asked the Joint Committee staff to review whether those rules have been applied in the manner intended by the Congress and whether the rules have been effective in deterring tax-motivated citizenship relinquishment and residency termination. The Joint Committee staff also was asked to provide recommendations on ways to improve these rules.

The Joint Committee staff spent extensive time during 1999 and 2000 on its review of the present-law tax and immigration rules relating to citizenship relinquishment and residency termination. Chairman Archer retired in 2000 at the end of the 106th Congress. At that time, the Joint Committee staff had not completed its review. Due to more pressing work, the project was set aside. In 2002, Ranking Member of the House Ways and Means Committee, Representative Charles Rangel, and Representative James Moran, separately requested the Joint Committee staff to produce a report regarding these rules. The Joint Committee staff spent extensive time during 2002 and early 2003 updating and completing its review to reflect, among other things, changes in laws and administrative practices since 2000 that affected the present-law rules under review.

This review[1] includes several parts: Part I provides an executive summary of the Joint Committee staff's review and recommendations. Part II discusses recent legislative activity with respect to phase-down and repeal of the estate tax and the implications of such changes for this review. Part III describes the methodology of the Joint Committee staff's review. Part IV describes the relevant present-law tax rules, including the alternative tax regime applicable to certain former citizens and former residents. Part V describes the relevant present-law immigration rules, including the special immigration rules applicable to former citizens. Part VI describes the potential purposes of an alternative tax regime applicable to certain former citizens and former residents. Parts VII and VIII focus on the enforcement and effectiveness of the present-law tax rules relating to tax-motivated citizenship relinquishment and residency termination and the related immigration rules. Part IX provides a summary of other countries' special tax regimes and estate, gift and inheritance regimes. Part X describes recent proposals that involve a different approach (known as a "mark to market," or "exit tax" approach) from that of the present-law alternative tax regime. Part XI sets forth several Joint Committee staff recommendations to improve the present-law alternative tax regime and the related immigration rules.

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[1] This document may be cited as follows: Joint Committee on Taxation, *Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency*, (JCS-2-03), February 2003.

I. EXECUTIVE SUMMARY

Overview of tax law

In general

U.S. citizens and noncitizens who are U.S. residents generally are subject to U.S. tax on a worldwide basis for U.S. Federal income, estate, and gift tax purposes.[2] On the other hand, noncitizens who are nonresidents generally are subject to U.S. tax only on income from U.S. sources and income effectively connected with the conduct of a trade or business within the United States. In addition, noncitizens who are nonresidents generally are subject to U.S. estate and gift tax only with respect to U.S.-situated property. Bilateral tax treaties may modify the treatment under these general tax rules.

Alternative tax regime for certain former citizens and former long-term residents

Since 1966, special tax rules have applied to a U.S. citizen who relinquishes U.S. citizenship with a principal purpose of avoiding U.S. taxes. These rules are referred to as the "alternative tax regime." Under the alternative tax regime enacted in 1966,[3] a former citizen is subject to an alternative method of income taxation for 10 years following citizenship relinquishment. The alternative tax regime is a hybrid of the tax treatment of a U.S. citizen and a noncitizen who is a nonresident. For the 10-year period following citizenship relinquishment, the former citizen is subject to tax only on U.S.-source income at the rates applicable to U.S. citizens, rather than the rates applicable to noncitizens who are nonresidents. However, for this purpose, U.S.-source income has a broader scope than it does for normal U.S. Federal tax purposes and includes, for example, gain from the sale of U.S. corporate stock or debt obligations. The alternative tax regime applies only if it results in a higher U.S. tax liability than the liability that would result if the individual were taxed as a noncitizen who is a nonresident.

In addition, since 1966, the alternative tax regime has included special estate and gift tax rules. Under these rules, if a former citizen who is subject to the alternative tax regime dies within 10 years of citizenship relinquishment, his or her estate includes the value of certain closely-held foreign stock to the extent that the foreign corporation owns U.S.-situated property. In addition, under the alternative tax regime, the former citizen is subject to gift tax on gifts of U.S.-situated intangibles, such as U.S. stock, made during the 10 years following citizenship relinquishment.

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[2] The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") repealed the estate tax for estates of decedents dying after December 31, 2009. However, the Act included a "sunset" provision, pursuant to which EGTRRA's provisions, including estate tax repeal, do not apply to estates of decedents dying after December 31, 2010.

[3] The present-law alternative tax regime was first enacted as part of the Foreign Investors Tax Act of 1966, Pub. L. No. 89-809.

In 1996, several significant changes were made to the alternative tax regime.[4] These amendments followed press reports and Congressional hearings indicating that a small number of very wealthy individuals had relinquished their U.S. citizenship to avoid U.S. income, estate, and gift taxes, while nevertheless maintaining significant contacts with the United States.

First, the 1996 amendments extended the application of the alternative tax regime to certain long-term residents who terminate their U.S. residency. Thus, under the 1996 amendments, the alternative tax regime applies both to U.S. citizens who relinquish citizenship and long-term residents who terminate residency with a principal purpose of avoiding U.S. taxes.

Under the 1996 amendments, a U.S. citizen who relinquishes citizenship or a long-term resident who terminates residency is treated as having done so with a principal purpose of tax avoidance (and, thus, generally is subject to the alternative tax regime) if: (1) the individual's average annual U.S. Federal income tax liability for the five taxable years preceding citizenship relinquishment or residency termination exceeds $100,000; or (2) the individual's net worth on the date of citizenship relinquishment or residency termination equals or exceeds $500,000. These amounts are adjusted annually for inflation.[5] Certain categories of individuals can avoid being deemed to have a tax avoidance purpose for relinquishing citizenship or terminating residency by submitting a ruling request to the Internal Revenue Service ("IRS") regarding whether the individual relinquished citizenship or terminated residency principally for tax reasons. This ruling practice is detailed in Notice 97-19 and was modified in Notice 98-34.[6]

The 1996 amendments provide for certain anti-abuse rules to prevent circumvention of the alternative tax regime through conversion of U.S.-source income or property to foreign-source income or property. In addition, the 1996 amendments extend the scope of the alternative tax regime by including foreign property acquired in nonrecognition transactions, taxing amounts earned by former citizens and former long-term residents through controlled foreign corporations, and suspending the 10-year liability period during any time at which a former citizen's or former long-term resident's risk of loss with respect to property subject to the alternative tax regime is substantially diminished, among other measures.

The 1996 amendments require individuals to provide certain tax information, including tax identification numbers, upon relinquishment of citizenship or termination of residency. The penalty for failure to provide the required tax information is the greater of $1,000 or five percent of the tax imposed under the alternative tax regime for the year. In addition, the U.S. Department of State ("Department of State") and other governmental agencies are required to provide this information to the IRS.

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[4] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.

[5] The inflation-adjusted amounts are $122,000 and $608,000, respectively, for 2003. Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

[6] 1997-1 C.B. 394 and 1998-2 C.B. 29. *See* A-166 and A-193.

Overview of immigration law

In general

For immigration purposes, a noncitizen seeking to enter the United States generally is required to present valid documentation, usually a visa and a passport. The Department of State and the Immigration and Naturalization Service (the "INS") form a "double check" system for entry into the United States. The Department of State grants visas, and the INS inspects persons upon arrival at a port of entry and determines whether they will be admitted into the country. There are many grounds on which a person can be denied entry or reentry, some of which can be waived. Even if such grounds cannot be waived, a person may be "paroled" (granted temporary admission) into the United States for emergency or humanitarian reasons.

Special immigration rule for U.S. citizens who renounce citizenship for tax reasons

In 1996, the Congress enacted a special immigration provision applicable to individuals who renounce their U.S. citizenship with the purpose of avoiding taxation.[7] Under this provision, a former citizen is to be denied reentry into the United States if the Attorney General determines that the individual renounced his or her citizenship for the purpose of avoiding U.S. tax.[8] The Attorney General has the authority to waive this prohibition with respect to non-immigrants (*i.e.*, individuals who do not want to establish permanent residence in the United States). This special provision does not apply to former long-term residents who terminate residence for tax reasons.

Overview of Joint Committee staff review

The Joint Committee staff conducted an extensive review of the present-law alternative tax regime for certain former citizens and former long-term residents and the related immigration laws. This included a review of the relevant statutes and their legislative history, discussions with the Federal agencies responsible for enforcing these laws, research of articles and commentaries written on the subject of citizenship relinquishment or residency termination, an examination of individual tax return information, and discussions with practitioners who advise individuals wishing to relinquish citizenship or terminate residency.[9]

To assist in this review, the Joint Committee staff requested that the General Accounting Office ("GAO") review the administrative practices of the U.S. Department of the Treasury ("Department of Treasury"), the IRS, the Department of State, and the INS in connection with the collection and processing of information about former citizens and former long-term

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[7] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Division C, sec. 352(a), 110 Stat. 3009-641 (1996).

[8] *Id.*

[9] For a description of the Joint Committee staff methodology for this review, *see* Part III. below.

residents. The Joint Committee staff also requested that the GAO review the enforcement of the various requirements set forth in the alternative tax regime and related immigration rules. The GAO completed its review and issued a report in May 2000.[10]

The Joint Committee staff spent extensive time during 1999 and 2000 conducting its review. Chairman William Archer, who originally requested the Joint Committee staff review, retired at the end of the 106th Congress in 2000. At that time, the Joint Committee staff had not completed its review. Due to more pressing work, the project was set aside. In 2002 and early 2003, based on renewed interest in the topic expressed by several Members of Congress, the Joint Committee staff spent extensive time to update and complete its review, including updating prior work to take into account changes in law and administrative practices since 2000. This process included reviewing numerous private letter rulings issued to former citizens and former long-term residents since 2000, analyzing the potential effects of changes in law, such as the changes to the estate tax provisions as part of EGTRRA, as well as other developments, such as reorganizations within the IRS that could affect the administration of the alternative tax regime.

Summary of Joint Committee staff findings

Based on the GAO and Joint Committee staff review of the various Federal agencies' administrative procedures, the Joint Committee staff concludes that there is little or no enforcement of the special tax and immigration rules applicable to tax-motivated citizenship relinquishment and residency termination. The GAO stated in their 2000 report that the IRS does not yet have a systematic compliance effort in place to enforce the present-law alternative tax regime. Since that time the IRS generally has ceased all compliance efforts directly relating to the income, estate, and gift tax obligations of former citizens and former long-term residents under the alternative tax regime, other than compiling a Certificate of Loss of Nationality ("CLN") database for such individuals and publishing their names in the *Federal Register* as required by section 6039G.[11] In addition, the INS and the Department of State have not denied reentry into the United States to a single former citizen under the 1996 special immigration rule. While the Joint Committee staff is aware that the INS has begun drafting guidelines to implement the immigration provision, it is unclear whether the guidelines will have any significant effect on enforcement.

The Joint Committee staff believes that a key reason for inadequate enforcement of the alternative tax regime is the inability to obtain necessary information from individuals: (1) at the time of citizenship relinquishment or residency termination; and (2) during the 10-year period following citizenship relinquishment or residency termination, for those individuals who are subject to the alternative tax regime. These enforcement difficulties begin at the time individuals notify the Department of State of their intent to relinquish citizenship.

For the period 1995 through 1999, only one-third of individuals relinquishing citizenship provided information statements that contained a social security number. For 2000 and 2001,

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[10] *See* the General Accounting Office Report ("GAO Report") at A-256.

[11] *See* A-141 (September 20, 2002, letter from the IRS) (relevant material redacted).

there was significant improvement in the number of information statements provided by individuals relinquishing citizenship, but the Joint Committee staff was unable to obtain specific information as to how many of these statements were fully completed and included social security numbers.[12] Without a social security number, the IRS cannot attempt to match the former citizen or former long-term resident to other IRS databases without a labor-intensive manual search.

For the period 1995 through 1999, 182 former citizens identified themselves as exceeding the thresholds provided under the alternative tax regime for being treated as having relinquished their citizenship for tax avoidance purposes.[13] For 2000 and 2001, 76 former citizens who provided information statements identified themselves as meeting one or more of the monetary thresholds or included a social security number.[14] Except for these individuals, the IRS does not appear to have sufficient information (e.g., social security numbers) for these periods to identify other individuals who might be subject to the alternative tax regime. Furthermore, with respect to those individuals who have been identified, the IRS currently makes no attempt to monitor and enforce the 10-year income tax return filing requirement for those individuals subject to the alternative tax regime.

The Joint Committee staff recognizes that monitoring the activities of individuals who no longer reside in the United States is inherently difficult, and that the need to do so poses serious challenges in enforcing these rules. At a minimum, an effective system for collecting and processing timely information relating to individuals who relinquish citizenship or terminate residency is a prerequisite to enforcing the rules. Enforcement of the immigration provision also is hindered by several factors, specifically lack of access by the Attorney General to the IRS records to identify former citizens who renounce citizenship for tax reasons, lack of access by the IRS to INS databases, differing interpretations between the INS and the Department of State as to what it means to officially renounce U.S. citizenship, and the lack of coordination between the tax rules and the immigration rules relating to individuals who relinquish citizenship or terminate their residency.

The Joint Committee staff also believes that inadequate enforcement of the alternative tax regime and the related immigration rules may be due in part to a low priority assigned to the enforcement of these rules by the Federal agencies involved. As indicated above, in 2000, the IRS generally ceased compliance efforts directed at former citizens and former long-term residents under the alternative tax regime. The IRS, therefore, cannot determine whether such individuals are meeting their tax return filing requirements under the alternative tax regime. Moreover, the GAO stated in its 2000 report that the IRS has never pursued an audit or otherwise

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[12] For a more detailed discussion, *see* Part VII.B. below.

[13] *See* the GAO Report at A-256.

[14] *See* A-123 (August 14, 2002, letter from the IRS).

examined those former citizens or former long-term residents who were determined in the ruling process to have a principal purpose of tax avoidance.[15]

Other factors also have contributed to enforcement problems. For example, the present-law alternative tax regime requires in many instances an inquiry into the subjective intent of the former citizen or former long-term resident -- i.e., whether one of the principal purposes for expatriating or terminating residency was the avoidance of tax. The IRS has limited resources that it must allocate to their best uses, and investigating the subjective reasons behind an individual's desire to relinquish citizenship or terminate residency requires a significant investment of those resources. If no such inquiry is made under the present-law rules, there is uncertainty as to whether a former citizen or former long-term resident is subject to the alternative tax regime.

The Joint Committee staff concludes that the problems with enforcement are significant enough that it is not possible to fully assess the potential effectiveness of the present-law alternative tax regime and related immigration rules. The Joint Committee staff believes that the enforcement problems (specifically the lack of information about former citizens and former long-term residents) must be addressed before the effectiveness of these rules can be fully evaluated. In this regard, the Joint Committee staff makes several recommendations designed to improve the administration and enforcement of the alternative tax regime and the related immigration rules.

Summary of Joint Committee staff recommendations

The Joint Committee staff recommends several changes to the present-law alternative tax regime and related immigration rules, with a view toward improving the administration and enforcement of these rules.

Consistent with its mandate in connection with this study, the Joint Committee staff has focused on potential improvements to the operation of the present-law rules. Thus, the staff's recommendations are designed to fit within the basic framework of the present-law alternative tax regime, and to make this regime work as well as possible. The Joint Committee staff does not take a position as to more fundamental changes that might be considered, such as replacing the present-law alternative tax regime with a mark-to-market exit-tax system, or eliminating altogether the tax regime specific to former citizens and former long-term residents.[16]

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[15] Recent information from the IRS indicates that the IRS has undertaken, or is in the process of undertaking, examinations of a small number of individuals who were determined to be subject to the alternative tax regime under the ruling process. However, the Joint Committee staff has been unable to determine, in all cases, the amount of tax collected from this small group of individuals. *See* A-132 (August 14, 2002, letter from the IRS); A-141 (September 16, 2002, letter from the IRS); A-141 (September 20, 2002, letter from the IRS) (relevant material redacted).

[16] *See* Part X, below, for a discussion of alternative approaches to the tax treatment of former citizens and former long-term residents.

While the Joint Committee staff believes that its recommendations would improve the effectiveness and administration of the present-law rules, it should be noted that, even if the Congress were to enact the Joint Committee staff recommendations, tax incentives for citizenship relinquishment and residency termination would remain. An alternative tax regime that is limited to U.S.-source income and, in the case of the estate and gift taxes, to U.S.-situated assets (albeit with expanded definitions of such income and assets) cannot eliminate the tax incentives to relinquish citizenship or terminate residency in cases in which an individual owns significant foreign-situated property. Similarly, an alternative tax regime that applies for a 10-year period following citizenship relinquishment or residency termination will not be effective with respect to individuals who are willing to wait the 10-year period prior to disposing of assets that would be subject to tax under the alternative tax regime. Perhaps most fundamentally, any tax regime applicable to individuals who are no longer physically present in the country, and whose assets may no longer be situated in the country or under the control of any U.S. person, inevitably faces serious challenges of enforcement as a practical matter. This enforcement effort requires significant resources to be devoted to the few individuals who are subject to the alternative tax regime. Accordingly, the Joint Committee staff believes that careful consideration should be given as to whether the alternative tax regime and related immigration rules, even as modified by the recommendations set forth below, can fully achieve the goals that the Congress intends to accomplish.[17]

The Joint Committee staff recommendations are summarized immediately below and are discussed in detail in Part XI, below.

A. Tax Recommendations

1. Provide objective rules for the alternative tax regime

The Joint Committee staff recommends that objective rules replace the subjective determination of tax avoidance as a principal purpose for citizenship relinquishment or residency termination under present law. Under the proposed objective rules, a former citizen or former long-term resident would be subject to the alternative tax regime for a 10-year period following citizenship relinquishment or residency termination, unless the former citizen or former long-term resident:

> (a) establishes that his or her average annual net income tax liability for the five preceding years does not exceed $122,000 (adjusted for inflation after 2003) and his or her net worth does not exceed $2 million, or alternatively satisfies limited exceptions for dual citizens and minors who have had no substantial contact with the United States, and
>
> (b) certifies under penalties of perjury that he or she has complied with all U.S. Federal tax obligations for the five preceding years and provides such evidence of compliance as the Secretary of the Treasury may require.

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[17] *See* Part VI, below, for background on the purposes of a special tax regime for former citizens and former long-term residents.

This recommendation, like present law, retains an income tax liability test and a net worth test, but it departs from the present-law approach in two significant respects. First, the objective monetary thresholds would become the general rule for conclusively determining whether a former citizen or former long-term resident would be subject to the alternative tax regime. The monetary thresholds would serve as a proxy for tax motivation and, unlike present law, no subsequent inquiry into the taxpayer's intent would be required or permitted in any case. The ruling process of present law would be eliminated. Second, because this objective monetary standard would be less flexible than present law, the present-law amount for the net-worth threshold would be increased.

The alternative tax regime would not apply to a former citizen who is a dual citizen or a minor with no substantial contacts with the United States prior to relinquishing citizenship. These exceptions for dual citizens and minors would use the present-law definitions of such individuals,[18] but the exceptions would operate differently from the present-law rules, which require an inquiry into intent. Under the recommendation, even if a former citizen or former long-term resident exceeded the monetary thresholds, that person would be excluded from the alternative tax regime if he or she fell within one of the specified exceptions (provided that the requirement of certification and proof of compliance with Federal tax obligations is met). These exceptions would provide relief to individuals who have never had any substantial connections with the United States, as measured by certain objective criteria, and would eliminate IRS inquiries as to the subjective intent of such taxpayers.

2. Provide tax-based rules for determining when an individual is no longer a U.S. citizen or long-term resident for U.S. Federal tax purposes

The Joint Committee staff recommends that an individual should continue to be treated as a U.S. citizen or long-term resident for U.S. Federal tax purposes until:

(a) notification of an expatriating act or termination of residency is provided to the Department of State or the INS, respectively, and,

(b) a complete and accurate IRS Form 8854 (i.e., a tax information statement) is filed.

In addition, the Department of State (including U.S. consular offices) should be required to provide a uniform tax information statement (i.e., IRS Form 8854) to all individuals who relinquish citizenship.

This recommendation would improve present-law rules by denying taxpayers the tax benefits of citizenship relinquishment or residency termination unless and until they provide the information necessary for the IRS to enforce the alternative tax regime.

[18] Secs. 877(c)(2)(A) and 877(c)(2)(C), respectively.

3. Provide a sanction for individuals subject to the alternative tax regime who return to the United States for extended periods

The Joint Committee staff recommends that a former citizen or former long-term resident who is subject to the alternative tax regime and who is present in the United States for more than 30 days in any calendar year during the 10-year period following citizenship relinquishment or residency termination should be treated as a U.S. resident for U.S. Federal tax purposes for that calendar year.

This recommendation would reduce the tax incentives to relinquish citizenship or terminate residency for individuals who desire to maintain significant ties to the United States.

4. Impose gift tax with respect to certain closely held foreign stock

The Joint Committee staff recommends that gifts of certain closely held stock of a foreign corporation by an individual subject to the alternative tax regime be subject to U.S. gift tax to the extent that the foreign corporation holds U.S.-situated assets.

This recommendation would create parity between the relevant estate and gift tax rules and would combat a well-known method of gift tax avoidance.

5. Impose annual return requirement

The Joint Committee staff recommends that former citizens and former long-term residents who are subject to the alternative tax regime be required to file an annual return that provides, among other things, information on the permanent home of the individual, the individual's country of residency, the number of days the individual was present in the United States, and detailed information about the individual's income and assets. The annual return would be required even if no U.S. tax is due.

This recommendation would enable the IRS to monitor more effectively both the income generated by assets as well as any dispositions of assets that may be subject to U.S. tax.

6. Transition issues

The Joint Committee staff recognizes that transition issues would have to be addressed in connection with implementing these recommendations. Any Joint Committee staff recommendations that are adopted should apply on a prospective basis.

The Joint Committee staff recommends an immediate moratorium on the issuance by the IRS of the "fully submit" category of rulings under Notice 98-34.

B. Immigration Recommendations

1. Conform present-law immigration provision to tax rules

The Joint Committee staff recommends that the present-law tax and immigration provisions be coordinated in terms of both coverage and administration. Accordingly, the

substantive standards governing whether a former citizen or former long-term resident is inadmissible into the United States under the special immigration provision should be tied to the tax law provisions, and the IRS should be the agency primarily responsible for applying these standards.

This recommendation would create consistency between the relevant tax and immigration provisions and would assign the responsibility for making tax-related determinations to the agency best-equipped to do so.

2. Eliminate discretionary exception from immigration provision

The Joint Committee staff recommends that no waivers of substantive inadmissibility be available for former citizens and former long-term residents who are inadmissible by reason of the special immigration provision relating to tax avoidance.

This recommendation would bolster the deterrent effect of the special immigration provision.

3. Promote interagency information sharing

The Joint Committee staff recommends that the INS's databases be made accessible to the IRS and other appropriate Federal agencies for purposes of administering the special immigration provision relating to tax avoidance. These databases also should be modified to include social security numbers, if available, among other modifications.

This recommendation would facilitate the interagency cooperation needed to enforce the special immigration provision.

4. Amend Code section 6103

The Joint Committee staff recommends that section 6103 be modified to enable the IRS to share with the appropriate agencies the minimum tax information necessary to implement the special immigration provision.

Like the previous recommendation, this recommendation would facilitate the interagency cooperation needed to enforce the special immigration provision.

II. ESTATE TAX REPEAL

Individuals who contemplate relinquishing citizenship or terminating residency for tax purposes generally consider three main U.S. taxes: the income tax, the estate tax, and the gift tax. For some taxpayers, the estate tax (the maximum rate of which reaches 49 percent for 2003) may serve as the principal motivating factor in the decision to relinquish citizenship or terminate residency.

In view of the small number of expatriating individuals relative to the overall number of persons potentially subject to the U.S. estate tax, this study cannot definitively establish a causal link between the estate tax and citizenship relinquishment or residency termination. However, the Joint Committee staff observes from a review of individual cases that several of the individuals who have relinquished citizenship or terminated residency have substantially reduced their potential worldwide estate tax liability by doing so. This experience suggests that a general analysis of tax-motivated citizenship relinquishment or residency termination and the rules that address these situations must be premised, in part, on the existence of an estate tax that, absent special rules, might be avoided by relinquishing citizenship or terminating residency. Recent developments in the law, however, may call this premise into question and thus affect this analysis.

EGTRRA made a number of changes to the estate and gift tax rules, including incremental rate reductions and unified credit increases from 2002 to 2009, and repeal of the estate tax for estates of decedents dying after December 31, 2009. However, EGTRRA also included a "sunset" provision, pursuant to which EGTRRA's provisions, including estate tax repeal, do not apply to estates of decedents dying after December 31, 2010. Thus, under present law, the estate tax phases down from 2002 to 2009, is repealed for 2010, and then is reinstated in 2011, without the rate reductions and unified credit increases that were phased in prior to repeal.

In the 107th Congress, several bills were introduced that would make estate tax repeal permanent (e.g., H.R. 586, H.R. 2143, H.R. 2316, H.R. 2327, and H.R. 2599) and one bill was introduced to accelerate estate tax repeal (S.3). The House passed H.R. 586 and H.R. 2143. In addition, the Senate passed, as Senate Amendment 2850 to S. 1731 (an agriculture reauthorization bill), a provision expressing the Sense of the Senate that estate tax repeal should be made permanent. The House also passed a similar measure (H. Res. 524). The Senate did not pass a bill making estate tax repeal permanent.

The analysis and recommendations in this report are based on present law, including the relevant changes made by EGTRRA, and no attempt is made to predict how the law might be amended in the future. Under present law, an estate tax is imposed on large estates in every year except one (2010), with a top marginal rate ranging from 45 percent to 55 percent, and the concern remains that this tax may be avoided in whole or in part by means of citizenship relinquishment or residency termination. Thus, despite the possibility of eventual permanent repeal of the estate tax, this report is premised on the present-law estate tax, the possibility of its avoidance by means of citizenship relinquishment or residency termination, and the goal of mitigating such avoidance.

If estate tax repeal were made permanent, then much of the analysis contained in this report would need to be revisited. For example, the incidence of tax-motivated citizenship relinquishment and residency termination likely would decline to some extent, since estate tax avoidance would be largely eliminated as a motivating factor.[19] Nevertheless, income tax avoidance, and perhaps gift tax avoidance, would remain motivating factors in some instances. The recommendations set forth in this report might need to be reevaluated if the tax incentives for expatriating or terminating residency were reduced, and were limited to income and gift tax avoidance. The potential impact of permanent estate tax repeal on the analysis and recommendations is noted as appropriate throughout the report.

[19] It might not be entirely eliminated, to the extent that revival of the tax were perceived as a possibility.

III. METHODOLOGY OF JOINT COMMITTEE STAFF REVIEW

In accordance with the request of Chairman Archer in 1999, and the requests of Mr. Rangel and Mr. Moran in 2002, the Joint Committee staff has studied the present-law tax rules and related immigration laws relating to tax-motivated citizenship relinquishment or residency termination. The purpose of the review is to:

(1) determine whether the present-law rules have been applied in the manner intended by the Congress;

(2) determine whether the administration of the present-law rules has been effective in deterring tax-motivated citizenship relinquishment or residency termination; and

(3) if the present-law rules or administration are not effective, make recommendations on ways to improve the rules or administration.

To meet these objectives, the Joint Committee staff undertook a thorough examination of the prior-law and present-law tax and immigration rules relating to tax-motivated citizenship relinquishment or residency termination and the relevant legislative history.[20] The Joint Committee staff reviewed the tax and information reporting forms and schedules required to be filed by former citizens and former long-term residents.[21] The Joint Committee staff studied the relevant IRS notices and private letter rulings that have been issued under present law.[22] The Joint Committee staff reviewed numerous commentaries by academics and practitioners relating to present law and proposed alternatives. The Joint Committee staff sought expertise from the Congressional Research Service ("CRS") to help understand immigration law, constitutional issues, and other non-tax legal matters.[23]

To assess the effectiveness of the administration of present law, the Joint Committee staff met with representatives of the relevant Federal agencies, including the Department of Treasury and the IRS (March 17, 2000), the Department of State (March 15, 2000), and the INS (March 6, 2000). In the course of completing and updating of the report in 2002, the Joint Committee staff met with representatives of the IRS (September 3, 2002). In addition, the Joint Committee staff

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[20] Part IV, below, describes the prior-law and present-law tax rules related to tax-motivated citizenship relinquishment and residency termination. Part V, below, describes present law relating to the requirements for United States citizenship, immigration, and visas. Part VI, below, reviews the relevant legislative history. Relevant tax treaties are reviewed at A-2.

[21] A copy of IRS Form 8854, Expatriation Information Statement, is at A-204.

[22] Copies of IRS Notice 97-19 and Notice 98-34 are at A-166 and A-193, respectively. Summaries of IRS private letter rulings issued to former citizens and former long-term residents are at A-218.

[23] *See* Memorandum I and II at A-53 and A-59, respectively.

requested information from each of these organizations (as well as the Tax Division of the Department of Justice) relating to the administration of present law, including requests to various agencies for updated information in 2002. All of the agencies responded. The written responses were supplemented as necessary by discussions with representatives of the relevant agencies, and in certain cases the Joint Committee staff made additional written inquiries based upon agency responses.[24]

In addition to direct inquiries, the Joint Committee staff engaged the GAO to study administrative procedures of the IRS, the INS, and the Department of State. The Joint Committee staff requested that the GAO compile data related to the number of former citizens and former long-term residents, tax return information of such individuals, and information relating to country of citizenship and residence of individuals who have relinquished citizenship or terminated residency. The Joint Committee staff met with the staff of the GAO on numerous occasions to discuss findings and to refine both requests for data and additional information regarding administrative procedures of the various agencies.[25]

The Joint Committee staff examined available tax records regarding certain individuals who have relinquished citizenship or terminated residency. This information is confidential return information, the disclosure of which is prohibited by section 6103, and is not reproduced in this report.

The Joint Committee staff discussed with practitioners the advice they offer to clients who may be contemplating citizenship relinquishment or residency termination. The Joint Committee staff asked how such individuals plan for citizenship relinquishment or residency termination and how the changes enacted in 1996 affected such planning. The Joint Committee staff queried practitioners for their opinions of how various modifications to present law might alter the planning advice they offer to such individuals. The Joint Committee staff also reviewed published materials that purport to give advice regarding the avoidance of U.S. tax through citizenship relinquishment or residency termination.

The Joint Committee staff reviewed the laws of selected foreign countries that impose tax consequences in connection with citizenship relinquishment, residency termination, and immigration. The Joint Committee staff also reviewed the tax laws relating to estates, inheritances, and gifts, with respect to both countries that are members of the Organization for Economic Cooperation and Development and countries that are reported to be the new country of

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[24] Copies of relevant correspondence are at A-10. Confidential tax return information, the disclosure of which is prohibited by section 6103, has been redacted.

[25] The GAO Report is at A-256. The GAO did not participate in the completing and updating of the Joint Committee staff review subsequent to 2000. Certain information examined by the GAO is confidential return information, the disclosure of which is prohibited by section 6103. This information was shared with the Joint Committee staff but is not reproduced in this report.

residence or citizenship of certain former citizens and former long-term residents subject to the alternative tax regime.[26]

[26] Part IX., below, provides a summary of other countries' taxation of citizenship relinquishment, residency termination, and immigration, and a summary of other countries' taxation of estates, inheritances, and gifts. The Law Library of the Library of Congress assisted the Joint Committee staff in researching these foreign laws.

IV. PRESENT-LAW TAX PROVISIONS RELEVANT TO CITIZENSHIP RELINQUISHMENT AND RESIDENCY TERMINATION

A. General Taxation of U.S. Citizens, Residents, and Nonresidents

1. Individual income taxation

(a) Income taxation of U.S. citizens and resident noncitizens

In general

A U.S. citizen generally is subject to U.S. individual income tax on his or her worldwide taxable income.[27] Thus, all income earned by a U.S. citizen, whether from sources inside or outside the United States, is taxable whether or not the individual lives within the United States. A noncitizen who resides in the United States generally is taxed in the same manner as a U.S. citizen if the individual meets the definition of a "resident" as described below.

The taxable income of a U.S. citizen or resident noncitizen is equal to the taxpayer's total worldwide income less certain exclusions, exemptions, and deductions. The appropriate tax rates are then applied to a taxpayer's taxable income to determine his or her individual income tax liability. A taxpayer may reduce his or her income tax liability by any applicable tax credits. A foreign tax credit is permitted for foreign income taxes paid on foreign-source income, subject to certain limitations.

In general, no U.S. income tax is imposed on unrealized gains and losses. When an individual disposes of property, any gain or loss on the disposition is determined by reference to the taxpayer's adjusted tax basis in the property, regardless of whether the property was acquired during the period in which the taxpayer was a U.S. citizen or resident.

Resident noncitizens

In general, a noncitizen is considered a resident of the United States[28] if the individual: (1) has entered the United States as a lawful permanent U.S. resident (the "green card test"); (2) is present in the United States for 31 or more days during the current calendar year and has been present in the United States for a substantial period of time -- 183 or more weighted days during

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[27] The determination of who is a U.S. citizen for tax purposes, and when such citizenship is considered lost, is governed by the provisions of the Immigration and Nationality Act, 8 U.S.C. sec. 1401, et seq. *See* Treas. Reg. sec. 1.1-1(c).

[28] The definitions of residents and nonresidents who are noncitizens are set forth in section 7701(b) of the Internal Revenue Code of 1986 ("the Code"). References in this document to section or sec. refer to the Code, unless otherwise noted. Section 7701(b) refers to such individuals as "resident aliens" and "nonresident aliens." Unless otherwise specified, this report will refer to the term noncitizen as opposed to alien.

a three-year period weighted toward the present year (the "substantial presence test"); or (3) makes an election to be treated as a resident of the United States (the "first year election.").[29]

An individual meets the 183-day part of the substantial presence test if the sum of: (1) the days present during the current calendar year; (2) one-third of the days present during the preceding calendar year; and (3) one-sixth of the days present during the second preceding calendar year, equals or exceeds 183 days.

An exception from being treated as a U.S. resident under the substantial presence test applies if (1) the individual is present in the United States for fewer than 183 days during the current calendar year, and (2) the individual establishes that he or she has a closer connection with a foreign country than with the United States and has a tax home in that country for the year.[30]

In general, an individual is treated as being present in the United States on any day if the individual is physically present in the United States at any time during such day.[31] An individual is not treated as present in the United States on any day during which (1) the individual regularly commutes to employment (or self-employment) in the United States from Canada or Mexico, (2) the individual is in transit between two points outside the United States and is physically present in the United States for less than 24 hours, or (3) the individual is temporarily present in the United States as a regular member of the crew of a foreign vessel engaged in transportation between the United States and a foreign country or U.S. possession.[32]

For purposes of the substantial presence test, any days that an individual is present in the United States as an "exempt individual" are not counted.[33] Exempt individuals include certain foreign government-related individuals, teachers, trainees, students, and professional athletes temporarily in the United States to compete in charitable sports events.[34] In addition, the substantial presence test does not count days of presence in the United States of an individual

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[29] Sec. 7701(b)(1)(A).

[30] Sec. 7701(b)(3)(B). The facts and circumstances to be considered when determining whether an individual maintained more significant contact with a foreign country than the United States are outlined in Treas. Reg. sec. 301.7701(b)-2(d). These criteria include; location of the individual's permanent home, location of the individual's family, location of personal belongings (e.g., automobiles, furniture, clothing), location of social, political, and cultural connections, location of routine personal banking activities, and location where the individual conducts business activities.

[31] Sec. 7701(b)(7)(A).

[32] Sec. 7701(b)(7)(B)-(D).

[33] Sec. 7701(b)(3)(D)(i).

[34] Sec. 7701(b)(5).

who is physically unable to leave the United States because of a medical condition that arose while he or she was present in the United States.[35]

In some circumstances, an individual who meets the definition of a U.S. resident (as described above) also could be defined as a resident of another country under the internal laws of that country. In order to avoid the double taxation of such individuals, most income tax treaties include a set of tie-breaker rules to determine the individual's country of residence for income tax purposes. In general, under these treaties a dual resident individual will be deemed to be a resident of the country in which he has a permanent home available to him.[36]

(b) Income taxation of nonresident noncitizens

A noncitizen who does not meet the definition of resident (as described above) is considered to be a nonresident for U.S. tax purposes. A nonresident noncitizen is subject to U.S. tax on income from U.S. sources or effectively connected with the conduct of a trade or business within the United States. Foreign-source income earned by a nonresident noncitizen generally is not subject to U.S. tax. Bilateral income tax treaties may modify the U.S. taxation of a nonresident noncitizen.

A nonresident noncitizen is taxed at regular graduated rates on net profits derived from a U.S. business.[37] A nonresident noncitizen is taxed at a flat rate of 30 percent on certain other types of income derived from U.S. sources.[38] A lower treaty rate may apply to such income. For example, dividends from portfolio investments frequently are taxed at a reduced rate of 15 percent under a treaty. Such income includes interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income. However, there is no U.S. tax imposed on interest earned by a nonresident noncitizen for deposits with U.S. banks and certain

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[35] Sec. 7701(b)(3)(D)(ii).

[36] If the individual has a permanent home available to him in both countries, the individual's residence is deemed to be the country with which his personal and economic relations are closer (i.e., his "center of vital interests"). If the country in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either country, he is deemed to be a resident of the country in which he has an habitual abode. If the individual has an habitual abode in both countries or in neither of them, he is deemed to be a resident of the country of which he is a citizen. If each country considers him to be its citizen or he is a citizen of neither of them, the competent authorities of the countries generally agree to settle the question of residence by mutual agreement.

[37] Sec. 871(b).

[38] Sec. 871(a).

types of portfolio debt investments.[39] Gains on the sale of U.S. stocks or securities generally are not taxable to a nonresident noncitizen because they are considered to be foreign-source income.[40]

A nonresident noncitizen is subject to U.S. income taxation on any gain recognized on the disposition of an interest in U.S. real property.[41] Such gains generally are subject to tax at the same rates that apply to similar income received by U.S. persons. If a U.S. real property interest is acquired from a foreign person, the purchaser generally is required to withhold 10 percent of the amount realized (i.e., the gross sales price). Alternatively, either party may request that the IRS determine the foreign person's maximum tax liability and issue a certificate prescribing a reduced amount of withholding.[42]

(c) Resident or nonresident noncitizens who physically leave the United States

With certain exceptions, a noncitizen (resident or nonresident) who physically leaves the United States or any U.S. possession is required to obtain a certificate from the IRS District Director that he or she has complied with all U.S. income tax obligations.[43] This certificate often is referred to as a "sailing permit."[44] In practice, noncitizens who leave the United States generally do not obtain a sailing permit.[45]

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[39] Secs. 871(h) and 871(i)(3).

[40] Sec. 865(a).

[41] Secs. 897, 1445, 6039C, and 6652(f), commonly referred to as the Foreign Investment in Real Property Tax Act ("FIRPTA"). Under the FIRPTA provisions, tax is imposed on gains from the disposition of an interest (other than an interest solely as a creditor) in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the U.S. Virgin Islands. Included in the definition of a U.S. real property interest is any interest (other than an interest solely as a creditor) in any domestic corporation unless the taxpayer establishes that the corporation was not a U.S. real property holding corporation at any time during the five-year period ending on the date of the disposition of the interest (sec. 897(c)(1)(A)(ii)). A U.S. real property holding corporation is any corporation if the fair market value of its U.S. real property interests equals or exceeds 50 percent of the sum of the fair market values of (1) its U.S. real property interests, (2) its interests in foreign real property, plus (3) any other of its assets which are used or held for use in a trade or business (sec. 897(c)(2)).

[42] Sec. 1445.

[43] Sec. 6851(d).

[44] A sailing permit is not required for individuals who have been in the United States for less than five days, foreign diplomats and their personal employees, certain short-term business visitors and industrial trainees, military trainees, individuals who commute to U.S. places of employment from Canada or Mexico, certain noncitizen students, and exchange visitors. A resident noncitizen who intends to maintains a U.S. residence is not eligible for these exceptions.

The requirements for obtaining a sailing permit depend upon whether the noncitizen's departure will jeopardize U.S. tax collection. If a noncitizen is a resident, the IRS District Director may determine that jeopardy exists only if there is information that indicates that the individual intends by his or her departure to avoid payment of income tax.[46] If, on the other hand, the departing noncitizen is a nonresident, the director can terminate the individual's tax year unless the individual establishes an intention to return to the United States and the departure will not jeopardize the collection of tax.[47]

If tax collection is not in jeopardy, a noncitizen who has no taxable income for the year must file with the IRS District Director a Form 2063, U.S. Departing Alien Income Tax Statement.[48] In addition, delinquent returns must be filed and taxes for prior tax years must be paid. A nonresident noncitizen who has taxable income for the year must file a Form 1040-C, U.S. Departing Alien Income Tax Return, for the tax year of the intended departure.[49] This return must show the income received and reasonably expected to be received for that year. Although the tax need not be paid on the amount shown, all returns must be filed and all taxes must be paid for prior tax years.[50] Noncitizens who have complied with these requirements will be issued sailing permits good for all departures during the current tax year. A sailing permit may be revoked if the IRS has reason to believe that a subsequent departure would result in jeopardy of tax collection.[51]

If tax collection is in jeopardy, the individual must file a Form 1040-C showing income received during the year through the date of departure.[52] The preceding tax year's return must be filed even if the period for filing has not expired.[53] All other tax returns also must be filed and

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Thus, a noncitizen who is a lawful permanent resident of the United States living near the Canadian or Mexican border technically is required to obtain a departure certificate before crossing the border to shop or have dinner.

[45] *See* generally, George Guttman, *News Analysis: the Sailing Permit: Tax Compliance and Departing Aliens*, 94 TNT 64-70 (April 4, 1994).

[46] Treas. Reg. sec. 1.6851-2(b)(1).

[47] *Id.*

[48] Treas. Reg. sec. 1.6851-2(b)(2).

[49] Treas. Reg. sec. 1.6851-2(b)(3)(ii)(A).

[50] Treas. Reg. sec. 1.6851-2(b)(3)(ii).

[51] Treas. Reg. sec. 1.6851-2(b)(2)(ii) and 1.6851-2(b)(3)(ii).

[52] Treas. Reg. sec. 1.6851-2(b)(3)(iii)(a).

[53] Treas. Reg. sec. 1.6851-2(b)(3)(iii)(b).

the tax required to be shown on the return and any taxes due and owing must be paid.[54] A bond or employer letter guaranteeing payment can be furnished instead of paying the income taxes due on Form 1040-C or the tax return for the preceding year if the period for filing such return has not expired.[55] The bond must equal the tax due plus interest to the date of payment as computed by the IRS. Taxes for earlier years cannot be postponed. The noncitizen will then be issued a sailing permit, but it will only be good for the specific departure date for which it is issued.[56]

(d) Transfers to foreign corporations, partnerships, estates, or trusts

Transfers to foreign corporations

The Code provides rules designed to prevent avoidance of U.S. tax with respect to gain inherent in property transferred to a foreign corporation. Gain generally is recognized when a U.S. person transfers appreciated property to a foreign corporation (notwithstanding general nonrecognition provisions of the Code).[57]

Certain exceptions from the general recognition rules apply. First, the rules generally do not apply unless there is a transfer by a U.S. person to a foreign corporation. Thus, individuals who relinquish U.S. citizenship or individuals who terminate U.S. residency generally are not subject to the section 367 rules after such relinquishment or termination.[58] A U.S. person who relinquishes citizenship or terminates residency may subsequently engage in transactions that involve the transfer of property to a foreign corporation without any adverse consequences under section 367.[59]

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[54] Treas. Reg. sec. 1.6851-2(b)(3)(iii)(c).

[55] Treas. Reg. sec. 1.6851-2(b)(3).

[56] *Id.*

[57] Sec. 367.

[58] The Department of Treasury has considerable regulatory authority under section 367 to address situations that may result in U.S. tax avoidance. For example, section 367(b) provides that certain tax-free corporate transactions that do not involve a transfer of property from a U.S. person (within the meaning of section 367(a)(1)) can be recharacterized as taxable "to the extent provided in regulations prescribed by the Secretary which are necessary or appropriate to prevent the avoidance of Federal income taxes." The legislative history of this provision suggests that it was directed principally at situations involving avoidance of U.S. tax on foreign earnings and profits.

[59] Section 877(d) generally provides for gain recognition in certain cases in which appreciated U.S.-source property is transferred by a former citizen or former long-term resident who is subject to the alternative tax regime in an otherwise tax-free exchange for foreign-source property. See Part IV.B, below, which contains a detailed discussion of certain anti-abuse rules

Second, section 367 does not apply in the case of property transferred by a U.S. person to a foreign corporation for use by such foreign corporation in the active conduct of a trade or business outside of the United States.[60] Certain property, such as inventory and intangible property, is not eligible for this exception.[61] Third, section 367 does not apply to certain transfers by U.S. persons of stock in U.S. corporations to foreign corporations.[62]

Certain taxpayers may avoid gain recognition under section 367 by entering into a gain recognition agreement obligating the taxpayer to recognize gain and pay tax if the property is disposed of within a specified time period after the transfer. The gain recognition agreement rules generally require the taxpayer to agree to file an amended return for the year of the original transfer if the property is disposed of by the transferee foreign corporation.[63] If a U.S. person who has entered into a gain recognition agreement either loses U.S. citizenship or ceases to be taxed as a lawful permanent resident (as the case may be), then immediately prior to such loss of status, the gain recognition agreement is triggered as if the transferee foreign corporation disposed of all the stock of the transferred corporation in a taxable transaction. No further gain is required to be recognized after such loss of status.[64]

Transfers to foreign partnerships

Transfers of property by U.S. persons to partnerships, both foreign or domestic, generally qualify as tax-free exchanges. However, the Treasury Secretary has regulatory authority to provide for gain recognition on a transfer of appreciated property by a U.S. person to a

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applicable to former citizens and former long-term residents under section 877, including certain property transfers to foreign corporations.

[60] Sec. 367(a)(3).

[61] Sec. 367(a)(3)(B). Under section 367(d), a U.S. person that contributes intangible property to a foreign corporation is treated as having sold the property to the corporation and is treated as receiving payments from the corporation that are commensurate with the income attributable to the intangible. The deemed payments under section 367(d) are treated as foreign-source income to the same extent that an actual royalty payment would be considered to be foreign-source income. Regulatory authority is granted to provide similar treatment in the case of a transfer of intangible property to a partnership.

[62] Sec. 367(a)(2) and Treas. Reg. sec. 1.367(a)-3(c).

[63] If a certain election is made, the taxpayer may file a return for the period in which the transferee foreign corporation disposes of the property, reporting gain from the original transfer plus interest on additional tax due. Treas. Reg. sec. 1.367(a)-8(b)(3).

[64] Gain recognition agreements filed under the special tax rules under section 877 (as discussed in Part IV.B.1.d, below) may not be used to avoid triggering gains under a section 367 gain recognition agreement. Treas. Reg. sec. 1.367(a)-8(e)(3)(ii).

partnership in cases in which such gain otherwise would be recognized by a foreign partner.[65] No regulations have been issued under this grant of authority.

Transfers to foreign estates or trusts

A U.S. person must recognize gain or loss upon the transfer of property to a foreign estate or trust as if such property was sold for an amount equal to its fair market value.[66] Certain exceptions from this general rule are provided in regulations.[67] The general recognition rule does not apply in the case of a transfer to a trust to the extent that any person is treated as the owner of the trust under section 679 (i.e., a grantor trust). For purposes of these rules, a U.S. trust that becomes a foreign trust is treated as having transferred all of its assets to a foreign trust. Thus, a U.S. trust that converts into a foreign trust is subject to the general gain recognition rule unless the foreign trust qualifies as a grantor trust. An individual who has renounced U.S. citizenship or terminated U.S. residency is not subject to these rules for transfers after such renunciation or termination.

(e) Like-kind exchanges

An exchange of property, like a sale, generally is a taxable event. However, no gain or loss is recognized if property held for productive use in a trade or business or for investment is exchanged for property of a "like-kind" that also is to be held for productive use in a trade or business or for investment.[68] If this "like-kind" exchange rule applies to an exchange, the basis of the property received in the exchange is equal to the basis of the property transferred, decreased by any money received by the taxpayer, and further adjusted for any gain or loss recognized on the exchange.

In general, real estate is treated as of a like-kind with other real property as long as the properties are both located either within or without the United States. Thus, an exchange of U.S. real estate for foreign real estate would not qualify for tax-free treatment. Similarly, personal property predominantly used within the United States and personal property predominantly used outside the United States are not like-kind properties.

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[65] Sec. 721(c).

[66] Sec. 684.

[67] Treas. Reg. sec. 1.684-3.

[68] Sec. 1031. Certain types of business property, such as inventory, stocks, bonds, and partnership interests, are not eligible for nonrecognition treatment under section 1031.

2. Estate, gift, and generation-skipping transfer taxation

(a) In general

Application of the estate and gift tax

U.S. citizens and resident noncitizens are subject to estate tax on the transfer of their worldwide estate at the time of death.[69] Estate tax also is imposed on the transfer of property belonging to nonresident noncitizens which, at the time of death, is situated in the United States.[70] EGTRRA repealed the estate tax for estates of decedents dying after December 31, 2009. However, EGTRRA included a "sunset" provision, pursuant to which the estate tax repeal "sunsets" one year later. Thus, the estate tax is repealed for 2010 and then is reinstated for estates of decedents dying after December 31, 2010.

U.S. citizens and resident noncitizens are subject to gift tax on transfers of property by gift made directly or indirectly, in trust or otherwise.[71] Nonresident noncitizens are subject to gift tax with respect to transfers of tangible real or personal property that is situated in the United States at the time of the gift. In general, no gift tax is imposed on gifts made by nonresident noncitizens of intangible personal property situated within the United States (e.g., U.S. stocks and bonds).[72] EGTRRA did not repeal the gift tax for any year.

Residency for purposes of estate and gift taxation is determined under rules different from those applicable to the income tax. In general, an individual is considered to be a resident of the United States for estate and gift tax purposes if the individual is "domiciled" in the United States.[73] An individual is domiciled in the United States if the individual lives in the United States, for even a brief period of time, with no definite present intention of later leaving the United States.

The gift tax and the estate tax are unified so that a single graduated rate schedule applies to cumulative taxable transfers made by a taxpayer during his or her lifetime and at death.[74] The highest marginal rate is 49 percent for 2003, phasing down to 45 percent by 2007.[75] A unified

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[69] Secs. 2001 and 2031.

[70] Secs. 2101 and 2103.

[71] Sec. 2501.

[72] Sec. 2501(a)(2).

[73] Treas. Reg. sec. 20.0-1(b)(1).

[74] For gifts made during 2010, when the estate tax is repealed under present law, a separate gift tax rate schedule applies, with rates beginning at 18 percent on the first $10,000 of taxable gifts and reaching a maximum marginal rate of 35 percent on taxable gifts over $500,000. Sec. 2502(a).

[75] Sec. 2001(c).

credit is available with respect to taxable transfers by gift and at death. The unified credit amount effectively exempts from estate tax transfers totaling $1 million in 2002 and 2003, $1.5 million in 2004 and 2005, $2 million in 2006, 2007, and 2008, and $3.5 million in 2009.[76] In 2010 the estate tax is repealed, and in 2011 and thereafter the estate tax is reinstated with a unified credit exemption equivalent amount of $1 million. For gift tax purposes, the effective exemption never increases above $1 million.[77] Both the estate tax and gift tax provide an unlimited deduction for certain amounts transferred from one spouse to another spouse, provided that the recipient spouse is a citizen of the United States.[78]

(b) Estate tax

U.S. citizens and resident noncitizens

An estate tax is imposed on the taxable estate of any person who is a citizen or a resident noncitizen of the United States at the time of death.[79] The taxable estate is equal to the decedent's worldwide gross estate, less allowable deductions (including the marital deduction).[80] Certain credits are allowed, including the unified credit, which directly reduce the amount of the estate tax.

The gross estate generally includes the value of all property in which a decedent had an interest at death.[81] The amount included in the gross estate generally is equal to the fair market value of the property at the date of the decedent's death, unless the executor elects to value all property in the gross estate at the alternate valuation date (which is six months after the date of the decedent's death).[82] The estate tax generally is due nine months after the date of the decedent's death.[83] The IRS may grant a reasonable extension for a period not to exceed six months.

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[76] The benefit of the unified credit applies at the lowest estate and gift tax rates. For example, in 2002, the unified credit applied between the 18-percent and 39-percent estate and gift tax rates. Thus, in 2002, taxable transfers, after application of the unified credit, were subject to estate and gift tax rates beginning at 41 percent.

[77] Sec. 2505.

[78] Secs. 2056 and 2523.

[79] Sec. 2001(a).

[80] Sec. 2051.

[81] Sec. 2031.

[82] Sec. 2032.

[83] Sec. 6081.

The gross estate includes the value of certain properties not owned by the decedent at death if certain circumstances are met. These generally include pre-death transfers for less than adequate and full consideration if: (1) the decedent retained the beneficial enjoyment of the property during his life; (2) the property was previously transferred during the decedent's lifetime but the transfer takes effect at the death of the decedent; and (3) the decedent retained the power to alter, amend, revoke, or terminate a previous lifetime transfer.[84] Beneficial interests in a trust that the decedent owns at the time of his death and which do not terminate with his death generally also are includible in his or her gross estate.

Nonresident noncitizens

The estate of a nonresident noncitizen generally is taxed at the same estate tax rates applicable to U.S. citizens, but the taxable estate includes only property situated within the United States that is owned by the decedent at death.[85] This includes the value at death of all property, real or personal, tangible or intangible, situated in the United States. Property situated within the United States (i.e., U.S.-situs property) also includes stock issued by a U.S. corporation,[86] transfers within three years of death, and certain revocable transfers if such property was situated in the United States either at the time of transfer or at death.[87] Special rules apply which treat certain property as being situated outside the United States for these purposes.[88]

To the extent provided by treaty, the estate of a nonresident noncitizen is allowed a pro rata portion of the generally applicable unified credit. The amount allowable in this case is the amount that bears the same ratio to the unified credit as the portion of the gross estate situated in the United States bears to the total gross estate.[89] Absent treaty relief, the estate of a nonresident noncitizen is allowed a unified credit of $13,000 (which effectively exempts the first $60,000 of the estate from tax).[90]

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[84] Secs. 2036 through 2038.

[85] Sec. 2103.

[86] Sec. 2104(a).

[87] Sec. 2104(b).

[88] *See*, *e.g.*, sec. 2105 (certain life insurance proceeds, bank deposits, and debt instruments).

[89] Sec. 2102(c)(3).

[90] Sec. 2102(c)(1).

(c) Gift tax

U.S. citizens and resident noncitizens

U.S. citizens and resident noncitizens are subject to gift tax on any transfer of property by gift made directly or indirectly, in trust or otherwise.[91] Thus, the gift tax applies to transfers of property, regardless of where such property is situated (in the United States or outside the United States). The amount of a taxable gift is determined by the fair market value of the property on the date of gift. An annual exclusion from the gift tax applies for gifts up to $11,000 ($22,000 if the non-donor spouse consents to treat the gift as having been made one half by each spouse), adjusted periodically for inflation.[92]

Nonresident noncitizens

Nonresident noncitizens are subject to gift tax with respect to certain transfers by gift of U.S.-situated property.[93] Such property includes real estate and tangible property located within the United States. Nonresident noncitizens generally are not subject to U.S. gift tax on the transfer of intangibles, such as stock or securities, regardless of where such property is situated.[94]

(d) Generation-skipping transfer tax

In general

A separate transfer tax is imposed on generation-skipping transfers in addition to any estate and gift tax that applies to such transfers.[95] This tax generally is imposed on transfers, either directly or indirectly or through a trust or similar arrangement, to a beneficiary in more than one generation below that of the transferor. The generation-skipping transfer tax is imposed at the maximum Federal estate tax rate, i.e., a flat rate of 49 percent for 2003, on generation-skipping transfers in excess of a $1.1 million lifetime generation-skipping transfer exemption for 2003.[96] The generation-skipping transfer exemption amount is adjusted periodically for inflation.

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[91] Sec. 2501.

[92] Sec. 2503(b).

[93] Secs. 2501, 2511(a).

[94] Sec. 2501(a)(2).

[95] Secs. 2601 through 2663.

[96] Sec. 2631.

Nonresident noncitizens

Nonresident noncitizens are subject to generation-skipping transfer tax only on transfers of property situated within the United States.[97] Nonresident noncitizens are allowed the $1.1 million generation-skipping transfer tax exemption.[98]

3. Income taxation of trusts, estates, and their beneficiaries

(a) Taxation of trusts and estates

In general

A trust or estate generally is treated as a conduit for income purposes in that the trust or estate is allowed a deduction for distributions to its beneficiaries during the year. The trust or estate is taxed on its income, reduced by the distribution deduction, as a separate taxable entity with certain exceptions.[99]

Grantor trusts

The grantor of a trust is taxed as the owner of the trust (or a portion thereof) if he or she retains certain powers or rights over the trust.[100] A U.S. person who transfers property to a foreign trust generally is treated as the owner of a portion of the trust.[101] The portion of the trust

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[97] Treas. Reg. sec. 26.2663-2(b), (c).

[98] Treas. Reg. sec. 26.2663-2(a).

[99] In addition to the distribution deduction, these exceptions include: (1) a separate tax rate schedule applies to estates and trusts; (2) an unlimited charitable deduction is allowed for amounts paid to (and, in the case of estates, amounts permanently set aside for) charity; (3) a personal exemption of $600 is allowed to an estate, $300 to a trust that is required to distribute all of its income currently, or $100 to any other trust; and (4) no standard deduction is allowed.

[100] Secs. 671 through 679. A grantor of a trust generally is treated as the owner of any portion of a trust if: (1) the grantor has a reversionary interest in either the corpus or the income from the corpus, if certain conditions are satisfied; (2) the grantor has a power of disposition without the approval or consent of any adverse party; (3) the grantor can exercise certain administrative powers over the trust; (4) the grantor or a nonadverse party has the power to revoke, i.e., revest in the grantor title of a portion of the trust; and (5) without prior approval of an adverse party, the income from the trust may be distributed to or for the benefit of the grantor or the grantor's spouse.

[101] For income tax purposes, a foreign trust is any trust, except if (1) a court within the United States is able to exercise primary supervision over the administration of the trust, and (2) one or more U.S. persons have the authority to control all substantial decisions of the trust. Sec. 7701(a)(31). Trusts that meet these two exceptions are treated as U.S. persons for income tax purposes. Sec. 7701(a)(30).

that the U.S. person is deemed to own is the portion that is attributable to the property transferred by the U.S. person, provided there is a U.S. beneficiary for any portion of the trust.[102] These rules generally do not apply, however, to any transfer made by reason of the death of the transferor or to sales or exchanges of property at fair market value.[103]

(b) Taxation of distributions to beneficiaries

Distributions from a trust or estate to a beneficiary generally are includible in the beneficiary's gross income to the extent of the distributable net income of the trust or estate. Distributable net income serves to measure the total amount of distributions that an estate or trust can deduct from its gross income, as well as the total amount of income that a beneficiary must include in gross income.[104]

There may be instances in which a trust beneficiary's income tax bracket is higher than the trust's tax bracket. Certain rules, which generally apply only to foreign trusts, apply to avoid the accumulation of income in the trust. Under these rules, an additional tax is imposed on the distribution of previously accumulated income in the year of distribution, but at the average marginal rate of the beneficiary during the previous five years.[105]

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[102] Sec. 679(a)(1).

[103] Sec. 679(a)(2).

[104] Sec. 643(a).

[105] Sec. 667(a) and (b). The amount of the distribution is grossed up by the amount of foreign taxes paid by the trust on the accumulated income, and a deduction or nonrefundable credit is allowed to the beneficiary for such taxes. Sec. 667(d). An interest charge is imposed under these throwback rules. Sec. 668.

B. Alternative Tax Regime for Individuals Who Relinquish U.S. Citizenship or Terminate U.S. Residency With a Principal Purpose of Tax Avoidance

1. Income taxation

(a) In general

An individual who relinquishes his or her U.S. citizenship or terminates his or her U.S. residency with a principal purpose of avoiding U.S. taxes is subject to an alternative tax regime for income tax purposes for the 10 taxable years ending after citizenship relinquishment or residency termination.[106] The alternative tax regime applies to such individuals only if it results in a higher U.S. tax liability than would otherwise be determined if the individual were taxed as a nonresident noncitizen.

The alternative tax regime for an individual who relinquishes U.S. citizenship or terminates U.S. residency with a principal purpose of avoiding U.S. taxes modifies the rules generally applicable to the taxation of nonresident noncitizens in several ways. First, the individual is subject to tax on U.S.-source income at the rates applicable to U.S. citizens rather than the rates applicable to other nonresident noncitizens.[107] Second, the scope of items treated as U.S.-source income for section 877 purposes is broader than under the general sourcing rules.[108] Third, the individual is taxed on exchanges of certain types of property that give rise to U.S.-source income for property that gives rise to foreign-source income.[109] Fourth, the individual is taxed on certain income or gain derived from stock in a closely-held foreign corporation.[110] Fifth, the individual is taxed on income or gain from certain property contributed to a controlled foreign corporation.[111]

The determination of whether an individual relinquishes his or her U.S. citizenship for purposes of section 877 is governed by the provisions of the Immigration and Nationality Act.[112]

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[106] Sec. 877.

[107] Sec. 877(b).

[108] Sec. 877(d). For example, gains on the sale or exchange of personal property located in the United States, and gains on the sale or exchange of stocks and securities issued by U.S. persons, generally are not considered to be U.S.-source income under the Code. Thus, such gains normally would not be taxable to a nonresident noncitizen. If an individual is subject to the alternative tax regime, however, such gains are treated as U.S.-source income with respect to that individual.

[109] Sec. 877(d)(2).

[110] Sec. 877(d)(1)(C).

[111] Sec. 877(d)(4).

[112] 8 U.S.C. sec. 1481. *See* Treas. Reg. sec. 1.1-1(c).

Under these provisions, a U.S. citizen may voluntarily give up his or her U.S. citizenship at any time by performing one of a number of "expatriating acts" with the intention of relinquishing U.S. nationality.[113] The most common of these acts are (1) to formally renounce one's nationality before a U.S. diplomatic or consular officer in a foreign country (by executing an Oath of Renunciation), or (2) to become naturalized in a foreign country.[114] An individual generally is considered to have lost his or her citizenship on the date that an expatriating act is committed, even though the loss may not be documented until a later date. When an individual acknowledges to a consular officer that an expatriating act was taken with the requisite intent, the consular officer prepares a certificate of loss of nationality ("CLN").[115] Once the CLN has been approved by the Department of State, a copy of the CLN is issued to the affected individual.

Section 877 also applies to long-term residents of the United States whose U.S. residency is terminated.[116] For this purpose, a long-term resident is any individual who was a lawful permanent resident of the United States for at least eight out of the 15 taxable years ending with the year in which such termination occurs.[117] An individual's U.S. residency is considered to be terminated when the individual either (1) ceases to be a lawful permanent resident pursuant to section 7701(b)(6) (i.e., the individual loses green-card status), or (2) is treated as a resident of another country under a tax treaty (and the individual does not also elect to waive the benefits of such treaty).

An individual who either relinquishes U.S. citizenship or terminates U.S. residency is subject to tax for a taxable year as though such year were comprised of two separate periods -- the time during which he or she is a U.S. citizen or U.S. resident and the time during which he or she is not a U.S. citizen or U.S. resident.[118] The individual is considered to be a noncitizen or a nonresident on the day he or she relinquishes U.S. citizenship or terminates U.S. residency.[119] Thus, for the tax year in which an individual's status as either a U.S. citizen or U.S. resident changes, such individual would be required to file one tax return as a U.S. citizen or U.S.

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[113] 8 U.S.C. sec. 1481.

[114] *See* Part V.B, below, for a more comprehensive description of these provisions.

[115] A sample of a CLN is at A-209.

[116] For purposes of determining any tax imposed under the alternative tax regime, any property held by a long-term resident on the date he or she becomes a U.S. resident is treated as having a tax basis of no less than its fair market value on such date. However, the individual may irrevocably elect not to have this provision apply.

[117] In applying the eight-year test, an individual is not considered to be a lawful permanent resident for any year in which the individual is treated as a resident of another country under a tax treaty (and the individual does not also elect to waive the benefits of such treaty).

[118] Treas. Reg. sec. 1.871-13(a)(1).

[119] Treas. Reg. sec. 1.871-13(a)(2).

resident (i.e., Form 1040) and another tax return as a noncitizen or nonresident (i.e., Form 1040NR).[120]

(b) Former citizens and former long-term residents deemed to have a principal purpose of tax avoidance

U.S. citizens who relinquish their citizenship and long-term residents who terminate their U.S. residency generally are treated (i.e., deemed) as having relinquished such citizenship or terminated such residency with a principal purpose of the avoidance of taxes if either: (1) the individual's average annual U.S. Federal income tax liability for the five taxable years ending before the date of such citizenship relinquishment or residency termination is greater than $100,000 (the "tax liability test"), or (2) the individual's net worth as of the date of such citizenship relinquishment or residency termination is $500,000 or more (the "net worth test").[121] These two tests are collectively referred to as the "monetary thresholds." The monetary thresholds are indexed for inflation in the case of a relinquishment of citizenship or termination of residency occurring in any calendar year after 1996. For 2003, the monetary thresholds for the tax liability test and the net worth test are $122,000 and $608,000, respectively.[122] Notwithstanding that an individual exceeds one of the monetary thresholds, as discussed in Part IV.B.1.c. below, certain exceptions may apply.

Although no regulations have been issued under section 877, Notice 97-19,[123] as modified by Notice 98-34,[124] provides guidance regarding the alternative tax regime, including rules applicable to the tax liability test and the net worth test. For purposes of the tax liability test, an individual's net U.S. income tax is determined under section 38(c)(1) (which provides a definition of net income tax for purposes of a limitation on general business credits). For purposes of the net worth test, a former citizen or former long-term resident is considered to own any interest in property that would be subject to gift tax if the individual were a U.S. citizen or resident who transferred the interest immediately prior to citizenship relinquishment or residency termination. A former citizen's or former long-term resident's beneficial interest in a trust also is included in the net worth calculation.

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[120] Each of these tax returns should reflect the income that is attributable to the respective number of days that fall within each of the two periods. Special rules apply for these purposes with respect to foreign-source income which is not effectively connected with a U.S. trade or business. Treas. Reg. sec. 1.871-13(c).

[121] Sec. 877(a)(2).

[122] Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

[123] 1997-1 C.B. 394. *See* A-166.

[124] 1998-2 C.B. 29. *See* A-193.

(c) Former citizens and former long-term residents not deemed to have a principal purpose of tax avoidance

Former citizens and former long-term residents falling below the monetary thresholds

A former citizen or former long-term resident who falls below the monetary thresholds is not automatically treated as having a principal purpose of tax avoidance, but nevertheless is subject to section 877 if the individual's relinquishment of citizenship or termination of residency had as one of its principal purposes the avoidance of tax. Factors taken into account in making a determination as to the existence of a principal purpose of tax avoidance include the substantiality of a former citizen's ties to the United States (including ownership of U.S. assets) prior to citizenship relinquishment, the retention of U.S. citizenship by the former citizen's spouse, and whether a former citizen resides in a country that imposes little or no tax.[125] If the Secretary of the Treasury establishes a reasonable belief that a relinquishment of U.S. citizenship or termination of U.S. residency would likely result in a substantial tax reduction for the year of citizenship relinquishment, the former citizen or former long-term resident bears the burden of proof that his or her relinquishment of citizenship or termination of residency did not have a principal purpose of tax avoidance.[126]

Former citizens who exceed the monetary thresholds

A U.S. citizen who loses his or her citizenship and who exceeds one of the monetary thresholds (described above) is nevertheless not treated (i.e., not deemed) as having a principal purpose of tax avoidance if the individual: (1) within one year from the date of loss of citizenship submits a ruling request for a determination by the Secretary of the Treasury as to whether such loss had as one of its principal purposes the avoidance of taxes; and (2) falls within one of certain categories of individuals eligible to submit such a ruling request.[127] The categories of individuals who are eligible to request a ruling are: (1) individuals born with dual citizenship who retain only their non-U.S. citizenship; (2) individuals who become, within a reasonable period after citizenship relinquishment, a citizen of the country in which the individual, the individual's spouse, or one of the individual's parents, was born; (3) individuals present in the United States for no more than 30 days during each year in the 10-year period immediately preceding the date of his or her loss of citizenship; (4) individuals who relinquish their citizenship before reaching age 18 ½; and (5) any other category of individuals prescribed by

[125] H.R. Conf. Rep. No. 104-736, at 325 (1996).

[126] Sec. 877(f).

[127] Sec. 877(c)(1).

Treasury regulations.[128] The ruling procedures to qualify for these exceptions are detailed in Notice 97-19, as revised by Notice 98-34.[129]

Under Notice 98-34, if a former U.S. citizen's tax liability or net worth exceeds the applicable thresholds, the individual will not be treated as having a principal purpose of tax avoidance if he or she: (1) is eligible to submit a ruling request that his or her citizenship relinquishment did not have for one of its principal purposes the avoidance of U.S. taxes (based on one of the categories set forth above); (2) submits such a request in a timely manner; and (3) provides the IRS with a complete and good faith ruling request.[130] The IRS determines whether a submission was complete and provided in good faith. If the ruling request constitutes a complete and good faith submission, the IRS may also, depending on the information submitted, provide a substantive ruling as to whether the individual's citizenship relinquishment had as one of its principal purposes the avoidance of U.S. taxes. Alternatively, the determination may express no opinion as to whether the individual's citizenship relinquishment had for one of its principal purposes the avoidance of U.S. taxes in cases in which, although there is a complete and good faith submission, the information submitted does not clearly establish the existence or lack of such a principal purpose. In sum, under Notice 98-34, an individual must receive a determination that he or she made a timely, complete, good-faith ruling request in order to avoid the deemed treatment of having a principal purpose of tax avoidance under section 877(a)(2). Such a determination may express a favorable opinion, an unfavorable opinion, or no opinion as to whether one of the individual's principal purposes is tax avoidance.

If the IRS determines only that a request was complete and submitted in good faith, such a determination means that the individual is not deemed to have a tax avoidance purpose. The determination, however, is not conclusive as to whether the individual ultimately can be found to have a principal purpose of tax avoidance based on the individual's facts and circumstances. Such a determination would be reserved for a subsequent time, such as on audit.

Before the IRS issued Notice 98-34, Notice 97-19 provided that a former citizen or former long-term resident who satisfied the tax liability test or net worth test would be subject to the alternative tax regime, unless such individual obtained a favorable ruling that the individual did not relinquish citizenship or terminate residency with a principal purpose to avoid tax. Thus, under Notice 97-19, the IRS would render either a favorable or unfavorable ruling as to the substantive question of the individual's purposes. The IRS stated in Notice 98-34 that making a

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[128] Sec. 877(c)(1)(A) and (2).

[129] 1997-1 C.B. 394 and 1998-2 C.B. 29, respectively. *See* A-166 and A-193, respectively.

[130] In addition, under the notices, former citizens who "narrowly" fail to satisfy one or more of the respective criteria may nevertheless submit a ruling request. The Secretary of the Treasury, in his or her sole discretion, may decline to rule on any such request if it is determined that the taxpayer more than "narrowly" failed to satisfy any of the requirements. In such a case, the former citizen would not be considered to have submitted a ruling request and, thus, would be subject to section 877.

determination regarding tax avoidance in an advance ruling presented difficulties due to the inherently factual and subjective nature of the inquiry and that in some cases the information submitted with the ruling request did not clearly establish the existence or lack of such a principal purpose.[131] As a result, the IRS modified its procedures to add a third type of ruling, a "fully submit" ruling, under which the deemed tax-avoidance purpose treatment under section 877(a)(2) does not apply when an individual meets all submission criteria and completes a good-faith ruling request. The modified procedures apply to ruling requests pending on and submitted after July 6, 1998.[132]

Former long-term residents who exceed the monetary thresholds

The Secretary of the Treasury is authorized to prescribe regulations to exempt categories of former long-term residents from section 877.[133] Under Notice 97-19, as modified by Notice 98-34, a former long-term resident may be excepted from being treated as having a principal purpose of tax avoidance (notwithstanding that such person exceeds one of the monetary thresholds), but only if he or she submits a ruling request within one year after residency termination, and the individual either: (1) becomes, within a reasonable period after residency termination, a resident fully liable for income tax in the country in which he or she was born, his or her spouse (if married) was born, or his or her parents were born; (2) was present in the United States for 30 days or less during each year of the 10-year period prior to residency termination; or (3) ceases to be taxed as a lawful permanent resident, or commences to be treated as a resident of another country under an income tax treaty and does not waive the benefits of such treaty applicable to residents of the foreign country, before the individual reaches age 18½ .[134]

(d) Income subject to section 877

Nonresident noncitizens (including former citizens and former long-term residents) are subject to U.S. income tax at graduated rates on certain types of U.S.-source income. Such

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[131] Notice 98-34, sec. III. *See* A-166.

[132] In addressing the ruling requests under Notice 97-19, the IRS also found that the information required to be submitted under that notice was insufficient in many instances. Notice 98-34 therefore modifies the information that must be submitted with the ruling request in order for the request to be considered a complete and good faith submission. For a detailed description of the required information, *see* Notice 98-34, sec III.

[133] Sec. 877(e)(4).

[134] As is the case with former citizens, Notice 97-19 and Notice 98-34 provide that former long-term residents who "narrowly" fail to satisfy one or more of the ruling criteria may nevertheless submit a ruling request.

income includes income effectively connected with a U.S. trade or business and gains from the disposition of interests in U.S. real property.[135]

The scope of items treated as U.S.-source income for section 877 purposes is broader than those items generally considered to be U.S.-source income under the Code. These special sourcing rules treat as U.S.-source income such items as gain on the sale or exchange of certain property located in the United States, gain on sale or exchange of stock of a U.S. corporation or debt of a U.S. person, income derived through controlled foreign corporations, gain on certain foreign property acquired in nonrecognition transactions, and gain on certain contributions of U.S. property to foreign corporations.

Gains from the sale or exchange of property located in the United States

Section 877 recharacterizes as U.S.-source income certain gains of former citizens or former long-term residents who are subject to the alternative tax regime, thereby imposing U.S. income tax on such gains (which otherwise would not be subject to U.S. tax in the hands of a nonresident noncitizen). Under this rule, gain on the sale or exchange of property (other than stock or debt obligations) located in the United States, as well as gains on the sale or exchange of stock issued by a U.S. corporation or debt obligations of a U.S. person, are treated as U.S.-source income.[136] In this regard, the substitution of a foreign obligor for a U.S. obligor generally is treated as a taxable exchange of the debt instrument and, therefore, any gain on such exchange is subject to tax under section 877. Such U.S.-source income and gains of the individual are taxable during the 10-year period after citizenship relinquishment or residency termination, without regard to whether the property giving rise to such income or gains was acquired before or after the date the individual became subject to section 877.

Income or gain derived from controlled foreign corporation stock

Section 877 treats as U.S.-source any income or gain derived from stock in a foreign corporation if the individual relinquishing citizenship or terminating residency owns, directly or indirectly, more than 50 percent of the vote or value of the stock of the corporation on the date of such relinquishment or termination or at any time during the 2-year period preceding such date.[137] Such income and gains are recharacterized as U.S.-source only (1) to the extent of the amount of earnings and profits attributable to such stock earned or accumulated prior to the date

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[135] For example, compensation (including deferred compensation) paid with respect to services performed in the United States is subject to such tax. Thus, a U.S. citizen who earns a stock option while employed in the United States and delays the exercise of such option until after such individual loses his or her citizenship is subject to U.S. tax on the compensation income recognized upon exercise of the stock option (even if the stock received upon the exercise is stock in a foreign corporation).

[136] Sec. 877(d)(1)(A) and (B).

[137] Sec. 877(d)(1)(C).

of loss of citizenship (or termination of residency, as applicable) and (2) while the ownership requirement is satisfied.[138]

Nonrecognition exchanges of U.S. property for foreign property

An individual subject to section 877 who exchanges property that would produce U.S.-source income for property that would produce foreign-source income is required to recognize immediately as U.S.-source income any gain on such exchange (determined as if the property had been sold for its fair market value on such date).[139] To the extent gain is recognized under this provision, the property would be accorded a step-up in basis. This rule requiring immediate gain recognition does not apply if the individual enters into an agreement with the Secretary of the Treasury specifying that any income or gains derived from the property received in the exchange during the 10-year period after the relinquishment of citizenship (or termination of residency, as applicable) will be treated as U.S.-source income. The gain recognition agreement terminates if the property transferred in the exchange is disposed of by the acquiror; any gain that had not been recognized by reason of the agreement is then recognized as U.S.-source. The Secretary of the Treasury is authorized to issue regulations providing similar treatment for nonrecognition transactions that occur within five years immediately prior to the date of relinquishment of citizenship (or termination of residency, as applicable). Under Notice 97-19, the above rules are applied by substituting the 15-year period beginning five years prior to the citizenship relinquishment or residency termination for the 10-year period described above.[140] In the case of any exchange occurring during the five years prior to the citizenship relinquishment or residency termination, any gain realized is to be recognized immediately after the loss of citizenship (or termination of residency).

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[138] The following example illustrates this rule: Mr. B lost his U.S. citizenship on July 1, 2002 and is subject to section 877. Mr. B has owned all of the stock of a foreign corporation, ("FCo"), since its incorporation in 1996. As of December 31, 2001, FCo has accumulated earnings and profits of $500,000. FCo has current earnings and profits of $100,000 for 2002 and does not have any subpart F income. FCo makes a $100,000 distribution to Mr. B in each of 2003 and 2004. On January 1, 2005, Mr. B disposes of all his stock of FCo and realizes $400,000 of gain. The distributions from FCo and the gain on the sale of the stock of FCo would be treated as U.S.-source income and would be taxed to Mr. B under section 877, subject to the earnings and profits limitation. For this purpose, FCo's earnings and profits for 2002 are pro-rated based on the number of days during 2002 that Mr. B is a U.S. citizen. Thus, the amount of FCo's earnings and profits earned or accumulated before Mr. B's loss of citizenship is $550,000. Accordingly, the $100,000 distributions from FCo in 2003 and 2004 would be treated as U.S.-source income taxable to Mr. B under section 877. In addition, $350,000 of the gain realized from the sale of the stock of FCo in 2005 would be treated as U.S.-source income taxable to Mr. B under section 877.

[139] Sec. 877(d)(2).

[140] Notice 97-19, sec. I. *See* A-166.

The Secretary of the Treasury is authorized to issue regulations to treat removal of tangible personal property from the United States, and other circumstances that result in a conversion of U.S.-source income to foreign-source income without recognition of any unrealized gain, as exchanges for purposes of computing gain subject to section 877. The taxpayer may defer the recognition of the gain if he or she enters into a gain recognition agreement as described above. For example, a former citizen who is subject to the alternative tax regime and who removes appreciated artwork that he or she owns from the United States could be subject to immediate U.S. tax on the appreciation under this provision unless the individual enters into a gain recognition agreement. Under Notice 97-19, the removal from the United States of appreciated tangible personal property having an aggregate fair market value in excess of $250,000 within the 15-year period beginning five years prior to the citizenship relinquishment or residency termination will be treated as an "exchange" subject to these rules. Gain from the removal of tangible personal property worth $250,000 or less will not be subject to the section 877 alternative tax regime.

Contributions of U.S. property to controlled foreign corporations

Section 877 provides for recharacterization if an individual to whom section 877 applies contributes property that would produce U.S.-source income to a foreign corporation, and: (1) the property is contributed to the foreign corporation during the 10-year period after citizenship relinquishment or residency termination; (2) the foreign corporation would be a controlled foreign corporation if the individual were a U.S. citizen; and (3) the individual owns, directly or indirectly, 10 percent or more (by vote) of the stock of such corporation.[141] Under these recharacterization rules, the former citizen or former long-term resident who is subject to the alternative tax regime is treated as receiving or accruing directly the income or gains received or accrued by the foreign corporation with respect to the contributed property (or other property that has a basis determined by reference to the basis of such contributed property) during the 10-year period after citizenship relinquishment or residency termination.[142] Moreover, if the individual

[141] Sec. 877(d)(4). For purposes of determining indirect and constructive ownership, the rules of section 958 apply.

[142] The recharacterization rules under section 877 for transfers to a foreign corporation are illustrated by the following example: Ms. A lost her U.S. citizenship on January 1, 2002, and is subject to section 877. On June 30, 2003, Ms. A transfers the stock she owns in a U.S. corporation ("USCo"), to a foreign corporation, ("FCo"), in exchange for all the stock of FCo in a transaction that qualifies for tax-free treatment under section 351. At the time of such transfer, A's basis in the stock of USCo is $100,000 and the fair market value of the stock is $150,000. Any income or gain on the USCo stock would be treated as received or accrued by Ms. A and not by FCo. Accordingly, if the USCo stock pays a dividend of $10,000 in 2004, Ms. A would be treated as receiving the dividend and would be subject to U.S. tax under section 877 on such dividend. Moreover, if FCo sells the USCo stock in 2004, Ms. A would be treated as recognizing the gain on such sale and would be taxable thereon under section 877. Alternatively, if Ms. A disposes of the stock of FCo in 2004 while FCo holds the USCo stock, the USCo stock would be treated as if sold by FCo immediately before Ms. A's disposition of the FCo stock;

disposes of the stock of the foreign corporation, the individual is subject to U.S. tax on the gain that would have been recognized if the corporation had sold such contributed property immediately before the disposition. If the individual disposes of less than all of his or her stock in the foreign corporation, such disposition is treated as a disposition of a pro rata share (determined based on value) of such contributed property.[143] Authority is provided for the Department of Treasury to issue regulations to prevent the avoidance of this rule. Information reporting is required as necessary to carry out the purposes of this rule.

Under Notice 97-19, individuals are required to apply the above rules by substituting a 15-year period beginning five years prior to the citizenship relinquishment or residency termination for the 10-year period described above.[144] In addition, an individual who makes a contribution must attach certain information to his or her U.S. tax return for the year in which the contribution is made, including the date of the contribution, a description of the property contributed, and a description of the percentage interest in the foreign corporation to which the property was contributed.

Special rule for shift in risks of ownership

Section 877 applies to income and gains for the 10 taxable years ending after the loss of citizenship (or termination of residency, as applicable). For purposes of applying section 877, the 10-year period is suspended for gains derived from a particular property during any period in which the individual's risk of loss with respect to such property is substantially diminished.[145]

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accordingly, Ms. A would be subject to U.S. tax under section 877 on the gain on the USCo stock.

[143] For example, if the individual owns 100 shares of the foreign corporation's stock and disposes of 10 of such shares, such disposition is treated as a disposition of 10 percent of the property contributed to the foreign corporation.

[144] Notice 97-19, sec. I. *See* A-166.

[145] Sec. 877(d)(3). For example, Ms. C lost her citizenship on January 1, 2002, and is subject to section 877. On that date, Ms. C owns 10,000 shares of stock of a U.S. corporation ("USCo"), with a value of $1 million. On the same date, Ms. C enters into an equity swap with respect to such USCo stock with a five-year term. In the transaction, Ms. C will transfer to the counter-party an amount equal to the dividends on the USCo stock and any increase in the value of the USCo stock for the five-year period. The counterparty will transfer to Ms. C an amount equal to a market rate of interest on $1 million and any decrease in the value of the USCo stock for the same period. Ms. C's risk of loss with respect to the USCo stock is substantially diminished during the five-year period in which the equity swap is in effect and, therefore, the 10-year period under section 877 is suspended during such period. Accordingly, if Ms. C sells her USCo stock for a gain on January 1, 2014, such gain would be treated as U.S.-source income taxable to Ms. C under section 877.

2. Estate, gift, and generation skipping transfer taxation

(a) Estate tax

In general, estates of nonresident noncitizens are subject to U.S. estate tax on the transfer at death of certain U.S.-situated property.[146] Such property includes real estate and tangible property located within the United States. In addition, stock held by nonresident noncitizens is treated as U.S.-situated if issued by a U.S. corporation.[147]

A special estate tax rule applies to former citizens and former long-term residents who relinquish citizenship or terminate residency with a principal purpose of tax avoidance. Under this rule, if the former citizen or former long-term resident dies within 10 years of citizenship relinquishment or residency termination, the former citizen's or former long-term resident's U.S. gross estate includes the value of certain closely-held foreign stock to the extent the foreign corporation owns U.S.-situated property. This rule applies only if: (1) the decedent owned, directly, at death 10 percent or more of the combined voting power of all voting stock of the corporation; and (2) the decedent owned, directly or indirectly, at death more than 50 percent of the total voting stock of the corporation or more than 50 percent of the total value of all stock of the corporation.[148]

(b) Gift tax

Nonresident noncitizens are subject to gift tax with respect to certain transfers by gift of U.S.-situated property.[149] Such property includes real estate and tangible property located within the United States. Nonresident noncitizens generally are not subject to U.S. gift tax on the transfer of intangibles, such as stock or securities, regardless of where such property is situated.[150]

A special gift tax rule applies to former citizens and former long-term residents who relinquish citizenship or terminate residency with a principal purpose of tax avoidance.[151] Under

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[146] Secs. 2101, 2103.

[147] Sec. 2104.

[148] Sec. 2107(b).

[149] Secs. 2501, 2511(a).

[150] Sec. 2501(a)(2).

[151] A former citizen or former long-term resident is treated as having relinquished citizenship or terminated residency with a principal purpose of tax avoidance if he or she meets certain monetary thresholds relating to a five-year tax liability test or a net worth test. Sec. 2501(a)(3)(B). (These thresholds are discussed in more detail in Part IV.B.1.b. above). Certain categories of individuals can avoid being treated as having a principal purpose of tax avoidance if they submit a timely and complete ruling request with the IRS as to whether their citizenship

this rule, the former citizen or former long-term resident is subject to gift tax on gifts of U.S.-situated intangibles (e.g., U.S. stock), if made within 10 years of citizenship relinquishment or residency termination.[152]

(c) Generation skipping transfer tax

No special rules apply relating to the generation skipping transfer tax for former citizens or former long-term residents who relinquish citizenship or terminate residency with a principal purpose of tax avoidance.

3. Double tax relief

In order to mitigate the double taxation of individuals subject to the alternative tax regime, a credit is permitted against the U.S. tax imposed under such provisions for any foreign income, gift, estate or similar taxes paid with respect to the items subject to such taxation.[153] This credit is available only against the tax imposed solely as a result of the alternative tax regime and is not available to be used to offset any other U.S. tax liability.[154]

4. Interaction with tax treaties

In general, U.S. tax treaties contain a "saving clause" which provides that the treaty does not affect the taxation by a country of its citizens or residents. By reason of this saving clause, unless otherwise provided in the treaty, the United States may continue to tax its citizens or

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relinquishment or residency termination had a principal purpose of tax avoidance. Sec. 2501(a)(3)(C). (These exceptions are discussed in more detail in Part IV.B.1.c. above.).

[152] Sec. 2501(a)(3)(A).

[153] Secs. 877(b), 2107(c)(2), and 2501(a)(3)(D). Because section 877 alters the sourcing rules generally used to determine the country having primary taxing jurisdiction over certain items of income, there is an increased potential for such items to be subject to double taxation. For example, a former citizen subject to the section 877 rules may have capital gains derived from stock in a U.S. corporation. Under section 877, such gains are treated as U.S.-source income, and, therefore, are subject to U.S. tax. The internal laws of the former citizen's new country of residence, however, may provide that all capital gains realized by a resident of that country are subject to taxation in that country and, thus, the gain from the sale of U.S. stock also may be taxable in his country of residence.

[154] For example, Mr. D lost his citizenship on January 1, 2002, and is subject to section 877. Mr. D becomes a resident of Country X. During 2002, Mr. D recognizes a $100,000 gain upon the sale of stock of a U.S. corporation. Country X imposes $15,000 tax on this capital gain. But for the double tax relief provision, Mr. D would be subject to U.S. tax of $20,000 on this gain under section 877, for a total of $35,000 of aggregate tax liability between the United States and the foreign country. However, Mr. D 's U.S. tax under section 877 would be reduced by the $15,000 of foreign tax paid, and Mr. D 's resulting U.S. tax on this gain would be $5,000.

residents as if the treaty were not in force. Some U.S. tax treaties contain a provision under which the saving clause (and, therefore, the U.S. jurisdiction to tax) applies to a former citizen or former long-term resident whose loss of citizenship or resident status had as one of its principal purposes the avoidance of tax; such application is limited to the 10-year period following the loss of citizenship or resident status. This approach is consistent with the alternative tax regime under section 877 for former citizens and former long-term residents as described above. However, not all U.S. tax treaties in force contain this provision. Tax treaties that do not contain this provision could preclude the United States from subjecting former citizens to U.S. tax under the alternative tax regime.[155]

A conflict arises because section 877 does not explicitly deny treaty benefits to former citizens or long-term residents. If former citizens and long-term residents qualify for resident status under the tax treaty between the United States and the country where they relocate, they are generally entitled to treaty benefits. This allows former citizens and long-term residents to benefit from treaty provisions that reduce or exempt their U.S.-source income that would otherwise be subject to tax under section 877. When former citizens or long-term residents are not mentioned in the saving clause of such treaty, it prevents the United States from continuing to tax them as though the treaty never went into effect. Therefore, unless former citizens and long-term residents are included in the saving clause, treaty provisions could preclude the United States from applying the alternative tax regime.

The legislative history of the 1996 legislative changes to the alternative tax regime indicates that the purpose of these provisions, as amended in 1996, was not intended to be defeated by any treaty provision.[156] It was anticipated that the Department of Treasury would review all outstanding treaties to determine whether the alternative tax regime, as revised in 1996, potentially conflicts with treaty provisions (such as the saving clauses in the various treaties) and to eliminate any such potential conflicts through renegotiation of the affected tax treaties as necessary.[157] The legislative history of the 1996 changes to the alternative tax regime states that beginning on the tenth anniversary of the enactment of such changes, any conflicting treaty provisions that remain in force take precedence over the alternative tax regime as revised.[158] This coordination rule is effective until August 21, 2006. [159]

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[155] *See Crow v. Commisioner, 85 T.C. 376 (1985)* (holding that section 877 does not apply if its application is inconsistent with a treaty).

[156] H.R. Conf. Rep. No. 104-736, at 329 (1996).

[157] *Id.*

[158] *Id.*

[159] *See* A-2 through A-9 for a list of outstanding U.S. tax treaties with savings clause provisions that potentially conflict with the alternative tax regime.

Consistent with Congressional intent, the IRS published Notice 97-19, declaring that all provisions of section 877 will prevail over treaty provisions in effect on August 21, 1996.[160] Typically, U.S. courts apply the "later-in-time" rule to determine whether a U.S. statute or a treaty is controlling authority in the event of a conflict, because both Federal laws and treaties are supreme law of the land.[161] However, the 1996 legislative history, along with Notice 97-19, call for only temporary non-supremacy of the treaties.[162]

5. Required information reporting and sharing

In order to enhance compliance with the alternative tax regime and to assist the IRS in identifying former citizens and former long-term residents who are subject to the alternative tax regime, the Health Insurance Portability and Accountability Act of 1996 added an information reporting requirement to the Code.[163] This information reporting obligation is imposed on former citizens and former long-term residents at the time of citizenship relinquishment or residency termination. In addition, the Department of State and other governmental entities are required to share certain information with the IRS with respect to such individuals.

Information reporting

Under the Code, a U.S. citizen who loses his or her citizenship is required to provide an information statement to the Department of State (or other designated government entity).[164] This information statement includes the following information: (1) the individual's social security number; (2) the mailing address of the individual's principal foreign residence; (3) the new country of residence; (4) the new country of citizenship; (5) information concerning the individual's assets and liabilities if the tax liability threshold or the net worth threshold under section 877(a)(2) is met; and (6) such other information as the Secretary of the Treasury

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[160] Notice 97-19, Sec. VIII. *See* A-166.

[161] Section 7852(d), enacted by the Technical and Miscellaneous Tax Act of 1988 ("TAMRA"), provides that neither a treaty nor a statute have preferential status, so that the later-in-time of a statute or a treaty controls (commonly referred to as the "later-in-time" rule).

[162] In the event the IRS seeks assistance from a treaty partner to enforce the provisions under section 877 with respect to a former U.S. citizen or long-term resident who has moved overseas, the IRS may have difficulty convincing the treaty partner that the provisions of section 877 override the treaty language agreed upon by both parties at the time of negotiation. In addition, the IRS has indicated that it has not utilized treaty provisions to obtain information as to whether or not an individual is subject to the expatriation tax rules. *See* A-123 (August 14, 2002, letter from the IRS).

[163] Pub. L. No. 104-191, sec. 512.

[164] Sec. 6039G.

prescribes.[165] A similar information statement is required for long-term U.S. residents who terminate their residency.[166]

Since January 1999, individuals can provide this information on IRS Form 8854.[167] Form 8854 requires the individual to provide: (1) the individual's social security number; (2) forwarding foreign address; (3) new country of residence; (4) all foreign countries of citizenship and the method by which citizenship was acquired; (5) the number of days the individual was physically present in the United States during the year of citizenship relinquishment or residency termination and each of the two preceding taxable years; and (6) information concerning U.S. tax liability for the five years preceding the date of citizenship relinquishment or residency termination. In the case of individuals with gross assets having a collective fair market value of more than $500,000, the form also requires the completion of a balance sheet showing assets and liabilities immediately prior to citizenship relinquishment or residency termination. If the tax liability threshold or the net worth threshold of section 877(a)(2) is met, Form 8854 asks several questions concerning the eligibility for and submission of a ruling request regarding whether the citizenship relinquishment or residency termination had as a principal purpose the avoidance of U.S. tax. The form must be signed under penalty of perjury.

The information statement must be provided by former citizens no later than the earliest day on which the individual (1) renounces U.S. nationality before a diplomatic or consular officer of the United States, (2) furnishes to the Department of State a statement of voluntary relinquishment of U.S. nationality confirming an act of citizenship relinquishment, (3) is issued a certificate of loss of U.S. nationality by the Department of State, or (4) loses U.S. nationality because the individual's certificate of naturalization is canceled by a U.S. court (collectively, the "reporting date").[168] The office reviewing the statements is required to provide to the Secretary of the Treasury copies of all statements received and the names of individuals who refuse to provide such statements.[169] A long-term resident whose residency is terminated generally is

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[165] Section 6039G(b) specifically requires some of this information to be reported, while other items are specified by Notice 97-19, as modified by Notice 98-34, and IRS Form 8854.

[166] Sec. 6039(G)(f).

[167] There is, however, no statutory requirement that individuals provide the required information on the official IRS form. Some Department of State consular offices will accept the information in alternate formats. Prior to January 1999, no uniform information statement (e.g., on an IRS form) existed. However, section 6039G and Notice 97-19 provide a list of certain required information.

[168] Sec. 6039G(a) and (c).

[169] Under Notice 97-19, a former citizen whose reporting date is on or before March 10, 1997, must provide the information statement to the IRS by June 8, 1997. If the reporting date is after March 10, 1997, and on or before June 8, 1997, the former citizen must provide the information statement to the nearest consular office, the Department of State, or a Federal court (if the individual's CLN was canceled by a court) on or before June 8, 1997. If the reporting

required to attach the information statement to his or her U.S. income tax return for the year of such termination.[170]

In addition, a former citizen or former long-term resident who is liable for U.S. taxes under the alternative tax regime for a taxable year during the 10-year period (and accordingly must file IRS Form 1040NR) must attach to that return a statement setting forth (generally by category) all items of U.S.-source and foreign-source gross income.

The IRS may impose penalties if an individual fails to provide the required information unless such failure is due to reasonable cause and not to willful neglect.[171] An individual who fails to provide the required information statement is subject to a penalty for each year (of a 10-year period beginning on the date of loss of citizenship or termination of residency) during which the failure to provide the statement continues. The penalty is equal to the greater of five percent of the tax required to be paid under section 877 for that year or $1,000.[172]

Interagency information sharing

The Department of State is required to provide the Secretary of the Treasury with a copy of each CLN documenting a loss of citizenship, that is approved by the Department of State. Similarly, the INS is required to provide the Secretary of the Treasury with the name of each individual whose status as a lawful permanent resident has been revoked or has been determined to have been abandoned. Further, the Secretary of the Treasury is required to publish in the *Federal Register* the names of all former citizens with respect to whom it receives the required statements or whose names or CLNs it receives under the foregoing information-sharing provisions. Because of restrictions placed on the disclosure of returns and return information by section 6103, the Department of Treasury is unable to share confidential information with the Department of State and the INS for purposes of administering civil immigration laws.[173]

6. Certain resident noncitizens having a break in residency status

A special rule applies in the case of a noncitizen who has been treated as a resident of the United States for at least three consecutive years, if the individual becomes a nonresident but

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date is after June 8, 1997, the former citizen must provide the information statement to the nearest consular office or Federal court (as the case may be) on or before the reporting date.

[170] Under Notice 97-19, a former long-term resident who terminated residency after February 5, 1995, and before January 1, 1996, must attach the information statement to either a 1996 IRS Form 1040NR (whether or not the individual is required to file a tax return) or an amended 1995 U.S. income tax return.

[171] Sec. 6039G(d).

[172] *Id.* No similar penalties were required to be imposed under pre-1996 law.

[173] For a more detailed discussion of the effect of section 6103 and the immigration exclusion for certain former citizens, see Part V.D., below.

regains residency status within a three-year period.[174] In such cases, the individual is subject to U.S. tax for all intermediate years under the alternative tax regime described above (i.e., the individual is taxed in the same manner as a former citizen or former long-term resident who relinquished citizenship or terminated residency for tax avoidance purposes). The special rule for a break in residency status applies regardless of the subjective intent of the individual.

[174] Sec. 7701(b)(10).

V. REQUIREMENTS FOR U.S. CITIZENSHIP, IMMIGRATION, AND VISAS

A. Overview

The Fourteenth Amendment to the U.S. Constitution defines citizens as "all persons born or naturalized in the United States and subject to the jurisdiction thereof."[175] Citizenship also can be conferred individually or collectively by statute. For example, by statute, U.S. citizens include individuals born abroad to an American parent.[176]

Noncitizens fall into three categories for purposes of U.S. immigration law. First, noncitizens who enter illegally or who violate the terms of their visa status are referred to as "unlawful" or "unauthorized." Second, individuals who are admitted temporarily as visitors for a specific purpose are "nonimmigrants."[177] Nonimmigrants are required to leave the country at the end of the time allotted them for the specific purpose.[178] Third, noncitizens who receive permission to live and work permanently in the United States are called by various names, including "immigrants," "resident aliens," "lawful permanent residents," "permanent residents," or may be referred to as "green card holders."[179] Immigrants are not citizens but they are allowed to reside permanently within the United States, may apply for U.S. citizenship through the naturalization process, are able to work without restriction, with limited exceptions for government employment. All immigrants in the United States are protected by the Constitution, but the extent of that protection varies according to the status of their presence here. Similarly, all immigrants enjoy most of the statutory protections accorded by Federal and State law, but the extent of that protection also varies by alienage status.[180]

A noncitizen seeking to enter the United States generally is required to present valid documentation for entry, usually a visa and a passport. These requirements, however, can be waived in certain circumstances. The Department of State and the INS form a "double check"

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[175] U.S. Const. amend. XIV, sec. 1.

[176] 8 U.S.C. sec. 1401.

[177] *See* Congressional Research Service, CRS Report for Congress, *98-918: Immigration Fundamentals* (September 15, 1999) and Congressional Research Service, CRS Report for Congress, RS20916: *Immigration & Naturalization Fundamentals* (May 18, 2001).

[178] *Id.*

[179] Immigrants are defined as anyone who does not fall within one of the nonimmigrant classifications. 8 U.S.C. sec. 1101(a)(15).

[180] *See* Congressional Research Service, CRS Report for Congress, *98-918: Immigration Fundamentals* (September 15, 1999).

system for entry into the United States. The Department of State grants visas.[181] The INS inspects individuals upon arrival at a port of entry and determines whether they are admitted into the country.[182] There are many grounds for inadmissibility, including criminal history, security and public health considerations, the likelihood of becoming a public charge, and documentary requirements violations.[183] Some grounds can be waived.[184] Even for grounds that cannot be waived, an individual may be "paroled" into the United States for emergency or humanitarian reasons.[185]

Among the grounds for inadmissibility is a provision that makes inadmissible former U.S. citizens who renounce their citizenship to avoid taxation.[186] Individuals seeking permanent resident status cannot obtain a waiver of this ground of inadmissibility and therefore, cannot return to the United States on a permanent basis. Individuals seeking to enter the United States temporarily, however, may obtain a waiver of this ground of inadmissibility.[187] Thus, while such individuals cannot establish permanent residency in the United States, they may receive a waiver to permit them to visit the United States as a nonimmigrant.

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[181] Under section 428 of the Homeland Security Act of 2002 ("Homeland Security Act"), Pub. Law 107-296, consular officers will continue to issue visas, but they will do so under the general supervision of the Secretary of Homeland Security. The Secretary of Homeland Security also will have general authority to refuse visas in accordance with immigration law, a power not currently given to the Secretary of State. The Secretary of State will retain authority to deny visas on foreign policy and national security grounds. The Homeland Security Act is not intended to fundamentally alter the immigration and nationality policy of the United States.

[182] Under subtitle D of the Homeland Security Act, enforcement functions of the INS, including inspections, will be performed under the Bureau of Border Security, Department of Homeland Security.

[183] 8 U.S.C. sec. 1182(a).

[184] 8 U.S.C. sec. 1182(d), (h), (i), (k), (l).

[185] 8 U.S.C. sec. 1182(d)(5). A grant of parole is temporary permission to be present in the United States. The parolee is required to leave when the conditions supporting his or her parole cease to exist. Parole does not constitute formal admission into the country.

[186] Sec. 212(a)(10)(E) of the Immigration and Nationality Act (the "INA"); 8 U.S.C. sec. 1182(a)(10)(E).

[187] 8 U.S.C. sec. 1182(d)(3).

B. Acquisition and Loss of U.S. Citizenship

1. Acquisition of U.S. citizenship

An individual may obtain U.S. citizenship in one of four ways: (1) being born within the geographical boundaries of the United States and certain of its territories; (2) being born outside the United States to at least one U.S. citizen parent (as long as that parent had previously been resident in the United States for a requisite period of time); (3) through the naturalization process; or (4) by an act of Congress.[188] The Department of State estimates that there are approximately 3.78 million U.S. citizens living abroad, although thousands of these individuals may not even know that they are U.S. citizens.[189]

2. Loss of U.S. citizenship

Seven acts

A U.S. citizen may voluntarily give up his or her U.S. citizenship at any time. Seven acts, which if performed voluntarily with the intention to relinquish U.S. nationality, will result in the loss of U.S. citizenship:

(1) becoming naturalized in another country;

(2) formally declaring allegiance to another country;

(3) serving in a foreign army;

(4) serving in certain types of foreign government employment if the individual is a national of the foreign country or if he or she takes an oath of allegiance to such foreign country;

(5) making a formal renunciation of nationality before a U.S. diplomatic or consular officer in a foreign country;

(6) making a formal renunciation of nationality in the United States during a time of war; or

(7) committing an act of treason for which the individual is convicted.[190]

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[188] U.S. Const. amend. XIV, sec. 1; 8 U.S.C. sec. 1401.

[189] Bureau of Consular Affairs, Department of State, *Private American Citizens Residing Abroad* (July 1999). This does not include U.S. Government (military and nonmilitary) employees and their dependents.

[190] 8 U.S.C. sec. 1481(a).

An individual who wishes to renounce citizenship formally (item (5), above) must execute an Oath of Renunciation before a consular officer, and the individual's loss of citizenship is effective on the date the oath is executed. In all other cases, the loss of citizenship is effective on the date that the act of relinquishing citizenship is committed, even though the loss may not be documented until a later date. The Supreme Court has held that relinquishment of citizenship alone is an insufficient basis for revoking citizenship.[191] Rather, the act of relinquishing citizenship must be done with the requisite intent.

A child under the age of 18 cannot lose U.S. citizenship by naturalizing in a foreign state, by taking an oath of allegiance to a foreign state, by serving in a foreign government, or by being convicted for an act of treason (a minor, probably would not be charged with this because he or she may not have the resources to commit this crime). A child under age 18 can, however, lose U.S. citizenship by serving in a foreign military or by formally renouncing citizenship, but such an individual may regain citizenship by asserting a claim of citizenship before reaching the age of 18 years and six months.[192]

Certificates of loss of nationality

Generally, the Department of State documents a loss of citizenship on a certificate of loss of nationality ("CLN") when the individual acknowledges to a consular officer that relinquishment of citizenship was taken with the requisite intent. There is no obligation for an individual to obtain a CLN or otherwise notify the Department of State of relinquishing one's citizenship. When an individual acknowledges that the relinquishment of citizenship was done with the requisite intent, the consular officer abroad submits a CLN to the Department of State in Washington, D.C. for approval.[193] Upon approval, a copy of the CLN is issued to the affected individual.[194] The date upon which the CLN is approved is not the effective date for loss of citizenship. The loss of citizenship is effective on the date the relinquishment of citizenship occurs, if done with the requisite intent.

Before a CLN is issued, the Department of State reviews the individual's files to confirm that: (1) the individual was a U.S. citizen; (2) relinquishment of citizenship occurred; (3) relinquishment was undertaken voluntarily; and (4) the individual had the intent of relinquishing citizenship.[195] If the relinquishment of citizenship involved an action of a foreign government (for example, if the individual was naturalized in a foreign country or joined a foreign army), the

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[191] *Vance v. Terrazas*, 444 U.S. 252, 260 (1980).

[192] An individual cannot regain his or her citizenship by asserting a claim of citizenship in this manner if he or she formally renounced citizenship during wartime. 8 U.S.C. sec. 1483(b).

[193] 8 U.S.C. sec. 1501; Department of State, 7 Foreign Affairs Manual, sec. 1221.

[194] Department of State, 7 Foreign Affairs Manual, sec. 1222.

[195] Department of State, 7 Foreign Affairs Manual, sec. 1211.

Department of State will not issue a CLN until it has obtained an official statement from the foreign government confirming the relinquishment of citizenship.[196]

If a CLN is not issued because the Department of State does not believe that relinquishment of citizenship has occurred (for example, if the requisite intent appears to be lacking), the issue may be resolved through litigation, as any dispute about relinquishment of citizenship could lead to litigation. Whenever the loss of U.S. nationality is put in issue, the burden of proof is on the individual or party claiming that a loss of citizenship has occurred to establish, by a preponderance of the evidence, that the loss occurred.[197]

Similarly, if a CLN has been issued, but the Department of State later discovers that such issuance was improper (for example, because fraudulent documentation was submitted, or the requisite intent appears to be lacking), the Department of State could initiate proceedings to revoke the CLN.[198] If the recipient is unable to establish beyond a preponderance of the evidence that citizenship was lost on the date claimed, the CLN would be revoked. To the extent that the IRS believes a CLN was improperly issued, the IRS could present such evidence to the Department of State and request that revocation proceedings be commenced.

Revocation of naturalized citizenship

In addition to relinquishment of citizenship, a naturalized U.S. citizen can have his or her citizenship involuntarily revoked. For revocation, a U.S. court must determine that the certificate of naturalization was illegally procured, or was procured by concealment of a material fact or by willful misrepresentation (for example, if the individual concealed the fact that he served as a concentration camp guard during World War II).[199] In such cases, the individual's certificate of naturalization is canceled, effective as of the original date of the certificate; in other words, it is as if the individual was never a U.S. citizen at all.

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[196] Department of State, 7 Foreign Affairs Manual, sec. 1214 ("A potentially expatriating act should be documented by statements from the foreign government.").

[197] 8 U.S.C. sec. 1481(b).

[198] *See* Department of State, 7 Foreign Affairs Manual, sec. 1231.

[199] *See* sec. 340(a) of the INA, 8 U.S.C. sec. 1451(a). *See also United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982).

C. General Rules for U.S. Immigration and Visas for Noncitizens

If an individual relinquishes or loses his or her U.S. citizenship, he or she becomes a noncitizen subject to U.S. immigration laws should that individual decide to enter the United States. In general, a noncitizen who wishes to enter the United States must complete a two-step process. The first step involves issuance of a visa by a U.S. consular officer abroad. This step is followed by inspection and admission (or exclusion) by an INS inspector at the port or place of entry.

1. Role of the Department of State

Outside of the United States, noncitizens deal almost exclusively with the U.S. Consulate or Embassy in their home country.[200] The U.S. consular officer has, within the confines of the law, almost complete discretion as to whom and under what circumstances a visa to the United States will be granted.[201] Furthermore, there is no appeal from a denial of a visa by the U.S. consul other than for interpretations of law.[202]

2. Role of the INS

The INS handles immigration matters with respect to noncitizens who are already in the United States. Currently, this agency is a division of the U.S. Department of Justice and operates through various regional and sub-regional offices throughout the United States.[203] Regardless of how a noncitizen may have arrived in the United States, after entry he or she is under the jurisdiction of the INS.[204]

3. Acquisition and relinquishment of immigrant visas

An immigrant visa is issued to an individual who intends to relocate to the United States permanently. Stringent conditions apply to the admission of immigrants. Once admitted, however, immigrants are subject to few restrictions. They may accept and change employment, and may apply for U.S. citizenship through the naturalization process, generally after five years.

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[200] Ramon Carrion, *USA Immigration Guide* 11 (1998).

[201] Under the Homeland Security Act, consular officers will continue to issue visas, but they will do so under the general supervision of the Secretary of Homeland Security.

[202] Ramon Carrion, *USA Immigration Guide* 11 (1998).

[203] The Homeland Security Act transfers the functions of the INS to the Department of Homeland Security. The INS is abolished upon this transfer. Within the Department of Homeland Security, immigration enforcement functions and the immigration services functions are transferred to separate entities. By law, these functions cannot subsequently be combined administratively.

[204] *Id.*

Application process

Petitions for immigrant, i.e., long-term permanent resident status, are first filed with the INS by the sponsoring relative or employer in the United States.[205] If the prospective immigrant is already residing in the United States, the INS handles the entire process, i.e., "adjustment of status."[206] If the prospective long-term permanent resident does not have legal residence in the United States, the petition is forwarded to Consular Affairs in their home country after the INS has reviewed it.[207] The Consular Affairs Officer (when the immigrant is coming from abroad) and the INS adjudicator (when the immigrant is adjusting status in the United States) must be satisfied that the individual is entitled to immigrant status.[208]

A personal interview is required for all prospective long-term permanent residents.[209] The burden of proof is on the applicant to establish eligibility for the type of visa for which the application is being made.[210] Consular Affairs Officers (when the immigrant is coming from abroad) and INS adjudicators (when the immigrant is adjusting status in the United States) must confirm that the immigrant is not ineligible for a visa under the so-called "grounds of inadmissibility" of the INA, which include criminal, terrorist, and public health grounds.[211]

Relinquishing permanent resident status

There are several ways in which permanent resident status can be relinquished. First, an individual who wishes to terminate his or her permanent residency may simply return his or her green card (or permanent resident card) to the INS. Second, an individual may be involuntarily deported from the United States (through a judicial or administrative proceeding) with the green card being canceled at that time. Third, a green card holder who leaves the United States and attempts to reenter more than a year later may have his or her green card taken away by the INS border examiner, although the individual may request a hearing before an immigration judge to have the green card reinstated. A green card holder may leave the United States permanently

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[205] *See* A-306, Congressional Research Service, CRS Report for Congress, RL31512: *Visa Issuances: Policy, Issues, and Legislation* (July 31, 2002).

[206] *Id*.

[207] *Id.*

[208] *Id.*

[209] 22 C.F.R. sec. 42.62.

[210] *See* A-306, Congressional Research Service, CRS Report for Congress, RL31512: *Visa Issuances: Policy, Issues, and Legislation* (July 31, 2002).

[211] *Id.*

without relinquishing his or her green card, although the individual would continue to be taxed as a U.S. resident.[212]

Tracking long-term permanent residents

Historically, there has been no statutory requirement that the INS track the movement of long-term permanent residents in and out of the United States. However, in connection with the implementation of section 402 of the Enhanced Border Security and Visa Reform Act of 2002, the INS proposes that long-term permanent resident arrivals and departures be tracked at air and seaports beginning in January 1, 2003.[213] The Arrival and Departure Information System (AIDS) would be the repository and retrieval mechanism for the arrival and departure data on all immigrants, including long-term permanent residents.[214] The long-term permanent resident's Alien Registration Receipt Number would serve as the identifier for retrieving the record.[215]

4. Nonimmigrant visas

Types of nonimmigrant visas

Various types of nonimmigrant visas are issued to individuals who come to the United States on a temporary basis and intend to return home after a certain period of time.[216] The type of nonimmigrant visa issued to such individuals is dependent upon the purpose of the visit and its duration.[217] Nonimmigrants must demonstrate that they are coming for a limited period and for a

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[212] Section 7701(b)(6)(B) provides that an individual who has obtained the status of residing permanently in the United States as an immigrant (i.e., an individual who has obtained a green card) will continue to be taxed as a lawful permanent resident of the United States until such status is revoked or is administratively or judicially determined to have been abandoned.

[213] *See* A-143 (October 8, 2002, letter from the INS).

[214] *Id.*

[215] *Id.*

[216] *See* A-284, Congressional Research Service, RL31381: *U.S. Immigration Policy on Temporary Admissions* (May 8, 2002). During fiscal year 1999 (the most recent year for which INS data are published), 31.4 million nonimmigrants entered the United States, of which 76.7 percent were tourists. Of that number, over 16 million nonimmigrants entered as visitors through the Visa Waiver Program.

[217] *See* sec. 101(a)(15) of the INA. There are 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas.

specific purpose.[218] An individual holding a nonimmigrant visa is prohibited from engaging in activities that are inconsistent with the purpose of the visa (for example, an individual holding a tourist visa is not permitted to obtain employment in the United States). A nonimmigrant is required to leave the country at the end of the time allotted his or her visa.

Nonimmigrant visas are available to the following categories of individuals: foreign diplomats ("A"); temporary business visitors ("B-1"); tourists ("B-2"); travelers in transit through the United States to another destination ("C"); crew members of foreign airlines or ships ("D"); treaty traders ("E-1"); treaty investors ("E-2"); students ("F"); representatives of international organizations ("G"); nurses, professionals in specialty occupations, temporary workers performing services unavailable in the United States, and participants in job training programs ("H"); employees of foreign media organizations ("I"); exchange visitors ("J"); fiances/fiancees of U.S. citizens ("K"); intracompany transferees ("L"); vocational and other nonacademic students ("M"); certain present or former employees of international organizations, their parents and siblings ("N"); representatives of NATO member states ("NATO" visas); individuals with extraordinary abilities in sciences, arts, education, business or athletics ("O"); internationally recognized athletes and entertainers ("P"); participants in international cultural exchange programs ("Q"); religious workers ("R"), informants or witnesses against a criminal or terrorist organization or enterprise ("S"), NAFTA professionals or their immediate families ("TN" or "TD"), victims of human trafficking or their immediate family ("T-1" or "T-2"), victims or informants of criminal activity or their spouse or child ("U-1" or "U-2"), and the spouse of a long-term permanent resident who has a petition pending for three years or longer or a child of a long-term permanent resident ("V-1" or "V-2" or "V-3"). For most of these categories, a qualifying individual and his or her spouse and minor children are eligible for the category of visa involved.

Foreign business people and investors often obtain "E" visas to come into the United States. Generally, an "E" visa is initially granted for a two-year period, but it can be routinely extended for additional two-year periods. There is no overall limit on the amount of time an individual may retain an "E" visa. There are two types of "E" visas: an "E-1" visa, for "treaty traders" and an "E-2" visa, for "treaty investors." To qualify for an "E-1" visa, an individual must be a national of a country that has a treaty of trade with the United States, and must be coming to the United States solely to engage in substantial trade principally between the United States and that country. Trade includes the import and export of goods or services. Nationals of that country must own at least 50 percent of the foreign-based company, and at least 50 percent of the shareholders must have an "E-1" or "E-2" visa and live in the United States (thus, an individual holding a green card would not be counted, or if they live outside the United States, could be classified as "E-1" or "E-2"). Over 50 percent of the individual's business must be between the United States and the foreign company. To qualify for an "E-2" visa, an individual (or a company of which he or she is an executive, manager, or essential employee) must be a national of a country that has a treaty investor agreement with the United States, and must be coming to the United States solely to develop and direct the operations of an enterprise in which he has invested, or is actively in the process of investing, a substantial amount of capital.

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[218] *Id.*

Application process

The burden of proof is on the applicant to establish eligibility for nonimmigrant status and the type of nonimmigrant visa for which the application is being made. The Consular Affairs Officer, at the time of application for a visa, and INS inspectors, at the time of application for admission, must be satisfied that the applicant is entitled to nonimmigrant status.[219] An application for a nonimmigrant visa usually is made at the consular post abroad where the applicant resides.[220] Generally, the applicant is required to appear personally, although this requirement may be waived, especially for "B" visitor visas.[221] Application for a nonimmigrant visa is made on form DS-156 (or supplemental form DS-157 for certain applicants). This is a short form requiring information regarding the purpose of the applicant's trip. Photographs and such other documents as the consul may request are also required.[222]

Ordinarily, tourist visas are issued almost immediately, usually without the need for supporting documents.[223] A treaty trader visa, on the other hand, requires documentation to show that the substantive requirements have been met.[224] Other visas, such as the temporary worker and intracompany transferee visas require prior approval of a visa petition by the INS.[225]

The primary inquiry for a nonimmigrant visa centers on whether the applicant truly intends to enter the United States temporarily for the purposes contemplated by the visa category. If the applicant cannot satisfactorily prove this intent, the application is denied.[226] The application also is denied if the individual is inadmissible under the statutory grounds for inadmissibility, unless the disqualification can be waived. Waivers are discussed below.

The nonimmigrant visa is endorsed or inserted on a page of the passport or equivalent document.[227] The visa includes the date and place of issuance, the visa classification, the limited number of entries for which it is valid or the letter "M" for unlimited entries, and the period of

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[219] *See* 22 C.F.R. sec. 41.11(a). S*ee also* A-306, Congressional Research Service, CRS Report for Congress, RL31512: *Visa Issuances: Policy, Issues, and Legislation* (July 31, 2002).

[220] 22 C.F.R. sec. 41.101.

[221] 22 C.F.R. sec. 41.102.

[222] 22 C.F.R. sec. 41.103.

[223] Gordon, Mailman, & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.04, *Control of Entry*, at 8-8 (May 2002).

[224] *Id.*

[225] *Id.*

[226] 22 C.F.R. sec. 41.11.

[227] 22 C.F.R. sec. 41.113.

validity.[228] The length of time for which an individual is admitted to the United States does not necessarily correspond to the period of the validity of the visa.[229] The INS inspector sets the admission period at the time of admission.

5. U.S. port of entry inspection

Ports of entry are found along the United States land border and at international airports and seaports. Noncitizens make their application for admission at these ports of entry and undergo inspection. Alternatively, a noncitizen may undergo a pre-inspection (inspection before departure or en route) instead of an inspection upon arrival.[230] For example, individuals departing by airplane for New York from Montreal or Toronto, Canada, usually are pre-inspected by U.S. Government personnel.[231]

The primary inspection involves an examination of documents (usually a passport and a visa) and an interrogation. Usually the inspector asks about the applicant's purpose in coming, how long he or she intends to stay, and any other information bearing on admissibility.[232] The primary inspector also notes visually and by the applicant's answers whether there are any physical or mental afflictions that would render the applicant inadmissible and indicate the need for a Public Health Service examination.[233] The inspector might also consult the "lookout" book or computer to note whether there is negative information bearing on admissibility.[234] The thoroughness of the examination depends on the circumstances and the place.

An applicant who is not clearly admissible usually is referred for a "secondary inspection."[235] At this point, more probing questions are asked to determine whether the applicant intends to work or remain in the country indefinitely or whether there are other grounds for denying admission. The inspector also may conduct a search of the individual and of his or

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[228] 22 C.F.R. sec. 41.113(c).

[229] 22 C.F.R. sec. 41.112(a).

[230] 8 C.F.R. sec. 235.7. There are also automated or expedited systems of inspection at certain ports of entry that have an identifiable group of low-risk border crossers.

[231] Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.05[2][b], *Manner of Inspection* at 8-12 (May 2002).

[232] *Id*., at sec. 805[2][c] at 8-12.

[233] *Id.*

[234] The operation of the various lookout systems is described below.

[235] Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.05[2][b], *Manner of Inspection* at 8-13 (May 2002).

her personal effects if the officer reasonably suspects that such a search would disclose grounds for inadmissibility.[236]

If the inspector remains uncertain, or there is a likelihood that a ground for inadmissibility would be waived by a district director, the applicant may be subject to a "deferred inspection," also known as "deferred inspection parole." A deferred inspection is conducted at the local INS office having jurisdiction. At some time during that process, a disposition is made. The applicant can be:

(1) admitted (either by being found admissible, or if possible, having the ground of inadmissibility waived);

(2) allowed to withdraw the application for admission and depart;

(3) paroled into the United States;

(4) temporarily removed for decision by the regional commissioner as to further action;

(5) summarily removed under the expedited removal procedure; or

(6) held or paroled for a removal hearing.[237]

6. Grounds of inadmissibility

The concept of inadmissibility can arise when noncitizens appear at the U.S. consulate and apply for a visa, or at a port of entry (e.g., airport, seaport, or other entry point). Noncitizens must satisfy the consular officers abroad and the INS inspectors upon entry to the United States that they are eligible for visas, or admission, and not subject to the "grounds of inadmissibility" of the INA. Thus, a U.S. consular office may deny a visa petition because the consular office believes that one or more grounds of inadmissibility may apply. If a noncitizen has a visa, the INS inspector at the border may deny them entry to the United States on the basis that one or more grounds of inadmissibility might apply.

The grounds of inadmissibility include: criminal history, security and terrorist concerns, health-related grounds, seeking to work without proper labor certification, illegal entrants and immigration law violations, ineligibility for citizenship, previous removal, the likelihood of becoming a public charge (e.g., indigence), and violations of documentary requirements.[238] In addition, individuals are inadmissible if they are former U.S. citizens who renounce their

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[236] 8 U.S.C. sec. 1357(c).

[237] Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.05[2][d], *Secondary or Deferred Inspection* at 8-13 (May 2002). The concepts of parole and waiver are discussed below.

[238] 8 U.S.C. sec. 1182(a).

citizenship for purposes of tax avoidance as determined by the Attorney General.[239] This latter ground of inadmissibility is discussed in more detail below.

7. Detecting inadmissibility: Department of State and INS lookout systems

(a) Department of State

The Department of State uses a computer database, the Consular Lookout Security System ("CLASS"), to screen and deny visas to individuals who are inadmissible to the United States.[240] CLASS is used to screen overseas visa applicants for criminal and terrorist backgrounds. CLASS is essentially a "watch list" that contains names of suspected terrorists. Through an information exchange program between the Departments of State and Justice, noncitizens who have been deported or who are known to be inadmissible are placed in CLASS.[241] Also placed in CLASS are the names of individuals known to have engaged in acts that may indicate a loss of U.S. nationality and thus ineligibility.[242]

Similarly, the Department of State uses the "TIPOFF" system, which includes a "watch list" of suspected terrorists.[243] TIPOFF provides information on suspected terrorists who should be watched closely. TIPOFF is unique in that it gathers its information directly from the intelligence community as well as law enforcement agencies.

(b) INS

INS utilizes a computer database called the InterBorder Agency Inspection System ("IBIS"), which includes components of CLASS.[244] At the port of entry, the inspector accomplishes an IBIS inquiry by entering an individual's passport number into the system.[245] IBIS is a broad system that interfaces with various FBI databases, Department of Treasury databases, and the Department of State's CLASS and TIPOFF databases. Due to this interface capability, the IBIS is able to obtain such information as whether a noncitizen is admissible, any criminal information, and whether a noncitizen is wanted by law enforcement.

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[239] 8 U.S.C. sec. 1182(a)(10)(E).

[240] Congressional Research Service, CRS Report for Congress, RL31019: *Terrorism: Automated Lookout Systems and Border Security Options and Issues* (June 18, 2001). S*ee* A-14, (March 31, 2000, Memorandum from the CRS to the Joint Committee staff).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* Machine-readable passports for countries in the visa waiver program are not required until October 1, 2003.

The INS also utilizes a computer database called the National Automated Immigration Lookout System ("NAILS"), which is a "watch list" of noncitizens who are inadmissible for entry to the United States. NAILS is a text-based system that feeds into IBIS and is used by INS inspectors during primary inspections. NAILS contains limited information about questionable noncitizens such as biographical data and some criminal history. NAILS interfaces with IBIS and CLASS.

The INS maintains a Computer Linked Application Information Management System ("CLAIMS"), which indicates whether an individual has been granted a waiver of inadmissibility in the course of pursuing an immigration benefit, such as admission or adjustment status. For non-criminal waivers, the INS does not currently maintain statistics regarding the number of waivers of inadmissibility granted by type.[246]

The INS also maintains a computer database called the Central Index System ("CIS"), which contains records long-term permanent residents whose status has been revoked or has been administratively or judicially determined to have been abandoned.[247] The records are retrieved using the long-term permanent resident's alien registration number. The information contained in the CIS is not shared with the IRS, nor is the CIS accessible by the IRS. The CIS contains the immigrant's date of birth, the country of origin, and the date that the INS determines that the long-term permanent resident abandoned residence, Form I-94 control number, and a social security number in some instances.

The INS's Nonimmigrant Information System ("NIIS") provides limited data on the arrival and departures of nonimmigrants admitted for short visits, as well as a nonimmigrant's stated destination in the United States. The NIIS is primarily accessed by a combined name, date of birth, or country of birth, and Form I-94 control number. The NIIS interfaces with IBIS, NAILS, and CIS.

INS computer systems are generally based on alien registration numbers, arrival/departure dates, or application or petition receipt numbers.

8. Waivers of inadmissibility

The INS has not implemented a system that maintains statistics regarding the number of waivers of inadmissibility granted by type in the context of non-criminal waivers.[248] The INS

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[246] *See* A-143 (October 8, 2002, letter from the INS to the Joint Committee staff). As part of a larger project, the INS is consolidating many of the forms currently used to apply for various criminal and non-criminal waivers under new Form I-724 series. Each form in the series would address separate grounds of inadmissibility and as a result, the INS would be able to compile more accurate statistics on the number of waivers sought for each ground of inadmissibility, as well as the number of approval and denials.

[247] *Id.*

[248] *Id.*

also does not maintain statistics on the number of waivers sought for each ground of inadmissibility, including the number of approval and denials.[249] The following represents the total number of waivers granted for all grounds of inadmissibility.[250]

Type of Waiver	FY 00	FY 01	FY 02 (through May 02)
Visa/Passport	20, 688	21,181	5,761
Non-Criminal	6,718	8,819	5,874
Criminal	4,415	4,864	3,968
Total	31,821	34,864	15,603

Nonimmigrant documentary waivers – in general

As a general rule, to be eligible for a nonimmigrant visa, a noncitizen must have a passport valid for six months beyond the dates of travel. For admission as a nonimmigrant, the passport and either a valid nonimmigrant visa or nonimmigrant border crossing identification card must be provided.[251] There are exemptions from this rule by statute and international agreement; there also is authority to waive either or both of the documentary requirements.[252] The law grants to the Attorney General and the Secretary of State, acting jointly, power to waive the visa or the passport requirements,[253] or both, on the basis of:

(1) unforeseen emergency in individual cases;

(2) reciprocity for nationals of foreign contiguous territories (Canada and Mexico) or adjacent islands; or

(3) immediate and continuous transit through the United States as passengers of carriers that have executed certain contracts.

By regulation, a blanket waiver of the need for a visa, the passport requirements, or both, applies to certain groups of nonimmigrants. Although covered by the waiver, a nonimmigrant

[249] *Id.*

[250] *Id.*

[251] 8 U.S.C. sec. 1182(a)(7)(B)(i).

[252] 8 U.S.C. sec. 1182(d)(4).

[253] The Homeland Security Act transfers immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security.

may still apply for and receive a visa. The following identifies the groups for which a blanket waiver of part or all of the documentary requirements has been made by regulation:[254]

(1) Canadian nationals;

(2) Residents in Canada or Bermuda having a common nationality with Canadians or with British subjects in Bermuda;[255]

(3) A resident of the Cayman Islands or the Turks or Caicos Islands who is a British subject and arrives directly from one of these places with a current certificate from its Clerk of the Court indicating no criminal record;

(4) Bahamian nationals or British subjects residing in the Bahamas if the U.S. immigration officer at Freeport or Nassau finds the individual admissible "clearly and beyond a doubt in all other respects;"

(5) British, French, or Netherlands nationals who reside in the respective insular possessions of those countries in the Caribbean area;

(6) Nationals of Jamaica, Barbados, Grenada, or Trinidad and Tobago proceeding to the United States as an agricultural worker or going to the U.S. Virgin Islands on a valid labor certification;

(7) Nationals and residents of the British Virgin Islands under certain conditions;

(8) Mexican nationals if: (a) they possess a border crossing card; (b) they are applying for temporary admission for business or pleasure and are coming from a contiguous territory; (c) they are crewmen on a Mexican commercial aircraft; (d) they are entering solely to apply for a Mexican passport or other documents at a

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[254] *See* generally, 8 C.F.R. sec. 212.1; 22 C.F.R. sec. 41.2. *See* Department of State, 9 Foreign Affairs Manual, sec. 41.2.

[255] This waiver includes citizens of all commonwealth countries and citizens of Ireland. The commonwealth countries are: Antigua, Australia, the Bahamas, Bangladesh, Barbados, Belize, Botswana, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Ireland, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, St. Kitts and Nevis, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom (including colonies, territories, and dependencies), Vanuatu, Western Samoa, Zambia, and Zimbabwe. A passport is not required for these individuals except after a visit outside the Western Hemisphere. Citizenship, as opposed to residency, is required. A resident who is the bearer of a certificate of identity or other stateless individual's document issued by the government of one of these countries may not benefit from the waiver. *See* A-274, Department of State, 9 Foreign Affairs Manual sec. 41.2 N1.1, Exhibit I.

Mexican consular office in the United States; (e) they are Mexican Federal Government officials on a temporary assignment and accompanying family bearing a diplomatic passport; or (f) entering pursuant to the International Boundary and Water Commission Treaty.

(9) Citizens of the Republic of the Marshall Islands and the Federated States of Micronesia;

(10) Citizens of certain Pacific Rim countries under certain conditions;

(11) Noncitizens in immediate and continuous transit through the United States, except for nationals of certain countries;

(12) Unforeseen emergencies; and

(13) Nonimmigrant fiancée spouses and children of U.S. citizens.

Special rules for Canada and Mexico

Citizens of Canada, Mexico, and certain islands in close proximity to the United States do not need visas to enter the United States, although other types of travel documents may be required. A non-resident border crossing identification card can be issued by either a consular or immigration officer to a resident in a foreign contiguous territory.[256] This provision facilitates the entry of pre-screened residents of Canada and Mexico who enter the United States frequently. Under the INS regulations, a Canadian border-crossing card may be issued to and used by a citizen of Canada or a British subject residing in Canada.[257] The Mexican border-crossing card is only issued to residents of Mexico who are also citizens of that country.[258]

Returning lawful permanent residents

Lawful permanent residents returning from a temporary visit abroad generally do not need a visa to reenter the United States. The lawful permanent resident must be returning to an unrelinquished permanent residence in the United States on a green card within a year of departure, or a reentry permit within two years.

Waiver of nonimmigrant documents in individual cases

A nonimmigrant not qualifying for the blanket waiver may make an application to the INS district director in charge of the port of entry showing that the failure to comply with the

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[256] 8 U.S.C. sec. 1101(a)(6).

[257] 8 C.F.R. sec. 212.6.

[258] *Id.*

documentary requirements was due to unforeseen emergency.[259] The process also may be initiated by a consular officer or officer of the visa office by transmitting the pertinent information to the appropriate immigration officer, requesting concurrence.[260]

Visa Waiver Program

The Visa Waiver Program was established as a temporary program by the Immigration Reform and Control Act of 1986.[261] Congress periodically enacted legislation to extend the program's authorization, and the program was made permanent in 2000.

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law.[262] To qualify for the Visa Waiver Program, a country must: (1) offer reciprocal privileges to the United States; (2) have had a nonimmigrant refusal rate of less than 3 percent for the previous year or an average of no more than 2 percent over the past 2 fiscal years with neither year going above 2.5 percent; (3) certify that the country issues, or will issue by October 1, 2003, machine-readable passports; and (4) be determined, by the Attorney General, in consultation with the Secretary of State, not to compromise the law enforcement or security interest of the United States by its inclusion in the program.[263]

Under this program, nonimmigrants from certain countries are admitted to the United States without a visa.[264] Temporary visitors for business or pleasure (tourists) from participating countries simply complete an admission form before their arrival and are admitted for up to 90 days. No background checks are done prior to arrival. At the port of entry, INS inspectors observe and question applicants, examine applicants, examine passports, and conduct checks

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[259] 8 U.S.C. sec. 1182(d)(4)(A). Emergency circumstances are discussed at 22 C.F.R. sec. 41.3(d) and 8 C.F.R. sec. 212.1(g).

[260] 8 C.F.R. sec. 212.1(j) and 22 C.F.R. sec. 41.3.

[261] Pub. L. No. 99-603.

[262] Pub. L. No. 106-396.

[263] *See* A-274, Department of State, 9 Foreign Affairs Manual, sec. 41.2, Exhibit II.

[264] *See* A-278, Congressional Research Service, RS21205: *Immigration: Visa Waiver Program* (April 22, 2002). As of April 2002, 28 countries were eligible to participate in the Visa Waiver Program: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Lichtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay. Argentina was removed from the Visa Waiver Program in February 2002 because of a recent economic collapse causing Argentine nationals to remain illegally past the 90-day period of admission.

against a computerized system to determine whether the applicant is admissible to the United States.[265] This is the only opportunity to identify inadmissible noncitizens.

However, there are several important restrictions, namely, noncitizens entering through the Visa Waiver Program are not permitted to extend their stays except for emergency reasons and then for only 30 days.[266] Additionally, with some limited exceptions, noncitizens entering through the Visa Waiver Program are not permitted to adjust status.[267] Noncitizens entering through the Visa Waiver Program who violate the terms of admission become deportable without any judicial recourse or review (except in asylum cases).[268]

Waiver of substantive inadmissibility for nonimmigrants

The provisions of the INA[269] that render certain noncitizens ineligible to receive visas apply to nonimmigrants as well as to immigrants.[270] The Attorney General, however, is given discretionary power to waive these substantive grounds of inadmissibility with respect to nonimmigrants, except for certain security and related grounds.[271] Applications are evaluated on a case-by-case basis. Factors considered in determining whether to approve a waiver include:

(1) The effect on U.S. public interests if the applicant is admitted;

(2) The seriousness of the actions or conditions causing inadmissibility; and

(3) The reasons for wishing to enter the United States.[272] (There is no need to show a compelling reason for the visit.)

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[265] *Id.* Although nonimmigrants who enter under the Visa Waiver Program do not need a visa, all visa waiver program applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

[266] *Id.* This provision was amended by P.L. No. 106-406, to provide extended voluntary departure to nonimmigrants who enter under the Visa Waiver Program and require medical treatment. Normally, nonimmigrants entering with a "B" visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status.

[267] *Id.*

[268] *Id.*

[269] Sec. 212(a).

[270] 8 U.S.C. sec. 1182(a).

[271] 8 U.S.C. sec. 1182(d)(3).

[272] *See* Department of State, 9 Foreign Affairs Manual, sec. 40.301 n.3.

When applying for a visa

In connection with a visa application, the Attorney General can grant a waiver only upon recommendation of the Secretary of State or the consular officer.[273] The recommendation for waiver must furnish detailed information concerning the grounds of inadmissibility, the date of intended arrival and length of stay in the United States, the purpose of such stay, the number of intended entries, and the justification for the waiver.[274] The consular officer or other Department of State official is notified of the decision on the recommendation. No appeal from an adverse decision is allowed.[275] If the Attorney General grants the waiver, the consular office may proceed with the issuance of the visa, subject to the conditions imposed by the Attorney General.[276]

At the port of entry

If a noncitizen does not require a visa, the procedure differs. The application for exercise of the waiver authority is submitted to the INS district director in charge of the intended port of entry prior to arrival in the United States.[277] The application details the ground for inadmissibility and the basis for the requested waiver. If the application is not made until arrival, the applicant must establish that he or she was not aware of the ground for inadmissibility and could not have learned of it by reasonable diligence.[278]

The applicant receives notice of the INS district director's decision and, if the application is denied, of the reasons and of the right to appeal within 15 days.[279] The denial of the application is without prejudice to its renewal in exclusion proceedings.[280]

Each waiver authorization specifies the sections of law under which the individual is inadmissible, the intended date of each arrival and the length and purposes of each authorized stay, the number of entries and length of time for which the authorization is valid, and the basis

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[273] *See* sec. 212(d)(3)(A) of the INA, 8 U.S.C. sec. 1182(d)(3)(A). The Homeland Security Act transfers immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security.

[274] 8 C.F.R. sec. 212.4(a).

[275] *Id.*

[276] 22 C.F.R. sec. 40.301(c).

[277] 8 C.F.R. sec. 212.4(b).

[278] *Id.*

[279] *Id.*

[280] *Id.*

for the waiver approval.[281] An authorization issued in connection with border crossing cards is valid for multiple entries during the period of validity of the card. Multiple entry authorizations (except for crewman and border crossing cards) are valid for one year, except that a longer period of validity may be permitted upon recommendation of the Department of State.[282] A single entry authorization is valid for a maximum of six months.[283] All admissions under such waivers are subject to the terms and conditions set forth in the authorization. Each authorization specifies that it is subject to revocation at any time.[284]

9. Parole

The INS may parole individuals "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[285] A grant of parole is temporary permission to be present in the United States and requires parolees to leave when the conditions supporting their parole cease to exist. Parole does not constitute a formal admission into the country.

In general, the parole authority allows the INS to respond to individual cases that present problems for which no remedies, such as waiver, are available elsewhere in the Immigration and Nationality Act. Since fiscal year 1992, the INS has used six categories of parole:[286]

(1) Port of entry parole.–This category is used most often. It applies to a wide variety of situations and is used at the discretion of the supervisory inspector, usually to allow short periods of entry. Examples include allowing otherwise inadmissible individuals to attend a funeral and permitting the entry of emergency workers, such as fire fighters, to assist with an emergency.

(2) Advance parole.–Advance parole may be issued to individuals legally residing in the United States other than as lawful permanent residents, who need to travel abroad and return, and whose conditions of stay do not allow for routine reentry. The most common example is an individual whose application for adjustment to lawful permanent resident status is in process.

(3) Deferred inspection parole.–This type of parole may be conferred by an INS inspector when noncitizens appear at a port of entry with documentation, but after preliminary examination, some question remains about their admissibility that can

[281] 8 C.F.R. sec. 212.4(c).

[282] 8 C.F.R. sec. 212.4(c)(7).

[283] *Id.*

[284] 8 C.F.R. sec. 212.4(c)(7) and (h).

[285] 8 U.S.C. sec. 1182(d)(5).

[286] Immigration and Naturalization Service, *Report to Congress: Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act* (September 3, 2002).

best be answered at their point of destination.[287] In the case of deferred inspection, the inspecting officer at the port of entry cannot make a final determination because necessary information is not available. Instead an appointment is made for the noncitizen to appear at a local INS office, where more information is available and the inspection can be completed.

(4) Humanitarian parole.–This category is reserved for individuals who need specialized medical care in the United States or because a severe medical condition makes detention or deportation of an otherwise inadmissible individual inappropriate.

(5) Public interest parole.–Public interest parole is intended for use with noncitizens who enter to take part in legal proceedings, either as witnesses or defendants.

(6) Overseas parole.–Some noncitizens are issued parole overseas after their applications for refugee status have been denied. This is the only category that is designed to constitute long-term admission to the United States. In recent years, most of the individuals INS has processed through overseas parole have arrived under special legislation or international migration agreements.

10. Admission to the United States: arrival and departure records

Form I-94 is an arrival and departure record that serves as evidence of lawful admission and noncitizen registration. If a noncitizen is admitted, one part of Form I-94 is issued to that individual, endorsed with the date and place of admission, the nonimmigrant classification, and the period for which admission is authorized.[288] The other part of Form I-94 is retained for the records of the INS.

The part of Form I-94 designated as "Departure Record" is surrendered to a representative of the transportation company when the individual leaves the United States. The document is then returned to the INS as part of its departure manifest. This record confirms the fact and date of departure.[289]

The requirement that a completed Form I-94 be issued applies to every admitted nonimmigrant with certain exceptions. These exceptions include entries by Canadian citizens and British subjects residing in Canada or Bermuda who are entering the United States as visitors

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[287] From January 1, 2000, through April 30, 2002, 25,114 individuals were paroled for deferred inspection. *See* A-143 (October 8, 2002, letter from the INS).

[288] The period of admission need not correspond to the length of the visa's validity. The passport is also stamped with the word "Admitted" and the date and place of admission.

[289] A nonimmigrant who will be making frequent entries into the United States over its land borders may be issued a Form I-94 valid for multiple entries during a six-month period.

for business or pleasure for less than six months.[290] Under certain circumstances, the exceptions also include Mexican visitors and government officials, and residents of the British Virgin Islands admitted only for a visit to the U.S. Virgin Islands.[291]

[290] 8 C.F.R. sec. 235.1(f)(i).

[291] *Id.*

D. Inadmissibility of Tax-Motivated Former U.S. Citizens

1. The immigration provision

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 prohibited individuals who renounce U.S. citizenship for purposes of avoiding taxation from entering the United States:

> Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.[292]

The immigration provision was introduced as an amendment to H.R. 2202, the Immigration in the National Interest Act of 1995, during a markup of the bill before the House Committee on the Judiciary. Then-Representative Jack Reed introduced the measure that would deem inadmissible to the United States former U.S. citizens who renounced their citizenship for purposes of tax avoidance. He stated:

> This legislation would simply state that if you [renounce your U.S. citizenship for purposes of tax avoidance], and there's no attempt by this legislation to prevent someone from renouncing their citizenship, you would not be able to return to the United States.[293]

An example of a wealthy individual who had renounced citizenship but desired to continue residing in the United States was used to illustrate the problem the amendment sought to address. It was noted that such individual had convinced a foreign government to appoint, or propose to appoint, the individual as a representative to the United States. In discussing the amendment, it was noted that "[t]he government of the United States should not reward those that renounce citizenship by granting them the privileges of residency."

Opponents criticized the measure on three grounds.[294] First, opponents found the amendment too punitive. Second, it was noted that it would be difficult to ascertain precisely why someone renounced citizenship. Finally, opponents believed the measure gave too much discretion to the Attorney General to determine whether the renunciation was for tax avoidance.

Despite this criticism, the amendment was approved by the House Committee on the Judiciary by a vote of 25 to 5 and ultimately became part of the Immigration and Nationality Act at section 212(a)(10)(E), 8 U.S.C sec. 1182(a)(10)(E).

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[292] Illegal Immigration Reform and Immigrant Responsibility Act, P.L. No. 104-208, Division C, sec. 352(a), 110 Stat. 3009-641 (1996).

[293] Federal Information Systems Corporation, Transcript 952970478, *Hearing of the House Judiciary Committee, Subject: Mark-Up of Immigration Legislation* (October 24, 1995).

[294] *Id.*

2. Attorney General access to return information

The immigration provision requires the Attorney General to determine whether a former citizen renounced his or her U.S. citizenship for tax avoidance purposes.[295] However, the ability of the Attorney General to access tax returns or return information for purposes of making this determination is limited under the Code. Section 6103 prohibits the disclosure of returns and return information unless an exception authorizing the disclosure is provided for in the Code. The willful unauthorized disclosure of a return or return information is a felony.[296] No explicit exception exists to facilitate the operation of the immigration provision without the Attorney General first obtaining the consent of the taxpayer whose information is being sought. Thus, even if the IRS made a determination that an individual's relinquishment of citizenship was tax-motivated, that information could not be shared with the Attorney General in the absence of the taxpayer's consent.

3. Availability of waivers

The immigration provision acts as an absolute bar to a former U.S. citizen's obtaining a green card. No waiver of inadmissibility is available for individuals seeking immigrant status.

Nonimmigrants, however, can seek a waiver of inadmissibility. Thus, the provision does not bar a tax-motivated former U.S. citizen from ever entering the United States. If a waiver can be obtained, such individual may enter the United States for a limited period of time per visit.

4. Effect of the immigration provision on admissibility

No former U.S citizens have been found inadmissible under section 212(a)(10)(E) of the INA since its enactment on September 30, 1996. The INS, Department of Justice, the Department of Treasury, the IRS, and the Department of State have been working to develop administrative guidelines and procedures regulations necessary to implement section 212(a)(10)(E) of the INA. This effort has been hampered by the lack of coordination among the various agencies.

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[295] Under the Homeland Security Act, this authority of the Attorney General will reside in the Department of Homeland Security.

[296] Sec. 7213(a).

VI. PURPOSES OF A SPECIAL TAX REGIME FOR CITIZENSHIP RELINQUISHMENT AND RESIDENCY TERMINATION

A. Background: The Tax Incentive to Relinquish Citizenship or Terminate Residency

In order to assess the purposes of a special tax regime for former citizens and former long-term residents, it is instructive to begin with a rough illustration of how U.S. tax savings can become a significant factor in a U.S. citizen's or resident's decision to relinquish citizenship or terminate residency. Assume a U.S. citizen owns appreciated U.S. stock in XYZ company with a $10 million basis and a $110 million fair market value. All appreciation accrued while the individual owned the stock as a U.S. citizen. If the individual sells that stock, the individual will realize a $100 million gain and will be subject to $20 million in taxes (assuming a 20-percent rate on long-term capital gains). When that individual dies (assuming for simplicity that the proceeds of the sale have not been consumed or reinvested prior to death), the $90 million of after-tax sales proceeds would be subject to estate taxes in the approximate range of $40 million to $50 million under present law, depending on the year of death (and assuming the estate includes other property sufficient to exhaust the unified credit and the lower estate tax rates).[297] The combined taxes thus would likely be in the approximate range of $60 million to $70 million. If the individual dies before the stock is sold, there would be no capital gains tax, and the estate tax owed with respect to the $110 million of stock would be in the approximate range of $50 million to $60 million, depending on the year of death (and subject to the various assumptions stated above).

If the United States did not have any special tax regime for former citizens and former long-term residents (as was the case before 1966), U.S. citizens and long-term residents in some instances would have a substantial tax incentive to relinquish citizenship or terminate residency and thereby become subject to U.S. tax only as a nonresident noncitizen.[298] In the above example, the sale of the stock by the former citizen generally would not be taxable in the United States.[299] In addition, the proceeds from the sale could be held in foreign accounts that would not be taxable in the United States. If the former citizen desired to continue holding the stock, it could be held indirectly through a foreign corporation in order to avoid the estate tax that might

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[297] If the individual dies in 2010, then no estate tax would be imposed under present law. Under present law, with the exception of 2010, the estate tax applies with a maximum rate ranging from a low of 45 percent (2007, 2008, 2009) to a high of 55 percent (2011 and later). The rate is 49 percent for 2003.

[298] There could be foreign tax consequences to consider. To the extent that income of the former citizen or former long-term resident is subject to foreign taxes, and assets of the former citizen or former long-term resident are subject to foreign estate taxes, the tax incentive for citizenship relinquishment or residency termination would be less compelling.

[299] Gains on the sale of stocks or securities issued by U.S. persons generally are not taxable to nonresident noncitizens because such gains are considered to be foreign-source income. Sec. 865(a).

otherwise be applicable. In addition, without special immigration rules, the former citizen could return to the United States for significant lengths of time (up to 182 days in any given year, and up to about four months per year on a sustained basis) without jeopardizing his or her status as a nonresident noncitizen. In sum, under the generally applicable tax rules, there are several tax-related benefits that might motivate an individual to consider relinquishing citizenship or terminating residency, and which might be addressed through a special tax regime for former citizens and former long-term residents.

The example above also illustrates that an analysis of taxpayer incentives to relinquish citizenship or terminate residency is complicated by uncertainty regarding the estate tax. EGTRRA provided incremental estate and gift tax rate reductions and unified credit increases from 2002 to 2009, among other changes, and repealed the estate tax for estates of decedents dying after December 31, 2009. However, EGTRRA also included a "sunset" provision, pursuant to which the EGTRRA provisions, including estate tax repeal, do not apply after December 31, 2010. Thus, under present law, the estate tax phases down from 2002 to 2009, is repealed for 2010, and then returns in 2011 without the rate reductions and unified credit increases that were phased in prior to repeal (i.e., the law in effect prior to 2002 applies). In the 107th Congress, several bills were introduced that would make estate tax repeal permanent (e.g., H.R. 586, H.R. 2143, H.R. 2316, H.R. 2327, and H.R. 2599) and one bill was introduced to accelerate estate tax repeal (S.3). The House passed H.R. 586 and H.R. 2143. In addition, the Senate passed, as Senate Amendment 2850 to S. 1731 (an agriculture reauthorization bill), a provision expressing the Sense of the Senate that estate tax repeal should be made permanent. The House also passed a similar measure (H. Res. 524). The Senate did not pass a bill making estate tax repeal permanent.

It is possible that the combination of the phasing down of the estate tax, its repeal for 2010, and an expectation on the part of taxpayers that this repeal may be made permanent could reduce the estate-tax incentives to relinquish citizenship or terminate residency. On the other hand, the delay prior to repeal for 2010, combined with the possibility that this repeal may not be made permanent, or may not be allowed to take effect in the first place, could suggest that the estate-tax incentives to relinquish citizenship or terminate residency are not significantly reduced as a result of EGTRRA. While the impact of the estate tax provisions of EGTRRA on incentives to relinquish citizenship or terminate residency thus cannot be precisely quantified, the example above illustrates that these incentives persist under present law, as substantial estate tax liabilities are still imposed, and may still be avoided in whole or in part by relinquishing citizenship or terminating residency, subject to the operation of the alternative tax regime.

B. Potential Purposes for a Tax Regime for Former Citizens and Former Long-Term Residents

In analyzing a special tax regime applicable to individuals who relinquish citizenship or terminate residency, it is necessary to consider the purposes intended to be served by such a regime. A regime could be designed to serve one or more of a variety of purposes, including: (1) expressing official disapproval of tax-motivated citizenship relinquishment or residency termination; (2) deterring or punishing tax-motivated citizenship relinquishment or residency termination; (3) removing unintended tax incentives for relinquishing citizenship or terminating residency, thereby achieving tax neutrality in the decision to take such actions; (4) taxing appreciation and asset value that accrues while a person is a U.S. citizen or resident; (5) ensuring that individuals cannot enjoy any tax benefits that may arise from relinquishing citizenship or terminating residency while still maintaining significant ties to the country; and (6) combinations of and variations on these purposes. Although the present-law alternative tax regime may serve several purposes, the legislative history to the enactment of the alternative tax regime in 1966 and its modifications, particularly the 1996 amendments, as discussed below, indicates that Congress primarily intended the alternative tax regime to serve the purpose of eliminating unintended tax incentives for citizenship relinquishment or residency termination.

C. Legislative History: Congressional Purpose for the Alternative Tax Regime

1. Foreign Investors Tax Act of 1966

The present-law alternative tax regime was first enacted as part of the Foreign Investors Tax Act of 1966[300] (the "1966 Act"). However, unlike present law, the original alternative tax regime did not contain objective thresholds to treat an individual's citizenship relinquishment as having a principal purpose of tax avoidance. Under the 1966 rules, an individual who relinquished U.S. citizenship was subject to the alternative tax regime only upon proof of a tax avoidance purpose. If it was reasonable to believe that the former citizen's loss of citizenship would result in a substantial reduction in U.S. tax based on the former citizen's income for the taxable year, then the former citizen had the burden of proving that the loss of citizenship did not have as one of its principal purposes the avoidance of U.S. income, estate or gift taxes.

The intent underlying the enactment of the alternative tax regime can be more fully understood in the context of broader revisions to the U.S. tax treatment of nonresident noncitizens and foreign corporations that were part of the 1966 Act. The 1966 Act eliminated progressive taxation of nonresident noncitizens for income that was not effectively connected with the conduct of a U.S. trade or business. Congress was concerned that such a change would encourage some individuals to surrender their U.S. citizenship and move abroad. By doing so, a former citizen could avoid the graduated tax rates on U.S. investment income.[301]

In addition, the 1966 Act reduced the estate tax rates applicable to nonresident noncitizens to more closely equate them with the taxation of estates of U.S. citizens.[302] Although Congress believed that it was doubtful that many citizens would relinquish citizenship for these reasons, in enacting the alternative tax regime, Congress clearly believed that removal of any such incentive was desirable.[303] Congress expressed a view that the wealth of a former citizen that generally would have been accumulated in the United States was properly subject to the regular U.S. estate tax rates.[304]

Similar reasoning applied in the gift tax context. Under pre-1966 law, a gift of intangible property having a U.S. situs by a nonresident noncitizen who was engaged in a U.S. trade or business was subject to U.S. gift tax. This rule proved impossible to enforce, so the 1966 Act provided that gifts of intangible property by nonresident noncitizens are not subject to the U.S. gift tax. To prevent the new rule from becoming a means of tax avoidance by U.S. citizens, the

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[300] Pub. L. No. 89-809.

[301] *See* H.R. Rep. No. 1450, at 22-23 (1966).

[302] *See* H.R. Rep. No. 1450, at 42 (1966).

[303] *See* H.R. Rep. No. 1450, at 46-50 (1966); S. Rep. No. 1707, 28-29, 54, 57 (1966).

[304] *See* S. Rep. No. 1707, at 54 (1966).

1966 Act provided that this new rule did not apply to gifts by individuals who renounced citizenship for tax avoidance purposes.[305]

The following statement of Senator Russell Long from the Senate floor debate on the 1966 Act captures the intent of Congress with respect to the enactment of the alternative tax regime:

> Your committee agrees with the House that such an amendment is necessary since–although there are undoubtedly few Americans who would avail themselves of such a maneuver–but for this provision, the bill does make such a scheme more advantageous. Therefore, we wish to foreclose the possibility that this bill would serve as an encouragement to such people.[306]

For these reasons, Congress designed a regime to apply special tax rules for those persons who relinquish citizenship with a principal purpose of avoiding U.S. income, estate, or gift taxes.

In addition to these general purposes for enacting an alternative tax regime, Congress enacted provisions with more specific purposes. Congress expressed concern with respect to avoiding the alternative tax regime through the transfer of assets abroad (and out of U.S. taxing jurisdiction) in connection with taking the steps to relinquish citizenship. Therefore, the 1966 Act provided that if certain stock ownership tests are met, the value of the former citizen's gross U.S. estate is to include the same proportion of the value of the stock holdings of the former citizen in the foreign corporation as its property having a U.S. situs bears to all its property. The purpose of this rule was to expand the U.S. estate tax base of former citizen decedents to prevent them from avoiding U.S. tax on the estate by transferring assets with a U.S. situs to a foreign corporation in exchange for its stock. Such a transfer would reduce the portion of the former citizen's gross estate having a U.S. situs subject to estate tax because the stock of a foreign corporation has a foreign situs even though the assets of the foreign corporation are situated in the United States.[307] Similar concerns, related to inappropriately avoiding the alternative tax regime, led Congress to modify the source rules with respect to certain other property, including bonds issued by U.S. persons.[308]

2. Deficit Reduction Act of 1984

The Deficit Reduction Act of 1984[309] provided a more objective definition of residence for income tax purposes.[310] In connection with this change, Congress extended the alternative

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[305] *See* H.R. Rep. No. 1450, at 50.

[306] Congressional Record, Oct. 12, 1966, at 25337.

[307] *See* H.R. Rep. No. 1450, at 47; S. Rep. No. 1707, at 54.

[308] *See* H.R. Rep. No. 1450, at 50; S. Rep. No. 1707, at 57.

[309] Pub. L. No. 98-369.

tax regime to certain residents who leave the United States and later return. In enacting this change, Congress intended that under the mechanical tests for residency, U.S. residents should not be able to leave the United States for a short period, dispose of assets free of U.S. tax, and then resume U.S. residence. Congress also expressed concern with the alternative tax regime to the extent the rules allow for the subsequent disposition of foreign assets held during U.S. citizenship or residence free of U.S. tax.[311]

3. Tax Reform Act of 1986

The concern with the conversion of U.S. assets into foreign assets as a means of avoiding the alternative tax regime, first expressed in 1966, resurfaced in connection with the Tax Reform Act of 1986[312] (the "1986 Act"). Congress sought to prevent former citizens who were subject to the alternative tax regime from avoiding the rules by making tax-free exchanges of U.S. property for foreign property. Under the 1986 Act, such converted property would retain its U.S.-source. Congress believed that former citizens should not be able to accomplish indirectly that which they are prohibited from doing directly.[313] Such changes were consistent with the purposes of the 1966 Act of removing tax incentives for expatriation. These changes were also consistent with the view that gains accrued while property was within the U.S. jurisdiction should be taxed in the United States.

4. 1995 Joint Committee staff study

Legislation enacted in 1995 directed the Joint Committee staff to conduct a study of issues presented by certain proposals to modify the tax treatment of expatriation.[314] The Joint Committee staff study was released on June 1, 1995, and contained several findings and conclusions relating to the prior-law alternative tax regime (i.e., pre-1996 law) as well as other proposals to modify significantly the alternative tax regime.[315] The Joint Committee staff

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[310] An individual who has been treated as a U.S. resident for at least three consecutive years, and who becomes a nonresident and then regains residency status within a three-year period is subject to U.S. tax for all intermediate years under the section 877 income tax rules. Sec. 7701(b)(10).

[311] *See* Joint Committee on Taxation, *General Explanation of the Revenue Provision of the Deficit Reduction Act of 1984*, 465, JCS-41-84 (Dec. 31, 1984).

[312] Pub. L. No. 99-514.

[313] *See* Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986*, 1050, JCS-10-87 (May 4, 1987).

[314] *See* the Self-Employed Person's Health Care Reduction Extension Act of 1995, Pub. L. No. 104-7, sec. 6 (1995).

[315] *See* Joint Committee on Taxation, *Issues Presented by Proposals to Modify the Tax Treatment of Expatriation*, (JCS-17-95), June 1, 1995 (hereinafter referred to as the "1995 Joint Committee staff study").

identified certain problems with the prior-law provisions, including the use of certain legal methods to avoid some or all taxation under section 877 through tax planning, the relocation of individuals to certain treaty countries that did not permit the United States to impose tax under section 877 on former citizens, the relocation of assets outside of the scope of section 877 (which only applied to U.S.-source income producing assets), and administrative difficulties associated with demonstrating that tax avoidance was the principal purpose for the individual's expatriation.

5. Health Insurance Portability and Accountability Act of 1996

Through press reports and hearings, Congress became informed that a small number of very wealthy individuals each year relinquish their U.S. citizenship for the purpose of avoiding U.S. income, estate, and gift tax in spite of section 877.[316] As a result, several significant changes were made to the alternative tax regime in 1996 as part of the Health Insurance and Portability and Accountability Act of 1996[317] (the "1996 Act"). Congress revisited the alternative tax regime and made several amendments to strengthen the regime, consistent with the purposes of the 1966 Act. In amending the alternative tax regime, Congress continued to recognize that U.S. citizens have a basic right under both U.S. and international law not only to leave the United States and live elsewhere, but also to relinquish their U.S. citizenship. Accordingly, Congress did not believe that the Internal Revenue Code should be used to stop U.S. citizens or residents from expatriating or terminating residency. Punishment or deterrence, therefore, does not seem to be the intended purpose of the alternative tax regime. At the same time, however, Congress believed that the Code should not provide an incentive for citizenship relinquishment or residency termination.[318] Thus, similar to the purposes underlying the enactment of the alternative tax regime in 1966, the 1996 amendments reflect the view of Congress that tax incentives for citizenship relinquishment or residency termination should be eliminated and tax neutrality should be the goal.[319]

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[316] *See* Robert Lenzner and Philippe Mao, "The New Refuges," *Forbes*, Nov. 21, 1994; United States Senate Committee on Finance, Subcommittee on Taxation and IRS Oversight, *Hearing on the Administration's Proposal to Impose a Tax on Individuals Who Renounce Their U.S. Citizenship*, Mar. 21, 1995; United States House of Representatives Committee on Ways and Means, Subcommittee on Oversight, *Hearing to Examine the Administration's Proposal Relating to the Tax Treatment of Americans Who Renounce Citizenship*, Mar. 27, 1995.

[317] Pub. L. No. 104-191. The 1996 legislative changes to the alternative tax regime generally followed the provisions of H.R. 3103, as passed by the House on March 28, 1996, with certain modifications.

[318] *See* Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 104th Congress*, 378, JCS-12-96 (Dec. 18, 1996).

[319] Notwithstanding that Congress expressed a purpose of removing tax incentives for citizenship relinquishment or residency termination as the reason for the 1996 amendments to the alternative tax regime, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 prohibited persons who renounce U.S. citizenship for the purposes of avoiding taxation from entering the United States. The apparent intent of this rule was that the United States

The 1996 Act extended the alternative tax regime to apply not only to U.S. citizens who lose their citizenship but also to certain long-term residents of the United States whose U.S. residency is terminated.

Second, the 1996 Act provided special rules for purposes of determining whether a former citizen or former long-term resident relinquished citizenship or terminated residency with a principal purpose of tax avoidance. Under these rules, an individual is deemed to have relinquished citizenship or terminated residency with a principal purpose of tax avoidance if (1) the individual's average annual U.S. Federal income tax liability for the five taxable years prior to citizenship relinquishment or residency termination exceeds $100,000, or (2) the individual's net worth on the date of citizenship relinquishment or residency termination is $500,000 or more, as adjusted for inflation. Certain categories of individuals can avoid being deemed to have a principal purpose of tax avoidance for expatriating or terminating residency under these special rules if such individuals submit a ruling request to the IRS regarding whether they relinquished citizenship or terminated residency principally for tax reasons.

Third, the 1996 Act expanded the categories of income and gains that are treated as U.S.-source (and, therefore, subject to U.S. income tax under section 877) if earned by an individual who is subject to the alternative tax regime, and included certain provisions to eliminate the ability to engage in certain transactions that under prior law (i.e., the law in effect before the 1996 changes) partially or completely circumvented the 10-year reach of section 877. These included transactions in which income is derived through controlled foreign corporations, certain foreign property is acquired in nonrecognition transactions, and U.S. property is contributed to foreign corporations.

Fourth, the 1996 Act provided relief from double taxation in circumstances in which another country imposes tax on items that would be subject to U.S. tax under the alternative tax regime. This change addressed the concern that amounts taxed under the alternative tax regime could be subject to double taxation. For example, under pre-1996 law, items could be taxed by both the United States and the country of residence of a former citizen.

Fifth, the 1996 Act contained provisions to enhance compliance with the alternative tax regime, and to assist the IRS in identifying former citizens and former long-term residents who are subject to the alternative tax regime. The 1996 Act imposed information reporting obligations on U.S. citizens who lose their citizenship and long-term residents whose U.S. residency is terminated at the time of citizenship relinquishment or residency termination, and required the Department of State and other governmental agencies to share certain information with the IRS with respect to such individuals.

The 1996 legislative changes to the alternative tax regime were effective for any individual who lost U.S. citizenship, and any long-term resident whose U.S. residency was terminated, on or after February 5, 1995. A special transition rule applied to individuals who committed an expatriating act within one year prior to February 6, 1995, but had not applied for

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should not allow individuals who renounce citizenship for tax purposes the continued enjoyment of some of the privileges of residency in the United States. *See* Part V.D.1, above.

a CLN as of such date. Such an individual was subject to the alternative tax regime, as modified in 1996, as of the date of application for the CLN, but was not retroactively liable for U.S. income taxes on his or her worldwide income. In the case of any former citizen, a request for a ruling that such individual did not have tax avoidance as a principal purpose for the individual's citizenship relinquishment was due not earlier than 90 days after August 21, 1996 (the date of enactment of the 1996 Act).[320]

The 1996 Act also directed the Department of Treasury to undertake a study on the tax compliance of U.S. citizens and green-card holders residing outside the United States and to make recommendations regarding the improvement of such compliance. The findings of such study and recommendations were required to be reported to the House Committee on Ways and Means and the Senate Committee on Finance within 90 days after August 21, 1996 (the date of enactment of the 1996 Act). In May 1998, the Department of Treasury issued its study on the income tax compliance by U.S. citizens and U.S. lawful permanent residents residing outside the United States.[321] The Department of Treasury noted that compliance and enforcement may be extremely difficult with respect to individuals whose connection with the United States was or will be minimal. For example, if an individual no longer has investments in the United States, the IRS may not receive information from third party payers with respect to that individual. Thus, the IRS may not be able to determine whether such individual should have filed a U.S. income tax return. The report also noted that information from the Department of State and the INS often lack the former citizen's or former permanent resident's social security number. Since IRS systems are based on such numbers, the report noted that the IRS has difficulty matching the information it receives from these agencies with other IRS data. In addition, the report pointed out that the date a CLN is issued does not correspond with the date of the expatriating act. The report noted that the 10-year period under section 877 potentially could expire between the date of the expatriating act and the issuance of the CLN by the Department of State. Finally, the Department of Treasury noted that the information provided by the INS with respect to former green card holders was not sufficient to identify which green card holders were former long-term residents for purposes of the alternative tax regime (i.e., a resident for eight out of the last 15 years).

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[320] *See* Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 104th Congress*, 387, JCS-12-96 (December 18, 1996). Similarly, the required information statements were not due earlier than 90 days after August 21, 1996. *Id.* Under Notice 96-60, 1996-2 C.B. 227, the IRS announced that it intended to issue detailed guidance with respect to the ruling request and information reporting rules, and stated that ruling requests and information statements are not due earlier than 60 days after the issuance of such guidance. The due dates for the information statements are described in Notice 97-19. See discussion in Part IV.B.5. above.

[321] *See Department of Treasury, Income Tax Compliance by U.S. Citizens and U.S. Lawful Permanent Residents Residing Outside of the United States and Related Issues*, Rep. No. 3108 (May 15, 1998).

D. Summary

There are several potential purposes that a tax regime for former citizens and former long-term residents could serve. The design of the taxing regime and evaluation of the effectiveness of the regime depends on one's view of the appropriate purpose for the regime. Congress has indicated that the present-law alternative tax regime is intended to serve the purpose of removing the tax incentives for citizenship relinquishment or residency termination. The scope of this review, therefore, is limited to analyzing the present-law rules to determine whether they are effective in achieving that purpose.

VII. ENFORCEMENT OF PRESENT-LAW TREATMENT OF CITIZENSHIP RELINQUISHMENT AND RESIDENCY TERMINATION

A. Summary

The present-law alternative tax regime and related immigration provisions are not being adequately enforced in the manner intended by Congress. The IRS has taken steps to provide detailed guidance under Notice 97-19[322] and Notice 98-34[323] with respect to the application of the alternative tax regime. However, the GAO stated in their 2000 report that the "IRS does not yet have a systematic compliance effort aimed at enforcing income, estate, or gift tax laws related to tax-motivated expatriation."[324] Since that time, the IRS has ceased all compliance efforts directly related to the income, estate, and gift tax obligations of former citizens and former long-term residents under the alternative tax regime, other than to compile a database of such individuals and publish the names of those individuals in the *Federal Register* as required by section 6039G.[325] While compliance investigations of former citizens or former long-term residents may occur due to other IRS compliance activities (e.g., tax shelter investigations), the IRS does not monitor the individuals identified as former citizens or former long-term residents, either through the letter ruling process or from the Department of State's provision of CLN information, for the payment of U.S. income, estate, or gift taxes that may be owed during the 10-year period following an individual's citizenship relinquishment or residency termination.[326] In addition, the INS and the Department of State have not issued guidelines implementing the immigration provision applicable to former citizens with the result that the current provision has not been enforced since it was enacted in 1996.

This section describes enforcement problems with the alternative tax regime at the following stages of enforcement: (1) the identification of former citizens and former long-term residents who are potentially subject to the alternative tax regime; (2) the determination of whether an individual's relinquishment of citizenship or termination of residency is tax-motivated; and (3) the monitoring, assessment, and collection of U.S. income, estate, or gift tax over the 10-year period following an individual's citizenship relinquishment or residency termination. This section also describes enforcement problems with the immigration provision relating to the denial of re-entry into the United States for U.S. citizens who relinquish citizenship for tax reasons.

The Joint Committee staff requested the GAO to investigate the enforcement by the Department of Treasury, the IRS, the Department of State, and the INS of the alternative tax

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[322] 1997-1 C.B. 394. *See* A-166.

[323] 1998-2 C.B. 29. *See* A-193.

[324] *See* GAO Report at A-256.

[325] *See* A-141 (September 20, 2002, letter from the IRS).

[326] *See* A-148 (October 10, 2002, letter from the IRS).

regime and related immigration rules. The discussion below is based primarily on the GAO's findings in 2000, which are reproduced in the Appendix (at A-219), supplemented by Joint Committee staff discussions with IRS and INS personnel since that report. The GAO's findings were based on a review of tax and immigration laws, the procedures used to enforce such laws, interviews with appropriate government personnel, and an analysis of tax and immigration information and statistical data. The Joint Committee staff understands that the IRS initiated a project in December 1999 to assess compliance with the alternative tax regime by individuals who have voluntarily supplied information concerning their net worth and their income tax liability. According to the GAO, the project was scheduled to be completed by July 2000.[327] The IRS has indicated that some examinations of former citizens or former long-term residents were initiated as a result of this project.[328] However, the Joint Committee staff was unable to obtain information on the amount of tax collected under the expatriation rules through these efforts. In addition, the IRS indicated that this program was not being renewed.[329] The Joint Committee staff also understands that the INS is currently in the process of developing guidelines to implement the immigration provision applicable to former citizens.[330]

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[327] *Id.*

[328] *See* A-123 (August 14, 2002, letter from the IRS).

[329] *Id.* For a description of the IRS's analysis of its own efforts, see the letters reproduced at A-123 and A-63.

[330] *See* A-143 (October 8, 2002, letter from the INS).

B. Enforcement of the Alternative Tax Regime for Former Citizens and Former Long-Term Residents

1. Identification of former citizens and former long-term residents who are potentially subject to the alternative tax regime

An important step in enforcing the alternative tax regime is the identification of individuals who relinquish citizenship or terminate residency and who are potentially subject to the alternative tax regime. The IRS does not independently obtain information to determine whether former citizens or former long-term residents may be subject to the alternative tax regime. Rather, it relies upon the information that is supplied by the former citizen or former long-term resident and a ruling process (described below) to identify whether they are subject to the regime.[331] The success of this identification process depends in large part on cooperation by the former citizen or former long-term resident and coordination by the various agencies responsible for obtaining the information necessary for the IRS to make an initial determination as to whether an individual is subject to U.S. income, estate, or gift taxes under the alternative tax regime. In many cases, the necessary information is not being supplied by the former citizen or former long-term resident or requested by the appropriate agencies responsible for providing such information to the IRS.

Former citizens

The most common method to identify an individual who may be subject to the alternative tax regime is through a formal renunciation of U.S. citizenship. A U.S. citizen who formally renounces his or her citizenship must execute an Oath of Renunciation before a consular officer in a foreign country. In such cases, the consular officer submits a CLN to the Department of State in Washington, D.C. for approval.[332] The Department of State generally documents each such loss of citizenship when the individual acknowledges to a consular officer that the act was taken with the requisite intent to renounce citizenship. A copy of the approved CLN is issued directly to the former citizen.

The following numbers of U.S. citizens formally renounced citizenship during the past eleven years:

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[331] *See* GAO Report at A-256.

[332] As described in more detail in Part V. B., above, there are several other ways that a U.S. citizen can lose citizenship without the issuance of a CLN. Many of these other methods of citizenship relinquishment are not required to be reported to the appropriate U.S. authorities. Without a complete list of former citizens, the IRS's auditing efforts to identify individuals who may be subject to the alternative tax regime generally will be limited to only those persons who voluntarily provide expatriation data (i.e., a population of less than 100 percent of all former citizens).

Table 1.–Former Citizens Receiving CLNs[333]

Year	Number
1991	619
1992	556
1993	697
1994	858
1995-97	1,903[334]
1998	440
1999	433
2000	522
2001	334
Total	6,362[335]

The Secretary of State is required to collect the approved CLNs and forward a copy to the Treasury Secretary each month.

While the IRS maintains a database (the "CLN database") of individuals who have received a CLN, according to the GAO, it was only in 2000 that the IRS utilized that information to monitor and enforce compliance with the alternative tax regime.[336] According to the IRS, no

[333] The data for 1991 through 1999 are from the GAO Report at A-256. The data for 2000 and 2001 are from the IRS. *See* Table 8 at A-321. The data differs from the information reported by the IRS at A-123 (August 14, 2002, letter from the IRS). The data reflects submissions of CLNs received by the IRS from the Department of State during the third quarter of 2002.

[334] According to the GAO, data for the years 1995 through 1997 are not distinguished by year because the IRS published the total number of former citizens for all three years in 1997 (the year the requirement was enacted). *Id.* In addition, the Joint Committee staff requested the Department of State to identify the number of approved CLNs for each of these three years. The Department of State advised the Joint Committee staff that they are unable to provide a yearly breakdown of CLNs approved for the years 1995, 1996, and 1997. According to the Department of State, their prior practice of collecting statistics on the annual numbers of CLNs was discontinued in 1994 because it did not serve their specific needs. *See* A-68 (May 18, 2000, letter from the Department of State).

[335] According to the IRS, 135 former U.S. citizens received CLNs for the period from January 1, 2002, through September 30, 2002.

[336] *See* GAO Report at A-256.

monitoring or compliance efforts are based on this database at present.[337] The CLN database is used only to coordinate reporting in the *Federal Register*.[338]

Furthermore, the usefulness of the CLN is dependent on the method of citizenship relinquishment. There is no requirement that a person obtain a CLN in order to relinquish citizenship. Also, the date that the Department of State issues a CLN is not necessarily the date of citizenship relinquishment. For example, a person could commit an expatriating act years before a CLN is issued. In such a circumstance, the 10-year period during which the former citizen may be subject to U.S. income, estate, or gift taxes under the alternative tax regime could expire before the CLN is issued and transmitted to the IRS. Generally, if there is no reason for the consular officer to suspect that the former citizen is being untruthful regarding the date of citizenship relinquishment, the date offered by the former citizen is accepted and recorded on the CLN. More importantly, a CLN by itself contains very little of the information that is needed to enforce the alternative tax regime. For example, it does not contain the individual's taxpayer identification number (i.e., his or her social security number).

Every individual who loses U.S. citizenship (formally or otherwise) is required to provide to the Department of State an information statement containing certain information.[339] The Department of State then forwards this information to the IRS, along with the names and other identifying information of persons who refuse to complete a statement. In March 1997, the IRS issued detailed guidance regarding the content of the required information statement in Notice 97-19. However, no official form was available from the IRS until January 1999 when IRS Form 8854 was released. In addition, the Department of State does not require that the information be provided on IRS Form 8854. The information supplied on Form 8854 and from the Department of State submissions is the basis of the IRS's CLN database. Based on anecdotal information, and information provided by the IRS, there is missing data related to various individuals in the database.[340] The IRS has drafted a first, second, and third notice and an associated Form 886E, "Explanation of Requested Items," but these notices and the related form are not yet in use.[341]

Information reporting relating to former citizens and former long-term residents is vital to any attempt to enforce the alternative tax regime. First, information reporting identifies

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[337] *See* A-141 (September 20, 2002, letter from the IRS).

[338] *Id.*

[339] Sec. 6039G(a). Although added to the Code in 1996, the provision became effective for individuals losing U.S. citizenship on or after February 5, 1995, and long term U.S. residents who terminate U.S. residency or begin foreign residency on or after February 5, 1995. However, under Notice 97-19, the information statements pursuant to section 6039G generally were not due earlier than June 8, 1997.

[340] *See* A-141 (September 20, 2002, letter from the IRS).

[341] *Id.*

individuals who may be subject to the alternative tax regime. Former citizens may voluntarily identify themselves as being tax-motivated on a tax information statement such as IRS Form 8854. According to the GAO, from 1995 through 1999, 182 out of the 1,158 former citizens who provided information statements identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2).[342] For 2000 and 2001, 76 or fewer of the 686 former citizens who provided information statements identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2).[343] Thus, through information reporting, as many as 258 individuals may have self-reported themselves to the IRS as potentially subject to the alternative tax regime. However, not all former citizens have filed IRS Form 8854 or provided another information statement. According to the GAO, of the 2,735 former citizens who received CLNs from 1995 through 1999 and whose names were published in the *Federal Register*, 1,158 provided a Form 8854 or other information statement.[344] That is, for the period 1995 - 1999, almost 58 percent provided none of the required information. [345] In contrast, for 2000 and 2001, of the 856 former citizens who received CLNs, 682 provided an information statement, or almost 80 percent of that population.[346] Receipt of IRS Form 8854 or other information statement remains a problem. The IRS reports that through September 30, 2002, the Department of State has forwarded 135 CLNs issued related to citizenship

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[342] *See* GAO Report at A-256.

[343] *See* A-123 (August 14, 2002, letter from the IRS). The IRS reported that for 2000 and 2001, 76 individuals who provided an IRS form 8854 or other information statement either identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) or included a social security number.

[344] *Id.* According to the GAO, the total of 2,735 former citizens receiving CLNs during 1995 through 1999 (which does not match the total for the same years listed in Table 1) reflects the fact that in March 2000 the IRS published a corrected listing of individuals receiving CLNs for the quarter ending June 1998.

[345] According to the IRS, because of the retroactive application of the 1996 alternative tax regime and the period required to publish guidance for former citizens and former long-term residents, the IRS initially did not receive a number of required information statements from former citizens and former long-term residents. However, after the issuance of Notice 97-19, approximately 95 percent of the CLN packages received contained the required information statement. *See* A-27 (May 5, 2000, letter from the IRS).

[346] *See* Table 8 at A-321. *See* A-123 (August 14, 2002, letter from the IRS). In that letter, the IRS reported that of the 792 former citizens who received CLNs, 686 provided an information statement, or almost 87 percent of that population. That data related to CLNs issued through June 30, 2002. The data reported in the text reflect a review of the prior submissions and CLNs issued in the third calendar quarter of 2002. In the third quarter of 2002, the Department of State issued an additional 64 CLNs relating to loss of nationality in either 2000 or 2001. A review of the prior data indicated that, in total, four fewer individuals submitted financial information than had been reported in the August 14, 2002, IRS letter.

relinquishments in 2002. Of these 135 individuals, only 41, or 30 percent, provided an IRS Form 8854 or other tax information statement.[347]

Provision of a social security number by the former citizen or former long-term resident is the second vital aspect of information reporting to the enforcement process. The IRS recordkeeping system for individuals in dependent on social security numbers. In the absence of a social security number, the IRS has a very limited ability to use the information and incorporate it into its existing systems. To search IRS databases by name, for example, is time consuming and often ineffectual. For the IRS to effectively monitor any returns filed by an individual subject to the alternative tax regime, the IRS requires an accurate social security number. The statute requires former citizens to include, among other things, their social security number on the information statement. However, many former citizens do not include a social security number as part of the required information. The GAO noted that in the period 1991 to 1999, of the 1,158 former citizens who provided tax information statements, only 955 included a social security number.[348] The experience has been similar in more recent years. The IRS has received 991 CLNs from the Department of State relating to the years 2000, 2001, and the first nine months of 2002. Of these individuals who relinquished citizenship, 723 have submitted IRS Form 8854 or other tax information statements and 623 have provided their social security number.[349] It is unclear whether the Department of State could compel an individual to furnish a social security number as part of the CLN process.[350] Some former citizens may not have a social security number. For example, dual citizens who were unaware of their U.S. citizenship may have never obtained a social security number. The Department of State has noted that many individuals who relinquish citizenship have a tenuous nexus to and have never resided in the United States. As a result, it is not uncommon for these individuals not to have a social security number.

The penalty for failure to report such information is equal to the greater of five percent of the first-year tax determined under section 877 or $1,000. However, according to the GAO and the IRS, no penalties have yet been imposed.[351] In January 2000, the IRS sent notices to persons

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[347] *Id.*

[348] *See* GAO Report at A-256.

[349] *See* Table 8 at A-321. The IRS reports that these data are not directly comparable to the figures reported by the GAO for years before 2001, because some individuals submit an IRS Form 8854 but no social security number and other individuals submit a social security number but no IRS Form 8854

[350] The Department of State does require individuals to surrender their U.S. passports as part of the CLN process. Section 6039E requires passport applicants (including renewal applications) to supply their social security numbers, effective for applications submitted after December 31, 1987. Because U.S. passports generally are not issued for more than 10 years, it should be possible to obtain missing social security numbers from passport applications.

[351] *See* GAO Report at A-256 and A-123 (August 14, 2002, letter from the IRS).

who failed to provide the required information statements. According to the IRS, approximately 125 letters were mailed to individuals who failed to provide required information statements; 74 individuals provided responses that brought them into full compliance with the section 6039G information reporting requirements.[352] The IRS indicated that compliance efforts were hampered with regard to individuals who did not respond due to lack of social security numbers or general inability to identify the individuals.[353] The Joint Committee staff understands that the IRS has not attempted systematically to collect missing information since the reorganization of the IRS in the fall of 2000, although, as noted above, the IRS has drafted a series of proposed notices and a form that would be sent to former citizens or former long-term residents for whom such data are incomplete. Some argue that the present-law penalty for failure to provide the required information may not be a sufficient disincentive to encourage information reporting.

While the Department of State has forwarded to the IRS whatever information it receives, the Department of State does not require its consular officers to obtain the information in a uniform fashion. The Department of State's November 1996 guidance to its consular posts calls for them to obtain tax information statements as required by section 6039G; however, each consular office has discretion in what forms to use. As a result, prior to the introduction of Form 8854 in 1999, the quality and usefulness of the information the Department of State received (and provided to the IRS) varied widely. There may still be gaps in the quality and usefulness of this information because the Department of State does not require each consular office to use Form 8854 (although many do).

Former long-term residents

Aside from the ruling process described below, no similar data to Table 1 (relating to the number of former citizens) exists for identifying former long-term residents who may be subject to the alternative regime.

Section 6039G(e)(3) requires the INS to provide the IRS with the name of each lawful permanent resident of the United States whose status has been revoked or has been administratively or judicially determined to have been abandoned. The law also requires each long-term resident (defined as a person who has been a lawful permanent resident for at least eight of the last 15 years) who ceases to be taxed as a resident to file an information statement similar to that filed by former citizens (i.e., Form 8854). That form is required to be filed directly by the former long-term resident with the IRS.

The CLN database maintained by the IRS contains former citizens only. The IRS does not track whether a former long-term resident has filed the required information statement, and does not have specific procedures in place to monitor compliance efforts with respect to former

[352] *See* A-123 (August 14, 2002 letter from the IRS).

[353] *Id.*

long-term residents under the alternative tax regime.[354] The IRS does not use the information provided by the INS to track former long-term residents.[355]

The INS does provide information to the IRS identifying whether a permanent resident's status has been revoked. However, the information supplied by the INS has not proven to be helpful in identifying former long-term residents who may be subject to the alternative tax regime. The information does not distinguish former long-term residents (as defined for purposes of the alternative tax regime) from other green-card holders.[356] The INS does not keep records regarding the movement of these individuals into or out of the United States.[357] Thus, it is unable to track whether a former permanent resident qualified as a "long-term resident" for purposes of section 877. Unless a former permanent resident tries to reenter the United States after a prolonged absence (e.g., more than one year) without the proper documentation, or voluntarily turns in his or her green card, the INS has no method for identifying these individuals.

In addition, the information from the INS generally does not include the individual's tax identification number (i.e., social security number). The INS does not organize its records by social security number because such a number is not necessary to carry out its functions. While persons are assigned a unique "alien registration number," it does not correspond to a social security number. Thus, the IRS has difficulty integrating that information into its social security number-based system.

2. Determination of whether an individual's relinquishment of citizenship or termination of residency is tax-motivated

Another important step in enforcing the alternative tax regime is to determine whether an individual's relinquishment of citizenship or termination of residency is tax-motivated. This determination has been based largely on the monetary thresholds under section 877(a)(2) (which

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[354] *See* GAO Report at A-256. The IRS could attempt to match the names of former long-term residents from the INS database with taxpayer identification numbers in the IRS database. The IRS notes, however, that this matching process involves a labor-intensive manual search.

[355] *See* GAO Report at A-256. The IRS contends that it has attempted to use the data, but because of the large volume of records and the lack of social security numbers use of the data is time consuming and resource intensive. *See* A-27 (May 5, 2000, letter from IRS) and A-123 (August 14, 2002 letter from IRS).

[356] *See* GAO Report at A-256.

[357] According to the INS, it does track the movements of nonimmigrants on its Nonimmigrant Information System ("NIIS"). NIIS tracks admission and departure dates of nonimmigrants, as well as each nonimmigrant's stated destination in the United States. The arrival and departure records of permanent residents are not tracked by any INS system.

deem a tax avoidance purpose for relinquishing citizenship or terminating residency), and an IRS ruling process for certain individuals who wish to avoid such deemed treatment.

Several enforcement problems exist with respect to identifying former citizens and former long-term residents who meet the monetary thresholds. As described above, the IRS generally has not received adequate information (including social security numbers) in order to determine whether an individual has met one or more of the statutory criteria deeming a tax avoidance purpose. The GAO determined that of the 182 former citizens during the period 1995 through 1999 who identified themselves as meeting one or more of these statutory criteria, only 23 submitted ruling requests.[358] The remaining 159 individuals for that period who did not submit a ruling request presumably are subject to the alternative tax regime. However, according to the GAO, the IRS generally has not sought to determine whether any of these individuals who are considered to be tax-motivated owe tax under these special rules. For 2000 and 2001, the IRS reports that, of the 76 former citizens who identified themselves as either meeting one or more of the monetary thresholds or who included a social security number, 44 submitted ruling requests.[359] Again, the remaining 32 individuals presumably are subject to the alternative tax regime, but the IRS has not sought to enforce these rules.

Similar enforcement problems have arisen in the ruling context. Under the ruling process, a former citizen or former long-term resident who falls within certain categories may avoid the deemed treatment under the monetary thresholds by submitting a ruling request within one year of citizenship relinquishment or residency termination. The table below identifies the number of private letter rulings that have been issued to former citizens and former long-term residents and publicly released during the period from January 1, 1997, through July 1, 2002 (excluding extension requests).

Table 2.–Summary of Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents during the Period from January 1, 1997 through July 1, 2002[1]

Year Issued	Former Citizens	Former Long-Term Residents	Total
1997	11	4	15
1998	0	3	3
1999	42	54	96
2000	22	40	62
2001	19	55	74
2002	6	14	20
Total	100	170	270

[1] Under Notice 97-19, private letter rulings may be submitted before or within one year after citizenship relinquishment or residency termination. Furthermore, those individuals may submit a ruling request up to one year after their citizenship relinquishment or residency termination.

[358] *See* GAO Report at A-256.

[359] *See* A-123 (August 14, 2002 letter from IRS).

During the period from January 1, 1997 through July 1, 2002, 270 former citizens and former long-term residents were issued private letter rulings in order to avoid being treated as having a tax avoidance purpose under the alternative tax regime. Of the 270 private letter rulings issued during this period, 100 were issued to former citizens and 170 were issued to former long-term residents. Under the present procedures, the receipt of a ruling request generally is the only practical way that the IRS becomes aware that a long-term resident terminated residency (even though such individuals are required to submit an information statement).

The private letter rulings that have been issued since the 1996 legislative changes to the alternative tax regime vary depending upon whether they were issued pursuant to Notice 97-19 or Notice 98-34. Under Notice 97-19, a former citizen or former long-term resident who met the monetary thresholds of tax avoidance and who was eligible to submit a ruling request was subject to the alternative tax regime unless he or she obtained a favorable ruling.[360] This ruling practice placed considerable pressure on the issuance of a taxpayer-favorable ruling.

The IRS's ruling practice was modified in Notice 98-34 due to the IRS's stated difficulties in making determinations regarding tax avoidance motives because of the factual and subjective nature of the inquiry. Under this modified ruling procedure, the IRS is not limited to ruling whether or not an individual's citizenship relinquishment or residency termination was tax-motivated. Rather, the IRS may merely rule that the former citizen or former long-term resident submitted a complete ruling request in good faith (without ruling on the substantive issue of whether one of the principal purposes of the citizenship relinquishment or residency termination was tax avoidance). If the former citizen or former long-term resident receives this third type of ruling (i.e., a "fully submit" ruling), the former citizen or former long-term resident is not treated as having a tax avoidance purpose as a result of meeting the monetary thresholds. However, the IRS reserves the right to make a subsequent determination (based on the facts and circumstances) that the individual's citizenship relinquishment or residency termination was tax-motivated.

Table 3, below, identifies the number of private letter rulings that have been publicly issued to former citizens and former long-term residents during the period from January 1, 1997, through July 1, 2002 (excluding extension requests), under Notice 97-19 and Notice 98-34, respectively, broken down by the type of ruling issued:

[360] Under Notice 97-19, the IRS could (if it chose to issue a ruling) provide either a favorable or unfavorable ruling as to whether an individual relinquished citizenship or terminated residency for tax avoidance purposes.

Table 3.–Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents Under Notices 97-19 and Notice 98-34 during the Period from January 1, 1997, through July 1, 2002

Ruling Issued	Notice 97-19	Notice 98-34	Total
Favorable:			
Former citizens	11	17	28
Former long-term residents	4	100	104
	15	117	132
Unfavorable:			
Former citizens	0	11	11
Former long-term residents	0	0	0
	0	11	11
Fully Submit:			
Former citizens	Not applicable	65	65
Former long-term residents	Not applicable	62	62
		127	127
Total	15	255	270

Only 15 rulings were issued under Notice 97-19. All of these rulings were favorable for the former citizen or former long-term resident (i.e., that the individual's citizenship relinquishment or residency termination was determined not to be tax-motivated). In addition, 255 rulings were issued through July 1, 2002, under Notice 98-34. Of the 255 rulings, 127 rulings were fully submit rulings with no opinion regarding whether the individual's citizenship relinquishment or residency termination was tax-motivated, and 11 were unfavorable rulings concluding that an individual relinquished citizenship with a principal purpose of tax avoidance. The remaining 117 rulings issued during this period under Notice 98-34 were favorable rulings concluding that the individual lacked a principal purpose of tax avoidance for citizenship relinquishment or residency termination. Summaries of the 270 private letter rulings issued during the period from January 1, 1997, through July 1, 2002, are contained in the Appendix at A-218.

The IRS has no special procedures in place to further investigate former citizens or former long-term residents who were issued an unfavorable ruling (i.e., concluding the existence of a principal purpose of tax avoidance).[361] Thus, even though a former citizen or former long-term resident was determined to have a principal purpose of tax avoidance and was subject to the alternative tax regime for 10 years following the citizenship relinquishment or residency termination, the IRS generally has not sought to determine whether these individuals owe any tax

[361] *See* GAO Report at A-256.

under these special rules.[362] In fact, aside from the 125 letters mailed in January 2000 requesting additional information, the IRS has made no special efforts to monitor former citizens' or former long-term residents' compliance with the rules. The IRS has never followed up on former citizens or former long-term residents who withdrew a ruling request after being informed that the IRS may rule unfavorably. In addition, the IRS has no special procedures in place to further investigate individuals who have received a determination only that he or she submitted a complete ruling request in good faith in accordance with Notice 98-34.[363]

For those former citizens or former long-term residents who have not submitted a ruling request or self-reported meeting one or more of the monetary thresholds, the IRS does not have special procedures to determine whether the individual is subject to the alternative tax regime.[364] These individuals could include those who met the monetary thresholds but were not eligible (or have not attempted) to submit a ruling request, as well as individuals who did not meet the monetary thresholds but who nevertheless could be determined to be tax motivated after a review of their particular facts and circumstances. This lack of enforcement may be attributable (in part) to the lack of sufficient information the IRS has received to date in order to make these determinations.

3. IRS monitoring, assessment, and collection of taxes during the 10-year period after citizenship relinquishment or residency termination

For former citizens or former long-term residents who are determined to be tax-motivated, the next step in enforcing the alternative tax regime is to monitor the former citizens or former long-term residents during the 10-year period after citizenship relinquishment or residency termination to determine the amount of U.S. income, estate, or gift tax that should be assessed and collected under the rules. Former citizens and former long-term residents who are subject to the alternative tax regime generally are required to file a Form 1040NR for each of the 10 years, beginning with the year following citizenship relinquishment or residency termination, if the former citizen or former long-term resident is liable for U.S. tax.[365] The former citizen or former long-term resident is required to attach to the Form 1040NR a statement setting forth (generally by category) all items of U.S.- and foreign-source gross income. In addition, the estates of former citizens and former long-term residents who are subject to the alternative tax regime and who die within the 10-year period after citizenship relinquishment or residency

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[362] In the case of taxpayer favorable rulings, no further action is required because the IRS had already made a determination concluding a lack of a principal tax avoidance purpose.

[363] *See* GAO Report at A-256. At the time of the GAO Report in 2000**,** since no fully submit rulings were issued prior to November 1998, the IRS arguably did not have sufficient time in which to begin audits of taxpayers who have received such rulings. However, the Joint Committee staff has not found that the IRS subsequently conducted any examinations of such individuals.

[364] *Id.*

[365] Treas. Reg. sec. 1.6012-1(b)(2)(ii)(b).

termination generally are required to file a Form 706-NA if they died owning property subject to the U.S. estate tax. Similarly, such former citizens and former long-term residents are required to file a Form 709 if they made a taxable gift of U.S.-situated property.

The IRS generally has not assessed liability for U.S. income, estate, or gift taxes under the alternative tax regime during the 10-year period after citizenship relinquishment or residency termination (although some taxpayers have self-assessed liability for tax under these rules). According to the GAO and subsequent inquiry by the Joint Committee staff, the IRS has no special procedures for monitoring former citizens' or former long-term residents' tax compliance during the 10-year period in which an individual is subject to the alternative tax regime under section 877.[366] The IRS is not able to quantify the number of tax returns of former citizens and former long-term residents that are filed each year, nor the related amount of tax reported on such returns.[367] In addition, the IRS has no special procedures in place to ensure that former citizens and former long-term residents are not converting their U.S. assets to foreign assets, and the IRS has never invoked any of the anti-abuse rules under section 877(d) with respect to a former citizen or former long-term resident.[368]

Prior to the reorganization of the IRS in the fall of 2000, the IRS had established guidelines under which a "planning and special programs unit" would conduct filing and payment monitoring and a compliance review of individuals entered into the CLN database. This administrative unit was to review the materials received along with the former citizen's CLN and establish a database. If the review revealed non-compliance prior to citizenship relinquishment or residency termination, the unit was to refer the case to the appropriate compliance personnel. Subsequent to citizenship relinquishment or residency termination, this planning and special programs unit was to monitor for filing compliance during the 10-year period and if required initiate audits or other compliance actions.[369] The JCT staff has not found that any monitoring or compliance actions were initiated under these guidelines.

In the fall of 2000, as part of the reorganization of the IRS, responsibility for compliance with section 877 became a function of the Small Business/Self-Employed division of the IRS.

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[366] *See* GAO Report at A-256 and A-141 (September 20, 2002, letter from the IRS).

[367] *Id.* Although IRS Forms 1040NR (U.S. Nonresident Alien Income Tax Return) and 706-NA (United States Estate and Generation Skipping Transfer Tax Return) contain questions regarding whether a taxpayer has relinquished U.S. citizenship or U.S. residency within the prior 10 years, the IRS does not appear to have used this information (to the extent supplied) to any degree.

[368] *See* GAO Report at A-256. Section 877, as revised in 1996, provides for several anti-abuse rules intended to prevent former citizens and former long-term residents from converting U.S.-source income producing property into foreign-source income producing property. Such a conversion would otherwise mean that such foreign-source income would not be subject to the alternative tax regime.

[369] *See* A-141 (September 20, 2002, letter from the IRS).

At present, as part of the operations of the Small Business/Self-Employed division, the Philadelphia Service Center of the IRS receives the CLNs, IRS Forms 8854 and other information from the Department of State and maintains the CLN database. The database currently is not used as the basis for any review of the former citizen's compliance in the five years prior to citizenship relinquishment or residency termination. The CLN database currently is not used as the basis of any monitoring of required filing by former citizens during the 10-year period following citizenship relinquishment or residency termination. Consequently, the database is not the basis of any compliance initiative related to post-expatriation tax liabilities. The only purpose the database currently serves is to provide the information necessary to fulfill the requirement that the IRS publish quarterly the names of expatriating individuals in the *Federal Register*.[370] Based on discussions with IRS officials, the Joint Committee staff understands that attempts at monitoring or compliance based upon the CLN database ceased in the fall of 2000.

Regarding the potential estate and gift tax liabilities of former citizens and former long-term residents, according to the GAO, the IRS has no procedures in place for determining whether former citizens or former long-term residents have died or owe U.S. estate taxes.[371] Thus, the IRS has been unable to determine the number of estates that are subject to the foreign stock look-through rule[372] that applies to estates of former citizens and former long-term residents who are subject to the alternative tax regime. The IRS does not have a separate process for auditing gift tax returns of former citizens and former long-term residents.[373] Rather, gift tax returns are reviewed as part of estate tax audits. Consequently, the IRS has been unable to determine the number of former citizens and former long-term residents required to pay gift tax on the transfer of U.S.-situated intangibles.[374]

Some of the enforcement problems with respect to the monitoring, assessment, and collection of U.S. estate and gift taxes of former citizens and former long-term residents may be attributable to broader enforcement problems in the area of U.S. estate and gift taxation of nonresident noncitizens. The IRS appears to devote little in the way of specific resources with respect to the enforcement of U.S. estate and gift taxes owed by such nonresidents -- whether former citizens, former long-term residents, or otherwise. According to the GAO, the IRS does not have any specific procedures in place to identify nonresident noncitizens who may have a

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[370] *See* A-141 (September 20, 2002, letter from the IRS).

[371] *See* GAO Report at A-256. IRS Form 706-NA contains a question that requires a noncitizen and nonresident decedent to identify whether he or she relinquished citizenship or terminated residency within 10 years of death. IRS officials indicated that any estate tax return which indicates that the decedent relinquished citizenship or terminated residency within 10 years of death would be selected for audit.

[372] Sec. 2107(b)

[373] *See* GAO Report at A-256.

[374] Sec. 2501(a)(3).

potential U.S. estate or gift tax liability.[375] Moreover, the IRS generally does not receive third-party information when nonresident noncitizens die having owned U.S.-situated property and, thus, having a potential U.S. estate tax liability.

To enforce the tax liability of a nonresident noncitizen (including individuals subject to the alternative tax regime), the IRS must do so through an estate's representative, trustees, or other individuals who would have personal liability for any tax. To the extent property is physically located within the United States, the IRS can levy upon such assets, as such action is one *in rem* (i.e., an action over the property). However, placing assets into foreign trusts with a foreign fiduciary, for example, may impair the IRS's ability to levy against such property, particularly if such assets are located outside the United States, and it may not be possible for the IRS to obtain jurisdiction over a foreign fiduciary. If the IRS seeks to enforce such tax, it may require obtaining a judgment in the United States as to the tax liability and seeking to enforce such judgment abroad. In addition, the IRS may seek to file an original action in a foreign court. However, sovereignty issues may arise in seeking the assistance of a foreign tribunal in enforcing U.S. tax law. Treaties also may provide some ability for the IRS to enforce U.S. tax law; however, this also requires assistance by foreign governments and, potentially, foreign tribunals with issues over which these entities otherwise would have no jurisdiction.

Some might argue that enforcement of the alternative tax regime could be improved through coordinated enforcement with other countries in which the former citizen or former long-term resident resides, particularly countries with which the United States has a treaty relationship. Most United States income tax treaties provide for the exchange of tax information. These agreements generally allow for the exchange of information that is relevant for carrying out the treaty provisions or the domestic tax laws of a treaty country. Such information may relate to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the treaty. However, the IRS has recently stated that "the IRS has not yet utilized exchange of information procedures under a treaty to solicit information regarding a citizen who we believe has relinquished citizenship to avoid tax pursuant to the 1996 expatriate tax law."[376] In addition, income tax treaties provide for at least some measure of tax collection assistance. However, such collection assistance is limited only to information to ensure that the exemptions or reduced rates of tax under the respective treaties do not inure to the benefit of persons not so entitled.[377] However, the value of

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[375] *See* GAO Report at A-256.

[376] *See* A-63 (May 16, 2000, letter from the IRS). *See* A-123 (August 14, 2002, letter from the IRS).

[377] *See* GAO Report at A-256. However, the United States income tax treaties with Denmark, France, Greece, the Netherlands, and Sweden generally provide for collection assistance with respect to all income taxes. This broader collection assistance is not available with respect to U.S. tax liabilities that relate to a period of time during which the taxpayer was a citizen of such foreign country. For example, assume that a U.S. citizen relinquished U.S. citizenship and became a Danish citizen. The former citizen may have had U.S. Federal income tax liabilities relating to the periods during which he or she was a U.S. citizen. The former citizen also could be subject to the alternative tax regime for a period of 10 years after

coordinated enforcement is very limited. Individuals who renounce citizenship or terminate residency for tax reasons are likely to move to countries that have no tax treaty relationship with the United States, which may prevent the enforcement of extraterritorial judgments.

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citizenship relinquishment (i.e., after becoming a Danish citizen). Under the U.S.-Denmark income tax treaty, the United States could request that Denmark assist in collecting U.S. taxes from the former citizen; however, such assistance would be limited to only the tax liabilities that accrued prior to the time when he or she became a Danish citizen (i.e., while he or she was a U.S. citizen). Thus, any section 877 tax liabilities generally would not be within the scope of the collection assistance provision.

C. Enforcement of the Immigration Provisions

Under the immigration provisions, a former U.S. citizen who "officially renounces" citizenship does not qualify for admission to the United States if the Attorney General determines that the renunciation was for tax avoidance purposes.[378] According to the GAO, no procedures are in place to implement this provision.[379] Thus, since its enactment in 1996, no individual has been deemed inadmissible under this provision.[380]

The immigration provision presents several enforcement difficulties. As a threshold matter, the INS and the Department of State do not agree on when an individual has "officially" renounced U.S. citizenship.

The immigration provision does not define what it means to "officially" renounce United States citizenship. Another statutory provision lists the acts by which an individual may lose or relinquish their U.S. citizenship.[381] The phrase "officially renounces United States citizenship" is not used in that section. Instead, certain acts are described using the words "formal" or "formally." These acts are: (1) formally declaring allegiance to another country, (2) making a formal renunciation of nationality before a U.S. diplomatic or consular officer in a foreign country, and (3) making a formal renunciation of nationality in the United States during a time of war.[382] Other acts, such as naturalizing in a foreign country, are not described in the statute as "formal." By using the phrase "officially renounces United States citizenship," the immigration provision creates an ambiguity as to acts that are considered "official." The immigration provision could be interpreted to apply to individuals committing any of a number of possible types of acts, or its application could be limited to only those individuals committing acts described as "formal."

According to the Department of State the phrase "officially renounces United States citizenship" means only a "formal" renunciation of U.S. citizenship before a U.S. consular officer abroad. On the other hand, according to the INS, any of the acts qualifies as "official" if performed voluntarily and with the intent to relinquish citizenship. If the act is confirmed by the issuance of a CLN, the INS maintains that the individual has "officially renounced" U.S. citizenship.

Committing any one of the acts does not automatically result in the loss of citizenship. The act must be voluntarily performed for loss of citizenship to occur. This is a subjective test and intent is not presumed. Intent may be difficult to prove absent some accompanying act

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[378] 8 U.S.C. sec. 1182(a)(10)(E), which became effective September 30, 1996.

[379] *See* GAO Report at A-256.

[380] *See* A-143 (October 8, 2002, letter from the INS).

[381] 8 U.S.C. sec. 1481.

[382] 8 U.S.C. sec. 1481(a)(2), (a)(5), and (a)(6).

wholly inconsistent with U.S. citizenship. In September 1990, the Department of State issued a policy statement designated as "Advice About Possible Loss of U.S. Citizenship and Dual Nationality." The policy statement provides that for certain acts, the Department of State operates on the premise that the individual intended to retain U.S. citizenship:

> As already noted, the actions listed above can cause loss of U.S. citizenship only if performed voluntarily and with the intention of relinquishing U.S. citizenship. The Department has a uniform administrative standard of evidence based on the premise that U.S. citizens intend to retain United States citizenship when they obtain naturalization in a foreign state, subscribe to routine declarations of allegiance to a foreign state, or accept non-policy level employment with a foreign government.[383]

Thus, an individual could commit an act by becoming naturalized in a foreign country but still retain their U.S. citizenship if they lacked the requisite intent. The difficulty in determining whether an individual had the requisite intent, hinders the determination that citizenship has been lost and in turn, that such individual is subject to the immigration provision.

No database to track individuals who lose citizenship for tax reasons can be developed until the responsible agencies agree who has lost citizenship within the meaning of the provision and therefore, should be included in the database. Without agreement on the individuals to whom the law applies, no action can be taken.

The difficulty in determining when a U.S. citizen has committed an act with the requisite intent to relinquish citizenship also has tax implications. When performed with the requisite intent, the act of relinquishing citizenship terminates the obligation to continue to pay U.S. taxes on worldwide income. No Federal law requires an individual to request a CLN or notify the Department of State of the intent to relinquish citizenship within a specified amount of time after the act has been committed. If an individual does notify a consular officer at some later date, the loss of citizenship is retroactive to the date of the relinquishment of citizenship. This retroactivity permits individuals who relinquish citizenship for tax reasons to assess after the fact whether it would be advantageous to claim that the relinquishment was effective at an earlier date. It is unlikely that the Federal Government would possess evidence to contradict a former citizen's statement of subjective intent.

Another enforcement problem exists with respect to the requirement that the Attorney General determine whether the former U.S. citizen renounced his or her citizenship for tax avoidance purposes. The law does not set out any criteria for determining tax avoidance. While the Attorney General could seek guidance from the IRS on how to apply the law generally, he cannot have access to a specific taxpayer's return information without the consent of the taxpayer. Thus, the Attorney General cannot access a taxpayer's returns for purposes of determining a tax avoidance motive.

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[383] Department of State, *Advice About Possible Loss of U.S. Citizenship and Dual Nationality*, 67 Interpreter Releases 1092 (October 1, 1990).

The law does not require the Attorney General to consult with or follow the opinion of the IRS regarding a former citizen's tax avoidance motive. Conceivably, the Attorney General, through the Department of Justice's Tax Division, could make a determination independent of the IRS, but it would require a review of detailed submissions from the individual seeking admission. Ordinarily, applications for tourist visas are granted within 24 hours. This process would be lengthened substantially if the Attorney General were to make an independent determination. In addition, for individuals for whom a visa is not required, a determination would have to be made at the time the individual attempts to enter the United States. Such a time-consuming process is ill-suited to having the INS make a determination at the port of entry. Even if admitted under deferred inspection, district agents of the INS would have to rely on individuals with tax expertise to make the determination. This also assumes that the individual being inspected would have available the needed records to provide to the INS for examination.

The IRS is required to publish quarterly in the *Federal Register* the names of each individual losing United States citizenship within the meaning of section 877(a).[384] The IRS publishes the list quarterly; however, the list is not limited to those individuals who have relinquished citizenship for tax avoidance purposes. Thus, the Department of State and the INS cannot rely on the list as a source of individuals to be deemed inadmissible to the United States. As a result, the list does not aid in the enforcement of the immigration provision.

The differing interpretations of the statute and the inability to access taxpayer records from the IRS has led to a lack of enforcement for the entire period that the law has been in effect. While the INS has been working with the Departments of State and Justice and the IRS to develop guidelines for administering the immigration provisions, no guidelines or procedures have been actually established. [385]

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[384] Sec. 6039G(e).

[385] *See* A-143 (October 8, 2002, letter from the INS).

VIII. EFFECTIVENESS OF PRESENT-LAW TREATMENT OF CITIZENSHIP RELINQUISHMENT AND RESIDENCY TERMINATION

A. Summary

The 1996 legislative changes to the alternative tax regime made improvements in the effectiveness of the provisions relating to citizenship relinquishment and residency termination. However, there are several areas in which the present tax law continues to provide tax incentives for citizenship relinquishment or residency termination. This section describes certain effectiveness problems with respect to both the alternative tax regime for former citizens and former long-term residents and related immigration laws.

Income tax rules

With respect to the income tax rules under the alternative tax regime, the following problem areas exist with respect to the rules that may hinder their effectiveness in removing tax incentives for citizenship relinquishment or residency termination. First, the alternative tax regime generally does not apply to foreign-source income or gain, such that an individual with significant foreign income or assets generally would be better off from a tax standpoint by relinquishing citizenship or terminating residency than by continuing to be taxed on his or her worldwide income.

Second, the 10-year period following citizenship relinquishment or residency termination during which a former citizen or former long-term resident is subject to the alternative tax regime can easily be avoided. For example, a former citizen or former long-term resident could wait for the 10-year period to expire before disposing of assets otherwise subject to the special rules, or borrow against U.S.-source assets during the 10-year period.

Third, significant challenges remain with respect to monitoring and enforcement during the 10-year period with respect to former citizens and former long-term residents who may otherwise not be subject to U.S. law. No effective system is in place for collecting and processing timely information relating to these individuals. Moreover, these individuals might not be physically present in the country at any time, and their assets may not be situated in the country or under the control of any U.S. person.

Fourth, the alternative tax regime continues to depend, in large part, on the subjective intent of the former citizen or former long-term resident, which has been acknowledged by both the Congress and the IRS as making the provisions difficult to administer. In this regard, significant administrative difficulties have arisen in this area as a result of the IRS ruling process for determining whether certain categories of individuals should not be treated as having a principal purpose of tax avoidance, including difficulties associated with the modified ruling procedures under Notice 98-34.[386] Of the 255 rulings issued under Notice 98-34 through July 1,

[386] 1998-2 C.B. 29. *See* A-193.

2002, 127 were "fully submit" rulings, which express no opinion regarding whether such individuals' citizenship relinquishment or residency termination was tax-motivated.[387]

Fifth, the penalties for failure to comply with the rules do not appear to be sufficient disincentives to encourage former citizens and former long-term residents to provide the critical information necessary for the Department of Treasury and the IRS to enforce the rules.

Estate and gift tax rules

Several features of the special estate and gift tax rules under the alternative tax regime hinder the effectiveness of these rules in removing the tax incentives for citizenship relinquishment or residency termination.

First, the alternative tax regime generally does not apply to foreign-situated property. Thus, to the extent that an individual owns foreign-situated property, such individual would be better off from a tax standpoint by relinquishing citizenship or terminating residency rather than continuing to be subject to U.S. estate tax on their worldwide estate. Moreover, former citizens and former long-term residents can avoid U.S. estate and gift taxes by investing in assets located outside the United States or converting U.S.-situated property to foreign-situated property after (or even before) citizenship relinquishment or residency termination, in order to remove their assets from the U.S. estate and gift tax base. This may be advantageous even if there are income tax consequences associated with transferring assets out of the U.S. taxable estate.

Second, enforcing U.S. estate and gift taxes against individuals who no longer reside in the United States presents special difficulties. For example, the IRS may have difficulty determining whether a former citizen or former long-term resident (or other nonresident noncitizen) who died outside the United States owned U.S.-situated property that is subject to U.S. estate tax.

Tax treaties

Even if the present-law alternative tax regime were modified to improve its effectiveness, the regime could still have little or no effect in many instances. Under relevant legislative history to the 1996 expatriation tax legislation and related administrative guidance, the alternative tax regime applies regardless of conflicting treaty provisions that may otherwise prevent the application of the alternative tax regime, for the 10-year period following the enactment of the 1996 expatriation legislation (i.e., August 21, 1996). After that 10-year period ends (i.e., beginning August 21, 2006), any conflicting treaty provisions that are still in force will take precedence over the alternative tax regime. Thus, for periods after that date, the alternative tax regime may have little or no effect with respect to individuals who relocate to certain countries with which the United States has a tax treaty, to the extent that the treaty does not

[387] *See* Table 3 in Part VII.

permit the United States to impose a tax on former citizens or former long-term residents who reside in such other countries.[388]

Immigration rules

Since its enactment in 1996, the INS and the Department of State have not enforced the immigration provision with respect to former citizens. The Joint Committee staff has been advised that the INS, in conjunction with the Department of Justice, the Department of Treasury, the Department of State, and the IRS, are in the process of developing guidelines to implement the immigration provision. In the absence of such guidelines, this review cannot assess whether such guidelines will improve the effectiveness of the immigration provisions.

[388] *See* Part VIII, D., below.

B. Income Tax Rules

1. Scope of section 877

Present-law section 877 applies only to certain U.S.-source income (albeit a broad definition of U.S.-source income) of a former citizen or former long-term resident that is earned or realized within the 10-year period following citizenship relinquishment or residency termination. Foreign-source income of the former citizen or former long-term resident generally is not taxed. Income earned or realized after the 10-year period is not taxed. As a result, if the goal of a special tax regime for former citizens and former long-term residents is to remove tax incentives for an individual to relinquish citizenship or terminate residency, the current scope of section 877 is too narrow to accomplish that goal. A U.S. citizen or long-term U.S. resident, who would otherwise be taxed on worldwide income, would be able to avoid U.S. tax on his or her foreign-source income and, after 10 years, on all of his or her income, by relinquishing citizenship or terminating residency. From a tax perspective, the individual would still be better off relinquishing citizenship or terminating residency as opposed to continuing to be taxed on his or her worldwide income, notwithstanding section 877 (even assuming effective enforcement and full compliance with section 877).

(a) Foreign-source income not affected

A U.S. citizen or resident who owns assets located abroad or assets that produce foreign-source income may have an incentive, under present law, to relinquish citizenship or terminate residency because the alternative tax regime does not tax foreign-source income, and generally does not tax foreign-situs property for estate and gift tax purposes. Similarly, to the extent that individuals restructure their activities to convert U.S.-source assets to foreign-source assets, considerable incentives for citizenship relinquishment or residency termination continue to exist.[389]

Several rules limit the ability of a U.S. taxpayer to convert U.S.-source assets to foreign-source assets. For example, if a person transfers U.S. property to a foreign corporation, prior to citizenship relinquishment or residency termination, recognition of any gain generally will be required.[390] If an individual relinquishes citizenship or terminates residency and then converts U.S.-source assets into foreign-source assets this provision will not apply. However, section 877 contains several provisions aimed at addressing such conversions.

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[389] This incentive, of course, is limited by foreign tax consequences. That is, if the former citizen or former long-term resident has a foreign tax burden on his or her foreign-source income that equals or exceeds the U.S. tax burden, then there may be no incentive to relinquish citizenship or terminate residency. To the extent that the former citizen or former long-term resident can choose where to reside, however, the individual could take up residence in a low tax jurisdiction and the U.S. tax incentive to relinquish citizenship or terminate residency would remain.

[390] Sec. 367.

A former citizen or former long-term resident who is subject to the alternative tax regime and who within the 10-year period beginning on the date of citizenship relinquishment or residency termination exchanges property that produces U.S.-source income for property that produces foreign-source income is required to recognize immediately as U.S.-source income any gain on the exchange.[391] In the alternative, such a former citizen or former long-term resident can enter into an agreement with the Secretary of the Treasury specifying that any income or gains derived from the property received in the exchange during the 10-year period after citizenship relinquishment or residency termination would be treated as U.S.-source income. The Secretary of the Treasury is authorized to issue regulations providing similar treatment for nonrecognition transactions that occur within five years immediately prior to the date of citizenship relinquishment or residency termination. Under Notice 97-19, the period is extended to cover the five years prior to citizenship relinquishment or residency termination as well as the 10 years subsequent to citizenship relinquishment or residency termination. As a result, a former citizen or former long-term resident cannot avoid section 877 by, for example, exchanging U.S. assets for stock in a foreign corporation, and then selling such stock in the foreign corporation, which otherwise would give rise to foreign-source income outside of the scope of section 877.

Similarly, the Secretary of the Treasury is authorized to issue regulations to treat removal of tangible personal property from the United States, and other circumstances that result in a conversion of U.S.-source income to foreign-source income without recognition of any unrealized gain, as exchanges for purposes of computing gain subject to section 877. Under Notice 97-19, the removal from the United States of appreciated tangible personal property having an aggregate fair market value in excess of $250,000 within the 15-year period beginning five years prior to the citizenship relinquishment or residency termination will be treated as an "exchange" subject to these rules. Thus, for example, a former citizen who removes appreciated artwork from the United States could be subject to immediate tax on the appreciation (or have to enter into a gain recognition agreement with respect to such property) under this provision.[392]

Preventing a nonrecognition exchange of U.S.-source assets for foreign-source assets accomplishes little, however, if former citizens and former long-term residents could achieve the same ends indirectly through entering into a gain recognition agreement with respect to the exchange of U.S.-source assets for stock in a foreign corporation, but then effecting the conversion of the U.S.-source assets to foreign-source assets within the corporation (thereby, for example, escaping U.S. estate tax because all assets held are foreign-source). Under present law, if a former citizen or former long-term resident who is subject to the alternative tax regime contributes property that would produce U.S.-source income to a controlled foreign corporation within the 10-year period after citizenship relinquishment or residency termination, any income or gain on the contributed property (or other property which has a basis determined by reference to the basis of such contributed property) received or accrued by the corporation is treated as

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[391] Sec. 877(d)(2) (as added by the 1996 Act.).

[392] On the other hand, under Notice 97-19, any gain from the removal of tangible personal property worth $250,000 or less will not be subject to tax under section 877. In such circumstances, an incentive to relinquish citizenship or terminate residency would remain; however, it may not be worth the administrative burdens to remove such an incentive.

received or accrued directly by the former citizen or former long-term resident and, therefore, treated as U.S.-source income that is subject to U.S. tax.[393] If the former citizen or former long-term resident disposes of the stock of the foreign corporation, the individual is subject to U.S. tax on the gain that would have been recognized if the corporation had sold such property immediately before the disposition. As in the case of nonrecognition transactions, individuals are required under Notice 97-19 to apply this contribution to a controlled foreign corporation rule for the 15-year period beginning five years prior to the citizenship relinquishment or residency termination.

A similar rule applies in the estate tax context. A decedent's estate includes the proportion of the decedent's stock in a foreign corporation that the fair market value of the U.S.-situs assets owned by the corporation bears to the total assets of the corporation.[394] This rule applies in situations in which (1) the decedent owned, directly, at death 10 percent or more of the combined voting power of all voting stock of the corporation and (2) the decedent owned, directly or indirectly, at death more than 50 percent of the total voting stock of the corporation or more than 50 percent of the total value of all stock of the corporation.[395]

Although the 1996 changes to the alternative tax regime were intended to restrict a former citizen's or former long-term resident's ability to convert U.S.-source assets to foreign-source assets, it is difficult to evaluate the effectiveness of the restrictions. Nothing prevents an individual from investing in foreign-source assets over time. In fact, the more time an individual spends abroad, the more likely that is to occur. Further, if there is no built-in gain with respect to an asset (or the asset is cash), there is no cost to converting it from U.S.-source to foreign-source because no gain recognition would be required. Consider a U.S. citizen who just inherited a sizeable amount of assets. Those assets would have a basis in that citizen's hands equal to their fair market value.[396] That individual could convert those assets to foreign-source with no tax cost and then relinquish citizenship, thereby (1) eliminating U.S. income tax on any gain or income subsequently generated, and (2) eliminating any potential future U.S. estate or gift tax. In addition, even if conversion cannot be accomplished without tax consequences, it may still be desirable to convert assets, particularly capital assets to which the lower capital gains tax rate would apply, to foreign-source and pay the corresponding income tax in order to avoid the estate

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[393] Sec. 877(d)(4). For section 877(d)(4) to apply, the individual must own, directly or indirectly, 10 percent or more (by vote) of the stock of the foreign corporation. Also, it will only apply if the foreign corporation would be a CFC if the individual were a U.S. citizen.

[394] Sec. 2107(b).

[395] Both the section 877 and section 2107 controlled foreign corporation look-through rules could be avoided if the individual owns 50 percent or less of the vote and value of the corporation. In addition, as discussed below, there is no analog to the controlled foreign corporation look-through rules in the gift tax area.

[396] Sec. 1014. This example assumes that the decedent does not die during 2010, when estate tax repeal and a carryover-basis regime are in effect under present law. Sec. 1014(f).

tax, which is considerably higher (leaving aside the one-year repeal of that tax for 2010 under present law).

Thus, it would seem that the only way to remove completely the tax incentive for a U.S. citizen or long-term U.S. resident to relinquish citizenship or terminate residency is to continue to tax that person on worldwide income even after citizenship relinquishment or residency termination.[397] Indefinitely taxing a nonresident noncitizen on his or her worldwide income would seem to exceed U.S. taxing jurisdiction and could be viewed as inconsistent with principles of international taxation, as well as U.S. treaties.[398] Such a tax also would seem to create a barrier to citizenship relinquishment or residency termination and raise international human rights and constitutional issues.[399] Moreover, with the person, property, and income outside of the United States, effective administration of such a rule may be impossible.

(b) The 10-year period

<u>Timing recognition of gains and losses to circumvent the 10-year period</u>

The alternative tax regime applies for a 10-year period from the date on which an individual relinquishes citizenship or terminates residency. As such, there remain tax incentives for citizenship relinquishment or residency termination for those who can delay their asset disposition (or who have a life expectancy of greater than 10 years in the case of the estate tax). A person can relinquish citizenship or terminate residency, wait 10 years, and then dispose of assets at a gain without U.S. tax consequences, transfer intangible property to relatives and

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[397] Other purposes could be accomplished through other means. For example, if it was decided that removing the incentive for citizenship relinquishment or residency termination is futile and that a better policy objective would be to capture tax appreciation that accrued while assets were held by a person subject to the U.S. taxing jurisdiction upon such person's departure from the U.S. taxing jurisdiction, a deemed-realization approach could be better suited to accomplish such an objective (albeit this approach would also present issues). In fact, the deemed-realization approach is not unlike the policy behind present-law section 367.

[398] Customary principles of international law generally call for the exercise of taxing jurisdiction to be based on one or more of several factors such as (1) nationality, (2) domicile or residence, (3) presence or doing business within the country, and (4) location within the country of property or transactions from which income is derived. Charles H. Gustafson and Richard C. Pugh, *Taxation of International Transactions*, par. 2007 (1991).

[399] For a discussion of international human rights and constitutional issues, see the 1995 Joint Committee staff study, supra note 315. Notwithstanding that, in general, the U.S. taxing jurisdiction would most likely not extend to the taxation of worldwide income of nonresident individuals who are not citizens of the United States. According to the CRS, it appears that reasonable evidentiary standards can be required to determine whether loss of citizenship has occurred. *See* A-53 (May 10, 2000, Memorandum I from the CRS). To the extent that loss of citizenship is not accomplished, it would seem that the U.S. taxing jurisdiction could extend to the worldwide income of such a person.

others in the United States without gift tax consequences, or convert the U.S.-source assets to foreign-source assets in order to avoid the estate tax.

Thus, it is unclear whether the 10-year period is sufficiently long to be an effective disincentive for tax-motivated citizenship relinquishment or residency termination. The 10-year period may be essentially meaningless to the extent that a former citizen or former long-term resident can effectively monetize a position with respect to appreciated assets or otherwise preserve the appreciation (through hedging the position or otherwise substantially diminishing the risk of loss with respect to the position) without triggering a taxable event during the 10-year period. For example, assume Ms. D lost her citizenship on January 1, 2002, and is subject to section 877. On that date Ms. D owns 10,000 shares of stock of a U.S. corporation ("USCo"), with a value of $10 million and a basis of $1 million. On the next day, Ms. D enters into a short sale of the stock (i.e., a short sale "against the box"). Ms. D closes the short sale 10 years later by delivering the stock.

By entering into the short sale, Ms. D hedges her position in the USCo stock so that the risk of loss on the stock is substantially (if not completely) diminished and monetizes the stock (including the appreciation). Under pre-1996 law, entering into the short sale could have accomplished a hedge and monetization of Ms. D's position without tax consequences.[400] Upon closing the short sale, $9 million of gain would be realized on the USCo stock, but the closing of the short sale would occur beyond the 10-year period covered by section 877. Accordingly, the alternative tax regime would no longer apply to Ms. D and, as a nonresident noncitizen, she would not be subject to U.S. tax on that gain.

Present law limits a taxpayer's ability to accomplish such a strategy in certain respects.[401] Under present law, the 10-year period is suspended for gains derived from a particular property during any period in which the individual's risk of loss with respect to such property is substantially diminished by (1) the holding of a put option with respect to such property (or similar property), (2) the holding by another person of a right to acquire the property, or (3) a short sale or any other similar transaction. Thus, in the above example, when the short sale is

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[400] Prior to the enactment of the section 1259 constructive sales rules in 1997, the recognition of gain or loss from a short sale "against the box" was deferred under the "open transaction" doctrine until the short sale was closed through delivery of the underlying property. Section 1259 now limits the ability of taxpayers to monetize or hedge financial assets that have appreciated in value by requiring the recognition of gain upon entering into a short sale (as well as other types of specifically defined "constructive sales") with respect to an appreciated financial position. However, section 1259 only applies if the taxpayer has substantially eliminated both the risk of loss and the opportunity for gain with respect to an appreciated financial position. Thus, section 1259 generally does not apply to transactions that reduce only the risk of loss or opportunity for gain, such as the purchase of a put option or the sale of a call option. Because of this and other similar limitations on its scope, section 1259 itself does not entirely eliminate the availability of certain techniques to monetize or preserve the appreciation in financial assets for the purpose of circumventing the 10-year period under section 877.

[401] Sec. 877(d)(3).

closed, Ms. D would continue to be subject to the alternative tax regime and the $9 million would be taxable U.S.-source income to Ms. D.

Notwithstanding this provision, however, a taxpayer generally still can monetize a position in U.S.-source assets (albeit at a cost) by borrowing against such assets until the 10-year period expires. For example, assume instead of entering into a short sale, Ms. D in the above example borrowed $10 million for a 10-year period, pledging her USCo stock as security. Ms. D would have the use of the funds for the 10 years (with interest and other costs). After 10 years, assuming the value of USCo did not decline, she could sell the USCo stock and use the proceeds to satisfy the obligation. There would be no U.S. income tax on the sale of the stock because the sale would occur beyond the 10-year period. Further assume that Ms. D used the proceeds from the borrowing to invest in foreign-source assets and that such assets and her USCo stock were her only assets. If Ms. D died during the 10-year period, her taxable estate would be reduced by a portion of the debt for U.S. estate tax purposes.[402] Ms. D's estate for estate tax purposes would include $10 million of U.S.-situated assets (the USCo stock). The foreign assets would not be included as part of her U.S. estate. The value of the U.S. estate would be reduced by half of the debt secured by the stock (the proportion treated as a deduction from the gross estate), or $5 million.[403] Ms. D has reduced her estate tax liability with respect to the $10 million of U.S.-situated assets by half. The heirs would inherit the stock and the foreign investment with a stepped-up basis, [404] and could sell either one without tax consequences and retire the debt. If the heirs chose to retain the foreign investment and sell the stock, a conversion of U.S. assets to foreign assets would have been achieved, and the heirs themselves could relinquish citizenship or terminate residency without U.S. tax being collected with respect to the appreciation in the U.S. assets, the proceeds of which effectively have been reinvested in the foreign assets. Thus, the ability to borrow against U.S.-source assets to circumvent the 10-year period provides a continuing opportunity for tax-motivated citizenship relinquishment or residency termination.

Similarly, if the taxpayer can defer receipt of payment (and corresponding tax consequences) until after the 10-year period through use of an installment sale, the alternative tax regime can be avoided, at least in part if not completely. The effectiveness of the 10-year period could be improved by (1) tolling the 10-year period during any time in which the former citizen or former long-term resident incurs a debt obligation that is directly or indirectly secured by

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[402] This example assumes that Ms. D does not die during 2010, when estate tax repeal and a carryover-basis regime are in effect under present law.

[403] A portion of the $10 million debt secured by the U.S. property is deductible under section 2106. This portion is based on the value of that portion of the decedent's gross estate situated in the United States at the time of death bears to the value of the decedent's entire gross estate wherever situated. Treas. Reg. sec. 20.2106-2(a)(2). In this simplified example, the decedent's U.S. estate consisted of $10 million of U.S. stock, $10 million of foreign stock, and $10 million of debt secured by the U.S. stock. The portion of the debt treated as a reduction in the value of the estate equals $5 million ($10 million debt multiplied by $10 million value of U.S. property in the estate over $20 million total value of the gross estate).

[404] Sec. 1014.

U.S.-source assets while that debt obligation remains outstanding and (2) extending the 10-year period to cover years in which proceeds of an installment sale of a U.S. asset made during the 10-year period are received after the expiration of the 10-year period. However, administrative and enforcement concerns, as described below, may militate against any further extensions of the 10-year period.

Post-departure enforcement

As discussed above, the present-law alternative tax regime, which applies for a 10-year period after citizenship relinquishment or residency termination, presents significant enforcement challenges. The initial enforcement challenge is that the IRS must make a determination as to whether a former citizen or former long-term resident is subject to section 877 and, therefore, should be monitored. The IRS may not, however, have the necessary information to make this determination.

Once this threshold-level determination has been made, the IRS has the continuing enforcement challenge of monitoring the former citizen or former long-term resident who is determined (or deemed) to be tax-motivated for the 10 year period. Such former citizens and former long-term residents generally are required to file a Form 1040NR for each of those 10 years if the former citizen or former long-term resident is liable for U.S. tax. The former citizen or former long-term resident is required to attach to the Form 1040NR a statement setting forth (generally by category) all items of U.S.- and foreign-source gross income. It may be difficult for the IRS to verify the completeness and accuracy of the return filed by the former citizen or former long-term resident, particularly for items that are not subject to U.S. information reporting. Similar difficulties exist for the IRS in determining whether a former citizen or former long-term resident who did not file a tax return is in fact required to do so and what the correct amount of income is.

As detailed in Part VII, above, prior to the reorganization of the IRS in the fall of 2000, the IRS had established guidelines under which the IRS, using the CLN database, would monitor certain individuals in the database for filing compliance during the 10-year period after citizenship relinquishment or residency termination and if required initiate audits or other compliance actions. Based on discussions with IRS staff, the Joint Committee staff understands that attempts at monitoring or compliance based upon the CLN database ceased upon the reorganization of the IRS in the fall of 2000.

There are several aspects to this continuing enforcement challenge with respect to information reporting. One is to keep track of items of income that come from or flow through third parties, such as interest and dividends. Because the Code has long required information reporting by U.S. payors of these items of income, the IRS can carry this out without much difficulty. However, it is possible for a former citizen or former long-term resident who is subject to the alternative tax regime to so structure his or her financial affairs prior to citizenship relinquishment or residency termination such that this information reporting is not done after citizenship relinquishment or residency termination.[405] Absent information reporting, it can be

[405] There are ways that the former citizen or former long-term resident can avoid entirely U.S. tax on some of these items. If, for example, the interest-generating cash deposits were

significantly more difficult for the IRS to reconstruct the taxpayer's income. Restructuring his or her financial affairs to avoid information reporting may, however, precipitate other consequences that the former citizen or former long-term resident may determine to be undesirable.[406]

Another aspect of this continuing enforcement challenge for the IRS with respect to information reporting is that it must keep track of the disposition of assets that will generate income (generally, capital gains). Again, the Code requires information reporting by persons such as brokers who sell assets, such as stock, on behalf of individuals, so in general the IRS is made aware that a sale transaction has occurred.[407] Information reporting is not required, however, on transfers of custody of such property (such as from one broker to another) that do not involve sales of the property. Accordingly, it would be possible for the former citizen or former long-term resident who is subject to the alternative tax regime to structure his or her financial affairs (by transferring the custody of the assets to a custodian who is not subject to U.S. information-reporting requirements) so that this information reporting does not occur. Again, this restructuring may precipitate other consequences that the former citizen or former long-term resident may determine to be undesirable.

Overlaying all of these considerations is the degree of cooperation with the IRS that is exercised by the former citizen or former long-term resident who is subject to the alternative tax regime. In general, the U.S. tax system relies to a very significant extent on the cooperation of taxpayers to fulfill all reporting obligations. The IRS is able to undertake enforcement actions against taxpayers who do not cooperate voluntarily, but the level of resources requisite to doing so increases substantially for items outside the general information reporting system. As a practical matter, it may be difficult to enforce such reporting obligations with respect to a taxpayer who no longer resides in the United States and who may not be otherwise subject to U.S. law. Any rule that requires monitoring and enforcement for a period of years after citizenship relinquishment or residency termination is likely to encounter the same challenges.

2. Proof of tax avoidance purpose

Under present law, the alternative tax regime applies to an individual who relinquishes citizenship or terminates residency, unless such relinquishment or termination did not have as a principal purpose the avoidance of tax. As a result of changes made by the 1996 Act, certain rules are provided that affect the burden of proving whether the relinquishment of citizenship or termination of residency had as a principal purpose the avoidance of tax. To understand these

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moved to a financial institution that is not subject to U.S. information-reporting requirements, the interest generated generally would not be considered U.S.-source income and, therefore, would not be subject to section 877.

[406] For example, reporting may be required on the exporting of monetary instruments pursuant to 31 U.S.C. 5316.

[407] Sec. 6045. Because this provision requires the reporting of gross proceeds but not the basis of the property, the IRS is not aware of the amount (if any) of taxable gain generated by the transaction.

changes, it is important to consider the establishment of a tax avoidance purpose under section 877 prior to the 1996 legislative changes.

(a) Proof of tax avoidance purpose under pre-1996 law

Prior to the changes to section 877 made in the 1996 Act, a two-level inquiry was required with respect to the determination of whether an individual's relinquishment of citizenship was tax-motivated, such that the alternative tax regime under section 877 applied. First, it was incumbent on the Department of the Treasury to establish that it was reasonable to believe that the individual's loss of citizenship would result in a substantial reduction in U.S. tax based on the individual's probable income for the taxable year. Once that was established, then the individual had the burden of proving that the loss of citizenship did not have as one of its principal purposes the avoidance of U.S. income, estate, or gift taxes. In other words, under pre-1996 law, once the burden of proof shifted to the former citizen, it would not be sufficient for the individual to establish that he or she had substantial non-tax reasons for relinquishing citizenship so long as one of the principal purposes was the avoidance of U.S. tax (and the taxpayer did not foreclose such possibility). No regulations were ever promulgated by the Department of the Treasury to interpret this provision and the Secretary of the Treasury infrequently applied the rule. As a result, it would seem that the burden on the taxpayer under such a rule was extremely high and, as a practical matter, the rule was difficult to administer.

(b) Proof of tax avoidance purpose after 1996 changes

In 1996, the Congress was concerned that the alternative tax regime was difficult to administer because the regime applied unless an individual could prove a lack of a tax-avoidance purpose for relinquishing citizenship.[408] The 1996 changes in the law, therefore, were intended generally to "subject certain former citizens to the citizenship relinquishment tax provisions without inquiry as to their motive for losing their U.S. citizenship."[409] At the same time, the amendments permitted such individuals to request a ruling from the Secretary of the Treasury as to whether the loss of citizenship had a principal purpose of tax avoidance.

Thus, under present law, U.S. citizens who relinquish their citizenship and long-term residents who terminate their residency generally are treated as having relinquished citizenship or terminated residency with a principal purpose of the avoidance of taxes if either: (1) the individual's average annual U.S. Federal income tax liability for the five taxable years ending before the date of such relinquishment or termination is greater than $100,000, or (2) the individual's net worth as of the date of such relinquishment or termination is $500,000 or more (i.e., the monetary thresholds).[410] The monetary thresholds contained in the tax liability test and the net worth test are indexed for inflation in the case of a loss of citizenship or termination of

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[408] *See* Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 104th Congress*, 378, JCS-12-96 (Dec. 18, 1996).

[409] *Id.*

[410] Sec. 877(a)(2).

residency occurring in any calendar year after 1996. For calendar year 2003, the monetary thresholds for the tax liability test and the net worth test are $122,000 and $608,000, respectively.[411] This effectively creates two categories of individuals: those former citizens and former long-term residents who fall below the monetary thresholds and those former citizens and former long-term residents who fall above one of the monetary thresholds.

Former citizens and former long-term residents falling below the monetary thresholds

A former citizen or former long-term resident who falls below the monetary thresholds is not automatically treated as having a principal purpose of tax avoidance. Such an individual is subject to the alternative tax regime if the individual's relinquishment of citizenship or termination of residency had as one of its principal purposes the avoidance of tax. Factors taken into account in making a determination as to the presence of a principal purpose of tax avoidance include the substantiality of a former citizen's ties to the United States (including ownership of U.S. assets) prior to citizenship relinquishment, the retention of U.S. citizenship by a former citizen's spouse, and the extent to which a former citizen resides in a country that imposes little or no tax.[412] As was the case with the law prior to the 1996 Act, if the Secretary of the Treasury establishes a reasonable belief that a relinquishment of U.S. citizenship or termination of U.S. residency would likely result in a substantial tax reduction for the year of citizenship relinquishment or residency termination, the former citizen or former long-term resident bears the burden of proof that his or her relinquishment of citizenship or termination of residency did not have a principal purpose of tax avoidance.[413] It is unclear when this burden would be invoked, and unclear what evidence the individual could introduce to overcome this burden (i.e., to establish that the relinquishment of citizenship or termination of residency did not have as one of its principal purposes the avoidance of tax). The burden of proof for making this determination is the same as that for pre-1996 law. In other words, the same types of administrative complexities and difficulties inherent in determining an individual's subjective purpose for citizenship relinquishment or residency termination apply with respect to these cases.

The use of objective thresholds such as income tax liability and net worth assumes that it is more likely that persons above these monetary thresholds have tax avoidance as one of their principal purposes for relinquishing citizenship or terminating residency. At the same time, by retaining pre-1996 law with respect to individuals falling below the monetary thresholds, the statute (and in particular section 877(f)) contemplates that an individual who falls below the monetary thresholds still could have tax avoidance as one of their principal purposes for relinquishing citizenship or terminating residency. Thus, with respect to individuals falling below the monetary thresholds, the 1996 amendments did not accomplish an easing of administrative difficulties.

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[411] Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

[412] H.R. Conf. Rep. No. 104-736, at 325 (1996).

[413] Sec. 877(f).

To the extent that more objective tests could be adopted in order to ease administrative difficulties in determining an individual's intent for relinquishing citizenship or terminating residency, it can be argued that the alternative tax regime simply should not apply to individuals who fall below the monetary thresholds. With respect to this class of individuals, the rules are difficult to administer and are not enforced. As a result, the rules themselves do not encourage compliance. It certainly would seem that some individuals below some monetary thresholds (whatever those thresholds are or should be) could relinquish citizenship or terminate residency for tax avoidance reasons. Excepting such persons from the alternative tax regime, however, can be viewed as part of the cost of a more administrable and more objective regime.

Former citizens and former long-term residents exceeding the monetary thresholds

A former citizen or former long-term resident who exceeds one or both of the monetary thresholds is treated as having a principal purpose of tax avoidance. As a result, such an individual generally will be subject to the alternative tax regime. Such a person will nevertheless not automatically be treated as having a principal purpose of tax avoidance if the individual (1) falls within certain categories of persons described below and (2) submits a ruling request for the Treasury Secretary's determination as to whether the individual's relinquishment of citizenship or termination of residency had for one of its principal purposes the avoidance of taxes. The individual must submit the ruling request within the one-year period beginning on the date of relinquishment of citizenship or termination of residency.

Former citizens are eligible to submit a ruling request (and therefore are not automatically subject to the alternative tax regime) if: (1) the individual was born with dual citizenship and retains only the non-U.S. citizenship; (2) the individual becomes, within a reasonable period after citizenship relinquishment, a citizen of the country in which the individual, the individual's spouse, or one of the individual's parents, was born; (3) the individual was present in the United States for no more than 30 days during each year in the 10-year period immediately preceding the date of his or her relinquishment of citizenship; (4) the individual relinquishes his or her U.S. citizenship before reaching age 18 and a half; or (5) the individual falls under any other category that may be prescribed by Treasury regulations.[414] Former long-term residents are eligible to submit a ruling request if: (1) the individual becomes, within a reasonable period after residency termination, a resident fully liable for income tax in the country in which he or she was born, his or her spouse (if married) was born, or his or her parents were born; (2) the individual was present in the United States for 30 days or less during each year of the 10-year period prior to residency termination; or (3) the individual ceases to be taxed as a lawful permanent resident, or commences to be treated as a resident of another country under an income tax treaty and does not waive the benefits of such treaty applicable to residents of the foreign country, before the individual reaches age 18½ .

If a former citizen or former long-term resident exceeds one of the monetary thresholds and (1) is eligible to submit a ruling request but does not submit such a request, or (2) is not eligible to submit a ruling request because such individual is not described in one of the specified categories, then such person is treated as having a principal purpose to avoid taxes and, therefore,

[414] Sec. 877(c)(1)(A) and (c)(2).

is subject to the alternative tax regime. For this class of individuals, the rules are very objective and straightforward – the alternative tax regime applies. The rules in this regard should be relatively simple to administer because they do not suffer from the administrative difficulties of pre-1996 law in trying to evaluate the intent of such individuals. Although the rules are easier to administer with respect to this class of individuals, that benefit is not without a cost: it is certainly possible that there are individuals within this class who relinquish citizenship or terminate residency for reasons wholly independent from tax avoidance, yet such individuals would nonetheless be subject to the alternative tax regime.

(c) Ruling process

Although the 1996 changes to the alternative tax regime provided certain objective monetary thresholds to simplify the inquiry into tax motivation, the changes preserved a ruling process for certain classes of former citizens and former long-term residents who exceeded one of the monetary thresholds and, therefore, would otherwise be treated as tax-motivated. Because the alternative tax regime automatically applies to a former citizen or former long-term resident exceeding one of the monetary thresholds absent the ruling process, there is great pressure on both (1) the categories of individuals eligible to request a ruling and (2) the ruling process itself. Individuals above one of the monetary thresholds, therefore, have an incentive to submit a ruling request provided that they fall (at least arguably) within one of the designated categories of eligible persons.

The procedures for obtaining a ruling with respect to whether an individual's relinquishment of citizenship or termination of residency is tax-motivated are detailed in Notice 97-19, as revised by Notice 98-34. Under Notice 98-34, if a former citizen's or former long-term resident's tax liability or net worth exceeds the monetary thresholds, the individual will not be automatically treated as having a principal purpose of tax avoidance if he or she (1) is eligible to submit a ruling request that his or her relinquishment of citizenship or termination of residency did not have for one of its principal purposes the avoidance of U.S. taxes (because the person satisfies the requirements of one of the categories described above), (2) submits such a request in a timely manner, and (3) provides the IRS with a complete and good faith ruling request. The IRS determines whether a submission was complete and provided in good faith. If the ruling request constitutes a complete and good faith submission, the IRS may also, depending on the information submitted, provide a substantive ruling as to whether the individual's relinquishment of citizenship or termination of residency had as one of its principal purposes the avoidance of U.S. taxes.

Thus, under Notice 98-34, the IRS has three basic alternatives for a ruling under section 877:

(1) The IRS could provide a substantive ruling that the individual's citizenship relinquishment or residency termination did not have for one of its principal purposes the avoidance of U.S. taxes in those cases in which the information submitted clearly establishes the lack of such a principal purpose;

(2) The IRS could provide a substantive ruling that the individual's citizenship relinquishment or residency termination did have as one of its principal purposes

the avoidance of U.S. taxes in those cases in which the information submitted clearly establishes the existence of such a principal purpose; or

(3) The IRS could express no opinion as to whether the individual's citizenship relinquishment or residency termination had one of its principal purposes the avoidance of U.S. taxes in those cases in which, although there is a complete and good faith submission, the information submitted does not clearly establish the existence or lack of such a principal purpose. [415]

If the IRS rules favorably with respect to the former citizen or former long-term resident (i.e., the information submitted clearly established that the individual did not have tax avoidance as one of his or her principal purposes for the citizenship relinquishment or residency termination), then the individual generally would not be treated as having relinquished citizenship or terminated residency for tax avoidance purposes and would not be subject to the alternative tax regime.[416] If the IRS rules adversely with respect to the reasons for the citizenship relinquishment or residency termination (i.e., the information submitted clearly established that one of the individual's principal purposes for relinquishing citizenship or terminating residency was tax avoidance), then the individual can challenge the ruling in court.[417] Very few of the published rulings, however, involved determinations that were adverse to the taxpayer.[418]

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[415] Although not explicitly discussed in Notice 98-34, the IRS presumably also could rule that the submission was not complete and in good faith, in which case the individual would be in the same position as if no submission were made -- that is, the individual would be treated as tax-motivated. Of course, as a practical matter, a former citizen or former long-term resident could withdraw such a request prior to the IRS so ruling. The withdrawal would have the same effect.

[416] It is possible that the IRS could later challenge the taxpayer on audit and, for example, contend that the ruling was based on factual misrepresentations. As a practical matter, however, if a taxpayer receives a favorable ruling, the taxpayer generally will be expected from the alternative tax regime.

[417] *See* H.R. Conf. Rep. No. 736, 104th Cong., 2d Sess. 325 (1996). In such cases, it would be the IRS's position that the alternative tax regime automatically applies to such taxpayer, and that the taxpayer would have to challenge an adverse ruling in a refund suit to recover any taxes paid by reason of section 877. Notice 97-19. The taxpayer presumably could challenge that position by arguing that a ruling should have been granted (that is, by demonstrating that one of the principal purposes for the citizenship relinquishment or residency termination was not the avoidance of U.S. tax).

[418] *See*, Part VII.B.2, above, Table 3: Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents Under Notice 97-19 and Notice 98-34 during the Period from January 1, 1997 through July 1, 2002.

Almost half of the rulings issued under Notice 98-34 fall within the "fully submit" category.[419] The monetary thresholds hold little meaning for this category of former citizens and former long-term residents. The position of an individual who receives a fully submit ruling is the same as (1) an individual who falls below the monetary thresholds or (2) an individual subject to the pre-1996 law. In each of these cases, the determination of the individual's purpose for citizenship relinquishment or residency termination is to be made if, and at the time, that the individual is selected for audit. The burden of proof provided by section 877(f) would apply. That is, once the Secretary of the Treasury establishes it is reasonable to believe the relinquishment of citizenship or termination of residency would result in a reduction of taxes, the burden of proving that the relinquishment of citizenship or termination of residency did not have for one of its principal purposes the avoidance of taxes is on the individual. Thus, the ruling process does little to assist with the determination of tax avoidance in cases in which the individual's intent is not entirely clear. If the taxpayer can clearly establish intent, the ruling process seems to work, although one might question whether a ruling process is necessary with respect to such cases. Thus, the fully submit category of ruling does not appear to be serving the legislative purpose of the alternative tax regime.

In addition, there is no clear, discernable pattern for the published private letter rulings under section 877. For the favorable rulings, one common factor is that the former citizen or former long-term resident would be subject to tax in his or her new country of citizenship or residence on worldwide income at a rate comparable to the U.S. income tax rate. That factor alone, however, does not appear to be dispositive. Hence, in many cases, the ruling process under present law does not appear to be accomplishing a clear delineation of who might be subject to the alternative tax regime.

(d) Conclusions

The present-law alternative tax regime depends, in large part, on a subjective inquiry as to the intent of the former citizen or former long-term resident – namely, whether one of the principal purposes of citizenship relinquishment or residency termination was the avoidance of U.S. taxes. The burden on former citizens and former long-term residents to establish that one of the principal purposes is not tax avoidance (i.e., to prove the negative) is extremely high. The difficulty in administering this subjective test has been acknowledged by both Congress and the IRS.[420] The 1996 amendments to section 877 made this inquiry more objective in certain respects: for former citizens and former long-term residents above the monetary thresholds who do not fall within one of the categories of persons eligible to submit a ruling request or who do not submit a timely ruling request, the alternative tax regime automatically applies without further inquiry. For all other classes of former citizens and former long-term residents, the uncertainties and administrative complexities associated with this subjective inquiry continue.

Because of the difficulties in administering subjective intent tests (both in connection with the ruling process and outside of the ruling process for taxpayers who either fall below the

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[419] *Id.*

[420] *See* H.R. Rep. No. 104-96, at 148 (1996); Notice 98-34.

monetary thresholds or who receive fully submit rulings), consideration should be given to eliminating the ruling process, and replacing present law with an entirely objective test. Under such a test, objective, demonstrable monetary thresholds would be considered as a proxy for a determination that one of an individual's principal purposes for relinquishing citizenship or terminating residency is avoidance of U.S. taxes. The alternative tax regime would automatically apply to former citizens and former long-term residents who exceed certain monetary thresholds. For those who fall below the monetary thresholds, the alternative tax regime would not apply. No further showing would be required of such individuals; there would be no subsequent audit exposure involving inquiry into their intent.

Use of an objective standard such as monetary thresholds involves certain trade-offs. There likely will be some individuals who fall below these monetary thresholds who relinquish citizenship or terminate residency for tax-motivated reasons. They would benefit from such a rule because their audit exposure would be eliminated. As a practical matter, given the enforcement weaknesses of present law, the cost of relieving such persons of obligations under the alternative tax regime are small (from both a revenue and policy perspective) as compared to the simplicity the rule would provide.

At the same time, there also are likely to be some former citizens and former long-term residents who exceed the thresholds who have no tax motivation for relinquishing citizenship or terminating residency. A question of fairness arises because such people would be subject to the alternative tax regime without opportunity for rebuttal (other than, perhaps, challenging whether they really exceed the thresholds). This issue exists under present law with respect to former citizens and former long-term residents who exceed the monetary thresholds and who are not eligible to submit a ruling request. The present-law ruling process, however, serves to mitigate the rigidity of the rule, at least with respect to those individuals who fall within one of the categories eligible to submit a ruling request. Thus, there are persons who could be worse off under a fully objective rule without an exception. The cost to such persons is compliance with the alternative tax regime. Some would argue that such a cost is not significant: the former citizen or former long-term resident generally would be taxed on U.S.-source income as a nonresident noncitizen in any event; the alternative tax regime expands the concept of U.S.-source income in this regard for a fixed, 10-year period of time. This cost should be weighed against the benefit of eliminating the subjective inquiry which, in connection with other measures to improve information collection, would result in a simpler rule to administer and a more effective regime. Because an objective standard is more rigid than present law, to the extent such a standard is adopted, consideration also should be given to raising the threshold to cover individuals with a higher net worth because the argument that there is correlation between monetary thresholds and intent generally would seem to be stronger in the case of higher net-worth individuals. As discussed in more detail below, much of the incentive to relinquish citizenship or terminate residency may be linked to avoidance of the U.S. estate and gift tax. Tax thresholds (such as the unified credit amount) under the estate and gift tax rules may serve as a useful reference in this regard.

To the extent that it is desirable to retain some opportunity for relief for taxpayers who exceed the objective monetary thresholds but who are not relinquishing citizenship or terminating residency for tax avoidance purposes, narrow, objective exceptions to the rule should

be established in lieu of the ruling process. This would produce a general benefit of moving away from the subjective inquiry of intent that is required in the ruling process as well as a specific benefit of eliminating the fully submit category of rulings, which appears to have an effect that is inconsistent with the intent of the 1996 amendments to the alternative tax regime. The exceptions should be limited in scope because such persons (notwithstanding that they exceed the monetary thresholds) would be out of the alternative tax regime without further inquiry. In this regard, it may seem fair to except from the alternative tax regime those individuals who relinquish their citizenship, but who never have had substantial contacts with the United States -- notwithstanding that such individuals may exceed the monetary thresholds.

For example, a person who has been a dual citizen since birth (because, for example, he or she was born in a foreign country but has one U.S. parent), but who never has been a resident of the United States and who has not utilized the benefits of his or her U.S. citizenship (as evidenced for example, by only visiting the United States, if at all, for short periods of time and by not traveling on a U.S. passport), might be viewed as having such insubstantial contacts with the United States as to warrant an exception from the alternative tax regime if that person decided to forgo his or her U.S. citizenship. Similarly, a minor who became a U.S. citizen by being born in the United States while his or her parents (who are foreign) were temporarily in the United States, but who gives up U.S. citizenship by age 18 and a half, might be excepted from the alternative tax regime if the person was not present in the United States for any significant period of time (e.g., less than 30 days) during a certain period (such as a 10-year period). In any case, such exceptions should be narrow, limited, clear, and objectively verifiable so as to avoid the difficulties raised by the present-law subjective intent test and ruling process.

In addition, no exceptions from the alternative tax regime should be permitted (regardless of whether a person is above or below the monetary thresholds) unless the former citizen or former long-term resident can establish that he or she has complied with all of his or her prior U.S. Federal tax obligations.[421] If a person has not complied with his or her tax obligations prior to citizenship relinquishment or residency termination, it seems fair to assume that tax avoidance is one of the principal purposes of the citizenship relinquishment or residency termination. If the person has not complied, the person should be required to take the necessary steps to become current with respect to those obligations. Once the person relinquishes citizenship or terminates residency, as a practical matter it likely will be more difficult for the IRS to enforce those obligations. Hence, it is in the interest of administration of the tax system to treat an individual's citizenship relinquishment or residency termination as tax-motivated unless he or she is current with respect to his or her U.S. tax obligations up to the point of citizenship relinquishment or residency termination.

This approach would simplify present law considerably and make it much more administrable. Former citizens and former long-term residents falling below the monetary thresholds would not be subject to the alternative tax regime. Former citizens and former long-term residents exceeding the monetary thresholds would be subject to the alternative tax regime unless they satisfy the requirements of limited, objective exceptions. For those who satisfy the

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[421] Because of concerns of administrability, the showing of compliance with tax obligations could be limited to a discrete period of time, such as five years.

requirements of these exceptions, they would also not be subject to the alternative tax regime, without further inquiry into intent.[422] At the same time, although the use of an objective standard for determining whether an individual is subject to the alternative tax regime would improve present law, that alone is not sufficient. As discussed below, steps should be taken to improve the ability of the IRS to obtain necessary information with respect to the former citizen or former long-term resident, and more stringent enforcement measures need to be adopted.

3. Information gathering with respect to former citizens and former long-term residents

Under the Code, a U.S. citizen who loses his or her citizenship is required to provide an information statement to the Department of State (or other designated government entity). With the following information: (1) the individual's social security number, (2) the mailing address of the individual's principal foreign residence, (3) the new country of residence, (4) the new country of citizenship, (5) information concerning the individual's assets and liabilities if the tax liability threshold or the net worth threshold under section 877(a)(2) is met, and (6) such other information as the Treasury Secretary prescribes. A similar information statement is required for long-term residents who terminate their residency. Individuals can provide this information on IRS Form 8854.[423] A copy of Form 8854 is in the Appendix at A-204.

An individual who fails to provide the required information statement is subject to a penalty for each year (of a 10-year period beginning on the date of loss of citizenship or termination of residency) during which the failure to provide the statement continues. The penalty is equal to the greater of five percent of the tax required to be paid under section 877 for that year or $1,000.

Several factors influence an assessment of the sufficiency of the penalties for failure to provide the required information statement. The overall rate of compliance may at first appear to be low. Fifty-seven percent of the 2,735 former citizens published in the *Federal Register* for 1995 through 1999 did not provide the required tax information statements when they relinquished citizenship.[424] Relatively recent changes, however, appear to have markedly improved compliance. The Department of State issued guidance to its consular posts as of November 1996, calling for them to obtain the required tax information statements from any person who loses citizenship. Based on a random sampling of 200 out of the 2,735 former citizens, the GAO estimates that after November 1996, 84 percent included expatriation tax information statements.[425] In addition, for 2000 and 2001, 87 percent of the 792 former citizens

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[422] The IRS could, of course, audit such individuals to verify that the requirements had been satisfied.

[423] There is, however, no statutory requirement that individuals provide the required information on the official IRS form. Some Department of State consular offices will accept the information in alternate formats.

[424] *See* GAO Report at A-256.

[425] *See* GAO Report at A-256. The GAO estimates the standard of error of this estimate as plus or minus eight percentage points.

who received CLNs provided a tax information statement.[426] This substantial increase in the compliance rate may be largely attributable to the Department of State issuance of guidance rather than to the possibility of the IRS imposing the penalty.

Another relatively recent change that may have improved compliance is the issuance by the IRS of Form 8854 in January 1999. This form is designed to obtain all of the information required to be reported by section 6039G. Although there is no statutory requirement that individuals utilize this form, many consular offices provide it to individuals who wish to renounce their U.S. citizenship. The absence of an official IRS form may have had an impact on the rate of noncompliance (and the quality of the information obtained) prior to January 1999.

The ability of the IRS to assess a monetary penalty against a former citizen or former long-term resident who refuses to provide the required tax information statement is dependent upon the nature and location of the taxpayer's assets. In general, the IRS has the power to collect the penalty if assets remain in the United States and can be found, but if the assets are in a foreign jurisdiction, the power of the IRS to collect is generally limited to whatever authority (if any) is provided pursuant to a tax treaty with the foreign jurisdiction. Because of these restrictions, it may not be possible to design a penalty that is effective against an uncooperative former citizen or former long-term resident. These restrictions may explain (in part) why the IRS has not assessed the penalty for not filing the required tax information statement.[427]

At the same time, however, it is important to recognize that the filing of a tax information statement by a former citizen or former long-term resident is critical for the IRS to enforce the alternative tax regime. At a minimum, the IRS must be able to obtain the individual's social security number, if the individual has a social security number, in order to utilize IRS records to verify compliance. To the extent that the information is not provided to the IRS, significant difficulties exist in effectively administering the alternative tax regime. As stated above, the present-law penalty does not appear to be an effective means of obtaining the necessary information. Rules should be adopted that provide adequate incentives for a former citizen or former long-term resident to provide such information.

As an alternative to monetary penalties as an incentive for providing the required information, consideration should be given to continuing to treat an individual as a U.S. citizen or resident (i.e., subject to tax on worldwide income) until such point when the individual satisfies the requirements of section 6039G (i.e., when the individual fully and accurately completes the IRS Form 8854.)[428] As a result, an individual who is relinquishing citizenship or terminating residency to avoid taxation on worldwide income or assets would have a meaningful incentive to complete Form 8854.

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[426] *See* A-123 (August 14, 2002 letter from the IRS).

[427] *Id.*

[428] As discussed below, modification of immigration rules in this regard to limit the admissibility of individuals who relinquish citizenship or terminate residency and do not comply with the information reporting requirements would be helpful.

Some may question whether requiring the completion of a tax form as a prerequisite to a loss of citizenship or permanent residence status for U.S. tax purposes raises constitutional issues or issues under principles of international law. The requirement to provide certain information as a prerequisite to relinquishment of tax citizenship can, however, be viewed as a requirement of proof of "intent" to relinquish tax citizenship. According to the CRS, it is generally acceptable under U.S. constitutional law for Congress to require reasonable evidentiary standards, such as the filing of an IRS form, as a requirement for loss of citizenship.[429] The CRS has indicated that there is some precedent for the divergence of the tax and nationality definitions of citizenship. Under principles of international law, the CRS has indicated that such limits on the right to relinquish citizenship cannot be arbitrary. It would not seem arbitrary, however, that individuals continue to be treated as citizens for U.S. tax purposes until such time when they provide appropriate notice to the government of their intention to relinquish their tax citizenship in a manner that will enable the government to reasonably enforce its tax laws. [430] In other words, as long as the limitation is reasonable and the underlying motive is to protect the integrity of the tax system rather than to penalize or prohibit the right to emigrate or expatriate, such requirement should not violate international norms. [431]

A related issue involves the potential lag in time between citizenship relinquishment, which occurs upon the individual's completion of an expatriating act with the requisite intent to relinquish citizenship, and the date upon which the Department of State receives notice of the citizenship relinquishment. Generally, the Department of State may not be aware of an individual's citizenship relinquishment until the individual provides notice such as through applying for a CLN. As discussed above, the date upon which the CLN is approved is not the effective date for loss of tax citizenship under present law; the loss of citizenship dates back to the date of the expatriating act. Thus, under present law, even if a former citizen provides the appropriate information on a Form 8854 upon applying for a CLN, that person could be treated as having relinquished citizenship several years prior to the application for that CLN by reason of an expatriating act in a prior year, such as naturalizing in a foreign country. The 10-year period will have started to run before the IRS has had any opportunity to learn of the citizenship relinquishment.

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[429] *See* A-53, Memorandum I from the CRS dated May 10, 2000.

[430] *Id.*

[431] *See* also the 1995 Joint Committee staff study, supra note 315. Although the requirement of filing an IRS form may (under principles of constitutional law and international law) be a reasonable prerequisite to giving up U.S. tax citizenship, concerns may be raised if this change in the law had a retroactive effect and caused persons who relinquished citizenship before its effective date to continue to be treated as citizens for U.S. tax purposes. Accordingly, it would seem appropriate for any such change in law to apply prospectively to expatriating acts occurring after the date of enactment.

In addition, according to the INS, no records are kept regarding the movement of permanent residents into or out of the United States.[432] Unless a former permanent resident tries to reenter the United States after a prolonged absence (e.g., more than one year) without the proper documentation, or voluntarily turns in his or her green card, the INS generally would not be aware that an individual has relinquished permanent residency status.

These absences or delays in notification of an expatriating act or termination of residency can preclude the IRS from properly enforcing the alternative tax regime. A rule that would conform the loss of citizenship or termination of residency for U.S. tax purposes to the date that the required information was provided to the IRS would serve an additional benefit of eliminating the problems created by this delay.

To effectively enforce the alternative tax regime, the IRS must obtain the required information as completely and consistently as possible. Accordingly, individuals seeking to relinquish their citizenship should be required to complete IRS Form 8854 and the use of alternate mechanisms by consular offices should be discontinued immediately.

Finally, the point of citizenship relinquishment or residency termination is not the only point in time at which it is in the interest of the IRS to receive information from former citizens or former long-term residents who are subject to the alternative tax regime. Under present law, such former citizens and former long-term residents are required to file tax returns only if they owe tax. As part of these tax returns, the former citizen or former long-term resident must also provide to the IRS a statement setting forth (generally by category) all items of U.S.-source and foreign-source gross income. Requiring the annual filing of balance sheet information by all former citizens and former long-term residents who are subject to the alternative tax regime (regardless of whether tax is due) during the 10-year period after citizenship relinquishment or residency termination would serve to provide the IRS with more recent financial and address information, thereby improving their ability to effectively administer the law.

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[432] The INS tracks the movements of nonimmigrants on its NIIS database. NIIS tracks admission and departure dates of nonimmigrants, as well as each nonimmigrant's stated destination in the United States. The arrival and departure records of permanent residents are not tracked by any INS system.

C. Estate and Gift Tax Rules

1. In general

Individuals who contemplate relinquishing citizenship or terminating residency for tax purposes generally consider three main U.S. taxes: the income tax, the estate tax, and the gift tax. For wealthy taxpayers, the estate and gift tax, the rates of which reach 49 percent (for 2003), may serve as the motivating factor in the decision to relinquish citizenship or terminate residency.[433] For these individuals, avoidance of U.S. estate and gift taxes, alone, could be the reason for citizenship relinquishment or residency termination, even if there may be income tax consequences associated with these acts. While the future of the estate tax is uncertain, the tax continues to apply at high rates to those estates that are subject to it, and relinquishing citizenship or terminating residency remains an effective way for many taxpayers to reduce or eliminate the burden of the tax.

As discussed in more detail below, the estate and gift tax rules under the alternative tax regime are not effective deterrents to relinquishing citizenship or terminating residency to avoid U.S. estate and gift tax. These rules merely expand the property that is considered U.S.-situated property for purposes of U.S. estate and gift taxes. Former citizens and former long-term residents may be able to avoid application of these rules by making certain that they do not own any such U.S.-situated property after citizenship relinquishment or residency termination. This can be achieved by either investing outside the United States or converting U.S.-situated property to foreign-situated property.

The income tax rules under the alternative tax regime may provide some deterrent to estate and gift tax-motivated citizenship relinquishment or residency termination. Some individuals may be unwilling or unable to pay an income tax on the conversion of U.S. property to foreign property or on the transfer of property to foreign corporations, trusts, or estates. However, individuals whose primary goal is avoidance of the U.S. estate and gift tax may be relatively unconcerned with the imposition of an income tax. For these individuals, the income tax rules under the alternative tax regime serve little deterrent effect.

2. History of the estate and gift tax rules of the alternative tax regime

In 1966, when the estate and gift tax rules under the alternative tax regime were first enacted, nonresident noncitizens were subject to lower estate and gift tax rates than were U.S. citizens. The rules then provided that former citizens who were subject to the alternative tax regime would not be able to take advantage of the lower estate and gift tax rates. In addition to lower estate and gift tax rates for nonresident noncitizens, the estate and gift tax rules were not unified in 1966.[434]

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[433] *See* Part VI, above.

[434] The estate and gift tax regime became unified in 1976. Pub. L. No. 94-455, Sec. 2001.

Two estate and gift tax rules (originally enacted in 1966) apply to individuals who are subject to the alternative tax regime. One rule is an estate tax rule that prevents former citizens and former long-term residents from sheltering property from U.S. estate tax by transferring U.S.-situated property to foreign corporations. Under this rule, the former citizen or former long-term resident is required to include in his or her U.S. estate the value of certain closely-held foreign stock to the extent the foreign corporation owns U.S.-situated assets.[435]

The second rule is a gift tax rule. Prior to 1966, U.S. citizens and nonresident noncitizens, alike, generally were subject to gift tax on the transfer of U.S. intangibles, such as U.S. stock and securities. Due to enforcement problems with these rules when applied to nonresidents, the gift tax rules were amended in 1966 to provide generally that nonresident noncitizens are not subject to U.S. gift tax on the transfer of intangibles. However, this intangible exclusion was not extended to individuals subject to the alternative tax regime, such that former citizens and former long-term residents who are subject to the alternative tax regime continue to remain subject to U.S. gift tax on transfers of U.S. intangible property.[436]

In 1988, the lower estate and gift tax rates that applied to nonresident noncitizens were repealed.[437] As a result, nonresident noncitizens, including former citizens and former long-term residents who are subject to the alternative tax regime, are now subject to the same rate bracket to which U.S. citizens and residents are subject.

3. Scope of the estate and gift tax rules of the alternative regime

The special estate and gift tax rules apply only to the transfer of certain U.S.-situated assets of certain former citizens and former long-term residents during the 10 years after citizenship relinquishment or residency termination. This includes a transfer during the former citizen's or former long-term resident's life (for gift tax purposes) or a transfer at a former citizen's or former long-term resident's death (for estate tax purposes) during this 10-year period. Foreign-situated assets generally are not subject to either U.S. estate or gift tax regardless of whether the nonresident noncitizen was an individual who relinquished citizenship or terminated residency for tax reasons. Thus, if an alternative tax regime is designed to remove estate and gift tax incentives for individuals to relinquish citizenship or terminate residency the present law provisions are insufficient deterrents. A wealthy U.S. citizen or resident who is otherwise subject to U.S. tax on his or her worldwide estate or on lifetime gifts of worldwide property would be able to avoid U.S. estate and gift tax by (1) surviving for 10 years after citizenship relinquishment or residency termination (or waiting 10 years to make a lifetime gift),[438] (2)

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[435] Sec. 2107(b).

[436] Sec. 2501(a)(3).

[437] Pub. L. No. 100-647, sec. 5032(a).

[438] Issues with respect to the 10-year period after citizenship relinquishment or residency termination as it relates to the estate and gift tax provisions are similar to those discussed above in connection with the income tax provisions. *See* Part VIII.B.1.b, above. An important distinction exists, however, in that it is much more difficult to plan survival for a 10-year period

investing in foreign situated-assets either prior to or after citizenship relinquishment or residency termination, and/or (3) converting U.S.-situated assets to foreign-situated assets, thereby removing such assets from the former citizen's or former long-term resident's U.S. estate or gift tax base. To limit these incentives, present law expands the class of property that is considered U.S.-situated.[439] These rules, however, are narrow in scope and, as a result, may not be effective at achieving their desired purpose.

(a) Foreign-situated assets not affected

The estate and gift tax rules under the alternative tax regime generally attempt to limit avoidance of the U.S. estate and gift tax by former citizens and former long-term residents through expanding the U.S. estate and gift tax base. The alternative tax regime expands the estate tax base by including the value of closely-held foreign stock of a former citizen or former long-term resident in the U.S. estate to the extent the foreign corporation owns U.S.-situated assets, if the former citizen or former long-term resident died within 10 years of citizenship relinquishment or residency termination.[440] For gift tax purposes, the alternative tax regime expands the U.S. gift tax base by subjecting to gift tax transfers of U.S.-situated intangibles (e.g., U.S. stocks and bonds) made within 10 years of citizenship relinquishment or residency termination.[441] These special estate and gift tax rules are designed to expand the definition of U.S.-situated property for estate and gift tax purposes. The estate and gift tax rules, however, have no application to foreign-situated property. Indeed, to the extent a former citizen or former long-term resident owns foreign-situated property or converts U.S. property to foreign property, the estate and gift tax rules under the alternative tax regime have no effect. Thus, the present-law alternative tax regime provides an incentive for former citizens and former long-term residents either to invest in property located outside the United States or to convert U.S.-situated property to foreign-situated property in a transfer or exchange.

To the extent that a U.S. citizen or long-term resident invests in foreign-situated assets over time, there is a U.S. estate and gift tax incentive for citizenship relinquishment or residency termination. Had that person made a gift or died while he or she was a U.S. citizen or long-term resident, the gross value of the foreign-situated asset would have been subject to U.S. estate or gift tax. The tax on such assets can be avoided by relinquishing citizenship or terminating residency, notwithstanding the present-law alternative tax regime.

(in order to avoid the estate tax) as opposed to postponement of realization for a 10-year period (in order to avoid the income tax) or postponement of a gift for a 10-year period (in order to avoid the gift tax).

[439] Secs. 2107 and 2501.

[440] Sec. 2107(b).

[441] Sec. 2501(a)(3). There is no foreign stock look-through rule for gift tax purposes that is analogous to section 2107(b).

In addition to individuals who have invested in foreign-situated property, there is an estate and gift tax incentive for citizenship relinquishment or residency termination for those who are able to "re-situate" their U.S. property outside the United States. If this conversion from U.S.-situated to foreign-situated property can be accomplished through a transfer or exchange without income tax consequences, the incentive may be considerable. As discussed below, however, even if income tax consequences exist, there still may be tax incentives for citizenship relinquishment or residency termination.[442]

Under the income tax rules, there are several provisions that limit the ability of a taxpayer to convert U.S.-situated property into foreign-situated property by providing for an income tax on certain transactions by U.S. citizens or residents or former citizens or former long-term residents.

An income tax is imposed on a U.S. person on the gain realized on transferring U.S. property to a foreign corporation.[443] If a U.S. person transfers property to a foreign corporation, such transfer generally is treated as a sale or exchange for an amount equal to the property's fair market value. For example, if a U.S. person contributes appreciated property to a foreign corporation, a tax would be imposed on the gain at the income tax rates.

An income tax is also imposed on the transfer by a U.S. person to a foreign trust or foreign estate.[444] Thus, if a U.S. person transfers appreciated property to a foreign trust, for example, a tax would be imposed on the inherent gain with respect to such property at the income tax rates.

For the five-year period prior to and the 10-year period after citizenship relinquishment or residency termination, individuals subject to the alternative tax regime generally are subject to U.S. income tax on the exchange of property that gives rise to U.S.-source income for property that gives rise to foreign-source income. [445] Such former citizens and former long-term residents who exchange U.S.-source income producing property for foreign-source income producing property generally are subject to income tax as if such U.S. property were sold for its fair market value on the date of such exchange. For example, if the former citizen or former long-term resident exchanges appreciated U.S. property, such as U.S. stock, for foreign stock, such individual generally must recognize gain to the extent of the gain inherent in the U.S. stock if the transaction occurs within five years prior to or 10 years after citizenship relinquishment or residency termination.

These income tax rules, however, may not be not sufficient to remove the estate and gift tax incentives for citizenship relinquishment or residency termination. First, the income tax

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[442] Secs. 367, 684, and 877.

[443] Sec. 367.

[444] Sec. 684.

[445] Sec. 877(d)(2) and Notice 97-19.

provisions apply only to the extent that there is gain realized on the property that is transferred or converted. If the property in question is cash or other high-basis property with little or no inherent gain, then the income tax rules would not serve any deterrent effect because there would be no income tax assessed on the conversion transaction. For example, an individual who inherits U.S.-situated property with a basis that is stepped up to fair market value[446] could immediately convert that property to foreign-situated property without income tax consequences (because there is no gain to tax).[447] Such individual could then relinquish citizenship or terminate residency, and the assets would be outside of the scope of the estate and gift tax rules under the alternative tax regime.

In addition, even if the individual pays income tax on gain with respect to transactions that convert U.S.-situated property to foreign-situated property, there may be an incentive to engage in such transactions and pay the income tax in order to avoid the estate and gift tax. Once the property has been transferred to a foreign entity or converted to foreign-situated property, it no longer would be subject to estate and gift tax if held by a former citizen or former long-term resident. Because the income tax rates are lower than the estate and gift tax rates and apply only to gain inherent in the property, whereas the estate and gift tax rates apply to the entire value of the property (and not just the inherent gain), individuals may be willing to pay the income tax in order to ensure that their property ultimately will be outside the U.S. estate and gift tax base. In other words, paying the income tax may be a small hurdle in successfully moving property outside the United States for U.S. estate and gift tax purposes.

(b) Post-departure enforcement

Enforcement of U.S. estate and gift tax of nonresident noncitizens (including individuals who relinquish citizenship or terminate residency for tax reasons) involves determining whether the individual has made a lifetime gift or transfer at death of U.S.-situated property. This presents difficulties. For example, the property may be cash or personal property for which no records of their transfer are kept indicating that the property has been transferred. For real estate or stock, for which such records generally are kept, tracking lifetime gifts would require examining local real estate records or corporate records, and such an examination by the IRS is unlikely unless the IRS becomes aware of the transfer from an outside source. In the estate tax context, similar difficulties may exist as well. Because the estate of a former citizen or former long-term resident would be administered outside the United States, the IRS may have difficulty learning of the death of former citizens and former long-term residents and may have trouble determining the extent of such individual's U.S.-situated property.

Enforcement of the additional estate tax rule that applies to certain former citizens and former long-term residents (which applies for the 10-year period after citizenship relinquishment or residency termination) presents difficulties of its own. Under this rule, the gross estate includes all U.S.-situated property and foreign stock to the extent the foreign corporation holds

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[446] Sec. 1014.

[447] U.S. estate tax may have been paid, however, by the estate of the decedent from which the former citizen or former long-term resident received the property.

U.S.-situated assets, provided that the decedent generally owned more than 50 percent of the stock. Such holdings would need to be identified on at least two levels. First, the decedent's interest in the foreign stock must be identified. This can be particularly difficult, because it could potentially require examination of the corporate records of a foreign corporation, jurisdiction over which the United States presumably would not have. Second, to the extent such a foreign corporation owns U.S.-situated property, enforcement would require looking through such foreign corporations to determine what assets they hold.

Under the gift tax rule, certain former citizens and former long-term residents are subject to gift tax on the transfer of U.S.-situated intangible property, such as U.S. stocks and bonds (again, for the 10-year period after citizenship relinquishment or residency termination). To enforce this provision, the IRS would need to determine when such stocks and bonds have been transferred by a nonresident noncitizen. Because such stocks or bonds would have been issued by a U.S. person, it may be possible for the IRS to examine, for example, the corporate records of a U.S. corporation.

4. Conclusions

Avoidance of U.S. estate and gift tax may be the primary reason some individuals relinquish citizenship or terminate residency. There is one estate tax rule and one gift tax rule that apply exclusively to former citizens and former long-term residents who are subject to the alternative tax regime, but those rules are narrow in scope and do not apply to the extent that the former citizen or former long-term resident holds foreign-situated assets. To the extent that the income tax rules under the alternative tax regime apply to certain conversion or exchange transactions, they may not be sufficient to deter estate and gift tax avoidance, because the income tax applies at rates substantially lower than those under the estate and gift tax. Moreover, the income tax provisions apply to the extent there is gain, depending on the value and the basis of the property. The estate and gift tax applies to the value of a taxpayer's entire interest in property. Thus, the income tax rules may serve as an inadequate deterrent in many cases of individuals who seek to avoid U.S. estate and gift tax.

It may be appropriate to consider additional tax rules that would provide greater deterrence to estate and gift tax-motivated citizenship relinquishment or residency termination. For example, consideration should be given to applying the special estate tax rule for gift tax purposes in order to prevent former citizens and former long-term residents from making lifetime gifts of closely-held stock in foreign corporations that hold U.S.-situated assets.

D. Tax Treaties

1. In general

The United States has entered into many tax treaties with other countries. These include income tax treaties, as well as estate, inheritance, and gift tax treaties. The traditional objectives of these tax treaties are to reduce or eliminate double taxation (e.g., income, estate, inheritance, or gift taxes), and to prevent avoidance or evasion of the taxes of the two countries. In the case of income tax treaties, these objectives principally are achieved through each country's agreement to limit, in certain specified situations, its right to tax income derived from its territory by residents of the other country. For example, treaties generally provide that neither country will tax business income derived by residents of the other country unless the business activities in the taxing jurisdiction are substantial enough to constitute a permanent establishment or fixed base in that jurisdiction. Treaties also address passive income such as dividends, interest, and royalties from sources within one country derived by residents of the other country either by providing that such income is taxed only in the recipient's country of residence or by reducing the rate of the source country's withholding tax imposed on such income. In addition, treaties generally prevent the source country from taxing capital gains derived by a resident of the other country and other income not specifically mentioned in the treaty.

Estate and gift treaties generally cover issues such as determining whether an individual is a domiciliary of each of the signatory countries, what property may be included in the gross estate of the country that is not the decedent's country of domicile or citizenship (i.e., a country that is not the individual's primary taxing jurisdiction), the exemptions, deductions, and credits that may be granted by a country that is not the decedent's country of domicile or citizenship, and any available credits.

To a large extent, the treaty provisions designed to carry out these objectives supplement U.S. tax law provisions having the same objectives. Treaty provisions modify the generally applicable statutory rules with provisions that take into account the particular tax system of the treaty partner.

2. Saving clauses

U.S. tax treaties typically provide rules to specify the residence or domicile of an individual who may be subject to tax as a resident under the domestic laws of both countries. The United States typically includes in its tax treaties a "saving clause" in order to preserve its right to tax U.S. citizens or residents who are residents of treaty partners. By reason of this saving clause, unless otherwise provided in the treaty, the United States may continue to tax its citizens or residents as if the treaty was not in force. The scope of the saving clause, however, differs by treaty. Some saving clause provisions apply only to preserve U.S. taxing jurisdiction with respect to U.S. citizens or residents. Other saving clause provisions apply to U.S. citizens or residents and to former citizens, but not to former long-term residents. The broadest saving clause provisions apply to U.S. citizens or residents as well as both former citizens and former long-term residents.

Income tax treaties

There are currently 55 U.S. income tax treaties in force. Of these treaties, eight contain a provision under which the saving clause (and, therefore, the U.S. jurisdiction to tax) applies to a former citizen or former long-term resident whose loss of citizenship or resident status had as one of its principal purposes the avoidance of tax; such application is limited to the 10-year period following the loss of citizenship or resident status.[448] This approach is consistent with the alternative tax regime for former citizens and former long-term residents as described above.

Not all U.S. tax treaties in force, however, are fully consistent with the approach under the alternative tax regime. In this regard, there are 16 U.S. income tax treaties currently in force that do not permit the United States to tax its former citizens or former long-term residents under the applicable saving clause.[449] These treaties potentially conflict with the alternative tax regime with respect to both former citizens and former long-term residents.

In addition, there are 24 U.S. income tax treaties currently in force that contain saving clauses that permit the United States to tax its former citizens (for the 10 years following the loss of citizenship if such loss had as one of its principal purposes the avoidance of tax), but do not expressly mention former long-term residents.[450] Of these treaties, 21 potentially conflict with the alternative tax regime with respect to former long-term residents.[451] According to the Department of Treasury, an additional potential conflict exists with the U.S.-Netherlands income tax treaty, because that treaty provides that the saving clause does not apply to former U.S. citizens who are nationals of the Netherlands.

There are seven U.S. income tax treaties currently in force that contain saving clauses that permit the United States to tax its former citizens, regardless of the reason for the loss of citizenship, but do not expressly mention former long-term residents.[452] According to the

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[448] *See* Table 4 at A-6. The Senate also has given its advice and consent to ratification of a new U.S. income tax treaty with Italy that contains a similar saving clause provision. The treaty and protocol are awaiting ratification by the Italian government.

[449] *See* Table 1 at A-3.

[450] *See* Table 2 at A-4.

[451] The U.S. income tax treaties currently in force with Austria, Ireland, and Luxembourg contain a saving clause provision that applies to former citizens (for the 10 years following the loss of citizenship if such loss had as one of its principal purposes the avoidance of tax), but does not expressly mention former long-term residents. According to the Department of Treasury, because these three income tax treaties entered into force after the date of enactment of the 1996 amendments to the alternative tax regime, the 1996 alternative tax regime does not override these three treaties with respect to former long-term residents. *See* S. Rep. No. 105-8 (1997), Exec. Rep. No. 105-7; S. Rep. No. 105-8 (1997), Exec. Rep. 105-13.

[452] *See* Table 3 at A-5.

Department of Treasury, five of these treaties potentially conflict with the alternative tax regime with respect to former long-term residents.[453]

Thus, of the 55 U.S. income tax treaties in force, only eight are fully consistent with the alternative tax regime. The majority of the remaining income tax treaties potentially conflict with the present-law alternative tax regime -- either with respect to former citizens (which is the case in 16 U.S. income tax treaties), or with respect to former long-term residents (which is the case in 42 U.S. income tax treaties). [454]

Estate and gift tax treaties

There currently are 16 U.S. estate and gift tax treaties in force. Of these treaties, only one is fully consistent with the alternative tax regime.[455] Of these treaties, 12 do not expressly permit the United States to tax estates of, or gifts by, former citizens and former long-term residents.[456] These 12 treaties potentially conflict with the alternative tax regime with respect to both former citizens and former long-term residents.

In addition, three of the 16 estate and gift tax treaties contain a saving clause that expressly permits the United States to tax estates of, and gifts by, former citizens whose loss of citizenship was tax-motivated, but do not expressly mention former long-term residents.[457] These three treaties potentially conflict with the alternative tax regime with respect to former long-term residents.

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[453] According to the Department of Treasury, because the income tax treaty with Switzerland entered into force after the date of enactment of the 1996 amendments to the alternative tax regime, even though the treaty is inconsistent with the alternative tax regime with respect to former long-term residents, the alternative tax regime does not override the treaty. *See* S. Rep. No. 105-8 (1997), Exec. Rep. 105-10. For the same reason, the U.S.-Ukraine income tax treaty should not be overridden by the 1996 alternative tax regime.

[454] As described above in notes 451 and 453, according to the Department of Treasury, five U.S. income treaties do not conflict with the 1996 alternative tax regime with respect to former long-term residents because those treaties entered into force after the date of enactment of the 1996 amendments to the alternative tax regime (*i.e.*, the income tax treaties with Austria, Ireland, Luxembourg, Switzerland, and Ukraine).

[455] *See* Table 7 at A-9. The new U.S. estate tax protocol with Germany permits the United States to tax estates of, and gifts by, former citizens and former long-term residents whose loss of such status has as one of its principal purposes the avoidance of U.S. tax for 10 years following such loss of status. Thus, the protocol amends the treaty to conform to the present-law alternative tax regime.

[456] *See* Table 5 at A-7.

[457] *See* Table 6 at A-8.

3. Interaction of the alternative tax regime with tax treaties

Potential conflicts between the alternative tax regime and the saving clauses in U.S. tax treaties may occur if, for example, income or gains are derived by a former U.S. citizen or former long-term U.S. resident who resides in a country with which the United States has a tax treaty. If the saving clause (and therefore the U.S. jurisdiction to tax) does not apply to the former U.S. citizen or former long-term U.S. resident, such individual generally would benefit from the treaty as if the alternative tax regime did not exist. For example, such individuals would obtain the typical treaty benefits providing for reduced rates or exemptions from U.S. tax on U.S.-source passive income, and exemptions from U.S. tax on U.S.-source capital gains, certain U.S.-source business and services income, or other U.S.-source income not specifically mentioned in the treaty. This result would apply even though U.S. tax would otherwise be imposed under the alternative tax regime with respect to these items of income during the 10-year period after citizenship relinquishment or residency termination.

The legislative history of the 1996 changes to the alternative tax regime addressed the interaction of the alternative tax regime and tax treaties. The legislative history stated that the alternative tax regime generally is consistent with the underlying principles of tax treaties. However, the legislative history contemplated that treaty provisions might conflict with the alternative tax regime. In particular, the legislative history stated that:

> [t]he Department of Treasury is expected to review all outstanding treaties to determine whether the expatriation tax provisions, as revised, potentially conflict with treaty provisions and to eliminate any such potential conflicts through renegotiation of the affected treaties as necessary. Beginning on the tenth anniversary of the enactment of the [1996 amendments to the expatriation tax provisions], any conflicting treaty provisions that remain in force would take precedence over the expatriation tax provisions as revised.[458]

Thus, until August 21, 2006 (the tenth anniversary of the enactment of the 1996 amendments to the alternative tax regime), the alternative tax regime will apply regardless of any conflicting treaty provisions that might otherwise restrict the United States' ability to tax its former citizens or former long-term residents. This may be viewed as a temporary (10-year) override of applicable treaties.

The Department of Treasury has undertaken efforts as part of its renegotiation of treaties to resolve some of these potential conflicts. The Department of Treasury has included a saving clause provision in its 1996 U.S. model income tax treaty that allows the United States to tax for 10 years (as if the treaty did not come into effect) former citizens and former long-term residents whose loss of such citizenship or resident status had as one of its principal purposes the avoidance of tax. However, as described above, conflicts in several U.S. treaties remain. The Department of Treasury has stated the following problems in attempting to resolve these remaining conflicts:

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[458] H.R. Conf. Rep. No. 104-736, at 329 (1996).

> While the Treasury Department intends to advocate this expanded saving clause whenever it takes part in treaty negotiations, it would be extremely difficult to renegotiate all potentially conflicting treaties within the 10-year period referred to in the legislative history of the 1996 expatriation legislation. The renegotiation of a tax treaty requires a significant commitment of resources by both countries. Accordingly, the Treasury Department must prioritize its treaty negotiations according to a variety of factors, including the relative significance of the issues to be addressed with its various treaty partners and potential treaty partners. The potential conflict between an existing treaty and the 1996 expatriation tax legislation is one such issue.
>
> Even if the Treasury Department sought to renegotiate a treaty to eliminate this potential conflict, numerous factors may limit its ability to do so.[459] For example, a country with which the United States has a tax treaty is likely to view an agreement to expand the saving clause as a concession by that country, because the provision would expand the United States' ability to impose tax on a resident of that country. That country, if it were willing to agree to the expansion, would probably expect a concession from the United States in return. This is particularly likely because the issue would arise as a result of a treaty override by the United States.[460] The concession expected from the United States may or may not be acceptable to the United States. In addition, the Conference Report to the 1996 legislation, which purports to withdraw the treaty override after 10 years following enactment of the legislation, could provide an incentive for treaty partners to delay negotiations on the issue until the override purportedly expires in 2006. Accordingly, even if the Treasury Department had the resources to renegotiate all of the income tax treaties that conflict or (potentially conflict) with the 1996 legislation, it is not certain that mutually acceptable agreements could be reached. [461]

To the extent that conflicting treaty provisions can be fully conformed with the alternative tax regime prior to August 21, 2006, the United States can preserve its taxing jurisdiction with respect to former citizens and former long-term residents who reside in such treaty jurisdictions. However, as described above, there may be significant practical difficulties in reaching that goal. To the extent that a conflicting treaty provision cannot be conformed

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[459] The difficulties involved in the renegotiation of U.S. treaties as a result of the 1996 legislation's treaty override were discussed in detail in the Statement of Leslie B. Samuels, Assistant Secretary (Tax Policy), Department of the Treasury, Before the Committee on Finance, United States Senate, dated July 11, 1995.

[460] In this regard, the United States is widely perceived as overriding its treaty obligations more frequently than its treaty partners, a perception that has the potential to make it more difficult to obtain concessions from treaty partners and potential treaty partners.

[461] *See* A-20 (April 7, 2000, letter from the Department of Treasury). The Department of Treasury stated similar concerns with respect to the renegotiation of estate and gift tax treaties.

before the temporary treaty override expires in 2006, the alternative tax regime could have limited or no effect (depending on the current treaty provision) with respect to individuals who reside (or choose to reside) in that treaty jurisdiction.[462]

[462] It is unknown how many former citizens or former long-term residents currently are residents of treaty countries that have treaty provisions that conflict with the alternative tax regime.

E. Immigration Rules

1. Substantive determinations of inadmissibility

The immigration rules require the Attorney General to determine whether an individual renounced his or her citizenship for the purpose of avoiding U.S. taxation. The statute does not give any standards to judge the citizen's intent in relinquishing his or her citizenship. As a result, the Attorney General has discretion in determining whether an individual's purpose in renouncing U.S. citizenship was to avoid taxation. The Attorney General, however, is not charged with the administration of the tax laws. That responsibility lies with the Department of Treasury. The Department of Treasury, however, is not charged with enforcing or assisting in the enforcement of the immigration provision. Thus, the statute requires an INS immigration officer at the border or Department of State consular officer abroad to make a tax determination in order to enforce the immigration laws. In theory, to enforce the statute, the INS immigration officer or consular officer (as representatives of the Attorney General) would have to consider the tax treatment of the individual as a U.S. citizen, and then compare it to the tax treatment of the individual in his or her new country and consider whether the individual had other reasons for relinquishing citizenship.

Because the exclusion is based on the subjective intent or motivation of the former citizen, it is inherently difficult to administer. This difficulty is exacerbated by the inability of the INS and the Department of State to obtain information from the IRS to make the required determination. Even if the IRS had concluded that an citizenship relinquishment was motivated by tax avoidance, that information could not be shared with the INS or Department of State in its determination of whether a citizenship relinquishment was for the purpose of tax avoidance. The lack of explicit disclosure authority to administer the immigration provision renders the bar ineffective. Given the lack of training in tax matters and the lack of access to tax records, it is not efficient for the INS or Department of State to make the required determination.[463]

In addition to the difficulty of administration, a disparity exists between the coverage of section 877 and the immigration provision. Under section 877, tax avoidance must be one of the principal purposes for citizenship relinquishment, thus allowing for other principal purposes. Under the immigration provision, tax avoidance must be the purpose for citizenship relinquishment. Consequently, the test is more inclusive under section 877 than under the immigration provision. Coverage also differs as to former green card holders. Under section 877, former long-term residents with a tax avoidance purpose, as well as former citizens, are subject to the 10-year tax. The immigration provision does not apply to these former long-term residents.

[463] As discussed in Part V, above, the Homeland Security Act transfers the functions of the INS and the immigration functions of both the Attorney General and the Department of State to the Department of Homeland Security.

2. Waivers

Present law provides for discretionary waiver of inadmissibility to the United States. This waiver neutralizes the effect of being deemed inadmissible under the immigration provision. For those individuals seeking to establish permanent residence in the United States, the immigration provision is a bar to entry. For those individuals seeking to visit the United States temporarily, however, this ground of inadmissibility can be waived.[464] Waiver is discretionary and applications are evaluated on a case-by-case basis. Factors considered in determining whether to approve a waiver include:

(1) The effect on U.S. public interests;

(2) The seriousness of actions or conditions causing inadmissibility; and

(3) The reasons for wishing to enter the United States. There is no need to show a compelling reason for the visit.[465]

Thus, under present law, an individual who renounces citizenship for tax reasons could be admitted to the United States to visit family or for vacation. Since the former citizen left the United States to avoid taxation, there is little likelihood that such individual would wish to re-establish permanent residency as an immigrant (i.e., and be subject to tax once again). More likely than not, such individuals would be making short, perhaps frequent, trips to the United States for business or pleasure. Given the discretionary nature of the waiver, such visits are not impeded by such individual being deemed inadmissible. Thus, the goal of the immigration provision -- to deny reentry into the United States for individuals who renounce citizenship for tax reasons -- is not achieved because such individual can continue to reenter the United States, even routinely, without establishing permanent residency.

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[464] 8 U.S.C. sec. 1182(d)(3).

[465] Department of State, 9 Foreign Affairs Manual, sec. 40.301 n.3.

IX. SUMMARY OF OTHER COUNTRIES' TAXATION OF CITIZENSHIP RELIQUISHMENT, RESIDENCY TERMINATION, AND IMMIGRATION, AND ESTATES, INHERITANCES, AND GIFTS

A. Summary of Other Countries' Taxation of Citizenship Relinquishment, Residency Termination, and Immigration

Overview

The Joint Committee staff surveyed other countries' taxation of citizens and residents.[466] While not an exhaustive survey, this survey reveals that most nations generally tax the worldwide income of their residents, whether citizens or noncitizens, but only the domestic source income of their nonresidents, whether citizens or noncitizens. Hence, unlike in the United States, the criterion of residence rather than citizenship is central to the liability to tax in most countries.

In general, it appears that a limited number of countries attempt to tax former residents and that a smaller group impose a tax on expatriation (an exit tax). Several European countries impose income tax on their former citizens or residents for some period of time after they become nonresidents. In some cases, the country in which the former resident chooses to claim residency determines whether the individual retains an income tax liability in his or her former country of residence. Australia, Canada, and Denmark impose an exit tax when a resident permanently leaves the country. The Danish departure tax generally is less expansive than those of Australia or Canada. Also, it is generally the case that among those countries that tax capital gains, the gain is taxed upon realization by a resident taxpayer, regardless of whether some part of that gain may have accrued to the individual prior to his or her immigration to such country. Australia, Canada, Denmark, and Israel are exceptions to this general rule.

The relevant provisions relating to taxation of former residents, exit taxes, and the taxation of immigrants' accrued gains are described below.[467]

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[466] The Joint Committee staff conducted this survey with the assistance of the staff of the Law Librarian of the Library of Congress. The Joint Committee staff also consulted primary sources, secondary sources, and outside practitioners. The results reported should not be interpreted as an authoritative representation of foreign laws, but rather as an overview of foreign tax statutes.

[467] Except where noted, all foreign currency conversions into U.S. dollars were made at the exchange rate prevailing on September 30, 2002, as reported by the International Monetary Fund in International Monetary Fund, *International Financial Statistics*, November, 2002.

Taxation of former residents

Finland

Generally a person who has his permanent residence in Finland is subject to taxation on his worldwide income and wealth.[468] For three years subsequent to departing Finland, a Finnish citizen is liable for Finnish income and wealth taxes on his worldwide income and wealth unless he can establish that no "essential ties" with Finland are maintained. The three-year "essential ties" rule is interpreted by the individual's facts and circumstances. Among circumstances that create essential ties are the individual's family residing in Finland; the individual carries on business activities in Finland; the individual owns real estate in Finland; and the individual is not permanently staying abroad perhaps for reasons of pursuing studies or a limited employment assignment. After three years, the individual is taxed as a nonresident unless the tax authorities can establish otherwise. The three-year rule does not apply for the purpose of inheritance taxation.

In practice bilateral tax treaties for the mitigation of double taxation of the individual often may override the three-year rule.[469] Even if a tax treaty overrides the three-year rule, the Finnish citizen still is required to file an annual tax return.

France

As provided by the France-Monaco income tax treaty, France can tax as a French resident any French citizen who resides in Monaco regardless of whether they resided in France or in another country prior to establishing residence in Monaco.[470] Cooperation between the tax authorities of France and Monaco provides enforcement of this arrangement. Treaty arrangements between France and Monaco regarding inheritance taxes are not as stringent as those governing income taxes. Non-French sited property of a French citizen residing in Monaco is exempt from French inheritance taxation if the individual had resided in Monaco for more than five years prior to death.

Aside from the unique agreements with Monaco, emigration from France generally creates no French tax liability under either the income or inheritance taxes, except in two circumstances. First, French citizens and other nonresidents are liable for income tax on French-source income. A distinction is made depending on whether or not the nonresident has one or more dwellings at his or her permanent disposal in France. If the nonresident does not have a

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[468] Finland is one of a number of European countries that imposes an annual net wealth tax.

[469] Finland's treaty with the United States eliminates the three-year rule to preclude double taxation.

[470] An exception to this rule arises in the case of an individual holding dual citizenship. If such an individual moved to Monaco from a country other than France he may claim the nationality of the other country to avoid taxation as a French citizen.

dwelling, he or she will be taxed exclusively on the basis of his or her French-source income. If the nonresident has one or more dwellings at his or her permanent disposal, whether held directly or indirectly, and the nonresident resides in a tax haven or nontreaty country, he or she is subject to tax based on a deemed income equal to three times the fair market rent of the dwellings. However, if his or her French-source income exceeds this deemed income, tax is assessed based on actual income.[471] In practice, such tax is infrequently collected.

Second, for certain French residents who emigrate from France on or after September 9, 1998, France imposes a tax on the net accrued, but unrealized, capital gains on the shares of companies[472] in which the émigré and his family hold more than 25 percent of the vote or value. To be subject to this tax, the individual must have been resident in France for at least six of the preceding 10 years. The taxpayer need not pay the liability immediately. Deferral is permitted if the taxpayer provides the name of a representative in France who is authorized to receive any correspondence from the tax administration on the taxpayer's behalf. The representative must agree to fulfill all obligations and the taxpayer must provide acceptable guarantees to the tax administration to secure payment of the deferred liability. In addition, the taxpayer must file an income tax return annually during the deferral period on which the taxpayer reports the deferred tax. The deferral period ends if, within five years from the date of departure from France, the taxpayer transfers, sells, or redeems the shares. Credit may be made for taxes paid to a foreign country on this subsequent transfer, sale, or redemption. The taxpayer is exempt from the deferred tax liability if the taxpayer reestablishes residence in France or if the taxpayer holds the shares for five years measured from the date of departure from France.[473]

Germany

Germany imposes a so-called "extended limited tax liability" on German citizens who emigrate to a tax-haven country[474] or do not assume residence in any country and who maintain substantial economic ties with Germany as measured in terms of the individual's German-source income or assets. The regime applies to both the German income tax and inheritance tax. This tax applies to an individual who was both a German citizen and a tax resident of Germany for at least five years during the 10-year period immediately prior to the cessation of his or her residence. The individual need not be a German citizen at the time of emigration. A qualifying individual is subject to the extended limited tax liability for 10 years after termination of

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[471] Former French citizens are exempt from this tax for their first two years of residence in a tax haven or nontreaty country.

[472] The provision applies to the ownership of any company, French or foreign, that was subject to French corporate income tax.

[473] The taxpayer is entitled to reimbursement of the costs associated with the establishment of the guarantees required to obtain deferral.

[474] For this purpose, a country is a tax haven if it does not impose an income tax or if the income tax liability that would arise for a single person with an income of €77,000 ($75,922) is less than two thirds of the corresponding German income tax liability.

residency, except that no such tax is due in years when the individual has German-source income of no more than €16,500 ($16,269).

Under extended limited tax liability, the individual is taxed on all income that does not qualify as foreign income in the hands of a resident. This includes German-source income that creates a tax liability for nonresidents in general, as well as German-source income for which other non-residents are not liable to taxation, as well as income that is not German-source income yet is not deemed to be foreign-source income. Examples of such income are interest income from deposits held in German banks or income from international consulting not attributable to a particular country, and passive income from foreign controlled companies. In the case of relocation to countries with which Germany maintains tax treaties, the tax treaties generally take precedence over the extended limited tax liability, with the effect that any issues of double taxation are dealt with by treaty. This German tax regime is similar to that imposed by section 877 under U.S. Federal tax law.

To avoid circumvention of the extended tax liability regime, Germany extends to individuals who are subject to the extended limited tax liability the taxation of base company income from foreign controlled corporations that is imposed on German resident shareholders.[475] Income from a foreign controlled corporation is attributed to a German extended limited tax liability taxpayer, if the taxpayer, alone or with other residents, owns more than 50 percent of the voting shares of the controlled corporation, and if, in addition, the controlled corporation resides in a low-tax country and the corporation's income is primarily passive income.

Another tax liability is imposed on emigrating taxpayers who own, or have owned, a certain percentage of shares in a German corporation by treating the taxpayers' change in residence as a deemed sale of the shares. As of January 2002, the disposition of shares in a German corporation qualifies as the disposition of a business asset that leads to income taxation on the realized gain, if the individual disposing of the shares has owned at least one percent of the company's shares at any time during the preceding five years, and these criteria are applied to resident or non-resident taxpayers who actually sell the shares, as well as to emigrating taxpayers who are deemed to have sold the shares when they leave the country. Before January 2002, the threshold value for taxing the capital gains of substantial share ownership was 10 percent of the share capital.

The above described taxation of capital gains realized from the sale of shares is an exception from the general principle that individuals are not taxed on long-term capital gains on shares. The taxation of the realized gains and deemed realized gains described above is based on the principle that holding one percent of the share capital, or more, amount to the ownership of a business asset and in Germany the general principle for business assets is that gains realized on the sale of a business asset are taxable income.

For emigrating taxpayers, the gain from the deemed sale is calculated by determining the fair market value at the time of relinquishing German residence less the taxpayer's basis. If the taxpayer had already owned the corporate holding at the time he or she became a German

[475] This provision is similar to rules under Subpart F of the U.S. Internal Revenue Code.

resident, the taxpayer may use the fair market value of the holding at the time he or she became a resident in lieu of basis. For years after 2000, such deemed gains of emigrating taxpayers are taxed as ordinary income, whereas such realized gains of resident taxpayers are taxed at a preferential rate by exempting one-half of the gain from income.

These tax regimes for former citizens and former residents apparently were enacted in response to the termination of residency by certain wealthy individuals, many of whom were highly visible to the general public as athletic or artistic performers. The Joint Committee staff was unable to find any information regarding the extent of any revenue raised by these provisions. Enforcement of the deemed disposition provision may be difficult with respect to its application to substantial participation in foreign companies. The extended limited tax liability generally only applies to German-source income and, in principle, should be enforceable. Enforcement may be enhanced by the taxation of foreign base company holdings. However, these provisions can be avoided by relocating the taxpayer's property outside Germany.

Ireland

In general, Irish residents, and those ordinarily resident, are liable for tax on their worldwide income, unless the individual is domiciled outside of Ireland. In this circumstance, only income from Irish sources and income remitted to Ireland from sources outside of Ireland and the United Kingdom is subject to tax. An individual is said to be "ordinarily resident" in the current year if the individual was resident in the prior three years. An individual ceasing residence in Ireland will not cease to be ordinarily resident, and thereby subject to Irish income tax, until he or she has been non-resident for three continuous tax years.

Italy

Resident individuals are subject to income tax on their worldwide income. Residents of Italy are those persons, whether citizens or not, who for the majority of the tax year are registered in the Civil Registry or who are domiciled in Italy. Italian citizens who remove themselves from the residents' register and have moved to any one of 57 identified tax havens[476] are deemed residents of Italy, unless proof to the contrary is provided.

[476] The identified tax haven countries are: Andorra; Anguilla; Antigua and Barbuda; Aruba; the Bahamas; Bahrain; Barbados; Belize; Bermuda; the British Virgin Islands; Brunei; the Cayman Islands; Cyprus; the Cook Islands; Costa Rica; Djibouti; Dominica; Ecuador; French Polynesia; Gibraltar; Grenada; Guernsey; Hong Kong; the Isle of Man; Jersey; Lebanon; Liberia; Liechtenstein; Macao; Malaysia; Malta; the Marshall Islands; Mauritius; Montserrat; Nauru; the Netherlands Antilles; Niue; Oman; Panama; the Philippines; Monaco; San Marino; Sark; the Seychelles; Singapore; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Switzerland; Taiwan; Tonga; the Turks and Caicos Islands; Tuvalu; Uruguay; Vanuatu; Samoa; and the United Arab Emirates.

The Netherlands

The Netherlands generally does not tax the capital gains realized by resident or nonresident taxpayers. However, a resident of the Netherlands is subject to tax on the sale of a "substantial interest" in a company, whether the company is a Dutch company or a foreign company. Generally a shareholding qualifies as a substantial interest in a company if the taxpayer, alone or with his or her spouse, holds directly or indirectly at least five percent of the total capital issued, or five percent of a particular class of shares in a resident or nonresident company.[477] A substantial shareholding also exists if a shareholder directly or indirectly owns at least five percent of the voting rights. If a taxpayer or spouse has a lineal ascendant or descendent who owns such an interest, all shares in the same company are deemed to be a substantial interest, but the two shareholdings are not aggregated for purposes of the five percent test.

Because the Netherlands taxes residents, rather than citizens, any tax that would be owed on the sale of a substantial interest in a foreign-sited business may be easily avoided by the owner emigrating, that is, becoming a nonresident and selling the interest in the business. The change in residency does not necessitate a change in citizenship. However, in the case of a business located in the Netherlands, the Netherlands asserts taxation authority on sales of substantial interests by nonresident owners. The ability to enforce such taxation may be precluded by income tax treaties. Substantial shareholders who emigrate are assessed provisionally. The tax is not collected if security for payment is provided to the Dutch tax administration. The tax becomes due if the substantial shareholding is sold within 10 years after emigration or if the company liquidates the enterprise or distributes its reserves. In some cases, the treaty provisions permit the Netherlands to tax former residents only if they are nationals of the Netherlands. Avoidance of these tax arrangements can be accomplished if the owner of a substantial interest is willing to relocate to a country with an income tax treaty that is less favorable to the Netherlands' tax authority. For example, a resident of the Netherlands could move to Belgium and wait five years prior to sale under the current income tax treaty between the two countries.

In addition to the sale of substantial interests, the Netherlands taxes the sale of business assets. The Netherlands has adopted certain provisions to prevent the emigration of a taxpayer to avoid payment of tax on the sale of business assets. A taxpayer who emigrated from the Netherlands and terminates his Netherlands business is subject to tax at the date of emigration. The gain subject to tax is calculated at the fair market value of the business assets and reserves less the adjusted basis of such assets. If the taxpayer were to emigrate, but not sell his business, there would be no tax liability as the business remains subject to Netherlands tax. If a resident or nonresident transfers a Netherlands business abroad, the transfer is subject to tax at the date of the transfer. Gain or loss is calculated as the difference between fair market value of the assets transferred and the taxpayer's adjusted basis.

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[477] Loans to the company also may constitute part of a "substantial holding." A person having a call option on five percent of the nominal issued equity capital also would qualify as a substantial shareholder.

The Netherlands also attempts to tax taxpayers who move pension fund assets out of the Netherlands. In the Netherlands, contributions to pension funds, which are often paid by the employer, generally are exempt from income tax and distributions are taxable. Under a provision effective January 1, 1995, a taxpayer is deemed to have received the fair market value of pension assets at the moment immediately preceding the transfer of such assets outside of the Netherlands. However, the tax does not apply if the pension distributions will be taxed in the foreign jurisdiction in which a former resident lives at the time of distribution. A similar provision applies to certain annuity payments. An émigré may obtain an extension of time to pay the tax on annuities and the taxpayer is not liable if the taxpayer does not redeem the annuity rights within five years of emigration.[478]

A Dutch citizen who emigrates continues to be treated as a resident of the Netherlands for 10 years following emigration for gift and inheritance tax purposes.[479]

Norway

Norway asserts tax liability on the worldwide income of individuals and businesses that reside in Norway. A former resident may still be considered resident for purposes of the income tax if he or she keeps a home in Norway, which is not let out, and he or she is unable to prove that he or she is considered resident for tax purposes in the country in which he or she is living. All remuneration (including pension distributions) derived from employment in Norway or paid to a manager or member of the Board of Directors of a company resident in Norway is liable for Norwegian income taxes regardless of the individual's country of residence.

If a business enterprise becomes nonresident, activity previously liable for income taxation is considered ceased and income tax is assessed as if the business or the assets were sold. If a limited liability company leaves Norway, the company has to be liquidated in Norway with whatever tax consequences may arise from liquidation. Individuals who terminate their residence, whether for tax purposes or not, and who dispose of shares in a Norwegian company or partnership within five years of the year in which residence is terminated are liable to Norway for tax on gains realized from such disposition. This rule also applies to dispositions of options and other equity derivative instruments. This rule does not apply to the disposal of bonds or certain other securities.

For income considered earned in Norway, Norway claims the primary right of taxation and makes no provision for relief from double taxation that might arise by another country. In practice, tax treaties may modify this outcome.

A business paying wages and salaries and distributing pension benefits is responsible for withholding taxes on such income regardless of the individual's country of residence. This ensures some enforcement of the provisions relating to the taxation of compensation paid to

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[478] Upon application and under certain conditions, a transfer of pension rights from the Netherlands to a foreign insurer may not be taxed if an employee is employed abroad.

[479] *See* Part IX.B., below, for a summary of inheritance taxation in the Netherlands.

former residents. A limited liability company, however, is not responsible for taxes derived from the sale of the company's shares. As this particular provision has only been in effect since 1992, there is limited experience regarding how this provision is enforced. As a general matter, Norway has concluded treaties regarding tax enforcement only with the other Nordic countries.[480]

Spain

Spain asserts tax liability on the worldwide income of individuals and businesses that reside in Spain. An individual is deemed to be a resident of Spain for income tax purposes if (1) the individual stays in Spain for more than 183 days (including temporary absences), (2) the individual's main center of business or professional activities or economic interests is in Spain, or (3) the individual's spouse and minor dependent children qualify as residents. In addition, Spanish citizens who remove themselves from Spain and establish residence in a country deemed a tax haven remain taxable on their worldwide income in the year of emigration and the four subsequent years. Spain has identified 48 countries as tax havens for this purpose.[481]

Sweden

A Swedish citizen or resident remains a resident for income tax purposes as long as he or she maintains essential ties with Sweden. If the individual was a resident of Sweden for at least 10 years, he or she is deemed a resident for five years following departure unless the individual can establish that he or she has not maintained essential ties with Sweden. If, after the initial five-year period, the Swedish government can establish that the individual has maintained essential ties with Sweden, or has created new essential ties, the individual will continue to be taxed as a Swedish resident. Through the creation of new essential ties, it is possible for an individual who had become a nonresident for tax purposes to be reinstated as a resident for tax purposes. "Essential ties" to Sweden can include a family present in Sweden, a home available for use in Sweden, and the extent of economic activity in Sweden.

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[480] The United States also has a tax treaty with Norway. It is beyond the scope of this review to compare the enforcement provisions of the U.S.-Norway treaty with Norway's other treaties.

[481] The identified tax haven countries are: in Europe, Andorra, Cyprus, Gibraltar, the Isle of Man, the Channel Islands, Liechtenstein, Luxembourg (but only with respect of income received by certain holding companies), Malta, Monaco, and San Marino; in the Americas, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Dominica, the Falkland Islands, Grenada, Jamaica, Monserrat, the Netherlands Antilles, Panama, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, the Turks and Caicos Islands, and the U.S. Virgin Islands; in Africa and the Middle East, Bahrain, Jordan, Lebanon, Liberia, Mauritius, Oman, the Seychelles Republic, and the United Arab Emirates; and in Asia and the Pacific, Brunei, the Cook Islands, Fiji, Hong Kong, Macau, the Mariana Islands, Nauru, Singapore, the Solomon Islands, and Vanuatu.

In the case of an individual who leaves Sweden to take up residence in a country with which Sweden has a tax treaty, the effect of this deemed status as a Swedish resident is generally overridden. However, a number of Swedish tax treaties do not cover the Swedish net wealth tax. Hence an individual can be a resident of Sweden for net wealth tax purposes and a resident of another country for income tax purposes.[482] In the case of countries with which Sweden has no tax treaty in force, Sweden does not provide a credit or deduction for foreign taxes paid by the individual in his country of residence. This creates the potential for double taxation of income.

Imposition of exit tax on citizens or long-term residents

Australia

Australia imposes a tax on the income from capital gains when a "capital gains tax event occurs."[483] One capital gains tax event occurs when individuals, companies, or trusts stop being Australian residents. A former resident person is required to compute gain or loss for each qualifying asset owned just prior to the time of becoming nonresident, except for assets having a connection with Australia[484] or for assets acquired before September 20, 1985. For this purpose, gain or loss is determined as the fair market value of the asset at the time just prior to becoming nonresident, less the taxpayer's basis.

An election is available for a taxpayer to disregard the tax on gain on any asset by reason of becoming a nonresident until the earlier of another capital gains tax event (such as a subsequent sale of the asset) in relation to the asset or when the taxpayer again becomes an Australian resident. Electing individuals are expected to report voluntarily their gains and associated tax upon a subsequent disposition. No security is required to obtain the deferment of tax. Also, an individual is exempt from the capital gains tax if he or she was resident in Australia for less than five years during the 10 years before he or she stopped being a resident

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[482] Similar provisions apply for inheritance tax purposes.

[483] Fifty percent of the income from realized capital gains is included in income subject to tax.

[484] Assets having a connection to Australia are those assets upon which nonresidents would be liable for capital gains tax. Nonresidents are subject to capital gains tax on taxable Australian assets including real property situated in Australia, stock holdings in non-publicly traded Australian companies, stock holdings in publicly traded companies where the nonresident shareholder (and related parties) hold 10 percent or more of the stock, interests in Australian partnerships, holdings in Australian unit trusts (i.e., mutual funds), an option or other right to acquire a capital gains tax asset, and certain shares or other security interests in a company that the taxpayer received as consideration for the disposal of another capital gains tax asset. Bilateral income tax treaties often preclude taxation by one treaty country of capital gains realized by residents of the other treaty country, except for gains from the disposition of real property situated in the first country. The U.S.-Australia income tax treaty, however, generally allows each country to tax capital gains from sources in that country realized by residents of the other country.

and he or she owned the assets prior to becoming an Australian resident or if he or she acquired the asset as an Australian resident as a bequest.

There may be significant potential for noncompliance with respect to such an exit tax. Assets that leave the country before the resident leaves are effectively beyond the reach of the Australian tax authorities.

Canada

A taxpayer is deemed to have disposed of certain capital gain property at its fair market value upon the occurrence of certain events, including death or relinquishment of residence. Real property, capital property, and inventory used in a business are exempt from tax upon relinquishing residence, as are investments in registered retirement savings plans. Like Australia, a departing individual may elect to defer the tax on the accrued gain on any asset until the asset is sold. However, the Canadian tax authorities generally require an electing taxpayer to provide security necessary to ensure that the deferred tax will be collected.

An individual who was not resident in Canada for more than five years during the 10-year period preceding departure is not subject to this deemed disposition rule with respect to property owned by such individual when he or she became resident or to property inherited since becoming a resident. Nonresidents who return to Canada after emigrating may elect to reverse the tax effects of the deemed dispositions regardless of how long they were nonresidents.

Denmark

Prior to January 1, 1995, if an individual left Denmark after having been a permanent resident for at least four years, the individual remained a resident for income tax purposes for up to an additional four years unless the individual could establish that he or she would be subject to a substantially equivalent income tax in the new country of residence. Effective January 1, 1995, a Danish citizen can achieve nonresident status immediately upon leaving Denmark if whole-year accommodations were no longer available to him or her in Denmark. Danish income tax generally applies to capital gains realized on shares in corporations and other financial instruments when realized and to pension income when distributed. However, nonresidents are not liable for Danish income tax on Danish-source capital gains on shares or bonds. Pension distributions received by nonresidents from Danish pension plans are liable for Danish income tax, but many tax treaties effectively override this provision of Danish law.

Since 1987, Denmark has imposed a departure tax on certain unrealized capital gains and certain pension assets. An individual who has been resident for at least five of the preceding 10 years and who becomes a nonresident under Danish law or who becomes a resident of another country as provided under treaty is deemed to have disposed of bonds, [485]certain holdings of stock, and certain other financial instruments. The deemed disposal of stock applies to stock

[485] With respect to bonds and other debt instruments, the individual must have been resident for at least seven of the 10 years preceding cessation of residence for the provision to have effect.

owned by shareholders who hold at least 25 percent of the share capital in the company or who control more than 50 percent of the voting power. Shareholders of less substantial interests also are subject to the tax if the shares have been held for at least three years. For stock listed on exchanges, an exemption of Dkr121, 400 ($16,116) (Dkr242,800 ($32,232) for joint returns) applies to the aggregate of all the individual's exchange listed stock. In addition, for publicly traded financial instruments subject to the departure tax, losses are deemed to be realized so that only net gains are subject to the tax. For unlisted shares, the value for the purpose of determining gain is determined by a formula that in practice often may understate market value. The deemed disposition also applies to an individual's business assets for the purpose of depreciation recapture. If an individual ceases residency and by cessation of residency the individual is not taxable on his or her employment income in Denmark as a nonresident, stock options received as employment compensation are includible in income in the year in which the individual ceased residency. In addition, certain pension contributions made in the five years [486] prior to an individual's removal from Denmark are subject to tax.

Payment of the tax liability may be postponed (with security) until actual sale occurs or the shareholder dies. If the shares are sold at a lower price while the individual is a nonresident, the departure tax is recalculated. If the individual repatriates prior to sale of the assets, the departure tax liability is cancelled. In addition, there are provisions for double tax relief in the case in which the individual's new country of residence imposes a tax on the actual sale.

Apparently the departure tax was imposed in response to the relocation to other European countries of certain high net worth permanent resident individuals who held substantial interests in Danish businesses. While no statistics are available on the amount of revenue collected by the departure tax, the perception is that the provisions have had some effect on the relocation decision of such individuals.

Germany

As explained above, in addition to the extended limited tax liability applied to former residents of Germany, if an emigrating individual has owned at least one percent of a company's shares at any time during the preceding five years, the individual is deemed to have sold the shares when he or she leaves the country. The gain from the deemed sale is calculated by determining the fair market value at the time of relinquishing German residence less the taxpayer's basis.

Singapore

Effective with stock options granted on or after January 1, 2003, residents who leave Singapore must pay a tax based on the value of any stock options they hold at the time of departure. The tax, at a maximum rate of 22 percent, is to be imposed on the difference between the market price of the underlying stock, measured one month before the resident gives up his or her resident status, and the strike price of the option. If gains subsequently realized upon

[486] The lookback period is 10 years for pension contributions of individuals who are substantial shareholders in the corporation sponsoring the pension plan.

exercise of the options are lower than the deemed realization, the individual may seek a refund from the Inland Revenue Authority of Singapore.[487] Singapore generally does not tax income from capital gains, but does impose an income tax on residents on their wages and other sources of employment income at the time such compensation is paid and employer-provided stock options at the time of exercise.

Treatment of accrued gains of immigrants

If an individual emigrates from one country to another and if the former country either imposes a tax upon accrued gain at the time of exit or asserts tax liability on former residents, double taxation of income from capital gain may occur. This problem would be eliminated if the immigrant country were to forgo taxation of any gain accrued on property owned by an immigrant prior to his or her immigration. Both Australia and Canada, countries with an exit tax, forgo taxation of gain accrued prior to immigration. An individual who becomes an Australian resident is permitted to take a basis in his non-Australian assets equal to their fair market value at that time, for all purposes. The step-up is not a taxable event in Australia. An individual who becomes a Canadian resident also is permitted to take a basis in his non-Canadian assets equal to their market value at that time, for all purposes. The step-up is not a taxable event in Canada. In both Australia and Canada, the exemption for previously accrued gain is permanent regardless of whether the individual subsequently sells the asset or holds it until death. Since November 2, 1994, Denmark has provided a step up in value of assets held by an individual who becomes a tax resident of Denmark. Also as noted above, for purposes of the German deemed tax on the sale of certain substantial interests in German corporations, if the taxpayer held the interest in the German corporation when he first became a German resident, he may use the fair market of the stock (in lieu of the historical cost) at the time he became a resident in computing the gain.

Israel offers a limited exemption for gain accrued prior to immigration. Immigrants are exempt from tax on capital gains from the realization of assets that they possessed prior to immigrating to Israel and that are sold within seven years of immigration.[488] If such property is sold more than seven years after immigration, the entire gain is subject to Israeli tax. In the case of a corporation that transfers its business headquarters to Israel, gains realized from assets possessed prior to relocation and sold within seven years are subject to a reduced rate of tax.

Australia, Canada, Denmark, and Israel appear to be exceptions with respect to the treatment of accrued gains of immigrants. Most countries do not offer immigrants a step-up in basis on their assets (Australia, Canada, and Denmark) or a limited exemption (Israel). Several countries tax the realized capital gains of residents, including gain accrued by immigrants prior to immigration, while some others do not. Among the countries that impose taxes on former residents, Germany generally exempts from income taxation gains on assets held for longer than

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[487] Bureau of National Affairs, *Daily Tax Report*, September 5, 2002, p. G-2.

[488] The exemption appears to extend to any gain that accrues to the asset during the immigrant's first seven years in Israel. The exemption may be universal. At the discretion of the tax commissioner, otherwise exempt gains may be subject to a reduced rate of tax.

six months.[489] The Netherlands also generally exempts gain from tax except with respect to business assets and substantial interests in a Dutch company.

[489] Germany subjects to income taxation gains from the sale of certain "speculative" assets and gain from the sale of real estate held for less than two years. Also, as explained in the text above, gains from sales of shares by "substantial" shareholders are subject to tax.

B. Summary of Other Countries' Taxation of Estates, Inheritances, and Gifts

Overview

The material below surveys[490] the estate or inheritance tax and gift tax systems of the following countries: Australia, Austria, Bahamas, Belgium, Belize, Bermuda, Canada, Cayman Islands, Costa Rica, Denmark, Dominican Republic, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Philippines, Portugal, Seychelles, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, and the United Kingdom.[491]

Among the countries surveyed, an inheritance tax is more common than an estate tax as is imposed in the United States. An inheritance tax generally is imposed on the transferee or donee rather than on the transferor or donor. That is, the heir who receives a bequest is liable for a tax imposed and the tax generally depends upon the size of the bequest received. The United States also imposes a generation skipping tax in addition to any estate or gift tax liability on certain

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[490] The information is a summary prepared by the Joint Committee staff with the assistance of the staff of the Law Librarian of the Library of Congress. The Joint Committee staff previously summarized other countries' taxation of estates, inheritances, and gifts. See the 1995 Joint Committee staff study, supra note 315. This section updates that summary. The Joint Committee staff derived these summaries primarily from the examination of secondary materials and the summary is not intended as an authoritative representation of foreign laws, but rather as a summary of the primary features of certain foreign wealth transfer statutes. The primary sources used in developing this summary were: Organization for Economic Cooperation and Development, *Taxation of Net Wealth, Capital Transfers and Capital Gains of Individuals*, (Paris: OECD), 1988; W. H. Diamond (editor), *Foreign Tax and Trade Briefs*, (New York: Matthew Bender), 1995; G. J. Yost, ed., *1993 International Tax Summaries*, (New York: John Wiley, Coopers and Lybrand International Tax Network), 1993; Ernst and Young International, *Worldwide Executive Tax Guide*, September 1999; Ernst and Young, *The Global Executive, 2002*, October 2001; Catherine S. Bobbett (editor), *Taxation Individuals in Europe, (Guides to European Taxation, Vol. VI)*, International Bureau of Fiscal Documentation, March 2002, (IBFD Publications BV: Amsterdam, The Netherlands); International Bureau of Fiscal Documentation, *Taxes and Investment in Asia and the Pacific*, various supplements 1999, 2000, and 2001, (IBFD Publications BV: Amsterdam, The Netherlands); International Bureau of Fiscal Documentation, *African Tax Systems*, Supplement No. 118, March 2001, (IBFD Publications BV: Amsterdam, The Netherlands); *Tax Laws of the World, South Africa*, February 2001, (Foreign Tax Law, Inc.: Ormand Beach, Florida); Walter H. Diamond and Dorothy B. Diamond (editors), *Tax Havens of the World*, June 2002, (LexisNexis); and Barry Spitz, 2000 *International Tax Havens Guide*, (New York: Harcourt Professional Publishing).

[491] The countries in this survey include most of the OECD countries, plus certain other countries (the Bahamas, Belize, Bermuda, Cayman Islands, Costa Rica, Dominican Republic, Hong Kong, Israel, Philippines, Seychelles, Singapore, South Africa and Taiwan), some of which have been identified as the worldwide tax home of some individuals who terminate their U.S. citizenship or long-term residency.

transfers to generations two or more younger than that of the transferee. This effectively raises the marginal tax rates on affected transfers. Countries that impose an inheritance tax do not have such a separate tax but may impose higher rates of inheritance tax on bequests that skip generations.

The survey generally reveals that the provisions of the U.S. estate and gift tax (1) exempting transfers between spouses, (2) providing an effective additional exemption of $1.0 million through the unified credit,[492] and (3) providing an $11,000 annual gift tax exemption per donee, may result in a larger exemption (a larger zero-rate tax bracket) than many other developed countries. However, because most other countries have inheritance taxes, the total exemption depends upon the number and type of beneficiaries. While the effective exemption may be larger, with the exception of transfers to spouses which are untaxed, marginal tax rates on taxable transfers in the United States generally are greater than those in other countries. This is particularly the case when comparing transfers to close relatives, who under many inheritance taxes face lower marginal tax rates than do other beneficiaries. On the other hand, the highest marginal tax may be applied at a greater level of wealth transfer than in other countries. Again, it is often difficult to make comparisons between the U.S. estate tax and countries with inheritance taxes because the applicable marginal tax rate depends on the pattern of gifts and bequests.

What the survey cannot reveal is the extent to which the practice of any of the foreign transfer taxes is comparable to the practice of transfer taxation in the United States. For example, in the United States, transfers of real estate generally are valued at their full and fair market value. In Japan, real estate is assessed at less than its fair market value.[493] Also unclear in the description below of various estate and inheritance taxes is the ability of transferors to exploit special tax breaks.

Specific country estate, inheritance, and gift tax provisions

Australia

Australia does impose not an estate, inheritance, or gift tax. However, the transferee receiving assets with accrued capital gains transferred at death retains the transferor's basis in the assets,[494] except for assets acquired prior to September 20, 1985. The basis of those assets

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[492] As explained in Part IV, above, both the unified credit and the marginal tax rates applicable to taxable transfers are scheduled to change between the present and 2011. The comparisons drawn in the text are on the basis of the law applicable in 2002.

[493] Thomas A. Barthold and Takatoshi Ito, "Bequest Taxes and Accumulation of Household Wealth: U.S.-Japan Comparison," in Takatoshi Ito and Anne O. Kreuger (eds.), *The Political Economy of Tax Reform* (Chicago: The University of Chicago Press), 1992, pp. 250-251.

[494] If the beneficiary is a tax-exempt person, the asset is treated as disposed and the gain is includible in the decedent's income subject to income taxation.

acquired prior to September 20, 1985, is stepped up to market value at the death of the transferor. Assets with accrued gains transferred by gift are treated as disposed and 50 percent of the gain is includible in the transferor's income subject to income taxation.

Austria

Austria imposes an inheritance tax and a gift tax. The tax applies to all transfers made or received by residents and to transfers of certain Austrian property by nonresidents. Austrian citizens are treated as residents for purposes of the inheritance tax for two years after emigration.

The first €2,180 ($2,149)[495] of inheritances received by the spouse, children, or grandchildren of a decedent are exempt from tax. For siblings, in-laws, nephews, and nieces the first €436 ($430) are exempt. For other inheritances, the first €72.7 ($72) are exempt. In addition, transfers by gift to a spouse are exempt up to €7,267 ($7,166) per ten-year period.

For taxable transfers, there are five different tax rate schedules: spouse and children; grandchildren and great grandchildren; lineal ascendants and siblings; in-laws, nephews, and nieces; and all others. For spouses and children, marginal tax rates begin at two percent on the first €7,267 ($7,166) of taxable transfers and rise to 15 percent on taxable transfers in excess of €4,360,370 ($4.299 million). For grandchildren, marginal tax rates begin at four percent on the first €7,267 of taxable transfers and rise to 25 percent on taxable transfers in excess of €4,360,370. For lineal ascendants and siblings, marginal tax rates begin at six percent on the first €7,267 of taxable transfers and rise to 40 percent on taxable transfers in excess of €4,360,370. For in-laws, nephews and nieces, marginal tax rates begin at eight percent on the first €7,267 of taxable transfers and rise to 50 percent on taxable transfers in excess of €4,360,370. For all others, marginal tax rates begin at 14 percent on the first €7,267 of taxable transfers and rise to 60 percent on taxable transfers in excess of €4,360,370.[496]

Bahamas

The Bahamas has no estate tax, inheritance tax, gift tax, wealth tax, or income tax. However, a four-percent probate duty is levied on any gross personal estate situated in the Bahamas.

Belgium

Belgium imposes an inheritance tax and a gift tax. The tax applies to all transfers of property upon the death of a resident and to the transfer of real property located in Belgium on

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[495] The material available to the Joint Committee staff reports exemptions and rate brackets in Austrian schillings. However, Austria has converted to the Euro. In the text, exemptions and rate brackets are reported in Euros, converting by the rate established in European Union regulation number 2866/98 that establishes irrevocably fixed conversion rates between member states adopting the Euro.

[496] Charitable bequests and gifts are taxed at a flat 2.5 percent rate.

the death of a nonresident. All immovable property located in Belgium and moveable, securitized property are subject to tax upon transfer by gift. The structure of these taxes depends upon the region of the country in which one lives, with the application in the Brussels and Walloon region differing from that of the Flemish region.

Brussels and Walloon region.–Any transfer from an estate of less than €620 ($611)[497] is exempt from tax. The first €12,395 ($12,221), plus an additional €1,239 ($1,222) for each minor child for each remaining year of minority, of transfers to a spouse is exempt from tax for transfers at death. For a child, the first €12,395 plus €2,479 ($2,444) for each remaining year of minority is exempt from tax. In general, there are no exemptions with regard to transfers by gifts. However, additional exemptions are permitted to the recipient of a bequest or gift if the recipient has at least three minor children. This additional exempt amount cannot exceed €124 ($122) per child.

For taxable transfers, there are four different tax rate schedules: spouses and direct ascendants or descendants; siblings; uncles, aunts, nephews, and nieces; and all others. For spouses and direct ascendants or descendants, marginal tax rates begin at three percent on the first €12,395 of taxable transfers and rise to 30 percent on taxable transfers in excess of €495,787 ($488,845). For siblings, marginal tax rates begin at 20 percent on the first €12,395 of taxable transfers and rise to 65 percent on taxable transfers in excess of €173,525 ($171,095). For uncles, aunts, nephews, and nieces, marginal tax rates begin at 25 percent on the first €12,395 of taxable transfers and rise to 70 percent on taxable transfers in excess of €173,525. For all other transferees, marginal tax rates begin at 30 percent on the first €12,395 of taxable transfers and rise to 80 percent on taxable transfers in excess of €173,525. Inheritances or gifts of family of small business assets are subject to an alternative tax at a flat rate of three percent. Proportional taxes of 1.1 percent, 6.6 percent, or 8.8 percent are levied on gifts to certain charities, nonprofit organizations, and local governments.

Flemish region.–In the case of bequests, a tax credit is allowed that is related to the first €496 ($489) of inheritance tax liability and is also related to the recipient's share in the decedent's estate. For spouses,[498] descendants, and ascendants, the credit is equal to €496 multiplied by the quantity one minus the recipient's share in the estate. Thus, if a child were left one fourth of his father's estate, the child's tax credit would be €372 ($367). Minor children may claim an additional tax credit of €74 ($73) for each full year of age that the child is under 21. In addition, a surviving spouse may claim an additional tax credit equal to one-half the sum of the tax credits applicable to all common children.

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[497] The material available to the Joint Committee staff reports exemptions and rate brackets in Belgian francs. However, Belgium has converted to the Euro. In the text, exemptions and rate brackets are reported in Euros, converting by the rate established in European Union regulation number 2866/98 that establishes irrevocably fixed conversion rates between member states adopting the Euro.

[498] For inheritance tax purposes, a domestic partner for an uninterrupted period of at least one year prior to the decedent partner's death qualifies as a spouse.

For gift taxes purposes, the tax rate schedules in the Flemish region are the same as in the Brussels and Walloon regions. For inheritances, in the case of a spouse, descendant, or ascendant, marginal tax rates begin at three percent on the first €49,779 ($49,082) and rise to 27 percent on taxable transfers in excess of €247,894 ($244,423). For bequests to siblings, marginal tax rates begin at 30 percent on the first €74,368 ($73,327) of taxable transfers and rise to 65 percent on taxable transfers, in excess of €123,947 ($122,212). For all other inheritances, marginal tax rates begin at 45 percent on the first €74,368 of taxable transfers and rise to 65 on taxable transfers in excess of €123,947. As in the Brussels and Walloon region, inheritances of family or small business assets are subject to an alternative tax at a flat rate of three percent.

Belize

Belize imposes an estate tax and a gift tax on residents. Marginal estate tax rates begin at a rate of one percent on the first B$500 ($227)[499] of the taxable estate with marginal tax rates increasing to 25 percent on that part of the estate in excess of B$50,000 ($22,727). However, under either the Belizean "Economic Citizen Investment Program" or the "Retired Persons Incentives Act," an individual may become an economic citizen or a qualified retired person and be treated as non-resident for purposes of establishing a Belizean offshore exempt trust.[500] If a settlor of an offshore exempt trust names non-resident beneficiaries of the trust, the trust is exempt from income, estate, and gift taxes.

To become a qualified economic citizen a head of household must invest B$50,000 ($22,727) in the Belize Economic Citizenship Investment Fund and pay a registration fee of B$50,000. The individual's spouse and children under 18 can be included as economic citizens for an additional B$10,000 ($4,545) each.[501] To become a qualified retired person, an individual must be at least 45 years old, a citizen or legal resident of the United States, the United Kingdom, Canada, or Belize, and the beneficial owner of a pension or annuity paying B$1,000 ($455) per month. In addition, the individual must deposit B$2,000 ($909) per month in a bank or other Belizean financial institution.[502] The individual may make withdrawals on the account, but regular deposits must be maintained.

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[499] The United States Department of Treasury, Financial Management Service, *Treasury Reporting Rates of Exchange as of September 30, 2002*, November 22, 2002, reports an exchange rate of 2.2 Belizean dollars for one United States dollar as of September 30, 2002. The Belizean dollar to U.S. dollar conversions in the text are made at that exchange rate.

[500] A qualified economic citizen or qualified retired person also is exempt from Belizean income tax.

[501] Different registration fees apply to dependent parents of the head of household or when the head of household is a single individual.

[502] Alternatively, the individual may make an annual deposit of B$24,000 ($10,909).

Bermuda

Bermuda imposes an estate tax on the value of the decedent's estate situated in Bermuda. Shares in business enterprises are not part of the taxable estate unless the decedent had been a resident at the time of his or her death. The first $50,000[503] of the estate is exempt from tax. For estates valued between $50,000 and $200,000, the marginal tax rate is five percent. The highest marginal tax rate is 15 percent for estates valued in excess of $1 million. Bermuda does not impose a gift tax.

Canada

Canada does not impose an estate, inheritance, or a gift tax. However, gains accrued on assets held by a taxpayer at the time of his death are treated as realized and taxable as income to the taxpayer. In the case of property transferred to a spouse at death, the spouse is treated as having acquired the asset at the transferor's basis. Carry-over basis also is permitted in the case of agricultural property bequeathed to a child of the decedent. Assets with accrued gains transferred by gift are treated as if transferred at the death of the transferor.

Cayman Islands

The Cayman Islands does not impose any tax on estates, inheritances, or gifts.

Costa Rica

Costa Rica does not impose any tax on estates, inheritances, or gifts.

Denmark

Denmark imposes an inheritance tax and a gift tax. Bequests and gifts to a spouse or registered homosexual partner are exempt from the inheritance tax and the gift tax. Otherwise all transfers at death by a resident are liable for the tax. Transfers at death of real property in Denmark by nonresidents are liable for the tax. The gift tax applies if either the donor or donee is a resident, but only if the donee is a child or other descendant, parent, grandparent, son-in-law, daughter-in-law, or spouse of a deceased child. Others who receive gifts must include them in income for income tax purposes.

The first Dkr48,200 ($6,399) of gifts is exempt from gift tax annually in the case of gifts to descendants, the spouse of a deceased child, parents, grandparents, or a domestic partner. The annual gift tax exemption for sons-in-law or daughters-in-law is Dkr16,900 ($2,243).

For taxable transfers at death, there are two different tax rate schedules: bequests to descendants, sons-in-law, daughters-in-law, spouse of a deceased child, ex-spouse, parents, and domestic partners; and bequests to others. For the first class of beneficiaries inheritances in excess of Dkr216,900 ($28,794) are taxed at a marginal rate of 15 percent. For the second class of beneficiaries, inheritances in excess of Dkr216,900 are taxed at a marginal rate of 36.25

[503] The U.S. dollar or the pound Sterling are official currency in Bermuda.

percent. Gifts in excess of the annual exclusion amounts are generally taxable on the same schedule.

Dominican Republic

The Dominican Republic imposes an inheritance tax and a gift tax. If the deceased person was a resident of the Dominican Republic, an inheritance or gift tax is imposed on all net inherited assets and gifts. Bequests of assets located in the Dominican Republic made by nonresidents also are subject to the inheritance tax. Transfers by gift from nonresident donors of assets located in the Dominican Republic are subject to a gift tax.

The rates of the inheritance and gift taxes are the same and vary by class of recipient.[504] In the case of taxable transfers to a spouse or lineal ascendant or descendant, tax rates range from one to 17 percent. In the case of transfers to a sibling, nieces, or nephew, tax rates range from three to 21 percent. For transfers to other relatives, tax rates range from six to 27 percent. For transfers to all others, tax rates range from eight to 32 percent. In all cases, if the beneficiary of the transfer is not a resident of the Dominican Republic, the tax liability is increased by 50 percent.

Finland

Finland imposes an inheritance tax and a gift tax. All transfers at death by residents are subject to tax. All transfers at death of Finnish property by nonresidents are subject to tax. All gifts of Finnish property are subject to tax and, for residents, gifts of certain foreign property are subject to tax.

The first €10,199 ($10,056) of bequests to a spouse (including a domestic partner) is exempt from tax. For any lineal descendant under age 18, the first €6,799 ($6,704) is exempt from tax. The first €3,399 ($3,351) of any other bequest is exempt from tax.

For taxable transfers, there are three different tax rate schedules: spouse (including a domestic partner),[505] parent, child or child's direct heir; siblings and their descendants; and others. For spouses, parents, children, and children's heirs, tax rates begin at a flat 10 percent on the first €13,600 ($13,410) of taxable transfers, followed by a marginal rate of 13 percent on the next €33,000 ($32,538), and rise to a 16 percent marginal tax rate on taxable transfers in excess of €46,600 ($45,948). For siblings and their decedents, the applicable tax rates are twice those above. For all others, the applicable tax rates are three times those above.

[504] A parent may not bequeath more than 50 percent of his or her estate to others if there is one surviving lineal descendant (33.3 percent if two surviving lineal descendants).

[505] The decedent's fiancé/fiancée also may fall into this category in certain circumstances.

The gift tax uses the same rate schedule. All gifts from the same donor received within a three-year period are cumulated for the purpose of determining gift tax liability. The first €3,400 of gifts received from each donor within a three-year period are exempt from tax.

France

France imposes an inheritance tax and a gift tax. The tax applies to worldwide transfers of assets by residents and to assets located in France when transferred by nonresidents. However, subject to treaty provisions since January 1, 1999, assets, wherever located, are taxable to France if the beneficiary has been fiscally resident in France for at least six years during the ten-year period preceding that in which the inheritance or the gift occurs. All gifts made to heirs and legatees during the ten-year period preceding the date of death are brought back into the estate and must be declared for the assessment in inheritance tax. This rule applies to residents and non-residents.

The first €76,000 ($74,936) are exempt from tax for transfers to a spouse occurring on or after January 1, 2002. The exemption is €46,000 ($45,356) in the case of children or parents. A €1,500 ($1,479) allowance applies to all successions (but not to gifts), whatever the relationship, when no other allowance is available. These exempt amounts are allowed for a ten-year period that commences upon the date of the first transfer.

For taxable transfers, there are four different tax rate schedules: spouses, parents and children; siblings; other relatives up to fourth degree removed; and other persons. For spouses, parents, and children, marginal tax rates begin at five percent on the €7,600 ($7,494) and rise to 40 percent on taxable transfers in excess of €1.7 million ($1.68 million). For siblings, marginal tax rates begin at 35 percent on the first €23,000 ($22,678) of taxable transfers and are 45 percent thereafter. For other relatives, the marginal tax rate is 55 percent on all taxable transfers. For other persons, the marginal tax rate is 60 percent on all taxable transfers.

Certain survivor annuities for a spouse or direct descendant and certain life insurance proceeds are exempt from tax.

Germany

Germany imposes an inheritance tax and a gift tax. Residents are liable for tax on all property received. Nonresidents are liable for tax on assets located in Germany, but only if either the donor or donee is a German resident.

The spouse is exempt from tax on the first €307,000 ($302,702) received by gift or the first €563,000 ($555,117) received by bequest.[506] Children are exempt from tax on the first €205,000 ($202,130) received. In the event of a transfer by bequest, this basic exemption amount is increased by €52,000 ($51,272) for children up to five years old, by €41,600 ($41,018)

[506] The additional €256,000 spousal exemption is reduced by the capitalized value of pension or similar benefits received by the surviving spouse by reason of the death of the deceased.

for children five to 10 years old, by €31,200 ($30,763) for children 10 to 15 years old, by €20,800 ($20,509) for children 15 to 20 years old, and by €10,300 ($10,156) for children 20 to 26 years old.[507] Step children, grandchildren, great grandchildren, and, in the case of a bequest, parents and grandparents are exempt from tax on the first €52,000 ($51,272) received. Siblings, nieces, nephews, stepparents, sons-in-laws, daughters-in-law, parents-in-law, divorced spouses, and, in the case of a gift, parents and grandparents are exempt from tax on the first €10,300 ($10,156) received.[508] All others are exempt from tax on the first €5,200 ($51,272) received.

For taxable transfers, the tax rate is determined by the class of beneficiary and is graduated according to the value of the transferred property. There are three classes of beneficiary. The first class comprises spouse, children, grandchildren, great grandchildren, and, for bequests but not gifts, parents and grandparents. The second class comprises siblings, children of siblings, divorced spouses, stepparents, children and parents of spouses, and, for gifts, parents and grandparents. All other persons compose the third class. For the first class of beneficiaries, marginal tax rates are seven percent on the first €52,000 of taxable transfers and rise to marginal tax rate of 30 percent on taxable transfers in excess of €25.565 million ($25.207 million). For the second class of beneficiaries, marginal tax rates are 12 percent on the first €52,000 of taxable transfers and rise to marginal tax rate of 40 percent on taxable transfers in excess of €25.565 million. For the third class of beneficiaries, marginal tax rates are 17 percent on the first €52,000 of taxable transfers and rise to marginal tax rate of 50 percent on taxable transfers in excess of €25.565 million.

Various exemptions or preferential treatments are granted for household or personal effects, property of artistic value or of service to the public welfare, benefits under various social security and survivor plans, and for business property. Among these is an exemption for beneficiaries of the first class, for household goods up to a value of €41,000 ($40,426) and for other personal property up to a value of €10,300, and either a total or 60-percent exclusion for qualifying real property serving artistic purposes, collections of art, and scholarly libraries. For qualifying substantial participation in business property and for real estate used for agriculture and forestry, the first €256,000 ($252,416) of the property value is exempt from tax.[509] For property valued in excess of €256,000, 40 percent of the value of the property is excluded from tax and the tax rate schedule applicable to beneficiaries in the first class is applied even if the assets are bequeathed to beneficiaries in the second or third class.

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[507] As in the case of a surviving spouse, these additional exempt amounts are reduced by the capitalized value of pension or similar benefits received by reason of the death of the deceased.

[508] For purposes of the exempt amounts, all gifts within a ten-year period are aggregated.

[509] This exemption must be split across all beneficiaries receiving qualifying property.

Greece[510]

Greece imposes an inheritance tax and a gift tax. In the case of a Greek citizen, regardless of where he is domiciled, the tax applies to all property in Greece and movable property located outside Greece. There is no inheritance tax liability related to property located outside of Greece that was owned by a decedent who was a Greek citizen, but who at the time of his death had been a resident of a foreign country for more than 10 years. For resident noncitizens of Greece, the tax applies to all movable property. Non-resident foreigners are liable for tax on any property located in Greece.

There are four different categories of heirs or transferees: parents, spouse, children, and certain illegitimate children; grandchildren, grandparents, siblings, step-siblings, nephews, and nieces; in-laws, foster parents, step-parents, and children from a spouse's previous marriage; and all others. The first €19,076 ($18,809)[511] of transfers to a parent, spouse, child, and certain illegitimate children is exempt from tax. The first €14,764 ($14,557) of transfers to grandchildren, grandparents, siblings, step-siblings, nephews and nieces is exempt from tax. The first €6,163 ($6,077) of transfers to in-laws, foster parents, step-parents, and children from a spouse's previous marriage is exempt from tax. The first €3,522 ($3,473) of transfers to all others is exempt from tax. For purposes of the exemptions and tax rates, there is lifetime integration of gifts and inheritances.

For the first category of heirs, marginal tax rates begin at five percent on the first €33,749 ($33,276) of taxable transfers (transfers in excess of the exempt amount) and rise to 25 percent on taxable transfers in excess of €192,223 ($189,532). For the second category of heirs, marginal tax rates begin at ten percent on the first €38,151 ($37,617) and rise to 35 percent on taxable transfers in excess of €173,147 ($170,723). For the third category of heirs, marginal tax rates begin at 20 percent on the first €46,662 ($46,009) and rise to 50 percent for taxable transfers in excess of €164,637 ($162,332). For the fourth category of heirs, marginal tax rates begin at 35 percent on the first €49,303 ($48,613) and rise to 60 percent on taxable transfers in excess of €161,996 ($159,728). In the case of a bequest from a parent to his or her minor child, the otherwise applicable tax rates are reduced by 60 percent on the first €35,216 ($34,723). That is, the marginal tax rate would be zero or two percent. On the next €102,715 ($101,277) of such gifts, applicable tax rates are reduced by 30 percent. That is, the marginal tax rates would be 3.5 percent and 10.5 percent. Lifetime gifts from a parent to a child are taxed at half the ordinary rates for gifts up to €82,172 ($81,021).

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[510] In July 2002, the Greek Parliament adopted a new, reduced tax rate schedule applicable to inheritances. This schedule is not available to the Joint Committee staff at present. The summary of Greek law in the text reflects amendments to inheritance and gift tax laws that the Greek Parliament adopted in November 2001.

[511] The material available to the Joint Committee staff reports exemptions and rate brackets in Greek drachma. However, Greece has converted to the Euro. In the text exemptions and rate brackets are reported in Euros, converting by the rate established in European Union regulation number 1478/2000 that establishes irrevocably fixed conversion rates between member states adopting the Euro.

Hong Kong

Hong Kong imposes an estate tax on the value of property situated in Hong Kong that is transferred on death. The estate tax is imposed at a flat rate on the total value of the taxable estate and the rate of tax is determined by the total value of the estate.[512] For taxable estates valued up to HK $7.5 million ($961,538)[513] there is no tax. For taxable estates valued above HK $7.5, but less than HK $9 million ($1.154 million), a tax of five percent is imposed on the entire taxable estate. For taxable estates valued above HK $9 million, but less than HK $10.5 million, ($1.346 million), a tax of 10 percent is imposed on the entire taxable estate. For taxable estates valued in excess of HK $10.5 million, a tax of 15 percent is imposed on the entire taxable estate.

Hong Kong does not tax transfers by gift.

Iceland

Iceland imposes an inheritance tax and taxes gifts as income to the donee. Spouses are exempt from the inheritance tax. There are three classes of heirs for purposes of the inheritance tax: children; parents and siblings; and all others. Marginal tax rates on bequests to children begin at one percent and rise to 10 percent. Marginal tax rates on bequests to parents and siblings begin at 15 percent and rise to 25 percent. Marginal tax rates on all other bequests begin at 30 percent and rise to 45 percent.

Ireland

Ireland imposes an inheritance tax and a gift tax. Tax is imposed on all transferred property if the donor or donee is resident in Ireland.[514] In other cases, the tax applies only to transfers of Irish property.

All inheritances received by a surviving spouse are exempt from tax. Gifts to a spouse during the donor's lifetime also are exempt from gift tax. The cumulative total of all gifts and inheritances received by an individual since December 2, 1998, that exceeds certain exempt thresholds is taxable at a flat rate of 20 percent. Children and the minor grandchild of a deceased

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[512] Because the same rate of tax is imposed on the entire taxable estate, but the rate varies with the size of the taxable estate, extremely high marginal tax rates arise at the breakpoints. Tax authorities may grant relief for estates slightly in excess of one of the breakpoints.

[513] The Hong Kong dollar is pegged to the U.S. dollar at an exchange rate of 7.8 Hong Kong dollars to one U.S. dollar. The currency conversions reported in this paragraph were made at that rate.

[514] An individual who is not domiciled in Ireland is not treated as resident or ordinary resident unless the individual was resident in Ireland for the five consecutive years preceding the year of gift or bequest. For gifts or bequests after December 1, 2004, an individual can be resident for inheritance and gift tax purposes even if not domiciled in Ireland.

child are exempt on the first €402,253 ($396,621)[515] of cumulative transfers. For transfers to parents, the exempt cumulative threshold is €402,253 with respect to inheritances and €40,225 ($39,662) with respect to gifts. For certain other relatives (lineal ancestors, other than parents, lineal descendants other than children or the minor grandchild of a deceased child, and siblings), the exemption is €40,225 and for others, the exempt threshold amount is €20,113 ($19,831).[516]

Certain insurance policies are exempt from inheritance taxes. Government securities and certain stocks received by foreign persons also are exempt. The value of closely held business property and agricultural property is reduced by 90 percent in the determination of the value of a transfer of such property. The €788 ($788) received per year per donee per donor is exempt from gift tax.

Israel

Israel does not impose an estate, inheritance, or gift tax. Property received by gift or inheritance retains the basis of the transferors (carryover basis).

Italy

Italy abolished inheritance and gift taxation effective October 24, 2001. However, transfer of real estate at death remains subject to a real estate transfer tax of three percent. In addition, gifts in excess of €180,759.91 ($178,229) to persons other than a spouse, a lineal ascendant, lineal descendant, or other relatives up to fourth degree removed are subject to tax at a rate of seven percent.

Japan

Japan imposes an inheritance tax and a gift tax. An individual who acquires property by inheritance, bequest, or gift and is domiciled in Japan, or who is a Japanese national temporarily traveling or residing abroad, is responsible for any tax liability on worldwide property received. An individual not domiciled in Japan is liable for taxes only relating to assets received that are located in Japan.

The Japanese inheritance tax relies on the concept of "statutory heir." Generally, the statutory heirs are the children and spouse if surviving, with grandchildren substituting for pre-deceased children. If there are no such surviving lineal descendants, lineal ascendant or lateral relations are designated statutory heirs. The total number of statutory heirs determines the size of the basic exemption. While a will may designate the distribution of property, the total tax

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[515] The material available to the Joint Committee staff reports exemptions and rate brackets in Irish pounds. However, Ireland has converted to the Euro. In the text exemptions and rate brackets are reported in Euros, converting by the rate established in European Union regulation number 2866/98 that establishes irrevocably fixed conversion rates between member states adopting the Euro.

[516] The threshold amounts are indexed for inflation after 2001.

liability of all transferred property is determined by determining the tax liability that would arise if the property were distributed according to what are referred to as "statutory shares." In the simple case, statutory shares would bequeath one-half of the decedent's estate to the surviving spouse and the remaining half would be divided pro rata among children of the decedent. The tax attributable to a bequest is determined as follows. (1) reduce the total value of the estate by liabilities; (2) reduce the residual by the basic exemption amount; (3) attribute the statutory shares of the estate to statutory heirs, and reduce each statutory heir's hypothetical bequest by any permitted exemption; (4) determine the tax liability for each statutory heir on his or her statutory share; and (5) sum the total tax liability of all hypothetical heirs and allocate that total liability to each actual heir and legatee based on their actual shares of the decedent's estate.

The basic exemption amount equals ¥50 million ($411,353) plus ¥10 million ($82,271) times the number of statutory heirs. For a surviving spouse, Japanese law provides a ¥160 million ($1.316 million) exemption. For minor children, Japanese law provides an exemption equal to ¥60 million ($493,624) multiplied by the numbers years the child is less than age 20. For bequests in excess of any exempt amount, marginal tax rates begin at 10 percent on the first ¥8 million ($65,817) and rise to 70 percent for bequests that exceed the exempt amount by ¥2 billion ($16.54 million) or more. Unrelated beneficiaries pay an additional 20 percent surcharge. If the surviving spouse inherits less than ¥160 million or less than the statutory share, regardless of size, a deduction eliminates all tax liability. A surviving spouse may claim a credit against his or her actual inheritance tax liability reducing that liability by a percentage equal to the greater of the amount of the statutory share in excess of ¥160 million or the value of property actually received, divided by the total value of the estate. Under age and handicapped children also receive additional credits against any tax liability.

The gift tax permits an annual allowance of ¥600,000 ($4,936). Beyond that exemption, gifts are taxed at marginal tax rates of 10 percent of the first ¥1.5 million ($12,340) of taxable gifts to 70 percent on taxable gifts in excess of ¥100 million ($822,707).

Korea

Korea imposes an inheritance tax and a gift tax. The taxes are imposed on the transfer of worldwide property for individuals domiciled in Korea. For nonresidents, the taxes apply to transfers of property located in Korea.

A surviving spouse may exempt from inheritance tax the first W3.0 billion ($2.45 million) received as an inheritance from the decedent spouse. For all others, there is a basic exemption of W200 million ($163,199). In addition, surviving children under age 20 may exempt an additional W5 million ($4,080) times the number of years under age 20 and persons who are over age 60 may exempt an additional W30 million ($24,480). Additional exclusions are provided under the inheritance tax for bequests of a family business (W100 million ($81,599)), farm property (W200 million), and for holdings of financial assets (W20 million ($16,320)).[517]

[517] For purposes of determining the value of a gift or bequest, the market value of financial assets is reduced by 20 percent, but not more than W200 million.

For gifts, W200,000 is exempt from tax annually. This exemption is increased to W30 million for gifts from lineal ascendants or descendants, and is increased to W500 million ($407,997) for gifts from a spouse. The gift tax exemptions apply to cumulative gifts received over a 10-year period.

The inheritance tax and gift tax have the same tax rate schedules. Tax is imposed at a marginal tax rate of 10 percent on the first W100 million of taxable transfers and rises to a marginal tax rate of 50 percent on taxable transfers in excess of W3.0 billion. The tax imposed on bequests to individuals two or more generations removed from the decedent is increased by 30 percent. For all inheritance tax returns, if the return is filed in a timely manner and the tax authorities deem the return to be accurate, tax liability is reduced by 10 percent.

Luxembourg

Luxembourg imposes an inheritance tax and a gift tax. The tax applies to residents, generally on all property of the deceased except for certain foreign property. For nonresidents, the tax applies only to certain immovable property in Luxembourg. The gift tax applies to all gifts of immovable property located in Luxembourg and to movable property represented by registered instruments.

Heirs in direct line of succession and spouses in the case of a marriage producing children are exempt from the inheritance tax. The first €37,184 ($36,663)[518] received by a childless spouse is exempt from inheritance tax. All other inheritances are taxable beyond a €1,239 ($1,222) exemption. However, if the decedent was a non-resident, in which case inheritance taxes generally only apply to transfer of real estate, there are no exemptions.

For taxable transfers, there are four different marginal tax rate schedules: childless spouse; siblings; aunts, uncles, nieces, nephews, adoptive parents, and adopted children; and all others. A childless spouse is taxed at a marginal tax rate of five percent on the first €9,916 ($9,777) of taxable inheritances and rising to a marginal tax rate of 16 percent on inheritances in excess of €1.735 million ($1.711 million). Inheritances of siblings are taxed at marginal tax rates beginning at six percent on the first €9,916 of taxable transfers and rising to 19.2 percent on taxable transfers in excess of €1.735 million. Inheritances of aunts and uncles, nieces, nephews, adoptive parents, and adopted children are taxed at marginal tax rates beginning at 10 percent on the first €9,916 of taxable transfers and rising to 32 percent on taxable transfers in excess of €1.735 million. Inheritance of others are taxed at marginal tax rates beginning at 15 percent on

[518] The material available to the Joint Committee staff reports exemptions and rate brackets in Luxembourg francs. However, Luxembourg has converted to the Euro. In the text exemptions and rate brackets are reported in Euros, converting by the rate established in European Union regulation number 2866/98 that establishes irrevocably fixed conversion rates between member states adopting the Euro.

the first €9,916 of taxable transfers and rising to 48 percent on taxable transfers in excess of €1.735 million.[519]

The gift tax applies at different rates on different donees. Gifts received by children of the donor are taxed at the lowest rate, 1.8 percent, while gifts to the spouse are taxed at 4.8 percent. The gift tax rate for gifts received by siblings is six percent; by aunts, uncles, nieces, and nephews, 7.2 percent; by fathers-in-law, mothers-in-law, sons-in-law, or daughters-in-law, 8.4 percent; by others, 14.4 percent.

Mexico

Mexico no longer has Federal or State taxes on inheritances, gifts, or donations. However, there is a title transfer tax of between 1.725 and 4.6 percent on transfers of real estate through inheritance, gifts, or donation. There also are stamp taxes assessed at between two and eight percent of value on gifts of real property. Gifts from persons other than direct ascendents or descendants are included in the recipient's taxable income. In addition, gifts to nonresidents of real estate located in Mexico and shares issued by Mexican companies are taxed at a flat 20-percent rate.

The Netherlands

The Netherlands imposes an inheritance tax and a gift tax. The taxes apply to all transfers made by residents and to transfers of certain Dutch property by nonresidents. If a citizen of the Netherlands dies within 10 years following his or her emigration, he or she is deemed to be a resident for purposes of the inheritance tax. In case of the gift tax, an emigrant citizen is deemed resident for purposes of the gift tax for one year following emigration. However, if the individual dies within 10 years of emigration, then he or she is deemed to have been resident for gift tax purposes throughout the period preceding his or her death.

For bequests to spouses, the first €467,848 ($461,298) are exempt from tax.[520] For bequests to children, the first €7,996 ($7,884) are exempt from tax. On inheritances received by parents of the transferor, the first €39,978 ($39,418) are exempt from tax. Bequeathed pension rights may reduce those deductions. For purposes of the gift tax, the first €3,999 ($3,943) of gifts from parents to a child are exempt annually.[521] For all others there is an exemption of €2,399 ($2,365) and gifts within a two-year period are aggregated.

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[519] If the deceased was non-resident, marginal tax rates on spouses with children range from five to 16 percent. Direct descendants are taxed at marginal tax rates of two to 6.4 percent.

[520] This exemption also is available to a surviving domestic partner, if the couple had lived together for at least five years. If the partners had lived together for less than five years, the exemption is reduced proportionately.

[521] This annual amount may be increased once in each child's lifetime for children between 18 and 35 years of age to €19,991 ($19,711).

For taxable transfers there are four different marginal tax rate schedules: spouse;[522] children and grandchildren; great-grandchildren and other descendants; siblings and lineal ascendants; and all others. For children and spouses, the rate of tax rises from five percent on the first €19,994 ($19,714) of taxable transfers to 27 percent on taxable transfers in excess of €799,554 ($788,359). For great-grandchildren and other descendants, the rates range from eight percent for the first €19,994 of taxable transfers to 43.2 percent on taxable transfers in excess of €799,554. For siblings and lineal ascendants, the rates range from 26 percent for the first €19,994 of taxable transfers to 53 percent on taxable transfers in excess of €799,554. For transfers to others, the marginal tax rates range from 41 percent for the first €19, 994 of taxable transfers to 68 percent on taxable transfers in excess of €799,554. In addition, gifts to charities in excess of €7,996 are subject to an 11 percent tax.[523]

New Zealand

New Zealand does not impose an estate tax. However, New Zealand does impose a gift tax. The gift tax applies to all transfers by persons domiciled in New Zealand and, in the case of transferors not domiciled in New Zealand, to property located in the country. A donor must aggregate all gifts made within the year for determination of the tax base. Gifts of less than NZ$2,000 ($939) per donor per donee are exempted from the tax base.

Under the gift tax, the first NZ$27,000 ($12,697) is exempt from tax. The next NZ$9,000 ($4,226) is taxed at a marginal tax rate of five percent. Marginal tax rates increase to 25 percent for transfers in excess of NZ$72,000 ($33,811).

Norway

Norway imposes an inheritance tax and a gift tax. All transfers by residents are subject to the taxes. Transfers by nonresidents of immovable property located in Norway also are subject to the taxes. If the deceased or donor was a non-resident citizen, tax is imposed as if he or she were a resident, unless he or she can establish that a similar tax was paid in the country of residence.

Interspousal transfers are exempt from tax. For transfers to all others, the first Nkr200,000 ($26,861) is exempt from tax.

There are two classes of transferees: children and parents; and all others, including charities. The first Nkr300,000 ($40,292) of taxable transfers are taxed at a marginal tax rate of eight percent for children and parents and at 10 percent for all others. For taxable transfers in excess of Nkr300,000, a marginal tax rate of 20 percent is imposed on children and parents and a marginal tax rate of 30 percent is imposed on all others.

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[522] A domestic partner with whom the deceased or donor has lived for at least five years qualifies for the rate schedule applicable to spouses.

[523] The exempt amounts and tax brackets are indexed for increases in consumer prices.

Philippines

The Philippines imposes an estate tax and a gift tax. Under the estate tax and gift tax, citizens and resident aliens are taxed on their worldwide estates or gifts from worldwide assets regardless of their residence at the time of death or gift.

The first P 1.2 million ($23,020)[524] is exempt from the estate tax. In addition, the value of the family home is not included in the taxable estate.[525] The first P 300,000 ($5,755) of the taxable estate is taxed at a rate of five percent. Marginal tax rates increase to 20 percent on taxable estates in excess of P 9.8 million ($187,995).

The first P 100,000 ($1,918) of a donor's total gifts made within a calendar year are exempt from tax. For annual gifts above the exempt amount, marginal tax rates rise from two percent on the first P 100,000 of taxable gifts to 15 percent on total taxable gifts in excess of P 9.9 million ($189,913).

Portugal

Portugal imposes an inheritance tax and a gift tax. The tax applies to both residents and nonresidents on assets situated in Portugal.[526]

Any recipient of a bequest or gift may exempt the first €374 ($369)[527] from tax. If the recipient of a bequest or gift is a spouse or child older than 18 years or other descendant, the recipient may exempt an additional €3,641 ($3,590). In the case of a bequest to a parent, an additional €1,821 ($1,796) may be exempted. No inheritance or gift tax is imposed on a transfer to a minor child.

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[524] The Bangko Sentral ng Pilipas, the central bank of the Philippines, reports the Philippines peso - U.S. dollar exchange rate on September 30, 2002 as 52.129 Philippines pesos per one U.S. dollar. Bangko Sentral ng Pilipinas, International Financial Statistics, IFS Report Form 566, November 7, 2002. Philippine currency conversion reported in the text are made at that rate.

[525] There is a P 1.0 million ($19,183) limitation to the exclusion for the family home. In addition, up to P 500,000 ($9,592) in medical expenses incurred in the year preceding death may be excluded and any amount received from the decedent's employer as a result of the death of the employee is excluded from the taxable estate.

[526] Debt is considered located in Portugal if the creditor is located in Portugal.

[527] The material available to the Joint Committee staff reports exemptions and rate brackets in Portuguese escudos. However, Portugal has converted to the Euro. In the text exemptions and rate brackets are reported in Euros, converting by the rate established in European Union regulation number 2866/98 that establishes irrevocably fixed conversion rates between member states adopting the Euro.

For taxable transfers there are four different tax rate schedules: spouse, children older than 18, and other descendants; siblings and ascendants; uncles, aunts, nephews, and nieces; and all others. For the spouse, children older than 18, and other descendants, marginal tax rates begin at three percent of the first €10,624 ($10,475) of taxable transfers and rise to 24 percent on taxable transfers in excess of €351,802 ($346,876). For siblings and ascendants, marginal tax rates begin at seven percent on the first €3,641 of taxable transfers and rise to 32 percent on taxable transfers in excess of €355,344 ($350,368). For uncles, aunts, nephews, and nieces, marginal tax rates begin at 13 percent on the first €3,641 of taxable transfers and rise to 45 percent on taxable transfers in excess of €355,344. For all others, marginal tax rates begin at 16 percent on the first €3,641 of taxable transfers and rise to 50 percent on taxable transfers in excess of €355,344.

Seychelles

Seychelles does not impose any tax on estates, inheritances, or gifts.

Singapore

Singapore imposes an estate tax, but no gift tax. The tax applies to all property in the estate of an individual domiciled in Singapore at the time of his death. Nonresident decedents are subject to the tax on any real or personal property situated in Singapore at the time of death.

The first S$500,000 ($281,373) of all property is exempt from the estate tax. In addition, the first S$9 million ($5.06 million) of residential business property, the value of the decedent's personal residence (up to S$3 million ($1.69 million)), and up to S$500,000 of the decedent's interest in the Central Provident Fund or any designated pension or provident fund is excluded from the estate. Certain other investments also are excluded from the taxable estate.

The first S$10 million ($5.63 million) of the taxable estate is taxable at a five percent rate. Amounts in excess of S$10 million are taxed 10 percent.

South Africa

South Africa imposes estate tax and a gift tax on the transfer of worldwide assets by residents. However, assets located outside of South Africa acquired prior[528] to the taxpayer becoming a resident of South Africa are exempt from the estate and gift taxes, as are bequests or gifts of property acquired by the transferor as an inheritance or gift from a person who is not a resident of South Africa.

Any bequest or gift to a spouse[529] is exempt from the estate tax. In addition, the first R1 million ($94,890) of an estate is untaxed. A tax of 20 percent is imposed on all taxable estates in

[528] Property outside South Africa acquired after the transferor became a resident of South Africa is treated as property acquired before residence if such property was acquired with funds from the sale of other property outside South Africa acquired prior to residency.

[529] Gifts to a fiancé or former spouse (under a divorce decree) are exempt from gift tax.

excess of R1 million. A donor may make annual gifts totaling R25,000 ($2,372) exempt from gift tax. Taxable gifts are taxed at a 20 percent rate.

Spain

Spain imposes an inheritance tax and a gift tax. The taxes apply to all transfers to residents and to transfers of assets located in Spain of nonresidents.

The Spanish inheritance and gift tax defines four categories of transferees; direct descendants under the age of 21; spouse, other direct descendants 21 or older, and direct ascendants; siblings, uncles, aunts, nephews, nieces, and ascendants and descendants by marriage; and all other persons. The inheritance tax provides an exempt amount for persons in the first three categories. For direct descendants under the age of 21, but greater than 13, the exempt amount is €15,956.87 ($15,733) plus €3,990.72 ($3,935) for each year under 21. For direct descendants age 13 or less, the exempt amount is €47,858.59 ($47,189).[530] For a spouse, direct descendants 21 or older, and direct ascendants, the exempt amount is €15,956.87. For siblings, uncles, aunts, nephews, nieces, and ascendants and descendants by marriage, the exempt amount is €7,993.46 ($7,882).[531]

Aside from the inheritance tax exemption amounts, there are not different tax rate schedules for different categories of heirs or donees. Marginal tax rates begin at 7.65 percent on the first €7,993.46 of taxable transfers and rise to 34 percent on taxable transfers in excess of €797,555.08 ($786,388). In addition, a net worth surcharge is applied to the transferee's tax liability that varies by category of heir and level of the heirs' wealth. The marginal rate of the surcharge can be as high as 140 percent for transferees who are distant relatives or unrelated and whose net wealth exceeds €4,020,770.98 ($3.96 million). For spouses, descendants, and ascendants, the marginal rate of the surcharge reaches 20 percent for transferees whose net wealth exceeds €4,020,770.98.

For qualifying family owned business assets, 95 percent of the value of the assets is excluded from the base of inheritance and gift taxes. To account for certain personal property if not specifically valued (e.g., household furnishings), the value of the estate is increased by three percent.

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[530] Note that the allowance for a 13-year old taxpayer does not equal €47,882.63 (15,956.87 plus eight times 3,990.72). While perhaps not intentional, the difference is part of Spanish law.

[531] The inheritance tax provides an additional exempt amount to transferees who are disabled. The first €9,195.49 ($9,067) of any life insurance payment to a spouse, direct descendant, or direct ascendant is exempt from inclusion in the inheritance tax. In addition, a spouse or direct ascendant or descendant may exclude up to €122,606.47 ($120,890) of the value of the decedent's personal residence from the base of the inheritance tax.

Sweden

Sweden imposes an inheritance tax and a gift tax. The tax applies to all property transferred by deceased Swedish citizens and resident foreigners, and to certain property left in Sweden by nonresident foreign citizens. In addition, the inheritance and gift taxes apply to a Swedish citizen, spouse of a Swedish citizen, or former Swedish resident, who has ceased to be resident in Sweden if he or she ceased being resident less than ten years prior to death (inheritance tax) or date of gift (gift tax).

There are three classes of taxpayers. Class I consists of spouses, lineal descendants, spouse of child, surviving spouse of a deceased child, step-child, adopted child or foster child, and their descendants. Class II consists of all other individual transferees. Class III consists of churches and Swedish institutions devoted to the public benefit.

A surviving spouse may exempt one-half of the decedent spouse's aggregate property from inheritance taxation. Also, an additional Skr280,000 ($30,164) of inheritance received by a spouse is exempt from tax. For other class I beneficiaries, the first Skr70,000 ($7,541) is exempt from tax. For lineal descendants under age 18, the exempt amount is increased by Skr10,000 ($1,077) for each year the beneficiary is under age 18. For bequests to class II or class III beneficiaries, the first Skr21,000 ($2,262) is exempt. Gifts are exempt up to Skr10,000 per donor per year.[532]

For class I beneficiaries, marginal tax rates begin at 10 percent on the first Skr300,000 ($32,319) of taxable transfers and rise to 30 percent on taxable transfers in excess of Skr600,000 ($64,628). For class II beneficiaries, marginal tax rates begin at 10 percent on the first Skr70,000 of taxable transfers and rise to 30 percent on taxable transfers in excess of Skr140,000 ($15,082). For class III beneficiaries, marginal tax rates begin at 10 percent of the first Skr90,000 ($9,696) of taxable transfers and rise to 30 percent on taxable transfers in excess of Skr170,000 ($18,314).

Switzerland

There is no taxation of transfers of property at death or by gift at the national level, but every canton except one imposes an estate or inheritance tax and one canton imposes both. Two cantons impose an estate tax in lieu of an inheritance tax. All cantons except two impose a gift tax. In addition, in four cantons the communes have, and exercise, the right to impose inheritance and gift taxes. Such taxes generally apply to all transfers by residents and to transfers of immovable property located in Switzerland by nonresidents.

This summary will not provide a description of the law applicable in each of the 26 cantons, but for illustrative purposes will outline the inheritance and gift taxes for three cantons: Geneva; Lucerne; and Zurich.

[532] A higher limit applies for birthday and wedding gifts.

Geneva.–For inheritance tax purposes, the first SF5,000 ($3,371) of bequests to a spouse,[533] descendant, or ascendant is exempt from tax. For all others the first SF500 ($337) of bequests is exempt from inheritance tax. For gift tax purposes, the first SF10,000 ($6,742) of bequests to a spouse, descendant or ascendant is exempt from tax. For all others, the first SF5,000 of bequests is exempt from inheritance tax.

The marginal tax rates applicable to taxable transfers vary with the size of the transfer and the degree of kinship between the transferor and transferee. For spouses, the highest marginal tax rate is six percent if the spouses have common children and one percent if the marriage is childless. For direct descendants or ascendants, the highest marginal tax rate is six percent if the transferor and transferee are one generation removed, 7.2 percent if two generations removed, and 7.8 percent if three generations removed. For all other transfers, the highest marginal tax rate is 26 percent.[534]

Lucerne.–Lucerne imposes an inheritance tax, but does not impose a gift tax. Bequests to a spouse and to descendants are exempt from tax.[535] In addition, domestic employees may exempt SF2,000 ($1,348) from the inheritance tax. Any other beneficiary may exempt SF1,000 ($674), but only if the beneficiary's income does not exceed SF4,000 ($2,697) or have a net worth greater than SF10,000 ($6,742).

The marginal tax rates applicable to taxable transfers vary with the size of the transfer and the degree of kinship between the transferor and transferee. For bequests to parents, siblings, nephews, nieces, or domestic employees, the lowest marginal tax rate is six percent and the highest marginal tax rate is 12 percent. For bequests to grandparents, uncles, aunts, and cousins, the lowest marginal tax rate is 15 percent and the highest marginal tax rate is 30 percent. For bequests to others, the lowest marginal tax rate is 20 percent and the highest marginal tax rate is 40 percent.

Zurich.–Zurich imposes an inheritance tax and a gift tax. Transfers to a spouse and descendants are exempt from both taxes. In the case of those other than a spouse or descendant, SF5,000 ($3,371) are exempt annually from the gift tax. The inheritance tax provides certain exemptions. Parents may exempt SF200,000 ($134,884) of bequests received from a deceased child. A grandparent, sibling, stepchild, godchild, foster child, fiancée or fiancé, or domestic employee of at least 10 years employment of the deceased may exempt SF15,000 ($10,113). A domestic partner of the deceased may exempt SF50,000 ($33,710) if the couple had cohabited for at least five years. A disabled dependent of the deceased may exempt SF30,000 ($20,227).

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[533] Geneva is one of only three cantons in which a spouse is not exempt from all inheritance or gift tax.

[534] The tax rates applicable to transfers to others than a spouse or direct descendant or ascendant change annually be a multiplier determined annually by the cantonal government. The multiplier is set between one and two.

[535] Municipalities impose an inheritance tax on untaxed descendants.

The marginal tax rates applicable to taxable transfers vary with the size of the transfer and the degree of kinship between the transferor and transferee. There are six categories of taxable beneficiary: parents; grandparents and stepchildren; siblings; stepparents; uncles, aunts, descendants of siblings; and all others. The marginal tax rate applicable to the first SF30,000 of taxable transfers to parents is two percent. The marginal tax rate applicable to transfers to parents increases to six percent for taxable transfers in excess of SF1.5 million ($1.01 million).[536] The tax applicable to transferees other than parents is expressed as a multiple of the tax calculated under the schedule applicable to parents. For grandparents and stepchildren, the multiple is two. For siblings, the multiple is three. For stepparents, the multiple is four. For uncles, aunts, and descendants of siblings, the multiple is five. For all others, the multiple is six. The tax otherwise due from any transferee is reduced by 80 percent with respect to qualifying closely held business assets.

Taiwan

Taiwan imposes an estate tax and a gift tax. The estate and gift taxes are imposed on the transfer of the worldwide property of a Taiwanese national regularly domiciled in Taiwan and on transfers of property located in Taiwan in the case of other persons. An individual who was domiciled in Taiwan within two years of death or gift is deemed to be domiciled in Taiwan at the time of death or gift.

Each estate may exempt T$7.0 million ($200,757)[537] from tax. In addition, up to T$4.0 million ($114,718) of bequests to a surviving spouse may be deducted from the taxable estate, up to T$1.0 million ($28,680) of bequests to surviving parents may be deducted from the taxable estate, and up to T$400,000 ($11,472) of each bequest to a lineal descendant or a sibling may be deducted from the taxable estate. In the case of a child or sibling under age 20, an additional T$250,000 ($7,170) multiplied by the number of years the beneficiary is under age 20 of any bequest may be deducted from the taxable estate. The estate does not include the proceeds of life insurance policies. Half of the value of qualifying agricultural real estate may be excluded from the estate.[538] Marginal tax rates begin at two percent for taxable estates between zero and T$600,000 ($17,208) and rise to 60 percent on taxable estates in excess of T$160 million ($4.59 million).

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[536] The six percent marginal tax rate is the marginal tax rate applicable to the largest transfers, but is not the highest marginal tax rate. The marginal tax rate is six percent for taxable transfers greater than SF360,000 ($242,718) and less than or equal to SF840,000 ($566,343). The marginal tax rate is seven percent for taxable transfers greater than SF840,000 and less than or equal to SF1.5 million.

[537] The *Wall Street Journal* of October 1, 2002, reported the Taiwan dollar to U.S. dollar exchange rate to be 34.868 Taiwanese dollars to one U.S. dollar in trading on September 30, 2002. The Taiwanese dollar to U.S. dollar conversions in the text are made at that exchange rate.

[538] T$400,000 of "professional equipment" and T$720,000 ($20,649) of household furnishings also may be excluded from the estate.

Under the gift tax, each donor may exempt T$1.0 million of gifts annually. Gifts of qualifying agricultural real estate are exempt from the gift tax. Marginal tax rates begin at four percent for taxable gifts from zero to T$600,000 and rise to 50 percent on taxable gifts in excess of T$45 million ($1.29 million).

Turkey

Turkey imposes an inheritance tax and a gift tax. The tax applies to transfers by Turkish nationals on their worldwide property. Nonresidents are liable for tax on transfers of Turkish assets.

The first TL59 billion ($35,400)[539] of inheritances are taxed at a marginal tax rate of one percent. Marginal tax rates increase to 10 percent for that portion of an inheritance exceeding TL951 billion ($570,600).

Under the gift tax, a gift received from a parent, child,[540] or spouse is taxed at a marginal tax rate of five percent on the first TL59 billion of a gift, with marginal tax rates increasing to 15 percent for that portion of a gift exceeding TL951 billion. For all other gifts, the gift is taxed at a marginal tax rate of 10 percent on the first TL59 billion of the gift, with marginal tax rates increasing to 30 percent for that portion of a gift exceeding TL951 billion.

United Kingdom

The United Kingdom imposes an inheritance tax and a gift tax. All transfers of property by persons domiciled in the United Kingdom and transfers of property situated in the United Kingdom by persons not domiciled are subject to tax. An individual is deemed to be domiciled in the United Kingdom for inheritance and gift tax purposes if the person was domiciled in the United Kingdom at any time within the three years preceding the transfer.

Transfers to a spouse are excluded from the taxable estate for inheritance tax purposes and generally are exempt from gift tax. The first £242,000 ($378,421) is exempt from inheritance taxation. Gifts made within seven years of death are includible in the base of the inheritance tax.[541] The first £3,000 ($4,691) of annual gifts is exempt from gift taxation.[542] Beyond those exempt amounts, inheritances and gifts are taxed at a flat 40 percent tax rate.

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[539] The *Wall Street Journal* of October 1, 2002 reported the Turkish lira to U.S. dollar exchange rate to be 1,666,667 Turkish lira to one U.S. dollar in trading on September 30, 2002. The Turkish lira to U.S. dollar conversions in the text are made at that exchange rate.

[540] Gifts from an adopted child are not deemed to be a gift from a child. Gifts from an adoptive parent are treated as a gift from a parent.

[541] To reduce double taxation of gifts made within seven years of death, only a percentage of the gift is includible in the inheritance tax base. The inclusion percentage depends upon the length of time between the gift and the transferor's death. For example, 40 percent of

Inter vivos transfers to discretionary trusts are subject to the gift tax at half the normal rate (20 percent). Tax rates applied to transfers at death or by gift of agricultural property and certain industrial plant, machinery, and equipment are 50 percent of the regular rate (*i.e.*, the tax rate is 20 percent).

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the value of the gift may be excluded for gifts made between four and five years in advance of the transferor's death.

[542] If unused, the £3,000 exemption may be carried forward for one year.

X. RECENT PROPOSALS TO MODIFY THE TAX TREATMENT OF U.S. CITIZENS AND RESIDENTS WHO RELINQUISH CITIZENSHIP OR TERMINATE RESIDENCY

A. Overview

Several alternatives to the present-law alternative tax regime have been considered. One alternative is a mark-to-market income tax upon an individual's citizenship relinquishment or residency termination. Such an approach would subject such individuals to U.S. income tax on the net unrealized gain with respect to their worldwide assets as if such property were sold for fair market value on the date of citizenship relinquishment or residency termination. Among other things, such an approach would differ from the present-law alternative tax regime in that the mark-to-market tax would be imposed regardless of whether the individual's citizenship relinquishment or residency termination was tax-motivated.

This section describes several recent mark-to-market tax proposals relating to citizenship relinquishment or residency termination: (1) the Clinton Administration's Fiscal Year 2001 Budget Proposal (the "Clinton Budget proposal"); (2) a bill introduced on October 19, 1999, by Representatives Rangel and Matsui (H.R. 3099, 106th Congress), and similar bills introduced on June 26, 2002, by Representatives Rangel and Gephardt (H.R. 4880, 107th Congress) and on July 22, 2002, by Senators Harkin and Stabenow (S. 2769, 107th Congress), (unless otherwise indicated, these bills are referred to collectively as the "House bill"); and (3) a bill passed by the Senate on October 3, 2002, (as an amendment to H.R. 5063) (the "Senate amendment"). This section also discusses general issues presented by a mark-to-market tax on citizenship relinquishment or residency termination.[543]

[543] For a more detailed discussion of a mark-to-market tax upon citizenship relinquishment or residency termination, see the 1995 Joint Committee staff study, supra note 315. The 1995 Joint Committee staff study analyzed various proposals to modify the tax treatment of citizenship relinquishment and residency termination that would have required U.S. citizens and certain long-term residents to pay a mark-to-market tax with respect to unrealized gains on their assets upon citizenship relinquishment or residency termination. The Clinton Administration submitted such a proposal as part of the President's Fiscal Year 1996 Budget, which was included in H.R. 981 and S. 453 on February 16, 1995. The Congress considered a modified version of the Clinton Administration's Fiscal Year 1996 Budget Proposal, which passed the Senate as an amendment to H.R. 831 on March 25, 1995. The Congress also considered a modified version of that Clinton Administration proposal, which passed the Senate as an amendment to H.R. 3448 on July 9, 1996. For a recent proposal relating to a mark-to-market tax on former citizens and former long-term residents, see the Clinton Administration's Fiscal Year 2001 Budget Proposal described below.

B. Summary of Proposals

In general, each of the mark-to-market proposals would impose a mark-to-market income tax on unrealized gains when an individual relinquishes citizenship or terminates residency, regardless of the taxpayer's subjective motivation for citizenship relinquishment or residency termination. In this regard, individuals who relinquish citizenship and long-term residents who terminate residency would be treated as having sold all their property at fair market value immediately prior to the citizenship relinquishment or residency termination. In general, the deemed sale rule applies to all property interests held by the individual on the date of citizenship relinquishment or residency termination. The proposals would generally exempt the first $600,000 worth of deemed gain. The proposals also provide various exemptions of certain types of property interests from the deemed sale rule (e.g., interests in U.S. real property).

There are variations among the proposals. For example, some proposals would subject all U.S. citizens who renounce citizenship and long-term residents who terminate U.S. residency to the mark-to-market regime, while other proposals would also require the individual's average tax liability or net worth to exceed certain specified levels. In addition, some proposals would replace the existing regime for taxing former citizens and former residents with the mark-to-market regime on a prospective basis, while other proposals would appear to retain both regimes (present law and the mark-to-market regime) without clear coordination rules.

The proposals generally would permit an individual to elect to defer payment of the mark-to-market tax imposed on the deemed sale of property. However, in order to elect deferral of the mark-to-market tax, the individual would be required to provide adequate security to ensure that the deferred tax and interest will be paid. The proposals contain some variations with respect to the manner in which adequate security may be provided.

The proposals would tax U.S. recipients of gifts or bequests made by a former citizen or former long-term resident subject to the mark-to-market rules. The manner of taxing the recipient varies to some degree among the proposals. For example, some proposals would tax the recipient on the full value of the property received as taxable gross income, while other proposals would tax the recipient on the full value of the property based on the applicable transfer tax rates. In addition, some proposals provide exceptions from the tax to the recipient, for example, in cases in which the property is taxable and shown on a timely filed gift or estate tax return of the former citizen or former resident.

Some proposals also contain provisions which coordinate the mark-to-market tax rules with immigration rules that apply to former citizens. For example, some proposals would eliminate the present-law immigration requirement that an individual's citizenship relinquishment be tax-motivated, and instead deny former citizens reentry into the United States unless he or she complies with applicable U.S. Federal tax obligations.

C. Description of Proposals

1. Clinton Budget proposal

In general

The Clinton Budget proposal to modify the tax treatment of U.S. citizens and residents who relinquish their citizenship or terminate their residency was transmitted to the Congress in conceptual form in the President's Fiscal Year 2001 Budget Proposal on February 7, 2000. The Clinton Budget proposal would replace the present-law income tax rules under the alternative tax regime with rules that generally would subject to tax U.S. citizens who relinquish their citizenship and long-term U.S. residents who terminate their residence on the net unrealized gain in their property as if such property were sold for fair market value on the date of citizenship relinquishment or residency termination. The new mark-to-market tax on individuals who relinquish citizenship or terminate residency would apply regardless of the taxpayer's subjective motive for citizenship relinquishment or residency termination. The proposal would provide certain rules and exclusions similar to those provided in the Senate amendment to the Health Insurance Portability and Accountability Act of 1996.

Individuals covered

The proposal would apply the mark-to-market tax to U.S. citizens who renounce citizenship and long-term residents who terminate U.S. residency. For this purpose, a long-term resident is any individual who was a lawful permanent resident of the United States for at least eight out of the 15 taxable years ending with the year in which the residency termination occurs.[544] An individual's U.S. residency is considered to be terminated when either the individual ceases to be a lawful permanent resident[545] (i.e., the individual loses his or her green card status) or the individual is treated as a resident of another country under a tax treaty (and the individual does not elect to waive the benefits of such treaty).

Deemed sale of property upon citizenship relinquishment or residency termination

Under the proposal, individuals who relinquish citizenship and long-term residents who terminate residency generally would be treated as having sold all their property at fair market value immediately prior to the citizenship relinquishment or residency termination. Gain or loss from the deemed sale of property would be recognized at that time, generally without regard to provisions that would otherwise provide nonrecognition treatment. The net gain, if any, on the deemed sale would be subject to U.S. tax at such time to the extent it exceeds $600,000 ($1.2 million in the case of married individuals filing a joint return, both of whom relinquish citizenship or terminate residency).

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[544] In applying this eight-year test, an individual is not considered to be a lawful permanent resident of the United States for any year in which the individual is taxed as a resident of another country under a treaty tie-breaker rule.

[545] Sec. 7701(b)(6)

The deemed sale rule of the proposal generally would apply to all property interests held by the individual on the date of citizenship relinquishment or residency termination, provided that the gain on such property interest would be includible in the individual's gross income if such property interest were sold for its fair market value on such date. Special rules would apply in the case of trust interests. U.S. real property interests, which remain subject to U.S. taxing jurisdiction in the hands of nonresident noncitizens, generally are excepted from the proposal. An exception also would apply to interests in qualified retirement plans and, subject to a limit of $500,000, interests in certain foreign pension plans as prescribed by regulations. The Secretary of the Treasury would be authorized to except other property interests as appropriate.

Deferral of payment of tax

Under the proposal, an individual would be permitted to elect to defer payment of the mark-to-market tax imposed on the deemed sale of the property. Under this election, the mark-to-market tax attributable to a particular property, plus interest thereon, would be due when the property is subsequently disposed. In order to elect deferral of the mark-to-market tax, the individual would be required to provide adequate security (e.g., a bond) to ensure that the deferred tax and interest will ultimately be paid.

Date of citizenship relinquishment

Under the proposal, an individual is treated as having relinquished U.S. citizenship on the date that the individual first notifies a U.S. consular officer of his or her intention to relinquish U.S. citizenship.

Effect on present-law alternative tax regime

The Clinton Budget proposal would replace the present-law income tax rules under section 877 with the mark-to-market rules described above. In addition, the proposal would repeal the special estate and gift tax rules under the alternative tax regime that currently apply to former citizens and former long-term residents. Thus, the special estate tax rule relating to a former citizen's or former long-term resident's estate including stock in certain foreign corporations would be repealed. In addition, the special gift tax rule for transfers of certain intangibles of former citizens and former long-term residents also would be repealed.

Treatment of gifts and bequests from a former citizen or former long-term resident

If a former citizen or former long-term resident subsequently makes a gift or bequest to a U.S. person, the proposal would treat the gift as taxable gross income to the U.S. recipient, taxable at the highest marginal tax rates applicable to gifts and bequests (and not the marginal income tax rates).

Coordination with immigration rules

The proposal would amend the immigration rules that deny reentry into the United States for individuals who renounce citizenship for tax reasons by removing the requirement that the renunciation of citizenship be tax motivated. In addition, the proposal would coordinate the

revised immigration rules with the proposal's tax rules. In this regard, it is understood that the proposal would deny former citizens reentry into the United States (regardless of their subjective motive for renouncing citizenship) if the former citizen did not comply with their tax obligations under the mark-to-market tax proposal. Reentry would be permitted for those individuals who satisfied their tax obligations, if any, under the tax proposal.

Effective date

The proposal would apply to U.S. citizens who relinquish their citizenship and to long-term residents who terminate their residency on or after the date of first committee action.

2. House bill (H.R. 3099, H.R. 4880, and S. 2769)

In general

Representatives Rangel and Matsui introduced H.R. 3099 on October 19, 1999. Similar bills were introduced on June 26, 2002, by Representatives Rangel and Gephardt (H.R. 4880), and on July 22, 2002, by Senators Harkin and Stabenow (S. 2769) (unless otherwise indicated, these bills are collectively referred to as the "House bill"). Like the Clinton Budget proposal, the House bill generally would subject certain U.S. citizens who relinquish their U.S. citizenship and certain long-term U.S. residents who terminate their U.S. residence to tax on the net unrealized gain in their property as if such property were sold for fair market value on the day before the citizenship relinquishment or residency termination. Gain or loss from the deemed sale would be recognized at that time without regard to other Code provisions. Any net gain on the deemed sale would be recognized to the extent it exceeds $600,000 ($1.2 million in the case of married individuals filing a joint return, both of whom relinquish citizenship or terminate residency).

Individuals covered

The mark-to-market tax would apply to U.S. citizens who relinquish citizenship and long-term residents who terminate U.S. residency and whose average income tax liability or net worth exceed specified levels. The income tax liability threshold is met if the individual's average annual U.S. Federal income tax liability for the five taxable years ending before the date of the citizenship relinquishment or residency termination is greater than $100,000 (indexed for inflation after 1996). The net worth threshold is met if the individual's net worth as of the date of citizenship relinquishment or residency termination is $500,000 or more (indexed for inflation after 1996). These are the same thresholds as in present-law.[546] Thus, the House bill generally would apply only to certain former U.S. citizens or long-term residents meeting the specified thresholds.[547]

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[546] The income tax liability and net worth thresholds under section 877(a)(2) for 2003 are $122,000 and $608,000, respectively. *See* Rev. Proc. 2002-70. 46 I.R.B. 845.

[547] As described above, similar to the House bill, the mark-to-market tax under the Clinton Budget proposal would apply only to net gain on the deemed sale in excess of $600,000

An individual is a long-term resident if he or she was a lawful permanent resident for at least eight out of the 15 taxable years ending with the year in which the residency termination occurs. An individual is considered to terminate long-term residency when either the individual ceases to be a lawful permanent resident (i.e., loses his or her green card status) or the individual is treated as a resident of another country under a tax treaty and the individual does not waive the benefits of the treaty.

Exceptions from the mark-to-market tax are provided in two situations. The first exception applies to an individual who was born with citizenship both in the United States and in another country; provided that (1) as of the citizenship relinquishment date the individual continues to be a citizen of, and is taxed as a resident of, such other country, and (2) the individual was a resident of the United States for no more than eight out of the 15 taxable years ending with the year of citizenship relinquishment. The second exception applies to a U.S. citizen who relinquishes U.S. citizenship before reaching age 18½ ; provided that the individual was a resident of the United States for no more than five taxable years before such relinquishment.

Deemed sale of property upon citizenship relinquishment or residency termination

The deemed sale rule generally applies to all property interests held by the individual on the date of citizenship relinquishment or residency termination. Special rules would apply in the case of trust interests (described below). U.S. real property interests, which remain subject to U.S. tax in the hands of nonresident noncitizens, generally would be excepted from the mark-to-market tax. An exception also would apply for interests in qualified retirement plans and, subject to a limit of $500,000, interests in certain foreign pension plans as prescribed by regulations.

Deferral of payment of tax

An individual would be permitted to elect to defer payment of the mark-to-market tax imposed on the deemed sale of the property. Under this election, the mark-to-market tax attributable to a particular property is due when the property is disposed (or, if the property is disposed in whole or in part in a nonrecognition transaction, such other time as the Secretary may prescribe). The mark-to-market tax attributable to a particular property is an amount which bears the same ratio to the total mark-to-market tax for the year as the gain taken into account with respect to such property bears to the total gain taken into account under these rules for the year. The deferral of the mark-to-market tax may not be postponed beyond the individual's death.

In order to elect deferral of the mark-to-market tax, the individual would be required to provide adequate security to ensure that the deferred tax and interest will be paid. A bond in the amount of the deferred tax and interest would constitute adequate security. Other security mechanisms would be permitted provided that the individual establishes to the satisfaction of the

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($1.2 million in the case of married individuals filing a joint return, both of whom relinquish citizenship or terminate residency).

Secretary that the security is adequate. In the event that the security provided with respect to a particular property subsequently becomes inadequate and the individual fails to correct the situation, the deferred tax and the interest with respect to such property will become due. As a further condition to making the election, the individual would be required to consent to the waiver of any treaty rights that would preclude the collection of the tax.

Interests in trusts

Detailed rules would apply to trust interests held by an individual at the time of citizenship relinquishment or residency termination. The treatment of trust interests depends on whether the trust is a qualified trust. A qualified trust is a trust that is organized under and governed by U.S. law and that is required by its instruments to have at least one U.S. trustee.

Nonqualified trusts

If an individual holds an interest in a trust that is not a qualified trust, a special rule applies for purposes of determining the amount of the mark-to-market tax due with respect to such trust interest. The individual's interest in the trust is treated as a separate trust consisting of the trust assets allocable to such interest. Such separate trust is treated as having sold its assets as of the date of citizenship relinquishment or residency termination and having distributed all of the proceeds to the individual, who then is treated as having recontributed the proceeds to the trust. The individual is subject to the mark-to-market tax with respect to any net income or gain arising from the deemed distribution from the trust.

The election to defer payment is available for the mark-to-market tax attributable to a nonqualified trust interest. A beneficiary's interest in a nonqualified trust is determined under all the facts and circumstances, including the trust instrument, letters of wishes, and historical patterns of trust distributions.

Qualified trusts

If an individual has an interest in a qualified trust, the amount of unrealized gain allocable to the individual's trust interest is calculated at the time of citizenship relinquishment or residency termination. In determining this amount, all contingencies and discretionary interests are assumed to be resolved in the individual's favor (i.e., the individual is allocated the maximum amount that he could receive). The mark-to-market tax imposed on such gains would be collected when the individual receives distributions from the trust, or if earlier, upon the individual's death. Interest is charged for the period the tax is deferred.

If an individual has an interest in a qualified trust, the individual is subject to the mark-to-market tax upon the receipt of distributions from the trust. These distributions also may be subject to other U.S. income taxes. If a distribution from a qualified trust is made after the individual relinquishes citizenship or terminates residency, the mark-to-market tax is imposed in an amount equal to the amount of the distribution multiplied by the highest tax rate generally applicable to trusts and estates, but in no event will the tax imposed exceed the deferred tax amount with respect to the trust interest. For this purpose, the deferred tax amount would be equal to (1) the tax calculated with respect to the unrealized gain allocable to the trust interest at

the time of citizenship relinquishment or residency termination, (2) increased by interest thereon, and (3) reduced by any mark-to-market tax imposed on prior trust distributions to the individual.

Mark-to-market taxes become due if the trust ceases to be a qualified trust, the individual disposes of his qualified trust interest, or if the individual dies. In such cases, the amount of mark-to-market tax would be equal to the lesser of (1) the tax calculated under the rules for nonqualified trust interests as of such date, or (2) the deferred tax amount with respect to the trust interest as of such date.

The tax that is imposed on distributions from a qualified trust generally is deducted and withheld by the trustees. If the individual does not agree to waive treaty rights that would preclude collection of the tax, the tax with respect to such distributions is imposed on the trust, the trustee is personally liable for the tax, and any other beneficiary has a right of contribution against such individual with respect to the tax. Similar rules apply when the qualified trust interest is disposed, the trust ceases to be a qualified trust, or the individual dies.

Date of citizenship relinquishment

An individual is treated as having relinquished U.S. citizenship on the date that the individual first makes known to the U.S. government or consular officer his intention to relinquish U.S. citizenship. Thus, a U.S. citizen who relinquishes citizenship by formally renouncing his nationality before a diplomatic or consular officer of the United States is treated as having relinquished citizenship on that date; provided that the renunciation is later confirmed by the issuance of a CLN.

A U.S. citizen who furnishes to the Department of State a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of an expatriating act with the requisite interest to relinquish his citizenship is treated as having relinquished his or her citizenship on the date the statement is furnished (regardless of when the expatriating act was performed); provided that the voluntary relinquishment is later confirmed by the issuance of a CLN. If neither of these circumstances exist, the individual is treated as having relinquished citizenship on the date a CLN is issued or a certificate of naturalization is canceled by a court. The date of citizenship relinquishment would apply for all purposes under the bill.

Effect on present-law alternative tax regime

There are no special coordination rules with the present-law alternative tax regime (e.g., section 877). Thus, it is unclear how the bill would interact with the present-law alternative tax regime, and, if they both apply, how potential double taxation would be addressed.

Treatment of gifts and bequests from a former citizen or former long-term resident

Any U.S. citizen or resident who receives a gift or bequest at the time the transferor was a former citizen or former long-term resident is subject to transfer tax on the value of the gift or bequest. Thus, the tax would be imposed on the recipient, but only to the extent that the gift or bequest during the year exceeds the gift tax annual exclusion. The tax would not apply to property that is shown on a timely filed gift tax return and that is a taxable gift by the former

citizen or former long-term resident, or property that is shown on a timely filed estate tax return of the former citizen or former long-term resident. Applicable gifts or bequests that are made in trust would be treated as made to the beneficiaries of the trust in proportion to their respective interests in the trust. The tax imposed on any such gifts or bequests would be reduced by the amount of any foreign gift or estate taxes paid with respect to such gifts or bequests.

Coordination with immigration rules

There are no special rules that would coordinate the mark-to-market tax rules with the special immigration rules enacted in 1996 for tax-motivated expatriates.

Effective date

The Rangel-Matsui bill (H.R. 3099) and the Rangel-Gephardt bill (H.R. 4880) generally would be effective for U.S. citizens who relinquish citizenship or long-term residents who terminate their residency on or after the date of action by the House Ways and Means Committee. The Harkin-Stabenow bill (S.2769) generally would be effective for U.S. citizens who relinquish their citizenship or long-term residents who terminate their residency on or after the date of action by the Senate Finance Committee.

The provisions of the Rangel-Matsui bill (H.R. 3099) and the Rangel-Gephardt bill (H.R. 4880) relating to gifts and bequests would be effective for gifts and bequests received from former citizens and former long-term residents on or after the date of action by the House Ways and Means Committee on this bill, regardless of when the transferor relinquished citizenship or terminated residency. The provisions of the Harkin-Stabenow bill (S. 2769) relating to gifts and bequests would be effective for gifts and bequests received from former citizens and former long-term residents on or after the date of action by Senate Finance Committee on this bill, regardless of when the transferor relinquished citizenship or terminated residency.

3. Senate amendment (H.R. 5063)

In general

The Senate passed a bill as an amendment to H.R. 5063 on October 3, 2002 ("the Senate amendment"). Like the Clinton Budget proposal and the House bill, the Senate amendment generally subjects certain U.S. citizens who relinquish their citizenship and certain long-term U.S. residents who terminate their residence to tax on the net unrealized gain in their property as if such property were sold for fair market value on the day before the citizenship relinquishment or residency termination. Gain from the deemed sale is taken into account at that time without regard to other Code provisions; any loss from the deemed sale generally would be taken into account to the extent otherwise provided in the Code. Any net gain on the deemed sale is recognized to the extent it exceeds $600,000 ($1.2 million in the case of married individuals filing a joint return, both of whom relinquish citizenship or terminate residency). The $600,000 amount is increased by a cost of living adjustment factor for calendar years after 2002.

Individuals covered

The mark-to-market tax applies to U.S. citizens who relinquish citizenship and long-term residents who terminate U.S. residency. An individual is a long-term resident if he or she was a lawful permanent resident for at least 8 out of the 15 taxable years ending with the year in which the residency termination occurs. An individual is considered to terminate long-term residency when either the individual ceases to be a lawful permanent resident (i.e., loses his or her green card status), or the individual is treated as a resident of another country under a tax treaty and the individual does not waive the benefits of the treaty.

Exceptions from the mark-to-market tax are provided in two situations. The first exception applies to an individual who was born with citizenship both in the United States and in another country; provided that (1) as of the citizenship relinquishment date the individual continues to be a citizen of, and is taxed as a resident of, such other country, and (2) the individual was not a resident of the United States for the 5 taxable years ending with the year of citizenship relinquishment. The second exception applies to a U.S. citizen who relinquishes U.S. citizenship before reaching age 18 ½, provided that the individual was a resident of the United States for no more than 5 taxable years before such relinquishment.

Election to be treated as a U.S. citizen

An individual is permitted to make an irrevocable election to continue to be taxed as a U.S. citizen with respect to all property that otherwise is covered by the expatriation tax. This election is an "all or nothing" election; an individual is not permitted to elect this treatment for some property but not for other property. The election, if made, applies to all property that would be subject to the expatriation tax and to any property the basis of which is determined by reference to such property. Under this election, the individual would continue to pay U.S. income taxes at the rates applicable to U.S. citizens following citizenship relinquishment or residency termination on any income generated by the property and on any gain realized on the disposition of the property. In addition, the property would continue to be subject to U.S. gift, estate, and generation-skipping transfer taxes. In order to make this election, the individual is required to waive any treaty rights that would preclude the collection of the tax.

The individual also would be required to provide security to ensure payment of the tax under this election in such form, manner, and amount as the Secretary of the Treasury requires. The amount of mark-to-market tax that would have been owed but for this election (including any interest, penalties, and certain other items) shall be a lien in favor of the United States on all U.S.-situs property owned by the individual. This lien arises on the citizenship relinquishment or residency termination date and continues until the tax liability is satisfied, the tax liability has become unenforceable by reason of lapse of time, or the Secretary is satisfied that no further tax liability may arise by reason of this provision.[548]

[548] The rules of section 6324A(d)(1), (3), and (4) (relating to liens arising in connection with the deferral of estate tax under section 6166) apply to liens arising under this provision.

Date of citizenship relinquishment

An individual is treated as having relinquished U.S. citizenship on the earliest of four possible dates: (1) the date that the individual renounces U.S. nationality before a diplomatic or consular officer of the United States (provided that the voluntary relinquishment is later confirmed by the issuance of a certificate of loss of nationality); (2) the date that the individual furnishes to the Department of State a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of an expatriating act (again, provided that the voluntary relinquishment is later confirmed by the issuance of a certificate of loss of nationality); (3) the date that the Department of State issues a certificate of loss of nationality; or (4) the date that a U.S. court cancels a naturalized citizen's certificate of naturalization.

Deemed sale of property upon citizenship relinquishment or residency termination

The deemed sale rule generally applies to all property interests held by the individual on the date of citizenship relinquishment or residency termination. Special rules apply in the case of trust interests, as described below. U.S. real property interests, which remain subject to U.S. tax in the hands of nonresident noncitizens, generally are excepted from the bill. Regulatory authority is granted to the Secretary of the Treasury to except other types of property from the bill.

An individual who is subject to the mark-to-market tax is required to pay a tentative tax equal to the amount of tax that would be due for a hypothetical short tax year ending on the date the individual relinquished citizenship or terminated residency. Thus, the tentative tax is based on all income, gain, deductions, loss, and credits of the individual for the year through such date, including amounts realized from the deemed sale of property. The tentative tax is due on the 90th day after the date of citizenship relinquishment or residency termination.

Retirement plans and similar arrangements

Subject to certain exceptions, the Senate amendment applies to all property interests held by the individual at the time of citizenship relinquishment or residency termination. Accordingly, such property includes an interest in an employer-sponsored retirement plan or deferred compensation arrangement as well as an interest in an individual retirement account or annuity (i.e., an IRA).[549] However, the provision contains a special rule for an interest in a "qualified retirement plan." For purposes of the provision, a "qualified retirement plan" includes an employer-sponsored qualified plan,[550] a qualified annuity,[551] a tax-sheltered annuity,[552] an

[549] Application of the provision is not limited to an interest that meets the definition of property under section 83 (relating to property transferred in connection with the performance of services).

[550] Sec. 401(a).

[551] Sec. 403(a).

[552] Sec. 403(b).

eligible deferred compensation plan of a governmental employer,[553] or an IRA.[554] The special retirement plan rule applies also, to the extent provided in regulations, to any foreign plan or similar retirement arrangement or program. An interest in a trust that is part of a qualified retirement plan or other arrangement that is subject to the special retirement plan rule is not subject to the rules for interests in trusts (discussed below).

Under the special rule, an amount equal to the present value of the individual's vested, accrued benefit under a qualified retirement plan is treated as having been received by the individual as a distribution under the plan on the day before the individual's citizenship relinquishment or residency termination. It is not intended that the plan would be deemed to have made a distribution for purposes of the tax-favored status of the plan, such as whether a plan may permit distributions before a participant has severed employment. In the case of any later distribution to the individual from the plan, the amount otherwise includible in the individual's income as a result of the distribution is reduced to reflect the amount previously included in income under the special retirement plan rule. The amount of the reduction applied to a distribution is (1) the excess of the amount included in income under the special retirement plan rule over (2) the total reductions applied to any prior distributions. However, under the provision, the retirement plan, and any person acting on the plan's behalf, will treat any later distribution in the same manner as the distribution would be treated without regard to the special retirement plan rule.

The Department of Treasury would be expected to provide guidance for determining the present value of an individual's vested, accrued benefit under a qualified retirement plan, such as the individual's account balance in the case of a defined contribution plan or an IRA, or present value determined under the qualified joint and survivor annuity rules applicable to a defined benefit plan.[555]

Deferral of payment of tax

An individual is permitted to elect to defer payment of the mark-to-market tax imposed on the deemed sale of the property. Interest is charged for the period the tax is deferred at a rate 2 percentage points higher than the rate normally applicable to individual underpayments. Under this election, the mark-to-market tax attributable to a particular property is due when the property is disposed of (or, if the property is disposed of in whole or in part in a nonrecognition transaction, at such other time as the Secretary of the Treasury may prescribe). The mark-to-market tax attributable to a particular property is an amount which bears the same ratio to the total mark-to-market tax for the year as the gain taken into account with respect to such property bears to the total gain taken into account under these rules for the year. The deferral of the mark-to-market tax may not be extended beyond the individual's death.

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[553] Sec. 457(b).

[554] Sec. 408.

[555] Sec. 417(e).

In order to elect deferral of the mark-to-market tax, the individual is required to provide adequate security to the Secretary of the Treasury to ensure that the deferred tax and interest will be paid. Other security mechanisms are permitted provided that the individual establishes to the satisfaction of the Secretary of the Treasury that the security is adequate. In the event that the security provided with respect to a particular property subsequently becomes inadequate and the individual fails to correct the situation, the deferred tax and the interest with respect to such property will become due. As a further condition to making the election, the individual is required to consent to the waiver of any treaty rights that would preclude the collection of the tax.

The deferred amount (including any interest, penalties, and certain other items) shall be a lien in favor of the United States on all U.S.-situs property owned by the individual. This lien shall arise on the citizenship relinquishment or residency termination date and shall continue until the tax liability is satisfied, the tax liability has become unenforceable by reason of lapse of time, or the Secretary of the Treasury is satisfied that no further tax liability may arise by reason of this provision.[556]

Interests in trusts

Detailed rules apply to trust interests held by an individual at the time of citizenship relinquishment or residency termination. The treatment of trust interests depends on whether the trust is a qualified trust. A trust is a qualified trust if a court within the United States is able to exercise primary supervision over the administration of the trust and one or more U.S. persons have the authority to control all substantial decisions of the trust.

Constructive ownership rules apply to a trust beneficiary that is a corporation, partnership, trust, or estate. In such cases, the shareholders, partners, or beneficiaries of the entity are deemed to be the direct beneficiaries of the trust for purposes of applying these provisions. In addition, an individual who holds (or who is treated as holding) a trust instrument at the time of citizenship relinquishment or residency termination is required to disclose on his or her tax return the methodology used to determine his or her interest in the trust, and whether such individual knows (or has reason to know) that any other beneficiary of the trust uses a different method.

Nonqualified trusts

If an individual holds an interest in a trust that is not a qualified trust, a special rule applies for purposes of determining the amount of the mark-to-market tax due with respect to such trust interest. The individual's interest in the trust is treated as a separate trust consisting of the trust assets allocable to such interest. Such separate trust is treated as having sold its net assets as of the date of citizenship relinquishment or residency termination and having distributed the assets to the individual, who then is treated as having recontributed the assets to

[556] The rules of section 6324A(d)(1), (3), and (4) (relating to liens arising in connection with the deferral of estate tax under section 6166) apply to liens arising under this provision.

the trust. The individual is subject to the mark-to-market tax with respect to any net income or gain arising from the deemed distribution from the trust.

The election to defer payment is available for the mark-to-market tax attributable to a nonqualified trust interest. Interest is charged for the period the tax is deferred at a rate two percentage points higher than the rate normally applicable to individual underpayments. A beneficiary's interest in a nonqualified trust is determined under all the facts and circumstances, including the trust instrument, letters of wishes, and historical patterns of trust distributions.

Qualified trusts

If an individual has an interest in a qualified trust, the amount of unrealized gain allocable to the individual's trust interest is calculated at the time of citizenship relinquishment or residency termination. In determining this amount, all contingencies and discretionary interests are assumed to be resolved in the individual's favor (i.e., the individual is allocated the maximum amount that he or she could receive). The mark-to-market tax imposed on such gains is collected when the individual receives distributions from the trust, or if earlier, upon the individual's death. Interest is charged for the period the tax is deferred at a rate 2 percentage points higher than the rate normally applicable to individual underpayments.

If an individual has an interest in a qualified trust, the individual is subject to the mark-to-market tax upon the receipt of distributions from the trust. These distributions also may be subject to other U.S. income taxes. If a distribution from a qualified trust is made after the individual relinquishes citizenship or terminates residency, the mark-to-market tax is imposed in an amount equal to the amount of the distribution multiplied by the highest tax rate generally applicable to trusts and estates, but in no event will the tax imposed exceed the deferred tax amount with respect to the trust interest. For this purpose, the deferred tax amount is equal to (1) the tax calculated with respect to the unrealized gain allocable to the trust interest at the time of citizenship relinquishment or residency termination, (2) increased by interest thereon, and (3) reduced by any mark-to-market tax imposed on prior trust distributions to the individual.

If any individual's interest in a trust is vested as of the citizenship relinquishment or residency termination date (e.g., if the individual's interest in the trust is non-contingent and non-discretionary), the gain allocable to the individual's trust interest is determined based on the trust assets allocable to his or her trust interest. If the individual's interest in the trust is not vested as of the citizenship relinquishment or residency termination date (e.g., if the individual's trust interest is a contingent or discretionary interest), the gain allocable to his or her trust interest is determined based on all of the trust assets that could be allocable to his or her trust interest, determined by resolving all contingencies and discretionary powers in the individual's favor. In the case in which more than one trust beneficiary is subject to the expatriation tax with respect to trust interests that are not vested, the rules are intended to apply so that the same unrealized gain with respect to assets in the trust is not taxed to both individuals.

Mark-to-market taxes become due if the trust ceases to be a qualified trust, the individual disposes of his or her qualified trust interest, or the individual dies. In such cases, the amount of mark-to-market tax equals the lesser of (1) the tax calculated under the rules for nonqualified

trust interests as of the date of the triggering event, or (2) the deferred tax amount with respect to the trust interest as of date.

The tax that is imposed on distributions from a qualified trust generally is deducted and withheld by the trustees. If the individual does not agree to waive treaty rights that would preclude collection of the tax, the tax with respect to such distributions is imposed on the trust, the trustee is personally liable for the tax, and any other beneficiary has a right of contribution against such individual with respect to the tax. Similar rules apply when the qualified trust interest is disposed of, the trust ceases to be a qualified trust, or the individual dies.

Coordination with present-law alternative tax regime

The expatriation income tax rules under section 877, and the expatriation estate and gift tax rules under sections 2107 and 2501(a)(3) (described above), do not apply to a former citizen or former long-term resident whose citizenship relinquishment or residency termination occurs on or after September 12, 2002.

Treatment of gifts and inheritances from a former citizen or former long-term resident

The exclusion from income for the value of property acquired by gift or inheritance[557] does not apply to the value of any property received by gift or inheritance from a former citizen or former long-term resident (i.e., an individual who relinquished U.S. citizenship or terminated U.S. residency), subject to the exceptions described above relating to certain dual citizens and minors. Accordingly, a U.S. taxpayer who receives a gift or inheritance from such an individual is required to include the value of such gift or inheritance in gross income and is subject to U.S. tax on such amount. Having included the value of the property in income, the recipient would then take a basis in the property equal to that value. The tax does not apply to property that is shown on a timely filed gift tax return and that is a taxable gift by the former citizen or former long-term resident, or property that is shown on a timely filed estate tax return and included in the gross U.S. estate of the former citizen or former long-term resident (regardless of whether the tax liability shown on such a return is reduced by credits, deductions, or exclusions available under the estate and gift tax rules). In addition, the tax does not apply to property in cases in which no estate or gift tax return is required to be filed, where no such return would have been required to be filed if the former citizen or former long-term resident had not relinquished citizenship or terminated residency, as the case may be. Applicable gifts or bequests that are made in trust are treated as made to the beneficiaries of the trust in proportion to their respective interests in the trust.

Information reporting

The bill provides that certain information reporting requirements under present law[558] applicable to former citizens and former long-term residents also apply for purposes of the bill.

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[557] Sec. 102.

[558] Sec. 6039G.

Immigration rules

The immigration rules that deny tax-motivated expatriates reentry into the United States would be modified to remove the requirement that the citizenship relinquishment be tax motivated, and instead denies former citizens reentry into the United States if the individual is determined not to be in compliance with his or her tax obligations (regardless of the subjective motive for expatriating). For this purpose, the amendment permits the IRS to disclose certain items of return information of an individual, upon written request of the Attorney General or his delegate, as is necessary for making a determination under section 212(a)(10)(E) of the Immigration and Nationality Act. Specifically, the amendment would permit the IRS to disclose to the agency administering section 212(a)(10)(E) whether such taxpayer is in compliance with section 877A and identify the items of noncompliance. Recordkeeping requirements, safeguards, and civil and criminal penalties for unauthorized disclosure or inspection would apply to return information disclosed under this provision.

Effective date

The Senate amendment generally is effective for U.S. citizens who relinquish their citizenship or long-term residents who terminate their residency on or after September 12, 2002. The provisions of the bill relating to gifts and inheritances are effective for gifts and inheritances received from former citizens and former long-term residents on or after September 12, 2002, whose citizenship relinquishment or residency termination occurs on or after such date. The provisions of the bill relating to former citizens under U.S. immigration laws are effective on or after the date of enactment.

4. AICPA proposals

The American Institute of Certified Public Accountants ("AICPA") submitted comments in March 2002 concerning the 1999 Rangel-Matsui bill (H.R. 3099) and the Clinton Administration Fiscal Year 2001 budget proposal. The comments related to the application of the mark-to-market rules, the rules relating to gifts and bequests from former citizens and former residents, and the application of the special immigration rules to former citizens.

Mark-to-market rules

The AICPA proposed several changes to prior mark-to-market proposals, including:

(1) increasing the dollar threshold for excluding deemed gains of former citizens or former residents from the mark-to-market regime (the dollar threshold in several of the prior bills is $600,000 for 2002), or alternatively, correlating the gain exclusion amount to a benchmark, such as twice the amount of the unified credit under section 2010(c) for estate and gift tax purposes;

(2) providing basis adjustments to fair market value for all assets upon commencement of U.S. tax residency;

(3) identifying other acceptable security arrangements under an election to defer payment of the mark-to-market tax, including letters of credit from a U.S. financial institution or a withholding arrangement with a U.S. brokerage firm;

(4) allowing alternative valuation dates for assets that may decline in value, or allowing a refund for stock that does not generate its anticipated value upon exercise of a stock option;

(5) exempting restricted property (e.g., stock options that have not vested) from the mark-to-market rules, or allowing a refund for property that does not vest (or vests at a lower value than that used for purposes of the mark-to-market tax);

(6) providing an exemption amount for foreign pension plans at twice the unified credit amount under section 2010(c);

(7) excluding assets that remain subject to tax from the mark-to-market rules, such as deferred compensation items such as stock options, non-qualified deferred compensation arrangements, and pension plan assets that are subject to U.S. withholding taxes;

(8) limiting the application of the mark-to-market rules to trust assets over which the beneficiary has control (with the resulting exemption from the rules for certain beneficial interests in U.S. non-grantor trusts);

(9) lengthening the long-term residency requirement to apply to individuals who have held a green card for 15 of the last 20 years (compared to 8 out of the last 15 years as under present law); and

(10) clarifying that the mark-to-market rules would apply only to individuals who relinquish citizenship or terminate residency after the effective date of the legislation.

Treatment of gifts and bequests from former citizens and former residents

The AICPA proposed several changes to prior proposals that would tax recipients of gifts and inheritances from former citizens and former residents subject to the mark-to-market rules, including:

(1) providing a credit against the tax for mark-to-market taxes previously paid by the former citizen or former resident;

(2) limiting application of the recipient tax to gifts and bequests received from former citizens and former residents to which the mark-to-market rules apply (thus, not applying the recipient tax to those individuals who are excluded from or otherwise carved out of the mark-to-market rules);

(3) coordinating the annual exclusion for gifts and bequests to provide for annual inflation adjustments (consistent with section 2503(b)(2));

(4) applying the recipient tax only with respect to gifts and bequests from individuals who expatriate or terminate residency after the date of enactment of the mark-to-market rules.

Finally, the AICPA proposed that if new changes to the immigration rules are enacted (e.g., coordination of those rules with the mark-to-market tax rules), then the original immigration rules should be repealed, and the new immigration rules should apply only prospectively.

D. General Issues Raised by Proposals

Income tax rules

Issues common to present law and proposals

Mark-to-market proposals would impose an income tax on unrealized gains when an individual relinquishes citizenship or terminates residency, regardless of the taxpayer's subjective motivation for citizenship relinquishment or residency termination. The mark-to-market proposals thus would eliminate the necessity to examine the former citizen's or former long-term resident's subjective intent in order for the deemed sale rules to apply. The taxation of unrealized gains under the mark-to-market proposals, however, is a departure from the normative U.S. income tax system, which generally imposes tax only on realized gains.

The mark-to-market proposals have been justified on certain grounds. First, some argue that it is appropriate to collect U.S. tax with respect to those individuals who have enjoyed the benefits of U.S. citizenship or residency or with respect to U.S. citizens and long-term residents whose assets have enjoyed the protection of being within U.S. borders.[559] That is, income taxes are one of the costs of citizenship, one of the mechanisms by which the Federal Government finances the benefits that U.S. citizens and long-term residents receive. Under this view, it may be unfair to tax a U.S. citizen who has had no meaningful contacts with the United States and who arguably has not exercised the benefits of citizenship. For example, this rationale would not seem to support imposition of a mark-to-market tax on a U.S. citizen who was born outside the United States and who never lived in nor held assets in the United States. In addition, it may be unfair to tax assets of long-term U.S. residents that were acquired outside the United States and were never brought into the United States. The mark-to-market proposals, however, would impose tax on former citizens and former long-term residents regardless of the level of the individual's U.S. benefits, regardless of any taxes the individual previously has paid, and regardless of the fact that the assets had no relationship with the United States. On the other hand, the individual's worldwide assets, including those assets that have no relationship with the United States, would remain subject to U.S. tax if the individual remains a U.S. citizen or long-term U.S. resident.

Second, some argue that it is appropriate to collect U.S. tax from certain U.S. citizens who relinquish U.S. citizenship but maintain a significant continuing relationship with the United States, including spending significant periods of time in the United States. It is argued that such individuals are not really relinquishing their ties to the United States and, thus, should continue to be taxed as U.S. citizens or residents. Under this view, the tax imposed under the mark-to-market proposals is a proxy for the tax that would have been owed had the individual continued to be a U.S. citizen or resident. If a mark-to-market tax were justified on the basis that the

[559] Some assert that benefits of U.S. citizenship include being able to travel on a U.S. passport and to enjoy the protection of a U.S. embassy outside the United States. Others assert that the benefits of U.S. citizenship relate primarily to beneficial services (such as advances in health care, technology, and modern public works) that are enjoyed by those living in the United States.

individual did not really sever ties with the United States, then it may not be appropriate to impose tax on individuals who clearly maintain no ongoing ties. For example, it may be inappropriate to tax an individual who acquired U.S. citizenship by birth and who has never lived in the United States. The mark-to-market proposals could affect former citizens who have lived abroad their entire lives and who have very tenuous ties to the United States. The mark-to-market proposals also would affect former citizens and former long-term residents who sever all ties with the United States. The proposals addresses this concern to some degree, although they do not completely eliminate the concerns.[560]

Third, proponents of the mark-to-market proposals argue that such proposals would simplify the taxation of former citizens and former long-term residents by eliminating the subjective inquiry into the intent of the former citizen or former long-term resident. Because there is no intent requirement under these proposals, the IRS would not have to delve into specific factual details for each individual's citizenship relinquishment or residency termination to determine if the individual had a tax avoidance motive. Instead, in order to assess the mark-to-market tax, the IRS would simply be required to show that an individual relinquished citizenship or terminated residency. Removing the intent requirement might also lead to increased voluntary compliance, because individuals would no longer be able to rationalize that they are not subject to the tax because they had other reasons for relinquishing citizenship or terminating residency.

These first three issues with respect to the mark-to-market proposals (i.e., collecting tax with respect to those who have enjoyed the benefits of citizenship, collecting tax from those who have not meaningfully severed ties with the United States, and eliminating inquiries into subjective intent) are not unique to the mark-to-market proposals, but rather are common issues with respect to the scope of any tax regime applicable to former citizens and former long-term residents. In fact, these same issues relate to the effectiveness of the present-law alternative tax regime. Some of the recommendations made by the Joint Committee staff with respect to present law address these issues and could also be applicable with respect to the mark-to-market proposals. The arguments discussed below, on the other hand, are more specific to the mark-to-market proposals.

Issues specific to mark-to-market proposals

Some argue that it is appropriate to tax unrealized gains that accrue during the period that an individual was subject to U.S. taxation on a worldwide basis. Under this view, a former citizen or former long-term resident with foreign income or assets should not be permitted to avoid U.S. tax on such income or assets that economically accrued while the individual was a

[560] For example, the House bill provides for an exception to the mark-to-market tax for individuals born with citizenship both in the United States and in another country; provided that, among other things, the individual was a resident of the United States for no more than eight out of the 15 taxable years ending with the year of citizenship relinquishment. The Senate amendment would exclude a dual citizen from birth from the mark-to-market rules if the individual was not a resident of the United States for the five years prior to citizenship relinquishment.

U.S. citizen or U.S. resident. A fundamental general principle of the U.S. Federal income tax system is that it taxes only realized gains. In part, this rule can be viewed as one of administrative convenience: the realization principle addresses liquidity concerns and income measurement valuation problems and costs. Nonetheless, income and gain accrue over time. As a result, the United States arguably has the right to tax the income or gain that accrues while an asset is held by a person who is a U.S. citizen or long-term resident subject to U.S. taxing jurisdiction. In this regard, citizenship relinquishment or residency termination could be viewed as a deemed realization event.[561] Consistent with this rationale, some would argue that an exit tax based on a mark-to-market regime would be more appropriately considered in the context of a broader policy initiative that would mark to market both items that are entering as well as items that are exiting the U.S. taxing jurisdiction.[562] Under such a regime, emphasis would be on measuring and taxing gains and income that accrue while (and only while) a person is a citizen or resident of the United States.

Proponents of the mark-to-market proposals argue that a special tax is more appropriately collected at the time of citizenship relinquishment or residency termination, as compared to collection of a tax over a 10-year period following an individual's citizenship relinquishment or residency termination (as under present law), when the individual may be outside the United States and collection of such taxes may be more difficult. To the extent that an individual does not intend to return to the United States, however, the IRS would likely have many of the same enforcement problems that exist under present law with respect to monitoring and investigating individuals who have physically departed the United States, and identifying individuals subject to the rules.[563] This problem of administration, however, generally is limited to the time of

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[561] Certain provisions under present law depart from the realization requirement, including the mark-to-market regime for securities dealers under section 475, the mark-to-market taxation of certain regulated futures contracts, foreign currency contracts, nonequity options, and dealer equity options under section 1256, and the rules for taxing original issue discount under sections 1271-1275.

[562] For related proposals in this regard, see the Clinton Administration's Fiscal Year 2001 Budget Proposals regarding modifying the treatment of built-in losses and other attribute trafficking and simplifying the taxation of property that no longer produces income effectively connected with a U.S. trade or business.

[563] The mark-to-market proposals also present serious administrability concerns with respect to their application to green-card holders. Unlike the procedures for relinquishing citizenship, there are no formal procedures when a noncitizen terminates U.S. residency by which such an individual is required to relinquish a green card, nor is there any incentive for an individual to actually turn in a green card upon leaving the United States. If such individuals were made aware that a special tax would be imposed upon the relinquishment of a green card, it may be even more likely that these individuals would simply leave the United States without ever notifying the authorities of their departure. Thus, it may be difficult for the IRS to determine the identity of long-term residents who terminate their residency absent any voluntary compliance by these individuals. An additional difficulty arises in the context of green-card holders in that some individuals who would otherwise obtain green-cards could instead obtain

citizenship relinquishment or residency termination. The proposals would ease the overall administrative burdens by not requiring monitoring of transactions over a 10-year period as under present law.[564]

Enforcement issues

Enforcement of the mark-to-market proposals would depend (as under present law) upon the extent to which former citizens and former long-term residents supply the necessary information for the IRS to determine that the requirements for imposing the tax apply. To the extent that the necessary information is not supplied by former citizens, former long-term residents, or appropriate agencies involved in the citizenship relinquishment or residency termination process (as has been the case under present law), enforcement of the tax may not be successful. Under both present law and the mark-to-market proposals, the IRS may not learn about the citizenship relinquishment or residency termination until the individual has physically left the country. In addition, physical separation from the United States may hinder the ability of the IRS to collect any tax owed (as under present law). With notification, the IRS can attempt to determine whether a former citizen or former long-term resident possesses any assets within the United States that could be seized to satisfy the tax liability. Seizure of assets for failure to pay taxes is permitted under present law.[565] The Senate amendment would grant the IRS the authority to impose a lien on U.S.-situs property for taxes that are deferred under that proposal. In addition, the Clinton Budget proposal and the Senate amendment would seek to encourage enforcement of the mark-to-market tax by denying former citizens reentry into the United States (regardless of their subjective motive for expatriating) if the former citizen did not comply with their tax obligations under the proposal.

The mark-to-market proposals would reduce a taxpayer's ability to avoid taxation through tax planning, because a more comprehensive tax base would be utilized. Thus, it would be more difficult to structure one's holdings in a manner designed to avoid the mark-to-market tax.

Critics of the mark-to-market proposals argue that the proposals present enforceability issues that do not exist under present law. Because such proposals would impose a tax on unrealized gains (and, thus, market price for the assets may not be readily available), there may be significant valuation disputes between taxpayers and the IRS. These valuation disputes are likely to be even more problematic in the case of interests in trusts, because beneficiaries who relinquish citizenship or terminate residency would be subject to a tax liability determined by

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certain types of nonimmigrant visas if the proposal was enacted and, thus, escape taxation under the proposal. Similar difficulties may exist, however, with respect to the administration of present law in connection with green-card holders.

[564] The strength of the proposals in easing administrative burdens is lessened to some extent by permitting the tax to be paid over a 10-year period. The requirement of posting a bond is helpful in this regard.

[565] Sec. 6331.

reference to the unrealized appreciation in the value of the trust's assets notwithstanding the fact that the beneficiary has no access to the assets of the trust.[566] The proposals also raise liquidity issues because the assets held at the time of citizenship relinquishment or residency termination may not be liquid and, thus, the individual may not have sufficient resources with which to pay the tax upon citizenship relinquishment or residency termination. These liquidity concerns are alleviated to some degree by the ability to defer payment of the mark-to-market tax if certain conditions are met (albeit, as described above, at the cost of lessening the ability to ease administrative burdens).

The mark-to-market proposals may create an incentive to relinquish citizenship or terminate residency that does not exist under present law for individuals who either have recently inherited wealth or who expect to inherit wealth in the near future, because the basis of inherited assets is stepped up to fair market value on the date of the decedent's death. Thus, there would be little or no mark-to-market tax imposed on such assets.

Double taxation issues

The proposals could give rise to potential double taxation issues. For U.S. tax purposes, the proposals would provide for a step up in basis for any gain recognized upon the deemed sale of assets upon citizenship relinquishment or residency termination, so that double taxation of that same gain generally would not occur for U.S. income tax purposes. However, as described below, such a regime could lead to double taxation if a former citizen or former long-term resident is subject to U.S. gift or estate tax on the same property. In addition, double taxation could occur if the foreign country to which the former citizen or former long-term resident became a resident also taxed the same gain upon a later disposition of the asset.[567] In this regard, many countries do not exempt from local tax gains that accrued prior to the time an individual became a resident of that country.[568] Consequently, double taxation will occur if a former citizen or former long-term resident is subject to the mark-to-market tax on the deemed sale of an asset, becomes a resident of another country that includes pre-immigration gains in its tax base, and subsequently sells that asset.[569] In addition, the House bill does not have special coordination

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[566] For a discussion of valuation and other problems associated with marking to market interests in trusts under prior mark-to-market proposals, see the 1995 Joint Committee staff study, supra note 315.

[567] Furthermore, the jurisdiction in which the asset is located may also levy its tax on the gain realized.

[568] See Part IX., above. Australia, Canada, Denmark, and Israel are exceptions to the general rule of most countries that tax gains that have accrued prior to the individual's immigration to such country.

[569] Such an individual generally would not be eligible for specific relief from double taxation under a tax treaty. It is uncertain whether double taxation relief could be obtained under a mutual agreement procedure article of an income tax treaty. These articles of U.S. tax treaties generally grant the competent authorities of the treaty countries to consult and resolve double taxation issues regardless of whether they are specifically covered by the treaty. A potential

rules with the present-law alternative tax regime. Thus, it is unclear how the House bill would interact with the present-law alternative tax regime, and, if they both apply, how potential double taxation would be addressed.

International law issues

Some have argued that under certain circumstances a mark-to-market tax upon citizenship relinquishment or residency termination might conflict with rights to emigrate or expatriate recognized by U.S. and international law.[570] In addition, potential constitutional issues have been raised with respect to such a tax.[571] The Joint Committee staff requested the CRS to review the constitutionality of the Clinton Budget proposal and the Rangel-Matsui bill (H.R. 3099), and whether these proposals comport with international law. As a general matter, according to the CRS, the possible application of a mark-to-market regime to those retroactively

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determination is made on a case-by-case basis that is based on the particular facts and circumstances. A former citizen generally would request competent authority assistance from the competent authority of his or her country of residence. The competent authorities may not reach agreement or even if agreement could be reached, the process can be time consuming (and, thus, costly) for the taxpayer. If the gain is attributable to U.S. sources, the foreign country may give a credit against its local tax for the U.S. tax paid.

[570] For a discussion of these issues, see the 1995 Joint Committee staff study, supra note 315. The 1995 Joint Committee staff study pointed out that some observers have labeled prior mark-to-market proposals as "exit taxes" that may conflict with rights to emigrate or expatriate recognized under international law. The 1995 Joint Committee staff study stated that it is difficult to conclude that such proposals would be an arbitrary infringement under international law if the mark-to-market proposals are viewed as an attempt to neutralize the tax consequences that flow under U.S. tax laws from the decision to retain or renounce U.S. citizenship.

[571] *Id*. The 1995 Joint Committee staff study described certain potential constitutional issues raised by prior mark-to-market proposals, such as whether the proposals violate the Constitution on the ground that the Sixteenth Amendment contains an implicit requirement that gains be realized before Federal income taxes are imposed, and whether other aspects of such proposals conflict with constitutional principles such as the due process clause of the Fifth Amendment. The 1995 Joint Committee staff study noted that judicial decisions and legal commentary represent a substantial line of authority for the position that the concept of realization is not constitutionally mandated, and that prior mark-to-market tax proposals generally would not appear to lead to a colorable constitutional challenge under the due process clause of the Fifth Amendment. However, it was also pointed out that there may be due process challenges as applied to particular factual settings, such as the case in which a beneficiary of a trust who has merely a contingent interest in the trust is deemed to have income under a mark-to-market proposal. The study also describes other potential due process challenges that may arise under such proposals, such as the retroactive application of mark-to-market taxes on individuals who have long since relinquished their citizenship under law in effect prior to the enactment of such a regime.

continued as U.S. citizens is an issue that is vulnerable to constitutional challenge.[572] In addressing these issues, the CRS stated the following:

> [W]e believe that the [Clinton] Administration proposal calls for replacing existing IRC § 877 with an exit tax effective for all those relinquishing citizenship on or after the date of first committee action. Generally, limited retroactivity for the period of time it takes to get legislation through the legislative process does not raise due process concerns. In some expatriates' cases, this trade off between 10 years of additional U.S. tax liability and a one-time exit tax may result in lower costs. For others, the opposite would be true. Existing law does not tax those who are not expatriating for tax avoidance purposes, while the [Clinton] Administration proposal would tax everyone expatriating who possesses over $600,000 in assets. The expatriates lacking a tax avoidance purpose have a stronger expectation of no change in the law than do those potentially subject to current IRC § 877. In addition, those who think they lost citizenship years ago and are not expatriating for tax avoidance purposes may be less likely to be well advised (and therefore be on notice of possible tax law changes).[573] Careful consideration should be given to whether it is fair to impose such a tax retroactively on the non-avoiders.
>
> We believe that the exit tax in the House proposal is supposed to be on top of the tax in IRC § 877. If this is correct, the House proposal would impose a new exit tax on everyone expatriating while continuing the existing regime for those who expatriate with tax avoidance purposes. The same objections that might be raised against the [Clinton] Administration proposal might be raised against the House proposal as well. In addition, the arguments that the House exit tax is a new tax, and the arguments that it is not fair to impose a new tax retroactively, seem stronger. This is not to say that imposing such a tax retroactively for a limited period would necessarily be found unconstitutional, but it raises more questions about the fairness of retroactive imposition than does the [Clinton] Administration proposal.[574]

With respect to international law considerations, the CRS stated that a non-confiscatory exit tax would not raise insurmountable international law concerns. However, the CRS concluded that to the extent that the mark-to-market tax is in addition to the present-law alternative tax regime (which may be the case with the House bill), the U.S. assertion of taxing jurisdiction will be seen as that much more outside international norms.[575]

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[572] *See* A-63 (May 10, 2000, memorandum II from the CRS).

[573] On the other hand, they can remain outside the tax system by never appearing before a government official to obtain a CLN.

[574] *See* A-63 (May 10, 2000, memorandum II from the CRS).

[575] *Id.*

Estate and gift tax rules

Under the mark-to-market proposals, the present-law estate and gift tax rules that apply generally to nonresident noncitizens would continue to apply. These individuals would continue to be subject to estate and gift tax on the transfer of U.S.-situated property. However, the Clinton Budget proposal and the Senate amendment would repeal the special estate and gift tax rules that apply to U.S. citizens and long-term residents who give up their U.S. citizenship or resident status with a principal purpose of avoiding U.S. tax.

In addition to imposing a mark-to-market tax upon citizenship relinquishment or residency termination, the mark-to-market proposals would impose a second "inheritance type" tax on the property of a former citizen or former long-term resident that is transferred back to a U.S. person. While the proposals are similar, there are differences in scope and application. Under the Clinton Budget proposal and the Senate amendment, the second tax would be imposed on the receipt of property by a U.S. person from a former U.S. citizen or former long-term resident. Under the Clinton Budget proposal, if a former citizen or former long-term resident subsequently makes a gift or bequest to a U.S. person, the value of the property would be treated as "gross income" to the U.S. recipient, taxable at the highest marginal rate applicable to estates and gifts. Under the Senate amendment, the U.S. recipient of the property would include in gross income the value of the property received from the former citizen or former long-term resident (subject to certain exceptions and with no special provision for taxing the recipient at the highest marginal transfer tax rates).

Under the House bill, the second tax would be imposed on the receipt of property by a U.S. person from any former U.S. citizen or former long-term resident that was subject to the mark-to-market regime upon citizenship relinquishment or residency termination. Under the proposal, if a former citizen or former long-term resident subsequently makes a gift or bequest to a U.S. person, the property would be subject to a new inheritance tax regime. Under this regime, the property received by a U.S. person would be subject to tax at the highest marginal rate applicable to estates and gifts.

Under the mark-to-market proposals, property could be taxed twice – once, based on gain upon citizenship relinquishment or residency termination, and again, based on value upon receipt by a U.S. person. Under present law, property also may be taxed multiple times. For example, property sold at a gain may be subject to income tax at one point and, subsequently, may be subject to estate or gift tax on its entire value. However, applying a similar regime to former U.S. citizens and former long-term residents would be a departure from the present-law alternative tax regime. In some instances, property that is subject to both income and estate and gift tax could be taxed at combined rates significantly higher under the mark-to-market proposals than under present law.

Enforcement of the present-law estate and gift tax rules for former citizens and former long-term residents during a 10-year period presents difficulties. However, the mark-to-market proposals, which would assess an estate and gift tax any time property flows back to a U.S. person from a former citizen or former long-term resident, would present enforcement problems of their own. For example, the new inheritance-type estate and gift tax would apply to property that flows back to a U.S. person at any time after citizenship relinquishment or residency

termination. Moreover, it may be difficult to track whether a former U.S. citizen or former long-term resident made a gift or bequest of property for the benefit of a U.S. person.

Immigration rules

The Clinton Budget proposal and the Senate amendment would make certain modifications to the immigration rules with respect to former citizens.[576] The proposals would eliminate the present-law requirement that the individual's citizenship relinquishment be tax-motivated before denying the former citizen reentry into the United States. The proposals also would coordinate the modified immigration provision with the new mark-to-market income tax rules described above and would deny former citizens reentry into the United States if they did not comply with their tax obligations under the mark-to-market regime.

Some argue that this type of coordination between the immigration and tax rules would enhance enforcement and collection of the mark-to-market tax. They argue that the ability of former citizens to reenter the United States should be conditioned on satisfaction of their obligations (including tax obligations) upon leaving the United States. On the other hand, the original purpose of the present-law immigration provision was to prevent tax-motivated former citizens from reentering the United States. Thus, some may question the appropriateness of applying such a provision across the board for all former citizens regardless of motive.

[576] These proposed modifications are not contained in the House bill.

XI. JOINT COMMITTEE STAFF RECOMMENDATIONS

The Joint Committee staff believes that the recommendations contained in this Part of the study will improve and rationalize the present-law rules relating to the tax and immigration treatment of citizenship relinquishment and residency termination.

With respect to the present-law tax provisions, the Joint Committee staff believes that certain of the problems inherent in present law can be addressed through modifications that would provide: (1) objective standards for determining whether former citizens or former long-term residents are subject to the alternative tax regime; (2) tax-based (instead of immigration-based) rules for determining when an individual is no longer a U.S. citizen or long-term resident for U.S. Federal tax purposes; (3) a sanction for individuals who are subject to the alternative tax regime and who return to the United States for extended periods; (4) imposition of U.S. gift tax on gifts of certain closely-held stock of foreign corporations that hold U.S.-situated property; and (5) an annual return-filing requirement for individuals who are subject to the alternative tax regime, for each of the 10 years following citizenship relinquishment or residency termination.

The Joint Committee staff also believes that certain changes to the present-law immigration provisions are necessary to improve the administrability of the special immigration rule relating to tax avoidance. These changes would promote greater coordination and information-sharing between the IRS and the agencies responsible for the immigration laws and would resolve certain inconsistencies between the tax and immigration provisions of present law.

Consistent with its mandate in connection with this study, the Joint Committee staff has focused on potential improvements to the operation of the present-law rules. Thus, the staff's recommendations are designed to fit within the basic framework of the present-law alternative tax regime, and to make this regime work as well as possible. The Joint Committee staff does not take a position as to more fundamental changes that might be considered, such as replacing the present-law alternative tax regime with a mark-to-market exit-tax system, or eliminating altogether the tax regime specific to former citizens and former long-term residents.[577]

While the Joint Committee staff believes that its recommendations would improve the effectiveness and administration of the present-law rules, it should be noted that, even if the Congress were to enact the Joint Committee staff recommendations, tax incentives for citizenship relinquishment and residency termination would remain. An alternative tax regime that is limited to U.S.-source income and, in the case of the estate and gift taxes, to U.S.-situated assets (albeit with expanded definitions of such income and assets) cannot eliminate the tax incentives to relinquish citizenship or terminate residency in cases in which an individual owns significant foreign-situated property. Similarly, an alternative tax regime that applies for a 10-year period following citizenship relinquishment or residency termination will not be effective with respect to individuals who are willing to wait the 10-year period prior to disposing of assets that would be subject to tax under the alternative tax regime. Perhaps most fundamentally, any

[577] *See* Part X, above, for a discussion of alternative approaches to the tax treatment of former citizens and former long-term residents.

tax regime applicable to individuals who are no longer physically present in the country, and whose assets may no longer be situated in the country or under the control of any U.S. person, inevitably faces serious challenges of enforcement as a practical matter. This enforcement effort requires significant resources to be devoted to the few individuals who are subject to the alternative tax regime. Accordingly, the Joint Committee staff believes that careful consideration should be given as to whether the alternative tax regime and related immigration rules, even as modified by the recommendations set forth below, can fully achieve the goals that the Congress intends to accomplish.[578]

The Joint Committee staff recommendations are discussed in detail below.

A. Recommendations Relating to the Tax Treatment of Citizenship Relinquishment and Residency Termination

1. Provide objective rules for the alternative tax regime

The Joint Committee staff recommends that objective rules replace the subjective determination of tax avoidance as a principal purpose for citizenship relinquishment or residency termination under present law. Under the proposed objective rules, a former citizen or former long-term resident would be subject to the alternative tax regime for a 10-year period following citizenship relinquishment or residency termination, unless the former citizen or former long-term resident:

(a) establishes that his or her average annual net income tax liability for the five preceding years does not exceed $122,000 (adjusted for inflation after 2003) and his or her net worth does not exceed $2 million, or alternatively satisfies limited exceptions for dual citizens and minors who have had no substantial contact with the United States, and

(b) certifies under penalties of perjury that he or she has complied with all U.S. Federal tax obligations for the five preceding years and provides such evidence of compliance as the Secretary of the Treasury may require.

Background

One of the major difficulties in administering the present-law alternative tax regime is that the IRS is required to determine the subjective intent of taxpayers who relinquish citizenship or terminate residency. The present-law presumption of tax-avoidance purpose in cases in which objective income tax liability or net worth thresholds are exceeded mitigates this problem to some extent. However, the present-law rules still require the IRS to make subjective determinations of intent in cases involving taxpayers who fall below these thresholds, as well for

[578] *See* Part VI, above, for background on the purposes of a special tax regime for former citizens and former long-term residents.

certain taxpayers who exceed these thresholds but are nevertheless allowed to seek a ruling from the IRS to the effect that they did not have a principal purpose of tax avoidance.[579]

Joint Committee staff recommendation

The Joint Committee staff recommends that objective rules replace entirely the subjective determination of tax avoidance as a principal purpose for citizenship relinquishment or residency termination under present law. Under the Joint Committee staff recommendation, a former citizen or former long-term resident would be subject to the alternative tax regime for a 10-year period following citizenship relinquishment or residency termination, unless the former citizen or former long-term resident: (1) establishes that his or her average annual net income tax liability for the five preceding years does not exceed $122,000 (adjusted for inflation after 2003) and his or her net worth does not exceed $2 million, or alternatively satisfies limited, objective exceptions for dual citizens and minors who have had no substantial contact with the United States; and (2) certifies under penalties of perjury that he or she has complied with all U.S. Federal tax obligations for the preceding five years and provides such evidence of compliance as the Secretary of the Treasury may require.

Objective monetary thresholds for determination of tax-motivation

This recommendation, like present law, retains an income tax liability test and a net worth test, but it departs from the present-law approach in two significant respects. First, the objective monetary thresholds would become the general rule for conclusively determining whether a former citizen or former long-term resident would be subject to the alternative tax regime. The monetary thresholds would serve as a proxy for tax motivation and, unlike present law, no subsequent inquiry into the taxpayer's intent would be required or permitted. The ruling process of present law would be eliminated.

Second, because this objective monetary standard would be less flexible than present law, the present-law amount for the net-worth threshold would be increased. Raising the net-worth threshold would mitigate concerns about subjecting non-tax-motivated individuals to the alternative tax regime, since tax savings generally are more significant, and hence tax motivation more likely, in cases involving high net-worth individuals. Because estate and gift taxes are often the principal motivating factors for persons who relinquish citizenship or terminate residency for tax-avoidance purposes, the net-worth threshold would be set at a level at which substantial liability may arise under the estate and gift tax rules. The recommended net worth threshold of $2 million is twice the unified credit exclusion-equivalent amount for gift tax purposes, a level above which the transfer tax can be significant enough to be a motivating factor for relinquishing citizenship or terminating residency.[580] The Joint Committee staff believes that

[579] Sec. 877(a), (c).

[580] Under present law, the unified credit exclusion equivalent amount for gift tax purposes is $1 million, even for years in which the amount increases for estate tax purposes, for the year in which the estate tax is repealed, and for the years following the sunset of EGTRRA. If changes are made to the estate and gift tax rules in this regard, it may be appropriate to consider correlative adjustments to the net worth threshold.

the income tax liability threshold under present law is set at an appropriate level to target income tax avoidance as a motivating factor, and thus the recommended level of $122,000 simply reflects the inflation-adjusted present-law amount.[581]

The net worth test also would serve as a backstop to the income tax liability test in cases in which income tax avoidance may be the motivating factor, regardless of whether transfer tax avoidance is also an important factor. For example, an individual with a large, highly appreciated securities portfolio might be motivated by income tax avoidance to relinquish citizenship, but such an individual would not necessarily be paying high levels of current income tax, and thus might not exceed the income tax liability threshold. The individual's large amounts of unrealized appreciation would, however, cause the individual to exceed the net worth threshold. For this reason, a net worth test may be desirable even if estate tax repeal were made permanent, or if the estate and gift taxes were both permanently repealed.[582]

Exceptions for certain dual citizens and minors with no substantial contact with the United States

The Joint Committee staff recommends that the alternative tax regime not apply to a former citizen who is a dual citizen or a minor with no substantial contacts with the United States prior to relinquishing citizenship. These exceptions for dual citizens and minors would use the present-law definitions of such individuals,[583] but the exceptions would operate differently from the present-law rules, which require an inquiry into intent. Under the recommendation, even if a former citizen or former long-term resident exceeded the monetary thresholds, that person would be excluded from the alternative tax regime if he or she fell within one of the specified exceptions (provided that the requirement of certification and proof of compliance with Federal tax obligations is met, as described below). Thus, narrow, objective exceptions for cases particularly likely to involve significant non-tax motivation would replace the intent-based inquiry applicable to these cases under present law. These exceptions are described below.

Certain dual citizens.–The Joint Committee staff recommends an exception from the alternative tax regime for an individual who has been a dual citizen of the United States and a foreign country since birth, and who has had no substantial contacts with the United States. A person would be treated as having no substantial contacts with the United States only if the person: (1) was never a resident of the United States (within the meaning of section 7701(b), as modified by any applicable treaty); (2) has never held a United States passport; and (3) was not present in the United States for more than 30 days during any one of the 10 calendar years preceding relinquishment of citizenship.

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[581] Sec. 877(a)(2)(A); Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

[582] Alternatively, a test based on unrealized appreciation may be appropriate in that scenario, since such a test would target a characteristic more directly relevant to income tax avoidance.

[583] Secs. 877(c)(2)(A) and 877(c)(2)(C), respectively.

Certain minors.–The Joint Committee staff recommends an exception from the alternative tax regime for an individual who: (1) was born to parents who were not U.S. citizens (and thus who became a U.S. citizen solely by virtue of being born in the United States); (2) relinquished U.S. citizenship prior to age 18½; and (3) was not present in the United States for more than 30 days during any one of the 10 calendar years preceding relinquishment of citizenship.

Certification and proof of compliance with U.S. Federal tax obligations

In order to be excepted from the application of the alternative tax regime under the Joint Committee staff recommendation, whether by reason of falling below the net worth and income tax liability thresholds or qualifying for the dual-citizen or minor exceptions, the former citizen or former long-term resident also would be required to certify, under penalties of perjury, that he or she has complied with all U.S. Federal tax obligations for the five years preceding the relinquishment of citizenship or termination of residency and to provide such documentation as the Secretary of the Treasury may require evidencing such compliance (e.g., tax returns, proof of tax payments).[584] If such a certification could not be made, the individual would be required to take the necessary steps in consultation with the IRS to come into compliance with his or her U.S. Federal tax obligations in order to qualify for exception from the alternative tax regime. Until such time, the individual would remain subject to the alternative tax regime. The IRS would continue to have the right to verify that the information submitted was accurate, and it would be expected that the IRS would randomly audit such persons to assess compliance.

2. Provide tax-based rules for determining when an individual is no longer a U.S. citizen or long-term resident for U.S. Federal tax purposes

The Joint Committee staff recommends that an individual should continue to be treated as a U.S. citizen or long-term resident for U.S. Federal tax purposes until the individual:

(a) gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Department of State or the INS, respectively, and

(b) files a complete and accurate IRS Form 8854 (i.e., files a tax information statement in accordance with the requirements of section 6039G).

In addition, the Joint Committee staff recommends that the Department of State (including U.S. consular offices) should be required to provide a uniform tax information statement (i.e., IRS Form 8854) to all individuals who seek to terminate their U.S. citizenship.

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[584] The recommendation is limited to five prior years in order to make the rule administrable from both the taxpayer's and the IRS's perspectives.

Background

Under present law, the Immigration and Nationality Act governs the determination of when a U.S. citizen is treated for U.S. Federal tax purposes as having relinquished citizenship.[585] Similarly, an individual's U.S. residency is considered terminated for U.S Federal tax purposes when the individual ceases to be a lawful permanent resident under the immigration law (or is treated as a resident of another country under a tax treaty and does not waive the benefits of such treaty). In view of this reliance on immigration-law status, it is possible in many instances for a U.S. citizen or resident to convert his or her Federal tax status to that of a nonresident noncitizen without notifying the IRS.

Although individuals who relinquish their citizenship or terminate their residency are required to provide tax information statements (e.g., on Form 8854), difficulties have been encountered in enforcing this requirement, and in many cases the IRS does not receive timely information that it needs to administer the alternative tax regime.[586] In these cases, an individual may become a non-resident non-citizen of the United States for Federal tax purposes -- and enjoy reductions in U.S. taxes from such tax status -- despite failing to provide the tax information statements necessary for the IRS to monitor and enforce compliance with the alternative tax regime.

Joint Committee staff recommendation

The Joint Committee staff recommends that an individual should continue to be treated as a U.S. citizen or long-term resident for U.S. Federal tax purposes[587] until the individual: (1) gives notice of an expatriating act or termination of residency (with the requisite intent to relinquish citizenship or terminate residency) to the Department of State or the INS, respectively;[588] and (2) files a complete and accurate tax information statement with the IRS (using Form 8854).

In addition, in order to enforce the alternative tax regime effectively, the IRS must obtain the required information as completely and consistently as possible. Accordingly, the Joint Committee staff recommends that the Department of State (including U.S. consular offices) be required to provide a uniform tax information statement (i.e., IRS Form 8854) to all individuals who seek to terminate their U.S. citizenship. The consular offices would be instructed to have

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[585] 8 U.S.C. section 1481. See Treas. Reg. sec. 1.1-1(c).

[586] *See* Part VII.B.3, above.

[587] Treatment as a U.S. citizen or long-term resident should be for all purposes of the Code, including section 7701(b)(10).

[588] As discussed in Part V, above, the Homeland Security Act transfers the functions of the INS and the immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security. For clarity of exposition, the discussion in this Part XI continues to refer to the separate agency functions, since the mechanical aspects of these transfers of responsibility remain to be resolved.

the individual accurately and completely fill out the form, provide a social security number, if any, and sign the form under penalties for not answering truthfully. A similar requirement would apply to the INS in connection with individuals who give notice to the INS of their intent to terminate residency.

This recommendation would improve the present-law rules by denying the tax benefits of citizenship relinquishment or residency termination unless and until the information necessary for the IRS to enforce the alternative tax regime is provided.

3. Provide a sanction for individuals subject to the alternative tax regime who return to the United States for extended periods

> **The Joint Committee staff recommends that a former citizen or former long-term resident who is subject to the alternative tax regime and who is present in the United States for more than 30 days in any calendar year during the 10-year period after citizenship relinquishment or residency termination be treated as a U.S. resident for that calendar year and be subject to U.S. Federal tax on a worldwide basis.**

Background

Under present law, resident noncitizens generally are subject to U.S. tax on a worldwide basis for U.S. Federal income, estate, and gift tax purposes. For U.S. Federal income tax purposes, a noncitizen generally is considered to be a resident if the individual is a lawful permanent resident (i.e., a green card holder), or the individual spends a significant amount of time in the United States under a "substantial presence" test. The "substantial presence" test treats an individual as a resident if he or she is present in the United States for 31 or more days during the current calendar year and was present in the United States for a substantial period of time -- 183 or more weighted days during a three-year period weighted toward the current year.[589] In general, for purposes of determining residency for income tax purposes, an individual is treated as being present in the United States on any day if the individual is physically present in the United States at any time during such day, although several exceptions apply.[590] Special residency rules apply for estate and gift purposes. In general, an individual is considered to be a

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[589] An individual meets the 183-day part of the test if the sum of: (1) the days present during the current calendar year; (2) one-third of the days present during the preceding calendar year; and (3) one-sixth of the days present during the second preceding calendar year, equals or exceeds 183 days. Presence for 122 days (or more) per year over the three-year period would be sufficient to trigger the test.

[590] For example, certain days of physical presence are excluded in the case of certain foreign government-related individuals, teachers, trainees, students, professional athletes temporarily present to compete in charitable events, and individuals who are physically unable to leave due to a medical condition that arose while present in the United States. Secs. 7701(b)(3)(D), 7701(b)(5).

resident of the United States for estate and gift tax purposes if the individual is "domiciled" in the United States.[591]

Individuals who relinquish citizenship or terminate residency for tax reasons often do not want to fully sever their ties with the United States. In other words, they hope to retain some of the benefits of citizenship or residency without being subject to the U.S. tax system as a citizen or resident. Under present law, these individuals generally may continue to spend significant amounts of time in the United States following citizenship relinquishment or residency termination -- approximately four months every year -- without being treated as a U.S. resident.

Joint Committee staff recommendation

The Joint Committee staff believes that present law provides insufficient deterrent to citizenship relinquishment or residency termination for individuals who desire to maintain significant ties with the United States. Accordingly, the Joint Committee staff recommends that a former citizen or former long-term resident who is subject to the alternative tax regime and who is present in the United States for more than 30 days in any calendar year during the 10-year period following citizenship relinquishment or residency termination be treated as a U.S. resident for that calendar year and thus be subject to U.S. Federal income tax on a worldwide basis.[592]

Similarly, if an individual subject to the alternative tax regime is present in the United States for more than 30 days in any year during the 10-year period following citizenship relinquishment or residency termination, and the individual dies during that year, he or she would be considered to be a U.S. resident, and the individual's worldwide estate would be subject to U.S. estate tax. Likewise, if an individual subject to the alternative tax regime is present in the United States for more than 30 days in any year during the 10-year period following citizenship relinquishment or residency termination, the individual would be subject to U.S. gift tax on any transfer of his or her worldwide assets by gift during that year.

For purposes of these rules, an individual should be treated as present in the United States on any day if such individual was physically present in the United States at any time during that day, with no exceptions. The present-law exceptions from being treated as present in the United States for residency purposes would not apply in this context.[593]

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[591] An individual is domiciled in the United States if the individual (1) is living in the United States and has the intention to remain in the United States indefinitely; or (2) has lived in the United States with such an intention and has not formed the intention to remain indefinitely in another country.

[592] Consistent with this approach, consideration also could be given to taxing a former citizen or former long-term resident who is subject to the alternative tax regime on a worldwide basis for the entire year of citizenship relinquishment or residency termination if he or she is present in the United States in the year of citizenship relinquishment or residency termination for more than 30 days. Cf. Treas. Reg. sec. 1.871-13.

[593] *See*, e.g., secs. 7701(b)(3)(D), 7701(b)(5) and 7701(b)(7)(B)-(D).

The Joint Committee staff believes that this recommendation would substantially reduce the incentives to relinquish citizenship or terminate residency for individuals who desire to maintain significant ties to the United States. At the same time, the proposal would not interfere unduly with non-tax-motivated individuals who may desire to relinquish citizenship or terminate residency precisely for the purpose of severing their ties with the United States in favor of another country to which they are more strongly connected.

4. Impose gift tax with respect to certain closely held foreign stock

The Joint Committee staff recommends that gifts of certain closely held stock of a foreign corporation by an individual subject to the alternative tax regime be subject to U.S. gift tax to the extent that the foreign corporation holds U.S.-situated assets.

Background

Under present law, estates of nonresident noncitizens are subject to U.S. estate tax on U.S.-situated property. For these purposes, stock in a foreign corporation generally is not treated as U.S.-situated property, even if the foreign corporation itself owns U.S.-situated property. However, a special estate tax rule applies to former citizens and former long-term residents who are subject to the alternative tax regime. Under this rule, certain closely-held foreign stock owned by the former citizen or former long-term resident is includible in his or her gross estate to the extent that the foreign corporation owns U.S.-situated assets, if the former citizen or former long-term resident dies within 10 years of citizenship relinquishment or residency termination. This rule prevents former citizens and former long-term residents who are subject to the alternative tax regime from avoiding U.S. estate tax through the expedient of transferring U.S.-situated assets to a foreign corporation (subject to income tax on any appreciation under section 367).

The special estate tax rule applies if the former citizen or former long-term resident who is subject to the alternative tax regime owns directly, at death, 10 percent or more of the total combined voting power of all classes of stock entitled to vote in the foreign corporation, and, directly or indirectly, more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote in the foreign corporation, or (2) the total value of the stock of such corporation. If this stock ownership test is met, then the estate of the former citizen or former long-term resident includes that proportion of the fair market value of the foreign stock owned by the decedent at death, which the fair market value of any assets owned by such foreign corporation and situated in the United States (at death) bears to the total fair market value of all assets owned by such foreign corporation (at death).[594]

No analogous rule applies for gift tax purposes, despite the fact that the concerns relating to the transfer of U.S.-situated assets to foreign corporations are equally present in this context. Thus, under present law, former citizens and former long-term residents who are subject to the alternative tax regime and who wish to make a gift of U.S.-situated property can transfer such

[594] Sec. 2107(b).

property to a foreign corporation (subject to income tax on any appreciation under section 367), and then make a gift of stock in the corporation free of gift tax. In this manner, a higher-rate transfer tax based on the total value of the property generally may be avoided at the cost of paying a lower-rate income tax based only on the appreciation of the property.

Joint Committee staff recommendation

The Joint Committee staff recommends that gifts of certain closely-held foreign stock by a former citizen or former long-term resident who is subject to the alternative tax regime be subject to gift tax if made within the 10-year period after citizenship relinquishment or residency termination. The terms of this special gift tax rule would be similar to those of the special estate tax rule. This proposal would create parity between the estate tax and the gift tax in this regard and would combat a well-known method of gift tax avoidance.

The gift tax rule would apply if the former citizen or former long-term resident owns directly, before making the gift, 10 percent or more of the total combined voting power of all classes of stock entitled to vote in the foreign corporation, and, directly or indirectly, more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote in the foreign corporation, or (2) the total value of the stock of such corporation. If this stock ownership test is met, then taxable gifts of the former citizen or former long-term resident would include that proportion of the fair market value of the foreign stock transferred by the individual, at the time of the gift, which the fair market value of any assets owned by such foreign corporation and situated in the United States (at the time of gift) bears to the total fair market value of all assets owned by such foreign corporation (at the time of gift).

This special gift tax rule would apply to a former citizen or former long-term resident who is subject to the alternative tax regime and who owns stock in a foreign corporation at the time of the gift, regardless of how such stock was acquired (e.g., whether issued originally to the donor, purchased, or received as a gift or bequest).

5. Impose annual return requirement

Require former citizens and former long-term residents who are subject to the alternative tax regime to file an annual return for each of the 10 years following citizenship relinquishment or residency termination

Background

Under present law, U.S. citizens who relinquish citizenship and long-term residents who terminate residency generally are required to provide information about their assets held at the time of their citizenship relinquishment or residency termination. If the collective fair market value of the former citizen's or former long-term resident's assets exceeds $500,000, then detailed information about the individual's and assets must be provided. However, this information generally is required to be provided only once.

Former citizens and former long-term residents who are subject to the alternative tax regime also are required to file annual income tax returns, but only in the event that they owe

U.S. Federal income tax. If a tax return is required, the former citizen or former long-term resident is required to provide the IRS with a statement setting forth (generally by category) all items of U.S.-source and foreign-source gross income, but no detailed information with respect to all assets held by the individual.

The Joint Committee staff believes that these information-reporting and return-filing provisions fail to provide the IRS sufficient information to enable it to monitor effectively the compliance of former citizens and former long-term residents with the alternative tax regime.

Joint Committee staff recommendation

The Joint Committee staff recommends that former citizens and former long-term residents be required to file an annual return for each year following citizenship relinquishment or residency termination in which they are subject to the alternative tax regime. The annual return would be required even if no U.S. Federal income tax is due. The annual return would require certain information, including information on the permanent home of the individual, the individual's country of residency, the number of days the individual was present in the United States for the year, and detailed information about the individual's income and assets that are subject to the alternative tax regime.

In general, former citizens and former long-term residents who are subject to the alternative tax regime would be required to provide annual income and balance sheet information on their U.S. assets, as well as foreign assets that are subject to U.S. tax under the alternative tax regime. This requirement would include information relating to foreign stock potentially subject to the special estate tax rule of section 2107(b) (and the analogous gift tax rule recommended above by the Joint Committee staff).

Obtaining annual information on the income and assets of former citizens and former long-term residents who are subject to the alternative tax regime would permit the IRS to monitor more effectively both the income generated by assets as well as any dispositions of assets that may be subject to U.S. tax. In addition, an annual filing would provide the IRS with up-to-date address and residency information.

6. Transition issues

The Joint Committee staff recognizes that transition issues would have to be addressed in connection with implementing the above recommendations. First, any Joint Committee staff recommendations that are adopted should apply on a prospective basis. Second, any Joint Committee staff recommendations that would override any conflicting treaty provisions should be given the same treatment as present-law section 877 (i.e., such conflicting treaty provisions would be overridden until the tenth anniversary of the enactment of the 1996 tax legislation applicable to former citizens and former long-term residents).

Third, the Joint Committee staff recommends an immediate moratorium on the issuance by the IRS of the "fully submit" category of rulings under IRS Notice 98-34. Under this category of rulings, the IRS loses a statutory presumption in its favor, but declines to reach an

opinion as to the central determination it is required to make in lieu of that presumption (i.e., the determination of taxpayer purpose).[595]

[595] As discussed in Part VII.B, above, "fully submit" rulings accounted for approximately half the rulings issued by the IRS under Notice 98-34 through July 1, 2002.

B. Recommendations Relating to the Immigration Treatment of Citizenship Relinquishment and Residency Termination

1. Conform present-law immigration provision to tax rules

(a) If the alternative tax regime recommendations set forth in Part A, above, are adopted, the Joint Committee staff recommends that the immigration law be modified to provide that a former citizen or former long-term resident who is subject to the alternative tax regime be barred from reentry into the United States unless such individual provides evidence of full compliance with his or her obligations under the alternative tax regime, as determined by the IRS.

(b) If the alternative tax regime recommendations are not adopted, the Joint Committee staff recommends that the immigration law be modified to provide that a former citizen or former long-term resident who is subject to the present-law alternative tax regime, as determined by the IRS, be barred from reentry into the United States.

Background

Under the immigration law, any former citizen of the United States who renounces U.S. citizenship and who is determined by the Attorney General to have done so for the purpose of avoiding U.S. tax is barred from reentering the United States.[596] The Attorney General is charged with the sole responsibility for making these determinations, based on information received from the Department of State and the IRS (subject to the disclosure restrictions imposed by section 6103).[597]

The special tax rules and the special immigration rules applicable to individuals who relinquish citizenship or terminate residency differ in three fundamental respects. First, the present-law immigration provision applies only to former citizens who relinquish citizenship for tax-motivated reasons. Former long-term residents are not subject to the immigration provision, even though such individuals are covered by the present-law alternative tax regime. Second, the present-law immigration provision applies only if tax avoidance is found to be the principal purpose for relinquishing citizenship, whereas the present-law tax provision applies if tax avoidance is found to be a principal purpose for relinquishing citizenship (or terminating residency). Third, under the present-law immigration provision, the Attorney General (as opposed to the IRS) makes the determination of whether a former citizen's relinquishment of

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[596] *See also*, the discussion in 2., below, concerning waivers of grounds of inadmissibility.

[597] As discussed in Part V, above, the Homeland Security Act transfers the functions of the INS and the immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security. For clarity of exposition, the discussion in this Part XI continues to refer to the separate agency functions, since the mechanical aspects of these transfers of responsibility remain to be resolved.

citizenship was tax-motivated and is not given any objective standards to guide this determination.

Joint Committee staff recommendation

In general

The Joint Committee staff believes that the present-law tax and immigration provisions should be coordinated in terms of both coverage and administration. Accordingly, the substantive standards governing whether a former citizen or former long-term resident is eligible for reentry into the United States should be tied to the tax law provisions, and the IRS should be primarily responsible for applying these standards, due to its privileged access to the necessary taxpayer information.

Coordination with the Joint Committee staff's tax recommendations

If the alternative tax regime recommendations described in Part A, above, are adopted, the Joint Committee staff recommends that former citizens and former long-term residents who provide evidence of full compliance with U.S. Federal tax obligations under the alternative tax regime be allowed to reenter the United States. However, under the third Joint Committee staff recommendation in Part A, above, if such an individual remains in the United States for more than 30 days in a calendar year, he or she would be treated as a U.S. resident for Federal tax purposes for that year. The Joint Committee staff believes that this is a sufficient sanction for maintaining significant ties to the United States following citizenship relinquishment or residency termination. Under this approach, the present-law immigration provision would be amended by removing the requirement that the relinquishment of citizenship be tax-motivated, and instead would deny a former citizen or former long-term resident reentry into the United States if the individual fails to establish to the IRS's satisfaction full compliance with all obligations under the alternative tax regime.[598]

In satisfying the standard of full compliance, former citizens and former long-term residents would be required to establish that they have provided all necessary tax documentation, including the filing of all required returns and schedules, and have paid any U.S. Federal tax due. The IRS would review all relevant information collected to determine those individuals who are subject to the alternative tax regime and are not compliant with their U.S. Federal tax obligations. The IRS would forward those names and other identifying information to the Department of State (including U.S. consular offices). Upon a later finding of full compliance with all U.S. Federal tax obligations under the alternative tax regime, such individuals would be permitted to reenter under immigration law.

[598] If an individual is treated as a U.S. resident under the 30-day rule recommended by the Joint Committee staff, then, in later years, the necessary compliance with U.S. Federal tax obligations for purposes of the immigration rule would include compliance with the individual's tax obligations as a U.S. resident for any year in which the 30-day rule applies.

Coordination with the present-law tax provisions

If the alternative tax regime recommendations described in Part A, above, are not adopted, the Joint Committee staff recommends that former citizens and former long-term residents subject to the present-law alternative tax regime be subject to the immigration provision denying certain individuals reentry into the United States. Thus, the alternative tax regime and related immigration provision would have uniform applicability and would apply with the same force to both former citizens and former long-term residents.

2. Eliminate discretionary exception from immigration provision

The Joint Committee staff recommends eliminating the discretion of the Attorney General to waive substantive grounds of inadmissibility with respect to former citizens and former long-term residents who would otherwise be inadmissible under the entry ban relating to tax avoidance.

Background

Under the present-law immigration rules, former U.S. citizens who renounce their citizenship for purposes of tax avoidance, as determined by the Attorney General, are inadmissible to the United States.[599] Under the immigration law, no waiver of inadmissibility is available for persons seeking immigrant status, but nonimmigrants can seek a waiver of inadmissibility.

If a nonimmigrant visa, such as a tourist visa, is sought, the Attorney General may waive grounds of substantive inadmissibility, except on certain security and related grounds. The waiver is purely discretionary and the law provides no criteria for the exercise of this discretion. In practice, the Government considers the risk of harm in admitting the applicant, the seriousness of the acts that cause inadmissibility, and the importance of the applicant's reason for seeking entry, which need not be compelling. Thus, even if a person is found to have relinquished citizenship for purposes of tax avoidance, such person may still be permitted to enter the United States if the Attorney General issues a waiver.

Joint Committee staff recommendation

The Joint Committee staff recommends that no waivers of substantive inadmissibility be available for former citizens and former long-term residents who are inadmissible by reason of the special immigration rules relating to tax avoidance. The Joint Committee staff believes that this proposal would bolster the deterrent effect of the special immigration rules.

[599] 8 U.S.C. sec. 1182(a)(10)(E).

3. Promote interagency information sharing

The Joint Committee staff recommends that the INS's databases be made accessible to the IRS and other appropriate Federal agencies for purposes of administering the entry ban relating to tax avoidance. These databases also should be modified to include social security numbers, if available, and in the case of non-criminal inadmissibility waivers, the type of waiver granted.

Background

One difficulty in administering the present-law immigration provision is that INS databases are not adequately interconnected with the databases of the IRS, the Department of Justice, the Department of State, and the Department of Treasury. Indeed, the majority of the information in the INS databases is not accessible to the other agencies. A related problem is that, unlike IRS databases, the INS databases are organized by alien registration number, and thus often do not contain social security numbers. Also, INS databases do not include the type of waiver granted in cases of non-criminal admissibility waivers.

Joint Committee staff recommendation

The Joint Committee staff recommends that the INS's databases be modified to facilitate and improve the sharing of information among the INS, the IRS, the Department of Justice, the Department of State, and the Department of Treasury. These databases should include social security numbers, if available, and in the case of non-criminal inadmissibility waivers, the type of waiver granted. The INS and Department of State databases should be available to the IRS for the purpose of monitoring former citizens and former long-term residents both at the port of entry and as they request visas. This proposal would enable the IRS to work in tandem with the INS and the Department of State to identify persons who are inadmissible under the immigration provision, and thereby enforce such provision.

4. Amend Code section 6103

The Joint Committee staff recommends that Code section 6103 be modified to enable the IRS to share with the appropriate agencies the minimum tax information necessary to implement the immigration provision.

Background

To effectively administer the present-law immigration provision, as well as the Joint Committee staff recommendations, the Department of State, the INS, and the IRS need to work together to identify and track individuals who are subject to the alternative tax regime. Under present law, this effort requires the Department of State and the INS to have access to certain tax return information from the IRS. Under present law, the IRS is prohibited from disclosing tax returns or return information unless specifically authorized. No explicit exception to the disclosure rules applies to facilitate the implementation of the present-law immigration provision. As a result, the present-law immigration provision cannot be fully implemented.

Joint Committee staff recommendation

The Joint Committee staff recommends that the provisions relating to the confidentiality of tax returns and return information be modified to enable the IRS to share with the appropriate agencies the minimum information necessary to implement the immigration provision.[600] The information would be disclosed pursuant to Treasury regulations.[601]

[600] If primary responsibility for determining excludability under the special immigration provision were transferred to the IRS (in accordance with the first Joint Committee staff immigration recommendation above), then less return information would need to be shared than would be necessary if another agency remained primarily responsible for such determinations.

[601] Recordkeeping requirements, safeguards, and civil and criminal penalties for unauthorized disclosure or inspection would apply to return information disclosed under this provision. Sec. 6103(p).

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COMPARISON OF SAVING CLAUSE PROVISIONS IN BILATERAL U.S. TAX TREATIES

Summarized below are the different types of saving clause provisions in bilateral U.S. tax treaties currently in force. The first four tables are lists of U.S. income tax treaties that:

(1) Contain saving clauses that preserve the right of the United States to tax current citizens but do not expressly mention former citizens;

(2) Contain saving clauses that expressly apply to current citizens and to former citizens (for 10 years after the loss of citizenship if such loss had as one of its principal purposes the avoidance of tax), but do not expressly mention former long-term U.S. residents;

(3) Contain saving clauses that expressly apply to current and former citizens after the loss of citizenship regardless of the reason for such loss; and

(4) Contain saving clauses that expressly apply to current citizens, and to former citizens and former long-term U.S. residents for 10 years after the loss of citizenship if such loss had as one of its principal purposes the avoidance of tax.

The last two tables are lists of U.S. estate and gift tax treaties that:

(1) Do not expressly apply to former citizens or former long-term residents; and

(2) Contain saving clauses that expressly apply to current citizens and to former citizens (for 10 years after the loss of citizenship if such loss had as one of its principal purposes the avoidance of tax), but do not expressly mention former long-term U.S. residents.

These tables are based on information provided by the Treasury Department (See the April 7, 2000, letter from the Treasury Department at A-20). The tables have been updated by the Joint Committee staff to reflect changes in treaties since 2000.

Appendix Table 1.–Income Tax Treaties That Contain Saving Clauses That Preserve the Right of the United States to Tax Its Current Citizens But Do Not Expressly Mention Former Citizens or Former Long-Term Residents

Treaty Partner	Year Treaty/ Protocol Signed	Article No.	Notes
Belgium	1970	23(1)	
Bermuda	1986	4(1)	
China	1984	Protocol 2	(1)
Egypt	1980	6(3)	
Greece	1950	XIV	
Iceland	1975	4(3)	
Japan	1971	4(3)	
Korea	1976	4(4)	
Morocco	1977	20(3)	
Pakistan	1957	II(1)(i)	(2)
Philippines	1976	6(3)	
Poland	1974	6(3)	
Romania	1973	4(3)	
Trinidad and Tobago	1970	3(3)	
USSR	1973	VII	(3)
United Kingdom	1975	1(3)	

Notes to Appendix Table 1:

(1) The Senate Foreign Relations Committee Report and the Treasury Department Technical Explanation to the U.S.-China income tax treaty provide that the saving clause in that treaty is intended to apply to former U.S. citizens whose loss of such status had as one of its principal purposes the avoidance of U.S. tax.

(2) The U.S.-Pakistan treaty does not contain a specific saving clause. Instead, the treaty provides that a resident of Pakistan does not include a U.S. citizen. The intent of the provision is to preserve the right of the United States to tax its citizens.

(3) The U.S.-U.S.S.R. income tax treaty that was signed in 1973 remains in effect for the following countries: Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan (See Rev. Proc. 93-22A).

Appendix Table 2.–Income Tax Treaties That Contain Saving Clauses That Explicitly Apply to Current Citizens and to Former Citizens (for 10 Years After the Loss of Citizenship if Such Loss Had as One of Its Principal Purposes the Avoidance of Tax) But Do Not Expressly Mention Former Long-Term Residents

Treaty Partner	Year Treaty/ Protocol Signed	Article No.	Notes
Australia	1982	1(3)	(1)
Austria	1996	1(4)	(1)
Barbados	1984	1(3)	(1)
Canada	1983	XXIX(2), Protocol; XIII(1)	(1)
Cyprus	1984	4(3)	(1)
Finland	1989	1(3)	(1)
France	1994	29(2)	(2)
Germany	1989	Protocol 1(a)	(2)
India	1989	1(3)	(1)
Indonesia	1988	28(3)	(1)
Ireland	1997	1(4)	(1)
Israel	1975	6(3)	(1) & (3)
Italy	1984	1(2)(b), Protocol 1(1)	(1) & (4)
Jamaica	1980	1(3)	(2)
Luxembourg	1996	1(3)	(1)
Mexico	1992	1(3)	(1)
Netherlands	1992	24(1)	(2) & (5)
New Zealand	1982	1(3)	(1)
Norway	1971	22(3), Protocol IX	(2)
Portugal	1994	Protocol 1(b)	(1) & (3)
Spain	1990	1(3), Protocol 1	(1) & (3)
Sweden	1994	1(4)	(1)
Tunisia	1985	22(2)	(1) & (6)
Turkey	1996	1(3)	(1)

Notes to Appendix Table 2:

(1) The tax avoidance motive is determined by whether there is avoidance of any tax.
(2) The tax avoidance motive is determined by whether there is avoidance of income tax.
(3) Competent authorities shall consult on the purpose of the loss of citizenship.
(4) The Senate has given its advice and consent to a new treaty and protocol with Italy, signed August 25, 1999, which is awaiting ratification by Italy. The new treaty and protocol's saving clause (Article 1(2) and Protocol 1(1)) would explicitly include former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of tax.
(5) The saving clause does not apply to nationals of the Netherlands.
(6) Tax avoidance motive must be acknowledged by the taxpayer or determined by a court. There is also no limit on the number of years that a country may tax its former citizens.

Appendix Table 3.–Income Tax Treaties That Contain Saving Clauses That Explicitly Apply to Current Citizens and Former Citizens After the Loss of Citizenship Regardless of the Reason of Such Loss But Do Not Mention Former Long-Term Residents

Treaty Partner	Year Treaty/ Protocol Signed	Article No.	Notes
Czech Republic	1993	1(3)	(1)
Hungary	1979	1(2)	(1)
Kazakhstan	1993	1(3)	(1)
Russian Federation	1992	1(3)	(1)
Slovak Republic	1993	1(3)	(1)
Switzerland	1996	1(2)	(1)
Ukraine	1994	1(3)	(1)

Notes to Appendix Table 3:

(1) The treaty contains no restriction on the number of years that either country may tax a former citizen and no requirement that the former citizen expatriated for a tax avoidance purpose.

Appendix Table 4.–Income Tax Treaties That Contain Saving Clauses That Explicitly Apply to Current Citizens and to Former Citizens and Former Long-Term Residents for 10 Years After the Loss of Such Status if Such Loss Had as One of Its Principal Purposes the Avoidance of Tax

Treaty Partner (1)	Year Treaty/ Protocol Signed	Article No.	Notes
Denmark	1999	1(4)	
Estonia	1998	1(4)	
Latvia	1998	1(4)	
Lithuania	1998	1(4)	
Slovenia	1999	1(4)	
South Africa	1997	1(4)	
Thailand	1996	1(2)	
Venezuela	1999	1(4), 17(3), Protocol 1	(2)

Notes to Appendix Table 4:

(1) The Senate has given its advice and consent to ratification of a new U.S. income tax treaty and protocol with Italy (signed August 25, 1999). The treaty and protocol are currently are awaiting ratification by the Italian government. The new treaty and protocol (Article 1(2), Protocol 1(1)) contain a saving clause provision which explicitly would include former citizens and former long-term residents for 10 years if the loss of such status had for one of its principal purposes the avoidance of U.S. tax.

(2) Former long-term residents are addressed in the Limitation on Benefits provision of the U.S.- Venezuela income tax treaty (Article 17(3)), which denies such persons the benefits of the treaty for 10 years if the loss of such status had for one of its principal purposes the avoidance of U.S. tax. The effect of this provision is to preserve the right of the United States to tax such former long-term residents.

Appendix Table 5.–Estate and Gift Tax Treaties That Do Not Explicitly Preserve the Right of the United States to Tax Former Citizens or Former Long-Term Residents

Treaty Partner	Year Treaty Signed	Article No.	Notes
Australia	1953	V(1)	(1) & (2)
Finland	1952	IV(1), V(1)	(1) & (3)
France	1978	8	(4)
Greece	1950	VI(1)	(1) & (3)
Ireland	1949	V(1)	(1) & (3)
Italy	1955	V(1)	(1) & (3)
Japan	1954	V(1)	(1) & (4)
Netherlands	1969	9	(3)
Norway	1949	V(1)	(1) & (3)
South Africa	1947	IV(2), V(1)	(1) & (3)
Switzerland	1951	III, IV (1)	(1) & (3)
United Kingdom	1978	5(1)(b)	(4)

Notes to Appendix Table 5:

(1) The treaty does not have an explicit saving clause. However, the general structure of the treaty allows the United States to tax its citizens, provided a foreign tax credit is allowed for tax imposed by the other country on property situated in that other country.

(2) The United States has an estate tax treaty and a gift tax treaty with Australia, both of which were signed in 1953.

(3) The treaty covers estate taxes.

(4) The treaty covers both estate and gift taxes

Appendix Table 6.–Estate and Gift Tax Treaties Containing Saving Clauses That Explicitly Apply to Current Citizens and to Former Citizens for 10 Years after the Loss of Citizenship if Such Loss Had as One of its Principal Purposes the Avoidance of Tax (Including Income Tax), But That Do Not Explicitly Mention Former Long-Term Residents

Treaty Partner	Year Treaty/ Protocol Signed	Article No.	Notes
Austria	1982	9(1)	(1)
Denmark	1983	1(3)	(1)
Sweden	1983	1(3)	(1)

Notes to Appendix Table 6:

(1) The treaty covers both estate and gift taxes.

Appendix Table 7.–Estate and Gift Tax Treaties Containing Saving Clauses That Explicitly Apply to Current Citizens, Former Citizens, and Former Long-Term Residents for 10 Years after the Loss of Citizenship if Such Loss Had as One of its Principal Purposes the Avoidance of Tax (Including Income Tax)

Treaty Partner	Year Treaty/ Protocol Signed	Article No.	Notes
Germany	1980	11(1)(a)	(1) & (2)
	1998	Protocol 1(4)	

CORRESPONDENCE

The following materials contain copies of certain correspondence with the General Accounting Office, Internal Revenue Service, Department of the Treasury, Department of State, Immigration and Naturalization Service, and Department of Justice (Tax Division) in connection with the Joint Committee staff research for this review. Memoranda prepared by the Congressional Research Service at the request of the Joint Committee staff are also contained herein. Tax return information that is subject to the disclosure requirements of Code section 6103 and certain other information have been redacted from the correspondence.

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Congress of the United States
JOINT COMMITTEE ON TAXATION
Washington, DC 20515-6453

December 7, 1999

Honorable David M. Walker
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Comptroller Walker:

In August 1996, the Internal Revenue Code (the "Code") was modified to address issues related to tax-motivated expatriation, as part of the Health Insurance Portability and Accountability Act of 1996 ("HIPA").[1] In addition, in September 1996, the immigration laws were changed to restrict the ability of tax-motivated expatriates to reenter the United States, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "1996 Immigration Act").[2] House Ways and Means Committee Chairman Bill Archer has requested the staff of the Joint Committee on Taxation ("Joint Committee staff") to undertake a review of these rules. In particular, the Joint Committee staff has been requested to: (1) review whether the expatriation rules under the Code and related rules restricting visas for tax-motivated expatriates have been applied by the Administration in the manner intended by Congress, (2) review whether these rules have been effective in deterring tax-motivated expatriation, and (3) provide recommendations on ways to improve such rules if our review indicates that the existing rules have not been effective.

We have been requested to provide the results of our review by May 31, 2000.

In connection with this review, the Joint Committee staff requests the U.S. General Accounting Office (the "GAO") to review the following general areas.

- Whether the Internal Revenue Service (the "IRS") has procedures in place (and the extent to which such procedures are followed) that ensure adequate compliance and enforcement of the tax-motivated expatriate rules relating to income taxation;

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[1] For example, HIPA included several amendments to the tax-motivated expatriation rules of sections 877 and 2107, and added a new section 6039G (relating to certain information reporting requirements).

[2] Division C of the Omnibus Consolidated Appropriations Act, 1997, sec. 352, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

Congress of the United States
JOINT COMMITTEE ON TAXATION
Washington, DC 20515-6453

- Whether the IRS has procedures in place (and the extent to which such procedures are followed) that ensure adequate compliance and enforcement of the tax-motivated expatriate rules relating to estates, gifts, and trusts;

- How the private letter ruling process is being used by taxpayers and the IRS to determine the application of the expatriation rules; and

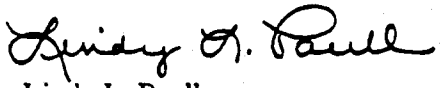
- Whether the State Department and the Immigration and Naturalization Service have procedures in place (and the extent to which such procedures are followed) (1) that ensure adequate compliance and enforcement with the 1996 Immigration Act relating to expatriates and (2) to coordinate with the IRS and/or the Attorney General's office relating to whether the expatriation was tax motivated.

The Joint Committee staff, pursuant to section 6103(f)(4) of the Code, requests that the GAO conduct the work as outlined in this letter. We expect that your designated representatives will have access to all IRS files, records, and returns necessary to complete this work for the Joint Committee staff. We recognize that other Congressional committees and Members of Congress may ask to be briefed on the progress of your work. We do not object to such briefings; however, we would like to be notified in writing of any such briefings and be given the opportunity to attend. (Of course, these briefings may not include disclosure of tax return information.) Although section 6103 access is necessary to conduct this review, your report should not contain any information subject to section 6103 disclosure restrictions. If this appears to present difficulties in fulfilling our request, please contact me as soon as possible so that we can further discuss this issue.

Due to the report deadline, the Joint Committee staff requests that you provide your final response prior to March 30, 2000. In addition, we ask that you supply this information as it becomes available. All information needs or delivery should be coordinated through Rick Grafmeyer, who may be reached at (202) 225-3621.

We appreciate your assistance in this matter and look forward to working with you.

Sincerely,



Lindy L. Paull
Chief of Staff

Congressional Research Service • Library of Congress • Washington, D.C. 20540

Memorandum

March 31, 2000

TO : Joint Committee on Taxation
Attention: Deirdre James

FROM : William J. Krouse
Analyst in Social Legislation
Domestic Social Policy Division

SUBJECT : **Issues Related to Excluding Tax-motivated Expatriates Under Section 212(a)(10)(E) of The Immigration and Nationality Act**

This memorandum examines issues related to implementing Section 212(a)(10)(E) of the Immigration and Nationality Act. This provision makes former U.S. citizens inadmissible for entry into the United States if the Attorney General determines they renounced their U.S. citizenship (expatriated) in order to avoid taxation by the United States.

Background

The Immigration and Nationality Act of 1952 (INA: 8 U.S.C. § 1101 et seq.) is the main body of law governing immigration to the United States. Section 103 of the INA gives primary responsibility for the administration and enforcement of immigration law to the Attorney General. Most of that authority is delegated to the Commissioner of the Immigration and Naturalization Service (INS). Section 104 of the INA also gives a large amount of responsibility for the administration and enforcement immigration law to the Secretary of State as it relates to the duties and functions of consular officers. With limited exceptions, any alien seeking to enter the United States is required to present valid documentation as required by the Attorney General in regulation.[1] Usually, such documentation includes a passport and visa. Immigrant and nonimmigrant visas are issued to eligible aliens by U.S. consular officers abroad. Any alien seeking entry into the United States must apply for admission at a designated international port of entry.

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[1]Section 212(d)(4)(B) of the INA gives the Secretary of State and the Attorney General the discretionary authority to waive documentary requirements for admission. These requirements are often waived on the basis of reciprocity. For further information on nationals for whom the Attorney General has waived nonimmigrant documentary requirements, see Sections 212.1(a) and (b) of *8 Code of Federal Regulations*. The Visa Waiver Pilot Program also authorizes the Attorney General to waive certain nonimmigrant visa requirements.

During both the visa and admission processes, aliens must satisfy the consular and immigration officer that they are not inadmissible under any of the grounds outlined in Section 212(a) of the INA. Grounds for inadmissibility are currently divided into 10 categories: 1) health-related grounds; 2) criminal and related grounds; 3) security and related grounds; 4) public charge proscription; 5) labor certification requirements and qualifications for certain immigrants; 6) illegal entrants and immigration violators proscription; 7) documentation requirements; 8) ineligibility for citizenship; 9) aliens unlawfully present; and 10) miscellaneous.

Among the miscellaneous grounds of inadmissibility is Section 212(a)(10)(E), which makes any former U.S. citizen who renounced citizenship to avoid taxation in the United States ineligible for admission into the United States. This provision was added to the INA by Section 352 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA; Division C of P.L. 104-208). It is important to note that this provision is not retroactive; it only applies to persons who renounced their citizenship on or after September 30, 1996 — the effective date of IIRIRA. Also, while there is no waiver of the "tax-motivated expatriation" ground for inadmissibility for an immigrant visa, there is a waiver for a nonimmigrant visa under current law.

Early on, however, observers noted that the implementation of Section 212(a)(10)(E) would be "beset with operational complications," for this provision charged the Attorney General with the *sole* responsibility for making determinations whether persons renounced their citizenship to avoid taxation in the United States. Observers noted that to make such determinations, at least three agencies would need to be involved. Those agencies include the Department of State's Bureau of Consular Affairs, the Department of Treasury's Internal Revenue Service (IRS), and the INS.[2]

Thus, the narrow statutory construction of Section 212(a)(10)(E), by giving the Attorney General the sole responsibility for making these determinations, has led to operational problems that have affected the implementation of this law. To date, not a single person has been excluded from entry into the United States for renouncing U.S. citizenship to avoid taxation.[3]

Formal Renunciation of Citizenship Before Consular Officers

The Department of State is responsible for determining the nationality and citizenship status of a person located outside the United States. Section 349(a) of the INA enumerates the specific acts that can trigger loss of citizenship, if such acts were voluntarily performed with the intent of relinquishing U.S. citizenship. Such acts include 1) obtaining naturalization in a foreign state; 2) taking oaths of allegiance to a foreign state; 3) entering into military service in a foreign state; 4) accepting policy-level foreign government employment; 5) making a formal renunciation of nationality before a diplomatic or consular

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[2]October 21, 1996 State Department Cable to all diplomatic and consular posts (no. 96-State-219622), reprinted in "State Dept. Instructs on New Voting and Renunciation of Citizenship Grounds of Exclusion," *Interpreter Releases*, v. 73, October 28, 1996, p. 1504.

[3]Both INS and DOS officials confirmed this fact with the author.

officer; 6) making a formal written renunciation of nationality to an officer designated by the Attorney General during wartime; or 7) if convicted of treason and subversion.

While case law regarding expatriation is lengthy and complicated, the leading Supreme Court case holds that U.S. citizens cannot be found to have expatriated themselves (i.e., voluntarily abandoned the United States, becoming the citizen of another country, by performing one of the acts enumerated in Section 249(a) other than taking an oath of renunciation), unless they did so intending to relinquish U.S. citizenship (*Vance v. Terrazas*, 444 U.S. 252, 1980). Over time, administrative authorities have become increasingly reluctant to infer intent to relinquish citizenship from otherwise expatriating acts. Consequently, for purposes of implementing Section 212(a)(10)(E), excluding tax-motivated expatriates, Section 349(a)(5), whereby a person formally renounces their citizenship to a consular officer, is the only provision that denotes conclusively that U.S. citizenship was renounced voluntarily and with clear intent and is, therefore, applicable to this discussion.

Consular officers are at times called upon to administer "Oaths of Renunciation" under Section 349(a)(5). According to State's *Foreign Affairs Manual*, there are three requirements for an oath of renunciation of U.S. citizenship. The oath of renunciation must 1) be taken in the presence of a diplomatic or consular officer, 2) be taken outside of the United States, and 3) be in the precise form prescribed by the Secretary of State. The consular officer must be satisfied that the person desiring to renounce U.S. citizenship is a U.S. citizen. Evidence of a person's U.S. citizenship is usually a matter of record in the form of a U.S. passport. Also, consular officers are required to take steps to establish that the renunciation is voluntary. As part of this process, the intending renunciant must read and sign a statement of understanding. In addition, an oath of renunciation is signed in triplicate by the renunciant and the officer. A Form FS-348 "Certificate of Loss of Nationality (CLN)" is prepared by the consular officer in quadruplicate, a copy of which is issued to the renunciant (expatriate).[4]

Under current law, State provides IRS with information about persons who renounce their U.S. citizenship.

Expatriates and the Internal Revenue Service (IRS)

Prior to enacting the Illegal Immigration Reform and Immigrant Responsibility Act, the 104th Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIPA; P.L. 104-191), which also includes provisions designed to discourage tax-motivated expatriation. HIPA included a provision that amended the Internal Revenue Code (IRC) at Section 877. This provision applies to both U.S. citizens who renounce or relinquish their citizenship and to legal permanent residents (immigrants) who abandon their U.S. residency for tax purposes. Under this provision, there is an irrebuttable presumption that an individual who has expatriated has a principal purpose of avoiding U.S. taxation if either their average annual net income tax for the five taxable years ending before the date of the expatriation is greater than $100,000 (the "tax liability test"), or the net worth of the individual is $500,000 or more (the "net worth test").

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[4] "Loss and Restoration of U.S. Citizenship, Part 1200," *Foreign Affairs Manual*, v. 7, as reprinted in *Immigration Law and Procedure*, v. 17, (Matthew Bender) p. 135- 170.

It is of interest to note that the test under Section 877 (IRC) is that tax-motivation be "one of the principal purposes" for expatriation; whereas, under Section 212(a)(10)(E) (INA), the test for inadmissibility is that tax-motivation be "the purpose" of expatriation. Consequently, the test is more inclusive under Section 877 than under Section 212(a)(10)(E). In addition, Section 212(a)(10)(E) only applies to former citizens and not to legal permanent residents who have abandoned their residency in the United States to avoid taxation (albeit a more difficult determination), leading some observers to suggest that there is a disparity in the law.[5]

As required by HIPA, IRS publishes a list quarterly in the *Federal Register* of the names of persons who have renounced their U.S. citizenship (expatriates) and who, by having renounced citizenship, may have done so to avoid taxation and may meet tax liability or net worth tests under Section 877(a). The IRS, however, does not make a preliminary determination based upon its records whether these expatriates meet either test and, thus, would be inadmissible into the United States. Consequently, these lists include expatriates whose motivation may not have been tax avoidance, and whose exclusion might be an embarrassment to the United States.

[*REDACTED INFORMATION***]**

[5]"Tax Problems for Departing Aliens," by David M. Hudson, *Immigration Briefings*, no. 97-03, March 1997, p. 36.

[***REDACTED INFORMATION***]

[6]The Visa Waiver Pilot Program authorizes the Attorney General to waive the visa documentary requirements for nationals from certain designated countries as temporary visitors for business or pleasure. For further information, see CRS Report 97-309, *Immigration: Visa Waiver Pilot Program*, by Ruth Ellen Wasem.

[***REDACTED INFORMATION***]

Alternatives for Congress

Regarding the exclusion of tax-motivated expatriates, Congress has several options, including 1) Section 212(a)(10)(E) of the INA could be repealed in which case, one mechanism by which to enforce Section 877 would be eliminated (IRS could still take other actions against these persons under Section 877); 2) take no action and the Departments of Justice, State, and Treasury could be left to solve the operational problems related to excluding tax-motivated expatriates; or 3) Section 212(a)(10)(E) could be amended in such a way as to mandate closer cooperation between Justice, State, and Treasury in effecting the exclusion of tax-motivated expatriates.

Under the third option, one possibility is that the Department of State could inform persons intending to renounce their U.S. citizenship that they would be presumed to have renounced their citizenship for tax purposes unless they signed releases that would allow the IRS to make a preliminary determination based on tax records. Such releases could also include the requirement that the expatriates provide specific information such as their social security or tax identification numbers by which the IRS could more expeditiously locate the person's files. Following an IRS determination concerning the expatriates' motivations, State could then send official notification to the expatriates while their foreign addresses are still current. In addition, such a notification could be used to inform expatriates of a rebuttal process by which they could administratively contest IRS determinations, if such determinations showed tax-motivation. Failure to sign releases could result in an automatic presumption of tax-motivation, and, the expatriates' names and other personal information could be entered into the CLASS system.

If you should have any questions or need further assistance, please contact me at (202) 707-2225.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

Lindy L. Paull, Esq.
Chief of Staff
Joint Committee on Taxation
Congress of the United States
Washington, DC 20515-6453

APR 07 2000

Dear Ms. Paull:

This is in response to your letter of March 9, 2000, in which you requested certain information regarding the interaction of the 1996 expatriation tax legislation and United States tax treaties. This letter follows the general format of your letter.

1. List each U.S. tax treaty or protocol in force that conflicts (or potentially conflicts) with the 1996 expatriation tax rules.

Income Tax Treaties

A list of the income tax treaties and protocols that conflict (or potentially conflict) with the 1996 expatriation tax rules is attached hereto as Appendix A .

The income tax treaties on the list fall into three general categories:

1) Treaties in which the saving clause preserves the right of the United States to tax its current citizens, with no specific mention of former citizens or former long-term residents. *See* Table A-1 of Appendix A.

2) Treaties in which the saving clause expressly preserves the right of the United States to tax its current citizens and, for a period of 10 years, former citizens if the loss of citizenship had as one of its principle purposes the avoidance of tax (with no specific mention of former long-term residents). *See* Table A-2 of Appendix A.

3) Treaties in which the saving clause expressly preserves the right of the United States to tax its current and former citizens, with no condition that the loss of citizenship was tax-motivated and no limitation on the number of years former citizens are subject to tax (but with no specific mention of former long-term residents). *See* Table A-3 of Appendix A.

Estate and Gift Tax Treaties

A list of the estate and gift tax treaties that conflict (or potentially conflict) with the 1996 expatriation tax rules is attached hereto as Appendix B.

The estate and gift tax treaties on the list fall into two general categories:

1) Treaties that do not explicitly preserve the right of the United States to tax former citizens or former long-term residents. *See* Table B-1 of Appendix B.

2) Treaties in which the saving clause expressly preserves the right of the United States to tax its former citizens for a period of 10 years if the loss of citizenship had as one of its principle purposes the avoidance of tax including, for this purpose, income tax (but with no specific mention of former long-term residents). *See* Table B-2 of Appendix B.

2. For each such treaty or protocol, describe each provision that conflicts with the 1996 expatriation tax rules.

Income Tax Treaties

In general, income tax treaties provide relief from double taxation when a resident of one country (the "residence country") derives income arising in the other country (the "source country"). This is accomplished, in part, by limiting the source country's taxing jurisdiction with respect to certain types of income. For example, income tax treaties generally reduce (sometimes to zero) the rate of tax that the source country can impose on passive income (e.g., dividends, interest, and royalties) derived by a resident of the other treaty country, prevent the source country from taxing capital gains derived by such a resident, prevent the source country from taxing business or personal services income of such a resident unless it is attributable to a permanent establishment or fixed base in the source country, and prevent the source country from taxing other income not explicitly mentioned in the treaty.

A potential conflict could occur when income or gains are derived by a former citizen or former long-term resident residing in a country with which the United States has a treaty. The 1996 legislation generally imposes tax at graduated rates, for a period of 10 years, on the U.S. source income (including gains from the sale of stock or debt issued by a U.S. person and gains from tangible personal property located in the United States) of a former citizen or former long-term lawful permanent resident whose loss of such status had as one of its principal purposes the avoidance of U.S. tax. In contrast, if a former U.S. citizen or former U.S. resident is not covered by a saving clause, treaties generally provide for a reduced rate or exemption from tax on U.S.-source passive income, an exemption from tax on capital gains, a limitation on taxing business or personal services income, and a restriction on taxing other income not otherwise mentioned in the treaty.

This potential conflict can be resolved by including within the scope of a treaty's saving clause former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of U.S. tax. Such a provision would allow the United States to apply the 1996 legislation as if the treaty did not exist. As discussed in response to Question 3, below, since 1996 the Treasury Department has successfully negotiated, and the Senate has

given its advice and consent to ratification to, nine income tax treaties or protocols that include such a provision in their saving clauses, thereby eliminating any potential conflict. *See* Table A-4 of Appendix A. Seven of these treaties already have entered into force, and two are awaiting entry into force.

Seventeen income tax treaties currently in force contain saving clauses that do not explicitly preserve the right of the United States to tax former citizens or former long-term residents. *See* Table A-1 of Appendix A. These treaties potentially conflict with the 1996 legislation with respect to both former citizens and former long-term residents.

Twenty-three income tax treaties currently in force contain saving clauses that explicitly allow U.S. taxation of former citizens whose loss of citizenship was tax-motivated, but do not explicitly refer to former long-term residents. *See* Table A-2 of Appendix A. Twenty-one[1] of these treaties potentially conflict with the 1996 legislation with respect to former long-term residents. An additional potential conflict exists with the U.S.-Netherlands treaty, because that treaty provides that the saving clause does not apply to former U.S. citizens who are nationals of the Netherlands.

Eleven income tax treaties currently in force contain saving clauses that explicitly allow continued U.S. taxation of former citizens, with no explicit requirement that the expatriation be tax motivated. *See* Table A-3 of Appendix A. Ten[2] of these treaties potentially conflict with the 1996 legislation with respect to former long-term residents.

Estate and Gift Tax Treaties

As discussed in response to Question 3, below, the Treasury Department successfully negotiated a protocol to the U.S.-Germany estate and gift tax treaty, to which the Senate has given its advice and consent to ratification, that contains a saving clause that allows the United States, for a period of 10 years, to impose its estate and gift taxes on former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of U.S. tax. This protocol, upon entry into force, will eliminate any potential conflict between the existing treaty and the 1996 legislation.

Twelve estate and gift tax treaties currently in force do not explicitly preserve the right of the United States to tax estates of, or gifts by, former citizens and former long-term residents. *See* Table B-1 of Appendix B. These treaties potentially conflict with the 1996 legislation with respect to both former citizens and former long-term residents.

Four estate and gift tax treaties currently in force contain saving clauses that explicitly allow U.S. taxation of estates of, or gifts by, former citizens whose loss of citizenship was tax-

[1] Because the treaties with Austria and Ireland entered into force after the enactment of the 1996 legislation, the 1996 legislation does not override those treaties with respect to former long-term residents. See Reports of the Senate Committee on Foreign Relations regarding the Austria treaty (Exec. Rept. 105-7) and the Ireland treaty (Exec. Rept. 105-13).

[2] Because the treaty with Switzerland entered into force after the enactment of the 1996 legislation, the 1996 legislation does not override those treaties with respect to former long-term residents. See Report of the Senate Committee on Foreign Relations regarding the Switzerland treaty (Exec. Rept. 105-10).

motivated, but do not explicitly refer to former long-term residents. *See* Table B-2 of Appendix B. These treaties potentially conflict with the 1996 legislation with respect to former long-term residents.

3. For each such treaty or protocol, describe the steps that have been taken to eliminate any conflicts with the 1996 expatriation tax rules. If no steps have been taken, describe the steps that will be taken by the Treasury Department to eliminate any such conflicts, including any plans to renegotiate these treaties and the projected timing of such renegotiations.

Income Tax Treaties

The Treasury Department has undertaken significant efforts to eliminate potential conflicts between the 1996 expatriation tax legislation and treaties. In the 3 ½ years since the legislation was enacted, the Treasury Department has successfully negotiated, and the Senate has given its advice and consent to, nine income tax treaties or protocols containing saving clauses that explicitly allow the United States to impose its expatriation tax laws with respect to both former citizens and former long-term residents.[3] Seven of these treaties and protocols already have entered into force, and two are awaiting entry into force. *See* Table A-4 of Appendix A.

The Treasury Department currently is engaged in active income tax treaty negotiations with four countries. Three of these involve the renegotiation of treaties currently in force that potentially conflict with the 1996 expatriation tax legislation. Although the expansion of the saving clause in each of these treaties ultimately depends upon whether the United States and the other country can reach mutual agreement on all relevant issues, the Treasury Department intends to advocate the expansion of the provision in each renegotiation to incorporate the 1996 legislative changes. For additional discussion of the Treasury Department's current treaty policy regarding this issue, see the response to Question 5, below.

While the Treasury Department intends to advocate this expanded saving clause whenever it takes part in treaty negotiations, it would be extremely difficult to renegotiate all potentially conflicting treaties within the 10-year period referred to in the legislative history of the 1996 expatriation legislation. The renegotiation of a tax treaty requires a significant commitment of resources by both countries. Accordingly, the Treasury Department must prioritize its treaty renegotiations according to a variety of factors, including the relative significance of the issues to be addressed with its various treaty partners and potential treaty partners. The potential conflict between an existing treaty and the 1996 expatriation tax legislation is one such issue.

[3] Two treaties (Ireland and Switzerland) currently in force that were signed after the 1996 legislation was enacted and to which the Senate gave its advice and consent to ratification in 1997 do not expand the saving clause to cover former long-term residents. Because substantially all negotiations had been completed for each of these two treaties by the time the 1996 legislation was enacted, the Treasury Department was unable to obtain agreement from the other country for this expansion.

Even if the Treasury Department sought to renegotiate a treaty to eliminate this potential conflict, numerous factors may limit its ability to do so.[4] For example, a country with which the United States has a tax treaty is likely to view an agreement to expand the saving clause as a concession by that country, because the provision would expand the United States' ability to impose tax on a resident of that country. That country, if it were willing to agree to the expansion, would probably expect a concession from the United States in return. This is particularly likely because the issue would arise as a result of a treaty override by the United States.[5] The concession expected from the United States may or may not be acceptable to the United States. In addition, the Conference Report to the 1996 legislation, which purports to withdraw the treaty override after 10 years following enactment of the legislation, could provide an incentive for treaty partners to delay negotiations on the issue until the override purportedly expires in 2006. Accordingly, even if the Treasury Department had the resources to renegotiate all of the income tax treaties that conflict (or potentially conflict) with the 1996 legislation, it is not certain that mutually acceptable agreements could be reached.

Estate and Gift Tax Treaties

The Treasury Department has successfully negotiated, and the Senate has given its advice and consent to, a protocol to the U.S.-Germany estate and gift tax treaty that contains a saving clause explicitly allowing the United States to impose its expatriation tax laws with respect to both former citizens and former long-term residents. That protocol currently is awaiting entry into force.

The Treasury Department currently is engaged in the active renegotiation of two other estate and gift tax treaties, both of which contain saving clauses that potentially conflict with the 1996 expatriation legislation. Although the expansion of the saving clause in each of these treaties ultimately depends upon whether the United States and the other country can reach mutual agreement on all relevant issues, the Treasury Department intends to advocate the expansion of the provision in each renegotiation to incorporate the 1996 legislative changes.

As noted above with respect to income tax treaties, the renegotiation of a tax treaty requires a significant commitment of resources by both countries, and a country with which the United States has a tax treaty is likely to insist on a concession by the United States in order to agree to an expansion of the saving clause. Accordingly, even if the Treasury Department had the resources to renegotiate all of the estate and gift tax treaties that conflict (or potentially conflict) with the 1996 legislation, it is not certain that a mutually acceptable agreement could be reached.

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[4] The difficulties involved in the renegotiation of U.S. treaties as a result of the 1996 legislation's treaty override were discussed in detail in the Statement of Leslie B. Samuels, Assistant Secretary (Tax Policy), Department of the Treasury, Before the Committee on Finance, United States Senate, dated July 11, 1995.

[5] In this regard, the United States is widely perceived as overriding its treaty obligations more frequently than its treaty partners, a perception that has the potential to make it more difficult to obtain concessions from treaty partners and potential treaty partners.

4. Describe any specific disputes that have arisen (with taxpayers, treaty partners, or otherwise) in connection with any conflicts between the 1996 expatriation tax rules and a tax treaty or protocol. Describe each such dispute in detail and indicate whether and how the dispute was resolved.

We are not aware of any specific disputes that have arisen since the enactment of the 1996 expatriation tax law.

5. Describe the Treasury Department's policy with respect to avoiding conflicts on this issue for future tax treaties, including any Treasury Department plans to include appropriate provisions in any future tax treaties to avoid such conflicts.

The Treasury Department has included a saving clause provision in its Model Income Tax Convention, dated September 20, 1996, that is consistent with the 1996 expatriation tax legislation. The model treaty provision, which is written in reciprocal terms, would allow the United States to tax for 10 years, as if the treaty had not come into effect, former citizens and former long-term residents whose loss of such status had as one of its principal purposes the avoidance of tax.

The model treaty reflects the Treasury Department's current policy with respect to the saving clause provision. Accordingly, the Treasury Department intends to propose the inclusion of this provision in future tax treaty negotiations. The nine treaties listed in Table A-4 of Appendix A, to which the Senate has given its advice and consent to ratification, reflect the Treasury Department's success in incorporating this provision into recent treaties.

With respect to estate and gift tax treaties, the Treasury Department intends to propose the inclusion of an expanded saving clause consistent with the 1996 legislation in its two active treaty renegotiations, as well as any future treaty negotiations that may take place. As noted above, the Treasury Department succeeded in incorporating this provision into a protocol with Germany, to which the Senate has given its advice and consent and which is awaiting entry into force.

* * *

I hope that these responses to your questions are helpful. If you need additional information, please contact me or Philip R. West, our International Tax Counsel.

Sincerely,

Jonathan Talisman
Acting Assistant Secretary (Tax Policy)

DEPARTMENT OF THE TREASURY
WASHINGTON

ASSISTANT SECRETARY

MAY 5 2000

Lindy L. Paull, Esq.
Chief of Staff
Joint Committee on Taxation
Congress of the United States
Washington, DC 20515-6453

Dear Ms. Paull:

This is in response to your letter of March 31, 2000, to Commissioner Rossotti and me, in which you requested certain information regarding the 1996 expatriation tax legislation. I will address certain of your inquiries from the perspective of the Treasury Department. Commissioner Rossotti will address your other inquiries in a separate letter. The numbers in parenthesis refer to the question numbering in your letter.

Describe whether the IRS plans to establish a regulation project with respect to the 1996 expatriation rules and, if so, the projected timing of such a project. (Question 19)

The IRS published detailed notices in 1997 and 1998 regarding the 1996 expatriation tax law changes. *See* Notice 97-19, 1997-1 C.B. 394, and Notice 97-34, 1998-2 C.B. 29. These notices, upon which taxpayers may rely, provide extensive guidance to taxpayers regarding the general application of the statute, the anti-abuse rules contemplated by the statute, and the procedures for the ruling process contemplated by the statute.

As stated in these notices, the IRS intends to incorporate the guidance set forth in the notices into regulations. It is not anticipated that the regulations will differ significantly from the guidance set forth in the notices. No date certain has been established for the regulation project.

Provide any information (including anecdotal information) that indicates whether the 1996 expatriation tax rules have had a deterrent effect on tax-motivated expatriations. (Question 22)

Based on both publicly available sources and information received by the IRS in the course of the private letter ruling process, significant numbers of wealthy citizens have continued to expatriate since the expatriation tax laws were amended in 1996. Of particular note is that many of these individuals hold a substantial portion of their wealth in non-U.S. assets. As a result, even if these individuals were determined to have expatriated with a principal purpose of tax-avoidance, they would not be subject to significant taxation under sections 877, 2107, and 2501(a)(3).

Additional information regarding these individuals is provided in Commissioner Rossotti's separate letter.

Describe whether the thresholds under Code section 877(a)(2) (relating to statutory presumptions of tax avoidance) are appropriate or whether and how such thresholds should be modified. Also describe whether the conditions for not presuming tax avoidance under section 877(c) are appropriate or whether and how such conditions should be modified. (Question 30)

As discussed in more detail in response to Question 34, below, the Treasury Department believes that the problems inherent in the current law cannot fully be addressed through the mere modification of the existing regime. Nonetheless, if the existing regime is retained, the Treasury Department recommends that, due to the nature of expatriation cases, the determination of tax avoidance should be based exclusively on objective criteria.

While the 1996 legislation purported to make the tax motivation inquiry objective by incorporating "average tax liability" and "net worth" tests, it also established several preferred classes of former citizens whose tax-motivation is not determined by these objective standards as long as they submit a request for a ruling as to whether their expatriation was tax-motivated.[1] Ultimately, a former citizen in one of these favored classes who submits a ruling request will be subject to tax under the 1996 expatriation provisions only if the IRS determines (either in the context of the ruling request or upon a subsequent examination), based on all facts and circumstances, that the individual's expatriation was done with a principal purpose of tax avoidance, and a court upholds that determination. The need to make this inherently factual and subjective inquiry was one of the primary problems with the pre-1996 law. One way in which this problem could be eliminated is to remove the exceptions to the tax-liability and net worth tests. Not only would such a change eliminate a significant obstacle that the IRS would face in order to prevail in a court case, but it would also free up significant amounts of resources that the IRS has been required to dedicate to the ruling process under the 1996 legislation.

In the context of making the tax motivation inquiry wholly objective, an increase in both the average tax liability and net worth thresholds might be appropriate in order to focus resources on those attempting to avoid significant amounts of U.S. tax liability. In particular, the net worth test could be increased, since many individuals whose net worth is $562,000 (the net worth threshold for calendar year 2000) may not have significant tax liabilities.

[1] At a minimum, the preferred classes of former citizens that are eligible to submit a request for a ruling should be significantly tightened. For example, the classes based on having citizenship in another country do not require the individual to actually move to that other country. Because most countries tax on the basis of residence, rather than citizenship, it is unlikely that the individual will be taxed by that other country if he does not reside there. Accordingly, the individual could move to a tax haven yet not be subject to the average tax liability and net worth tests as long as he submits a request for a ruling.

Of course, these changes would not remedy other significant problems inherent in the current law, such as the general lack of taxation on foreign assets and the administrative difficulties associated with attempting to track transactions for 10 years after the individual has cut his citizenship ties with the United States.

Describe in detail any problems that the Treasury Department or the IRS has encountered or believes exist with respect to the 1996 expatriation tax rules, including any problems associated with taxpayer compliance with, or the enforcement or effectiveness of, such rules. (Question 32)

Numerous problems inherent in the 1996 expatriation tax legislation significantly undermine its effectiveness and administrability. These problems include:

- It does not prevent tax avoidance by a patient expatriate who is willing to wait 10 years before selling his assets. This is particularly problematic because the expatriate may have the beneficial use of the assets during that 10-year period by borrowing against them.

- It generally does not tax an expatriate's gain on foreign assets, even though U.S. citizens are taxable on their worldwide assets

- It generally does not impose transfer tax on foreign assets, even though U.S. citizens are taxable on their worldwide gifts and estate. Moreover, it allows gift tax avoidance on U.S. assets if those assets are held through foreign corporations.

- With respect to certain favored classes of former citizens, it retains the pre-1996 law requirement that a subjective tax-avoidance motive be established.

- It raises significant administrative problems because it focuses on transactions that occur up to 10 years after expatriation and that may have little connection with the United States.

These problems are discussed in more detail in answers to the other questions.

Describe in detail the types of strategies or structures taxpayers use (or may use) to avoid the 1996 expatriation rules, including any structures or strategies used by taxpayers planning to expatriate to convert U.S. source assets to foreign source assets, and the effect, if any, of other Code provisions such as section 367 with respect to such strategies or structures. (Question 33)

There are numerous techniques available to avoid the 1996 expatriation tax rules. For example:

Borrowing During 10-Year Period: The 1996 expatriation tax law applies only for the 10-year period following an individual's loss of citizenship or long-term residence status. During that 10-year period following expatriation, an individual can borrow money using his assets as security. In this way, he can enjoy economic benefits associated with the assets, but will not be subject to tax under section 877. Once the 10-

year period ends, he can sell the underlying assets (including stock of a U.S. corporation) without paying U.S. tax on the gain.

Use of Foreign Corporations to Avoid Gift Taxes: Under the 1996 legislation, an individual can contribute assets (including U.S.-situated property) to a foreign corporation and then make a gift of the stock of that foreign corporation immediately after expatriating without incurring any U.S. gift tax liability. This technique works under the 1996 legislation even if the recipient of the gift is a U.S. person. This technique is particularly useful if the expatriate hold assets with a relatively high basis, so that the income tax consequences on the contribution are minimal.

Creation of Foreign Wealth: In general, the 1996 expatriation tax does not impose either income tax or transfer tax with respect to foreign assets. As a result, individuals who may be considering a future expatriation have an incentive to invest in foreign assets so that gain from, and transfers of, those assets will not be taxed following expatriation.

Describe what laws or procedures, if any, may need to be enacted, modified, or implemented to improve taxpayer compliance with, or the enforcement or effectiveness of, the 1996 expatriation tax rules, including any additional information or assistance from the State Department and the INS that would be helpful to the IRS in administering these tax rules. (Question 34)

The Treasury Department believes that most significant problems associated with the 1996 expatriation tax laws are inherent in the structure of the regime. For example, even if an expatriate is admittedly tax-motivated, no tax is imposed if the expatriate is patient, and no tax is generally imposed with respect to foreign assets (in contrast to the treatment of citizens who do not expatriate, who are subject to income and transfer taxes on their worldwide assets).

Moreover, under the 1996 law, the tax consequences to a tax-motivated expatriate may depend on transactions that occur up to 10 years after the individual left the United States and that have little, if any, connection to the United States. The administrative problems inherent in such circumstances may be significant, and it is doubtful that additional information or assistance from another U.S. government department or agency would be useful. For example, with respect to the estate tax rules under the 1996 legislation, it may be difficult for the IRS to obtain reliable information to help it identify whether a deceased expatriate owned stock of a foreign corporation that held U.S. assets, particularly if the stock is transferred to a non-U.S. person.

For these reasons, the Treasury Department does not believe that modification of the existing regime would significantly improve the effectiveness or administrability of the regime. Instead, the Treasury Department believes that a more appropriate, effective, and administrable method for taxing expatriates is that proposed in the Administration's FY 2001 budget. That proposal, by imposing tax at the time a wealthy expatriate leaves U.S. taxing jurisdiction, and by including foreign assets within the regime, would eliminate many of the problems inherent in the current law. Moreover, that proposal, by

focusing on gains that accrued while the expatriate was a U.S. person, is consistent with the general policy underlying the other mark-to-market proposals in the Administration's FY 2001 budget.

Nonetheless, if the existing regime is retained, changes could be made to improve certain aspects of the regime. For example, as discussed in more detail in response to Question 30 above, the tax-motivation inquiry could be made wholly objective by eliminating the exception for the preferred classes of citizens who can submit requests for rulings.

We note that the Administration's FY 2001 budget, in addition to proposing a mark-to-market tax regime for expatriates, included a proposal to better coordinate the tax law and the immigration law applicable to former citizens. Under this proposal, the admissibility to the United States of a former citizen would, in general, be conditioned on whether the former citizen filed a final tax return for the year of expatriation reporting his mark-to-market gains. The Treasury Department believes that specific coordination between the expatriation tax law and the immigration law is appropriate in the context of the budget proposal because the information to be furnished by the IRS to the INS (i.e., whether a former citizen filed a final tax return for the year of expatriation) would be objectively and readily determinable by the IRS. In contrast, the Treasury Department does not believe that this type of explicit coordination would be appropriate or administrable in the context of the 1996 expatriation tax regime, because the determination of compliance under the current regime depends on information that might not be readily available to the IRS (e.g., an individual's net worth and events occurring up to 10 years after the expatriation).

* * *

If there are other issues you would like us to address, or if you need additional information, please let me know.

Sincerely,

Jonathan Talisman
Acting Assistant Secretary (Tax Policy)

Department of the Treasury
Internal Revenue Service
Washington, DC, May 5, 2000

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, DC 20515-6453

Dear Ms. Paull;

This is in response to your letter dated March 31, 2000, in which you requested certain information regarding the tax and immigration laws enacted in 1996 regarding tax-motivated expatriates. Acting Assistant Secretary Talisman will address some of those matters in a separate letter. I will address your inquiries from the perspective of the Internal Revenue Service. This letter follows the general format of your letter.

Pursuant to sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code of 1986, this letter contains tax return information (which is underlined). Any disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

1. Describe the experience of the Treasury Department and the IRS in monitoring compliance of U.S. citizens who renounce citizenship and certain U.S. residents who terminate U.S. residency (collectively, "expatriates") under code sections 877, 2107, 2501(a)(3) and 6039G as enacted in 1996 (the "1996 expatriation tax rules").

The IRS has been successful in obtaining agreements with the Department of State (DOS) and the Immigration and Naturalization Service (INS) for obtaining expatriate information.

The IRS has processes in place for receiving and reviewing the incoming data with a procedure to conduct a preliminary review of overall filing compliance. The IRS conducts a check of the average tax for the 5-year period prior to expatriation as part of this review. Through these efforts the IRS has identified 11 cases that are potentially not in compliance with IRC § 877. These cases are either in the process of being classified for examination, the examination process has been initiated, or steps to secure a delinquent tax return have begun. Of the 11 cases, 10 relate to tax year 1997 and 1 to tax year 1996.

It is noteworthy that 4 of the 11 cases were identified after the cases were selected for examination pursuant to normal classification procedures. This process may include high profile expatriates, but is not designed to monitor or target any taxpayer solely on the basis of renunciation of citizenship. The IRS has also provided guidance to

taxpayers concerning these provisions, including administering the ruling process contemplated by the statute.

Despite these efforts, the IRS has experienced, and expects to experience in the future, significant difficulties in administering this provision. For example, enforcement of the provision requires IRS to obtain information regarding transactions that take place outside the United States up to 10 years after an individual expatriates. The IRS anticipates significant difficulties may arise in monitoring such transactions, particularly when the former citizen may have limited contacts with the United States. In addition, the implementation of the 1996 expatriation tax law (including both the ruling process and the examination function) has been very labor intensive. Because the IRS has limited resources, the dedication of resources in this area must be balanced against other areas in which they might be utilized. Even if they were found to have expatriated for a principal purpose of tax avoidance, some taxpayers will not be subject to tax under IRC § 877, 2107, or 2501(a)(3) because they hold foreign assets that will not be subject to tax under these sections.

2. Describe the IRS procedures to enforce the 1996 expatriation tax rules, including any IRS procedures (written or otherwise) specifically applicable to expatriates.

Procedures are in place for the DOS to provide the IRS with copies of each Certificate of Loss Nationality (CLN) each month as they are received by DOS in Washington, D.C. The CLN is the official document signed by a Consular Officer recognizing an individual's loss of nationality. The CLN includes information such as the effective date of expatriation, dates of residency in the United States for the past three years, foreign residency address, and how U.S. citizenship was originally obtained.

When the IRS receives the CLN it is assigned to the Technical Section within the International District in the Office of the Assistant Commissioner (International) and the following actions are taken:

- The record is entered into a CLN database,
- The CLN package is reviewed to ensure that the expatriation information statement that is required by IRC § 6039G is included.
    - If the expatriation information statement is not included, a letter is mailed requesting the information and explaining penalties,
    - 60 days are allowed for response; if no response is received, the case is referred to a compliance unit for case development and further action as required.
- A check for return filing compliance for the 6 years prior to expatriation is completed,
- A determination is made as to when the first IRC § 877 related return would be due,

- Not later than 30 days after the close of each calendar quarter, the IRS publishes in the Federal Register the name of each individual losing United States citizenship (within the meaning of IRC § 877(a)) with respect to whom the IRS receives information during such quarter. This action is required by IRC § 6039G.
- Future filing is monitored to ensure filing compliance with IRC § 877,
- If required, audits are opened and conducted, and/or other appropriate action is taken.

The Private Letter Ruling Process

IRC § 877(c)(1) provides that a former citizen whose average income tax liability or net worth exceeds specified thresholds will not be conclusively considered to have had a principal purpose of tax avoidance if he is described within certain specified categories and if he submits a ruling request as to whether his loss of citizenship had for one of its principal purposes the avoidance of U.S. taxes. Notice 97-19, 1997-1 C.B. 394, as modified by Notice 98-34, 1998-2 C.B. 29, provides a similar procedure for certain specified categories of long-term residents.

In order to facilitate the letter ruling request process, the IRS published detailed guidance regarding ruling request submissions in these Notices. The Office of the Associate Chief Counsel (International) currently administers the ruling process. The ruling process is described in more detail below in response to subsequent questions.

3. In May 1998, the Treasury Department published a study entitled *Income Tax Compliance by U.S. Citizens and U.S. Lawful Permanent Residents Residing Outside the United States and related issues.* We request the following information regarding this study.

> **a. The study states that "IRS, in conjunction with [the State Department], has established procedures [under section 6039G] by which information submitted to [the State Department] is forwarded to IRS. IRS and [the State Department] have established procedures [under section 6039G] by which the copies [of certificates of loss nationality] are forwarded to IRS." Provide copies of those procedures.**

Representatives of the IRS and the State Department met in November of 1996 and outlined the information that the IRS required. The State Department agreed to provide to the IRS on a monthly basis a copy of the complete CLN package, including the statement filed under section 6039G. Additionally, at that meeting, the State Department agreed to provide the IRS with copies of CLN packages for the retroactive period (February 6, 1995 through August 1996).

Although these procedures are not in written form, all of the requested information has been provided to the IRS in a timely manner. Because of the retroactive applicability of the legislation and the period required to publish guidance for expatriates IRS initially received a significant number of CLN packages that did not contain the required expatriation information statement. However, after publication of Rev. Proc. 97-19 in March 1997, approximately 95 percent of the CLNs have contained the required expatriation information.

b. The Study also states that the "IRS is currently establishing a process by which those individuals who do not provide the information statement required under section 6039G will receive a letter from IRS explaining the requirements and requesting information." Please indicate whether such a process has been established. If so describe the process.

A review of the CLN package is conducted by the IRS to ensure that the expatriation information statement that is required by IRC § 6039G has been included. If the expatriation information statement is not included with the package, a letter requesting the information and explaining penalties for failure to provide the information is mailed to the expatriate. Sixty days is allowed for a response. If no response is received within 60 days, the case is referred to a compliance unit for case development and further appropriate action.

c. The study further states that "IRS, in cooperation with [the Immigration and Naturalization Service], has established a procedure by which [information regarding green-card holders whose status has been revoked or abandoned] is submitted to IRS. IRS will conduct a random sampling on a yearly basis with respect to this information and attempt to determine whether former lawful permanent residents have complied with their past U.S. tax obligations under section 877 of the code as amended." Describe the procedure referred to above and provide information on the random samples conducted by the IRS to date, including the results of such random samples.

At the meeting in November of 1996, the IRS outlined the information the IRS required. The INS agreed to provide this information on an annual basis. It was further agreed that the information would be furnished to IRS by June of each year for the prior calendar year.

The IRS received the data for 1996 and 1997 in 1998 as a single package and received the data for 1998 in June 1999. The data that the IRS receives generally is for all individuals who gave up their green cards during the previous year. The IRS loads the data into a database and discards the records for individuals who do not meet the residence requirement of IRC § 877(e)(2). The IRS then conducts a statistically

valid sample of the remaining records, with separate samples being drawn for abandoned and revoked green cards.

For those in the abandoned green card status for 1999, there were 1,730 records for which the IRS received social security numbers after making the adjustments noted above. Of this total, the IRS conducted a filing compliance review of 67. The IRS found that this population was generally filing compliant.

For the taxpayers whose green cards were revoked,[1] the IRS had 18,202 records for which the IRS received social security numbers after making the adjustments noted above. Of this number, the IRS selected a sample of 205 for a filing compliance review. Of this sample, the IRS encountered numerous difficulties. Chief among these was invalid social security numbers, social security numbers/name mismatch (the last name on Social Security's records did not match the name the IRS had), and no record of filings.

4. Describe in detail any pending taxpayer controversies involving the present law expatriation tax rules (e.g., cases under audit or litigation).

Although there are open audits, the IRS currently has no controversies involving the present law expatriation tax rules, since no adjustments have been proposed as of this date.

There are approximately 4 open ruling requests in which the IRS concluded that the evidence supports a finding that an expatriation was motivated by a principal purpose of tax avoidance. The taxpayers do not agree and are either in the process of submitting additional information, scheduling an adverse conference, or considering whether to withdraw the ruling request.

5. Describe the procedures the IRS follows to identify potential cases of tax-motivated expatriation under the 1996 expatriation rules, including any procedures for monitoring public reports of high profile expatriates.

The IRS has covered its procedures for identification of expatriate taxpayers in its response to question 2, above. As to procedures for monitoring public reports of high profile expatriates, the IRS does not as a general business practice do this. News reports have often been found to be inaccurate, and contain biased information.

6. Describe the purpose or purposes for issuing Notice 98-34, including any

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[1]The records received from INS do not have a "revoked" category. However they do contain a category titled "deported", and the IRS has used this category for our response to the part of your question relating to revoked green card.

problems or difficulties, if any, in administering Notice 97-19.

Notice 98-34 was issued as a result of the experience of the Office of Chief Counsel in administering the advance letter ruling procedure under section 877(c). Notice 98-34 revised the list of information set forth in Notice 97-19 that a taxpayer seeking a ruling is required to submit. This revision, which reflected the experience gained by the IRS in determining which information was most relevant to the inquiry, was done in order to facilitate the collection of that information in the original submission package. In addition, Notice 98-34 narrowed the categories of former long-term residents eligible to submit rulings in order to ensure that only those former long-term residents with significant tax ties to another country were eligible to submit ruling requests.

Notice 98-34 also modified the ruling practice set forth in Notice 97-19. In considering the significant number of requests submitted under Notice 97-19, the IRS found that making a determination regarding tax avoidance in the context of an advance ruling presented difficulties due to the inherently factual and subjective nature of the inquiry. In many cases, the IRS was not able to make a definitive advance determination regarding a principal purpose of tax avoidance because the information submitted with respect to the advance ruling did not clearly establish the existence or lack of such a principal purpose.

This difficulty arose because the nature of the inquiry makes it difficult to render sound pre-audit determinations. In the context of a ruling request, the Office of Chief Counsel is required to make an inherently subjective determination of a persons' intent based on facts submitted by the individual. In the ruling process, the flow of information to the IRS is, to a great extent, controlled by the taxpayer and is not well designed for making factual determinations. Although the Office of Chief Counsel in the ruling process may ask for additional information and further documentation, it is not in a position to confirm the validity of information submitted by a taxpayer (e.g., by a subpoena for documents or the taxpayer's books and records), particularly because that information may consist of representations as to expected future events. These difficulties were compounded by the fact that the Office of Chief Counsel received over one hundred and fifty requests for rulings, severely burdening the office's resources.

Notice 97-19 provided that an expatriate eligible to submit a ruling would be subject to the conclusive determinations of the average annual income tax liability and/or net worth tests of section 877(a)(2) unless the individual obtained a favorable ruling, rather than merely submitted a request, that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes. Thus, an expatriate would be adversely affected if the IRS, for the reasons discussed above, were unable to make a definitive determination in the context of an advance ruling as to the individual's subjective intent.

For these reasons, Notice 98-34 announced that, in those cases where the IRS is unable to make a determination in the context of an advance ruling as to the individual's subjective intent, the IRS will issue a ruling as to whether a taxpayer's timely ruling request was complete and submitted in good faith (a so-called "fully submit" ruling). Moreover, Notice 98-34 provided that as long as a timely request for ruling was complete and submitted in good faith, the conclusive determinations of the average annual income tax liability and/or net worth tests of section 877(a)(2) would no longer apply. As explained in response to Question 8, below, the IRS believes that this modified approach is supported by section 877(c)(1)(B), which provides that the conclusive determinations under section 877(a)(2) do not apply if an eligible individual "submits" a ruling request for a determination as to whether such loss had for one of its principal purposes the avoidance of U.S. taxes.

If an individual receives a "fully submit" ruling that does not rule as to the taxpayer's subjective intent, the individual could still be determined in the context of a subsequent examination to have expatriated with a principal purpose of tax motivation. Indeed, Notice 98-34 noted that information collected as part of the ruling process may be forwarded to the Office of Assistant Commissioner (International) to consider in any later examination of the individual's returns. Under such circumstances, the inquiry into this subjective matter is shifted from the Office of Chief Counsel, which is not well equipped to address such factual issues in an advance ruling process, to the examination function, which may be better equipped to handle such matters.

7. Notice 98-34 states that "making a determination regarding tax avoidance in an advance ruling presents difficulties due to the inherently factual and subjective nature of the inquiry." Describe the difficulty in making such a determination given the statutory presumptions of a tax avoidance purpose under Code sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B).

The average annual income tax liability and net worth tests of IRC § 877(a)(2) (which are cross-referenced in sections 2107(a)(2)(A) and 2501(a)(3)(B)) do not have direct applicability to the tax-avoidance inquiry in the context of a section 877 ruling request. Section 877(a)(2) provides that an individual shall be treated as having a principal purpose of tax avoidance if either the average annual income tax liability or net worth tests is satisfied. However, section 877(c)(1) provides that section 877(a)(2) "shall not apply" if the individual is described in certain categories and the individual, within one year of expatriation, submits a ruling request for a determination as to whether the expatriation had a principal purpose of tax avoidance. Thus, once an eligible expatriate submits the ruling request (assuming it is complete and in good faith), the conclusive determinations of tax avoidance under section 877(a)(2) (as well as the cross-references in section 2107(a)(2)(A) and 2501(a)(3)(B)) do not apply, and the inquiry must focus on the individual's specific facts and circumstances.

The ruling process requires the IRS to make an inherently subjective determination of a person's intent based on facts submitted by the individual. Since people expatriate for many reasons, this determination requires the IRS to establish that any advantageous tax results of the expatriation was, in fact, one of the principal purposes for that individual's decision to expatriate. This leads to the legal question of whether an individual's non-tax purposes were so great that they reduce the tax purpose to a level beneath that of a principal purpose. For example, assume that a long-term resident who has a fatal illness relinquishes his green card to return to his country of origin to be with his family. However, the country of origin has no estate tax so the long-term resident will escape a substantial amount of U.S. estate taxes. As a further example, assume that a United States citizen who gained his citizenship through her mother's U.S. citizenship decides to expatriate. She has never lived in the United States, and has no U.S. based assets or income source. However, since the United States taxes on worldwide income, her expatriation would result in a reduction in U.S. income taxation. These type of fact patterns, as well as other complex patterns the IRS has seen, make it very difficult in specific cases to determine whether, as a legal matter, the individual had a principal purpose of tax avoidance.

The ruling process prescribed by section 877 and the related gift and estate tax provisions require determinations not normally made in a ruling process. Ordinarily, the Office of Chief Counsel does not rule on factual issues, as stated by Section 7.01, Rev. Proc 2000-1, 2000-1 I.R.B. 4, 21; Treas. Reg. § 601.201(d)(2). In the ruling process, the flow of information to the IRS is to a great extent controlled by the taxpayer and is not well designed for making factual determinations. Although the Office of Chief Counsel in the ruling process may ask for information and further documentation, it is not in a position to confirm the validity of information submitted by a taxpayer (*e.g.*, by a subpoena for documents or the taxpayer's books and records).

8. Notice 98-34 states that the statutory presumptions of tax avoidance under Code sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B) will not apply if the expatriate submits a complete ruling request in good faith. Describe the rationale and the authority for this position.

The position in Notice 98-34 is supported by section 877(c)(1)(B), which provides that the average annual income tax liability and net worth tests of section 877(a)(2) "shall not apply" to certain eligible individuals if:

> within the 1-year period beginning on the date of the loss of United States citizenship, such individual submits a ruling request for the Secretary's determination as to whether such loss has for 1 of its principal purposes the avoidance of taxes under this subtitle or subtitle B.

Under this language, once an eligible individual submits the request, the tax liability and net worth tests of section 877(a)(2) no longer apply. Notice 98-34 requires the

submission to be "complete" and in "good faith" in order to preclude taxpayers from attempting to escape the conclusive determination of section 877(a)(2) by merely submitting a skeletal ruling request that does not contain sufficient information or by refusing to cooperate with the IRS' requests for additional relevant information.

9. Describe the action taken by the IRS with respect to expatriates who receive an adverse IRS ruling that the taxpayer expatriated principally to avoid taxes. For each such case, describe in detail the steps taken by the IRS, including whether the IRS initiates immediate auditing of income, estate, or gift tax returns.

When an adverse ruling is issued, a copy of the letter and the case file is received in the International District in the Office of the Assistant Commissioner (International). The first action taken is to update our database to reflect the fact that an adverse ruling was issued. Then the file is referred to the Technical section where the following action is taken:

- A compliance check for return filing compliance for 6 years prior to expatriation is completed.
- The file is reviewed to identify the facts on which the adverse ruling is based (e.g., avoidance of estate tax, income tax or both).
- A determination is made as to when the first IRC § 877 return is due.
- The file is monitored to ensure filing compliance.
- On an annual basis, a sample of these cases are selected for classification.
- If appropriate, examinations are opened on specific cases selected in the classification process.

10. Describe the criteria for determining whether an expatriate submitted a complete ruling request in good faith in accordance with Notice 98-34. Describe the action taken by the IRS in cases where the IRS rules that the expatriate submitted a complete ruling request in good faith (even though no substantive ruling is provided as to whether the individual's expatriation was tax-motivated). For each such case, describe in detail the steps taken by the IRS, including the steps taken by IRS field auditors and the IRS National Office to determine whether the individual expatriated principally to avoid tax.

Under IRC. § 877(c) tax avoidance is not conclusively determined under the tax liability and/or net worth tests of section 877(a)(2) if, within one year of expatriating, a taxpayer submits a request for a ruling that the taxpayer's expatriation did not have as a principal purpose the avoidance of U.S. taxes, and the taxpayer is either a dual citizen described in IRC. § 877(c)(2)(A), a long term foreign resident as described in IRC § 877(c)(2)(B), or an individual who renounces his United States citizenship before age 18½.

Notice 98-34 and Rev. Proc. 2000-1, 2000-1 I.R.B. 4, set forth procedures for submitting a request for a private letter ruling under IRC § 877(c). Upon receipt of the private letter ruling request, an attorney in the Office of Chief Counsel (International) examines the submission to determine whether the applicant satisfies the procedural requirements in Rev. Proc. 2000-1 and completely and in good faith answered each of the 23 questions required by Notice 98-34. These questions solicit relevant information regarding the taxpayer, including information regarding his assets, his past and expected future tax liabilities, and the circumstances surrounding his expatriation.

The Office of Chief Counsel may also request any other information reasonably required after its review of the submission. If the information submitted is incomplete, or if there is any other information reasonably required to make a determination, the attorney discusses the case with the reviewer, and, if the reviewer concurs, requests additional information from the applicant's representative. The submission is also examined to determine whether it was made in good faith. This is a subjective determination based on whether the information received is internally consistent and appears realistic and reasonable.

After a determination is made that a submission is complete and submitted in good faith, the request is examined to determine whether the IRS is able make a substantive determination in the context of the ruling process as to whether one of the principal purposes of expatriating was the avoidance of U.S. taxes. Under IRC § 877(f), a taxpayer has the burden of proving the absence of a principal purpose of tax avoidance if the IRS establishes that it is reasonable to believe that a taxpayer's expatriation will result in a significant reduction in taxes on his probable income.

In certain circumstances, it is clear that the facts establish the existence of a principal purpose of tax avoidance. For example, the submission might indicate that the taxpayer might significantly reduce taxes (including transfer taxes, which are not specifically referred to in section 877(f)) by expatriating, with no objective evidence of significant non-tax avoidance purposes. In some cases, it might be clear that no principal purpose of tax avoidance existed, either because the facts do not indicate a significant reduction in taxes, or because objective evidence is presented of significant non-tax avoidance purposes. In other cases, the facts submitted in the ruling process do not clearly indicate either the absence or existence of a principal purpose of tax avoidance. For example, it may be difficult in the context of a ruling request for the IRS to determine whether the "significant reduction" standard of section 877(f) is satisfied, since it depends on a taxpayer's representations as to future facts as well as the potential applicability of a foreign country's tax laws to those future events. Under such circumstances, the Office of Chief Counsel will issue a ruling that the request was complete and submitted in good faith but will not issue a substantive ruling.

The Office of Chief Counsel sends a copy of each private letter ruling issued, including "fully submitted" rulings, to the Examination Division in the Office of the Assistant

Commissioner (International). In addition, the taxpayer must file an income tax return for the year the private letter ruling is issued, whether or not there is any U.S. tax due, and must attach a copy of the private letter ruling to the return. The return and the attached copy of the private letter ruling serve to notify the IRS that the taxpayer is an expatriate who received a "fully submitted" ruling and is potentially subject to the tax consequences under IRC §§ 877, 2107, and 2501 provided there is evidence (including actual facts that may have occurred between the time of the advance ruling and the examination) that the expatriation was motivated by a principal purpose of avoidance of U.S. taxes.

11. Describe the circumstances in which an IRS ruling that the expatriate submitted a complete ruling request in good faith could be withdrawn or given no effect, including cases in which a subsequent IRS examination reveals additional facts that should have been disclosed with the original ruling submission.

If a private letter ruling concludes that an expatriate submitted a complete request in good faith, the ruling may subsequently be withdrawn by the IRS if it discovers that the actual facts are significantly different from those represented in the ruling request. For example, an individual might have represented he was going to reside in a certain country with a significant income tax on residents, but the IRS later discovers that he actually moved to a tax haven shortly after receiving the fully submit ruling.

12. Describe the situations in which the IRS may extend the ten year period under the 1996 expatriation rules, including the substitution under Notice 97-19 of the fifteen year period beginning five years prior to an individual's expatriation for the ten year period referred to in section 877(d)(4). Describe the criteria, rationale and authority for such extensions.

Section 877 makes a significant distinction between U.S. and foreign assets. In general, the former are taxable, while the latter are not. Accordingly, taxpayers have a strong incentive to convert U.S. assets to foreign source.

In an effort to minimize the ability of an expatriate to sanitize U.S. source income or gains by converting assets on a tax-free basis to non-U.S. source assets, IRC § 877(d)(2)(B) provides that, notwithstanding a non-recognition provision of the Internal Revenue Code, where property giving rise to U.S. source income or gain is exchanged in an otherwise tax-free transaction for property generating non-U.S. source income or gain during the 10-year period referred to in IRC § 877(a), such property will be treated as if sold for its fair market value on the date of the exchange, with the result that any gain will be recognized by the expatriate for the taxable year. IRC § 877(d)(2)(D) authorizes the IRS to prescribe regulations to substitute the 15-year period beginning five years prior to expatriation for the 10-year period referred to in IRC § 877(a), and to apply IRC § 877(d)(2) to all exchanges that occur during such 15 year period. Notice 97-19 announces the IRS' intention to exercise this authority to provide that the

exchange rules apply for the 15 year period before expatriation, rather than the 10-year period provided by IRC § 877(a). Accordingly, any transaction within such 15-year period resulting in exchange of property giving rise to U.S. source income or gain for property generating foreign source income or gain will be treated as an IRC § 877(d)(2) exchange. The inclusion of the five year period prior to expatriation is intended to prevent pre-expatriation planning to evade the purposes of IRC § 877(d)(2)(B).

In addition, IRC § 877(d)(2)(E) authorizes the IRS to prescribe regulations under which the removal of appreciated tangible personal property from the United States, as well as any other occurrence which, without the recognition of gain, would result in the conversion of income or gain from U.S. source to foreign source would be treated as an exchange. Notice 97-19 announces the IRS' intention to exercise this authority to provide that the appreciated tangible property rules apply for the 15-year period before expatriation, rather than the 10-year period provided by IRC § 877(a). In the case of removal of appreciated tangible personal property, Notice 97-19 indicates that only the removal of such property having an aggregate value in excess of $250,000 during the 15-year period beginning five years prior to the date of expatriation will be treated as an IRC § 877(d)(2) exchange. This de minimis exception reflects a determination that the removal of property such as household effects with a value of less than $250,000 was not a significant abuse that Congress intended to be addressed by IRC § 877. The inclusion of the five-year period prior to expatriation is intended to prevent pre-expatriation planning to evade the purposes of IRC § 877(a).

IRC § 877(d)(4) generally provides that when an expatriate contributes U.S. source property to a controlled foreign corporation and the individual would be a United States shareholder but for the individual's expatriation, then any income or gain on such property, or any other property that has a basis determined in whole of in part by reference to such property, received or accrued by the corporation during the 10-year period following expatriation shall be treated as received or accrued directly by the individual and not by the corporation. If the individual disposes of any stock in the corporation or other stock that has a basis determined in whole or in part by reference to such stock during the 10-year period referred to in IRC § 877(a) and while the contributed property is held by the corporation, the individual is taxable on the gain that would have been recognized by the corporation had it sold a pro rata share of the property immediately before the disposition. IRC § 877(d)(4)(D) announces the intention of the IRS to exercise this authority to prevent the avoidance of the purposes of IRC § 877(d)(4). As a result, the exchange rules apply for the 15-year period before expatriation, rather than the 10 year period provided by IRC § 877(a). The inclusion of the five-year period prior to expatriation was intended to prevent pre-expatriation planning to evade the purposes of IRC § 877(d)(4).

13. Describe the manner in which the IRS determines whether a nonresident alien (expatriate or otherwise) has made a lifetime gift of U.S. situated property or has died leaving U.S. situated property.

Gift Tax

A nonresident not a citizen must file a U.S. Gift Tax Return, Form 709, when gifts of U.S. situated property exceed the $10,000 annual exclusion for any donee. Additions to tax may be imposed under IRC § 6651 for failure to timely file a gift tax return. In addition, an indirect method of identifying nonresident aliens who made gifts of $100,000 or more to U.S. persons is through Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. U.S. recipients of a gift or bequest after August 20, 1996, of more than $100,000 from a foreign person must complete part IV of Form 3520. The IRS uses these returns to identify foreign donors and verify whether they are compliant with U.S. tax law. Discovering unreported gifts by nonresident alien expatriates has always been very difficult because gifts of intangible and tangible personal property are not easily tracked. The gift requires no transfer agent or recording of the transfer that could be used to identify the taxable transfer. Even where a gift of real estate is recorded with the Register of Deeds, it would be impossible for the IRS to monitor these records nationwide.

Estate Tax

A nonresident alien who dies with U.S. situs assets exceeding the value of $60,000 is required to file a Form 706NA, U.S. Estate Tax Return for the Estate of a Nonresident Not a Citizen of the United States. Additions to tax may be imposed under IRC § 6651 for failure to timely file an estate tax return. Question 6 of Part III of Form 706NA asks whether the decedent lost his U.S. citizenship or residency within 10 years of death. Another method of identifying nonresident alien decedents who own U.S. situs property is through requests for Transfer Certificates, Form 5173. IRC § 2203 provides that where there is no executor or administrator appointed and acting within the United States, the term "executor", for purposes of determining obligations under the Internal Revenue Code, means "any person in actual or constructive possession of any property of decedent." In order for these individuals to protect themselves from possible personal liability for tax, such "statutory executors" may request a transfer certificate from the IRS. Treasury Regulation § 20.6325-1. Before the IRS will honor such a request, sufficient information for the IRS to make a determination of estate tax liability must be submitted. In those cases where the estate meets the filing requirements, the return must be filed and tax liability paid before a Transfer Certificate will be issued. Also, as discussed above, Form 3520 provides an indirect method for determining large bequests to U.S. persons from nonresident alien decedents.

Identifying individuals who are non-compliant and who are not detected by indirect methods of identification is difficult at best. This is particularly true if an expatriate dies owning stock of a foreign corporation that itself held US assets.

14. Describe to what extent, if any, the Treasury Department or the IRS has coordinated its enforcement efforts of the 1996 expatriation tax rules with other countries, including our treaty partners.

Pursuant to several tax treaties, the IRS receives routine exchanges of information from foreign taxing authorities. The information consists of inventories of U.S. assets reported to the foreign taxing authorities for succession tax purposes by estates of resident decedents. IRS personnel review these materials. If a case is open on the matter, the information is given to the examining attorney/agent. If no case is open but the information indicates that a return should have been filed with a tax due, inquiries are directed to the estate's fiduciaries or other representatives.

15. Describe to what extent, if any, information collected by the Department of State (the "State Department") or the Immigration and Naturalization Service (the "INS") with respect to expatriates is available to the IRS. Describe the usefulness of such information to the IRS and the difficulties, if any, in utilizing the information provided by the state Department or the INS in enforcing the 1996 expatriation tax rules.

As stated in 3a above, the IRS receives the complete CLN file from DOS. This file generally contains personal information about an individual's purpose for expatriation, how U.S. citizenship was obtained as well as the expatriation information statement required by IRC § 6039G and other information. The IRS has not experienced any difficulty using the information and has generally found it to be useful.

As stated in 3c above, in contrast to expatriating citizens, when a green card holder departs the United States, he/she is not required to provide a new (overseas) mailing address or a social security number. This results in the only address of record being the former U.S. address and no tax identification information on which to start research. These two factors present problems for the IRS in utilizing the data provided by the INS and make the data of limited value.

16. Describe what assistance the IRS has provided to the State Department and the INS to implement section 212(a)(10)(E) of the Immigration and Naturalization Act. Describe any difficulties encountered in providing information to the State Department and the INS and what steps have been taken to resolve those difficulties. Describe what law or procedures, if any, need to be changed or modified to enable the State Department and the INS to access the information needed.

A working level task group comprised of representatives from INS, DOS, Justice, Treasury and IRS has been formed to assist INS in implementing this section. Members of this group have met (either in person or through conference calls) on numerous occasions. Much of the activity has been to determine what INS's

information needs would be and how these needs could be met. Personnel in the Office of the Assistant Commissioner (International) and in the Office of the Associate Chief Counsel (International) have provided comments regarding INS' drafts of regulations under section 212(a)(10)(E) of the Immigration and Naturalization Act.

[***REDACTED INFORMATION***]

As contemplated by the statute, section 212(a)(10)(E) of the Immigration and Naturalization Act is to be implemented and administered by the Attorney General, who exercises authority over immigration law issues. It is our understanding that the INS is in the process of completing regulations providing detailed guidance regarding procedures under that statute.

[***REDACTED INFORMATION***]

18. Describe in detail any efforts by the Treasury Department or the IRS regarding enforcement of, or compliance with, the 1996 expatriation tax rules, including any information that has been obtained to date.

This question has been covered in detail in questions 2, 3, 5, 9 and 13.

19. Describe whether the IRS plans to establish a regulation project with respect to the 1996 expatriation rules, and if so, the projected timing for such project.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

20. Provide information regarding any Treasury Department or IRS studies or projects (public or nonpublic) on overseas taxpayers which could involve expatriates. For example, a report on the Internet described an IRS sampling of persons overseas applying for passport renewals. The IRS allegedly contacted these persons to determine how many were filing tax returns

The IRS has completed the project described below:

Passport Information Gathering Project
IRC § 6039E requires applicants for a U.S. passport to provide their social security numbers on the Passport application. Failure to provide this information can subject the individual to a $500.00 penalty. To measure the effectiveness of this requirement, the IRS conducted a Compliance Information Project (CIP). The IRS took (for one quarter) the information provided to the IRS by the DOS regarding passport applicants and extracted only those who made application overseas, and failed to provide a social

security number. For this population (estimated to be 4,000 annually), a letter was mailed to 1,039 individuals. The results of this mailing were as follows:

- Number responding - 607
- Number providing SSN - 400
- Number not providing SSN – 207
  - Reasons for not providing SSN include:
    - Never had an SSN, born in United States to a Non-Resident, immigrated to current country of residence as child; or born overseas to a U.S. parent - 191
    - Lost SSN Card and forgot number, are contacting the Social Security Administration for a number – 16
- Letter from IRS returned undeliverable – 66

It is important to note the difficulty inherent in implementing projects aimed at expatriates. In particular, these individuals may no longer have any significant connection with the United States. Moreover, their tax liability under sections 877, 2107, and 2501(a)(3) may depend on transactions that have little, if any, connection to the United States (and therefore would generate no U.S. information reporting), and that occur up to 10 years after the individual's expatriation.

21. Describe whether the IRS has considered including a question on IRS Form 709 (relating to gift tax returns) regarding whether a taxpayer has relinquished U.S. citizenship or terminated U.S. residency within the last ten years. If so, please indicate the rationale for not including such a question.

The IRS has considered adding an expatriation question on Form 709. However, the IRS has concluded that adding the question would have minimal compliance benefit in relation to the increased tax burden placed upon resident alien and resident citizen filers. The number of gift tax returns filed by nonresident citizens and nonresident aliens is approximately 200 annually. Since the expatriate population is a very small fraction of this filing population, few positive responses would be expected. It is also likely that if an expatriate files a gift tax return, she/he is already in compliance with the law.

[*REDACTED INFORMATION***]**

The IRS does not keep statistics in the normal course of business as to the effect of the 1996 legislative changes compared to the prior law. However, it is the IRS's understanding, based on both publicly available sources and information received in the course of the private letter ruling process, that significant numbers of wealthy

citizens have continued to expatriate since the expatriation tax laws were amended in 1996.

Numerous wealthy former citizens have submitted requests for rulings under section 877(c). Of particular note is that many of these individuals hold a substantial portion of their wealth in non-U.S. assets. As a result, even if these individuals were determined to have expatriated with a principal purpose of tax-avoidance, they would not be subject to significant taxation under sections 877, 2107, and 2501(a)(3).

[***REDACTED TAXPAYER INFORMATION***]

Public reports also cite examples of wealthy citizens who have recently expatriated. For example, a magazine article noted that in the first quarter of 1999 expatriates included "J. Paul Getty's grandson Tara Getty, 31; Jacob Stolt-Nielsen, 36, son of shipping magnate Jacob Stolt-Nielsen, Jr.; and Joseph J. Bogdonovich, Jr., son of the Star-Kist mogul." Other news articles noted that Ernest J. Olde, founder of Olde Financial Corp., surrendered his citizenship shortly before the sale of his company in 1999 for $850,000,000.

A brief search of the internet also identified numerous web sites discussing the use of expatriation as a tax planning vehicle. For example, one web site asserted that "[w]e are aware of increased levels of interest in this planning technique. . . . Without question some of these individuals are also at least partially interested in escaping U.S. worldwide taxation of their income and estate."

23. Provide the number of individuals that currently are assigned to administer compliance with the 1996 expatriation tax rules.

Currently, the International District of the Office of the Assistant Commissioner (International) has 1 Tax Examiner, 2 Revenue Agents, and 1 Management Analyst assigned to review each CLN received, publish the quarterly listing in the Federal Register, and perform any compliance activity required at the current level. In addition, resources are expended by Revenue Agents who work expatriate cases that were identified through our normal classification process.

The Office of Associate Chief Counsel (International) currently has seven docket attorneys and two immediate branch reviewers assigned to process requests for rulings under IRC § 877(c)(1). This group is not solely dedicated to processing IRC § 877(c) rulings because of the large amount of other legal work in the Office of Associate Chief Counsel (International). An Assistant Chief Counsel and an Associate Chief Counsel also review work in this area as needed.

24. Provide the number and type of individual income tax returns filed by overseas taxpayers (expatriates or otherwise) for each year of the most recent

ten year period for which information is available, including the type of tax return in the 1040 series. Provide the number of examinations completed by the Office of Assistant Commissioner (International) or other relevant IRS offices of such returns for each of the most recent five years.

The tables below indicate the number and types of returns filed by overseas taxpayers for the most recent seven tax years. The IRS currently only maintain seven years worth of data.

Tax Year 1993

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	7,074
1040 EZ	98,286
1040 EZ (TELEFILE)	4,602
1040 A	114,058
1040	405,055
1040 SS	37
1040PR	25
1040 NR	305,933

Tax Year 1994

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	3,003
1040 EZ	94,525
1040 EZ (TELEFILE)	3,552
1040 A	102,060
1040	392,476
1040 SS	56
1040PR	37
1040 NR	328,387

Tax Year 1995

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	7,722
1040 EZ	89,072
1040 EZ (TELEFILE)	2,907
1040 A	81,857
1040	408,078
1040 SS	40
1040PR	21
1040 NR	345,651

Tax Year 1996

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	11,533
1040 EZ	99,292
1040 EZ (TELEFILE)	107
1040 A	103,179
1040	442,454
1040 SS	75
1040PR	17
1040 NR	352,365

Tax Year 1997

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	14,061
1040 EZ	101,027
1040 EZ (TELEFILE)	118
1040 A	89,817
1040	469,174
1040 SS	64
1040PR	24
1040 NR	415,386

Tax Year 1998

TYPE OF RETURN	# OF RETURNS FILED
1040 PC	13,158
1040 EZ	90,802
1040 EZ (TELEFILE)	9
1040 A	74,070
1040	400,199
1040 SS	44
1040PR	28
1040 NR	337,996

The number of examinations completed on returns filed by individual overseas taxpayers for the past five years are as follows:

Fiscal Year ending 1995	1,860
Fiscal Year ending 1996	1,605
Fiscal Year ending 1997	1,533
Fiscal Year ending 1998	1,041
Fiscal Year ending 1999	1,003

25. Provide for the most recent five years the audit coverage rates for (a) individual taxpayers residing overseas (expatriates or otherwise), and (b) individual taxpayers residing within the United States.

Audit Coverage for individual taxpayers residing overseas

	1995	1996	1997	1998	1999
Individual, overall average	.20	.16	.14	.11	.10

Audit Coverage for individual taxpayers residing within the United States

	1993	1994	1995	1996	1997
Individual, overall average	0.92	1.08	1.67	1.67	1.28

The audit rate for overseas taxpayers is significantly lower than for US taxpayers because of decreased manpower and resources devoted to the former, and the diversion of manpower and resources to special projects and other programs.

26. For each of the last five years, provide the number of taxpayers that have filed income tax returns under section 877, estate tax returns under section 2107, and gift tax returns under section 2501(a)(3).

This information is not readily available. The IRS as a matter of business practice does not systematically mark or code tax returns by IRC section or taxpayer classification.

27. For each of the last five years, provide the number of income tax returns (on IRS Form 1040NR) and estate tax returns (on IRS Form 706NA) that indicate that the taxpayer expatriated or the decedent died (as the case may be) within ten

years of expatriating. For each such return, describe any action taken by the IRS to audit the returns for compliance with present-law expatriation tax rules.

This information is not readily available. The IRS as a matter of business practice does not systematically mark or code tax returns by IRC section or taxpayer classification.

28. Provide the number of information statements received annually pursuant to section 6039G and the number and amount of civil penalties assessed by the IRS for failure to comply with the information reporting requirements, including failure to provide a correct Social Security number.

IRS data indicates that 1866, or 64 percent, of the 2931 expatriates in the database have provided an information statement indicating whether they met the tax-motivation criteria. Because of the retroactive applicability of the legislation and the period required to publish guidance for expatriates IRS initially received a significant number of CLN packages that did not contain the required expatriation information statement. Ninety-five percent of the expatriates who did not provide the required information statement expatriated prior to the issuance of Notice 97-19 in March 1997. IRS continues to contact individuals for the proper information statements and will refer any non-responses to a compliance unit for appropriate action as required.

The IRS does not maintain information as to the number of taxpayers who have been subject to a penalty under IRC § 6039G(d). However, the penalty is a relatively small amount and difficult to collect from an individual who has severed all or most connections with the United States.

[***REDACTED INFORMATION***]

30. Describe whether the thresholds under Code Section 877(a)(2) (relating to statutory presumptions of tax avoidance) are appropriate or whether and how such thresholds should be modified. Also describe whether the conditions for

not presuming tax avoidance under section 877(c) are appropriate or whether and how such conditions should be modified.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

31. Describe the potential consequences and issues involved if the IRS were to modify its ruling practice (as currently reflected under Notice 98-34) to no longer provide a ruling that an expatriate submitted a complete ruling request in good faith.

Section 877(c)(1)(B) provides that the average tax liability and net worth tests of section 877(a)(2) "shall not apply" if an eligible individual "submits" a ruling request for a determination as to whether such loss had for one of its principal purposes the avoidance of U.S. taxes. Thus, once an eligible individual submits the request, the conclusive determinations of section 877(a)(2) do not apply and the determination of whether the taxpayer had a principal purpose of tax avoidance depends on a subjective inquiry into the actual facts and circumstances surrounding the expatriation. This result follows from section 877(c)(1)(B), regardless of whether the IRS makes the subjective determination in the context of an advance ruling request or in the context of a subsequent examination. Accordingly, a change in the IRS' ruling practice to no longer provide "fully submit" rulings would not in and of itself restore the conclusive determinations of section 877(a)(2).

The elimination of the "fully submit" category of rulings would, however, create significant administrative difficulties for the IRS. As described more fully in the answer to Question 6, it is difficult to make sound fact-intensive determinations in the context of an advance ruling process, particularly when the determination involves inherently subjective issues and the available resources to handle the large number of ruling requests is limited. The issuance of a "fully submit" ruling under the circumstances set forth in response to Question 10 enables the issue to be handled by the IRS examinations function, which is better able to address inherently factual inquiries.

33. Describe in detail the types of strategies or structures taxpayers use (or may use) to avoid the 1996 expatriation rules, including any structures or strategies used by taxpayers planning to expatriate to convert U.S. source assets to foreign source assets, and the effect, if any, of other Code provisions such as section 367 with respect to such strategies or structures.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

34. Describe what laws or procedures, if any, may need to be enacted, modified, or implemented to improve taxpayer compliance with, or the enforcement or effectiveness of, the 1996 expatriation tax rules, including any additional

information or assistance from the State Department and the INS that would be helpful to the IRS in administering these tax rules.

This question is addressed in Acting Assistant Secretary Talisman's separate letter.

I hope this information is helpful. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Charles O. Rosotti

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2000

Ms. Lindy L. Paull
Chief of Staff
Joint Committee on Taxation
U.S. House of Representatives
1015 Longworth House Office Building
Washington, DC 20515

Dear Ms. Paull:

This responds to your letter, dated April 13, 2000, asking the Tax Division for information on two subjects pertaining to the Tax Division's role in implementing § 212(a)(10)(E) of the Immigration and Nationality Act (INA) (8 U.S.C. § 1182(a)(10)(E)): our involvement, if any, in implementing the statute and our ability to make the tax-avoidance determination required by the statute.

As noted in your letter, § 212(a)(10)(E) of the INA, provides that "[a]ny alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is excludable." We are aware that, since the statute was enacted, the Immigration and Naturalization Service (INS) , the Internal Revenue Service (IRS) , the Treasury Department, and the State Department have been grappling with problems of implementation. Due to our concern about the statute's requiring a "determination by the Attorney General" that a renunciation of citizenship was tax motivated, the Tax Division participated in some discussions relating to enforcement of § 212(a)(10)(E). The topics addressed were the areas of responsibility for enforcing the statute, appropriate interpretation of the statute, and problems of enforcement.

This statute is an immigration statute. A taxpayer-expatriate's protest of INS' determination that the taxpayer should be excluded from re-entry is not within the categories of matters over which the Tax Division has jurisdiction. 28 C.F.R. § 0.70. As the determinations would be made in the context of an attempted re-entry to the United States after some form of expatriation, whether formal renunciation or some lesser expatriating act, oversight and enforcement is the responsibility of the INS, based on information received from the State Department and the IRS (consistent with the restrictions of Internal Revenue Code § 6103), and in accordance with the statutes governing immigration in Title 8 of the United States Code. Consequently, the interagency discussions concluded that the "front line" efforts at

enforcement are the responsibility of the INS. In fact, INS has coordinated its responsibilities with those of the State Department and the IRS, and has drafted implementing regulations that it expects to publish for comment shortly. The Tax Division's function is to review INS' draft to assure that the tax avoidance discussion in the regulations is consistent with the positions taken by the Division in tax litigation.

With regard to the Tax Division's role in determining whether a renunciation of citizenship was tax-motivated, the attorneys of the Division, in the course of litigating cases referred to the Division, either at the trial or appellate levels, often litigate the question whether a taxpayer has acted for the purpose of tax avoidance. The cases involving the packaging of losses to take advantage of the installment sale provisions of the Internal Revenue Code and Treasury Regulations are recent examples (*see*, *ASA Investerings Partnership v. Commissioner*, 201 F.3d 505 (D.C. Cir. 1999)). Accordingly, the Tax Division has institutional expertise, generally speaking, with litigation involving tax-avoidance and tax-motivated transactions. As a rule, these cases are very fact-intensive, and for litigation in the trial courts we generally have the benefit of an IRS investigative file and can make extensive use of available discovery tools. The obstacles to the Tax Division's assisting in enforcement of § 212(a)(10)(E) by making the tax avoidance determination are, however, several.

As noted, disputes over re-entry to the United States are not within the scope of the Tax Division's jurisdiction. 28 C.F.R. § 0.70. The Tax Division is not an investigatory body but is essentially a government law firm comprised of prosecutors and civil litigators. Almost exclusively, the Division's responsibilities involve handling cases arising from investigations by the IRS or, occasionally, the FBI or some other investigatory body or agency. It is our view that the investigation and preliminary analysis leading up to the Attorney General's determination should be conducted in the first instance by an investigatory agency. Because the Tax Division is staffed and geared toward litigating cases in court, it does not expect to provide day-to-day assistance to the INS in administering the INS re-entry program. It is more consistent with the Division's jurisdiction to confine its involvement to assuring that implementation of § 212(a)(10)(E) does not adversely impact on tax issues arising in litigation. Of course, if INS asks for assistance after implementing regulations are issued, the Tax Division is, as always, amenable to discussing the kind of assistance requested and the extent to which the request can be accommodated.

In conclusion, litigation involving transactions where the issue is tax-avoidance is certainly within the Tax Division's area of expertise. Because the Division does not have any operational responsibility over the enforcement of § 212(a)(10)(E), however, it has viewed its role in its implementation as primarily advisory.

We hope this information is helpful and responsive to your request.

Sincerely,

Robert Raben
Assistant Attorney General

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Memorandum

May 10, 2000

TO : Joint Committee on Taxation
Attention: Lindy Paull

FROM : Marie B. Morris
Legislative Attorney
American Law Division

SUBJECT : Does Date of Loss of Citizenship or Permanent Resident Status Have to Coincide for Tax and Immigration/Nationality Law Purposes?

This is the first of two memoranda requested on your behalf relating to proposed changes in the taxation of persons giving up United States citizenship. For purposes of this memorandum, the terms "loss of citizenship", "expatriation," and "loss of nationality" are used interchangeably.

Background

Under current immigration law, a citizen of the United States may voluntarily relinquish citizenship by performing any of a number of acts with the intent of giving up U.S. citizenship. Some of these acts include being naturalized in a foreign country, taking an oath of allegiance to a foreign country, serving as an officer in the armed forces of another country, and making a formal renunciation before a diplomatic or consular officer of the United States in a foreign country in the manner prescribed by the Secretary of State. See 8 U.S.C. § 1481(a). Although the statute and some cases presume that loss of citizenship is automatic when one of the acts listed in the statute occurs,[1] usually the United States is not on notice that such an act has occurred until the individual notifies a diplomatic or consular officer of the United States of the act and indicates that the act was done with the intention of relinquishing U.S. citizenship. Normally, after receiving notification, the Department of State prepares a Certificate of Loss of Nationality [CLN] which indicates that citizenship was lost effective as of the date of the act.

Under current tax law, citizenship is determined according to immigration/nationality law. Any individuals losing U.S. citizenship after the enactment of P.L. 104-191 in 1996, are required to furnish a statement (usually to the Department of State) at the time they

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[1] Gordon, Mailman, Yale-Loehr, 7 IMMIGRATION LAW AND PROCEDURE, REVISED EDITION, §100.02[5][a] at 100-45 through 100-48.

renounce their citizenship or at the time they furnish a certificate of voluntary relinquishment of U.S. nationality to the Department of State. Internal Revenue Code [IRC] § 6039G. The 6039G statement, which is furnished on Form 8854, is to include, among other things, the taxpayer's identification number, mailing address, country of citizenship, date of expatriation, and, for certain individuals, a statement of net worth. The penalty for failure to file Form 8854 is imposed for each year of the 10-year period after the date of expatriation that the form is not filed. The penalty for each year is the greater of $1,000 or 5% of the tax required to be paid under IRC § 877.

Under IRC § 877, any individual giving up U.S. citizenship who has a net worth of $500,000[2] or who had an average annual net income tax liability in excess of $100,000[3] for 5 taxable years before the date of loss of citizenship is presumed to be giving up citizenship for tax avoidance purposes. IRC § 877 imposes a special alternative tax for ten years after an individual gives up citizenship (or permanent residence status) for tax avoidance purposes. IRC § 2107 imposes the U.S. estate tax on nonresident decedents dying with taxable estates if, within the 10-year period ending on the date of death, the decedent lost U.S. citizenship. IRC § 2501 imposes a gift tax on the taxable transfer of intangible property by gift if the donor had lost U.S. citizenship within the 10 years prior to the gift. If the individual requests a ruling, either prior to or within one year after loss of citizenship, the statute permits a number of exceptions to this presumption. Some of the exceptions include becoming a citizen of one's birth country, one's spouse's birth country, or one's parent's birth country.

Under a transition rule included in P.L. 104-191 §511(g)(3)(A), former citizens who performed certain expatriating acts, including being naturalized in a foreign country after reaching age 18, take an oath of allegiance to a foreign country after attaining age 18, serving in the armed forces of a foreign country under certain conditions, and serving in the government of a foreign country (but not including renouncing U.S. citizenship before a diplomatic or consular officer of the United States), who did not furnish the State Department with a signed statement of voluntary relinquishment of U.S. citizenship before February 6, 1995, confirming the performance of the expatriating act, may find the 10-year period extended in their cases. Under the transition rule, the 10-year period begins when the individual furnishes the statement of voluntary relinquishment to the State Department. Those who can prove to the satisfaction of the IRS that they lost U.S. citizenship prior to February 6, 1994, are subject to the prior version of IRC § 877.

Question

Because CLNs can be issued with a retroactive effective date and because the Form 8854, Expatriation Information Statement, may not be filled out in full or on time, the question has been raised whether there would be any constitutional or international law problems with treating an individual as a United States citizen for tax purposes until the individual has <u>both</u> performed an expatriating act under 8 U.S.C. § 1481(a) <u>and</u> provided the information required by IRC § 6039 to the Internal Revenue Service. The requirement of

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[2] This statutory amount is adjusted for inflation. The 2000 amount is $562,000.

[3] The 2000 inflation-adjusted amount is $112,000.

both an expatriating act and notice to the IRS is referred to as "the proposal" in this memorandum. Presumably, if an individual's expatriating act was based on renunciation of citizenship under § 1481(a)(5), the dates of the act and the providing of the information would coincide. If applied to current law, such a definition would essentially prevent the start of the 10-year periods under IRC §§877, 2107, and 2501 until after the individual had done something to relinquish citizenship and notified the IRS of the fact. The question does not preclude a change in existing tax law.

Analysis

Constitutional law. Because the United States is essentially a "nation of immigrants," we have long had an interest in immigrants being able to renounce citizenship in the country they left and being able to enjoy full citizenship in the United States. In connection with public outcry against the British treatment of naturalized Irish-American citizens arrested in Ireland[4], Congress enacted a July 27, 1868 statute, 15 Stat. 223, the preamble to which recognized that the

> "right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; . . . Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

Although this language was adopted in connection with immigrants giving up citizenship in another country, it is presumed that the same policy applies to those desiring to give up United States citizenship. Unfortunately, we do not know of any Supreme Court decisions involving people desiring to give up citizenship. The Supreme Court decisions in this area of law have involved the United States trying to strip citizenship from a person who wanted to remain an American citizen. Since the enactment of the Immigration and Nationality Act Amendments of 1986, P.L. 99-653, United States law has required that renunciation of American citizenship be a voluntary act. This reflects the decision of the Supreme Court in *Afroyim v. Rusk*, 387 U.S. 253 (1967), a 5-4 decision holding that an individual keeps his citizenship unless he voluntarily relinquishes it. *Vance v. Terrazas*, 444 U.S. 252 (1980), upheld the power of Congress to impose evidentiary standards governing the loss of citizenship. The evidentiary standards upheld in that case are similar to those under existing immigration law, 8 U.S.C. § 1481(b), which provides:

> Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 . . . the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be

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[4] Gordon, Mailman, Yale-Loehr, 7 IMMIGRATION LAW AND PROCEDURE, REVISED EDITION, §100.02[1][b] at 100-9.

presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Since *Vance v. Terrazas* confirms that Congress has the power to impose reasonable evidentiary standards on the loss of citizenship, it seems unlikely that there would be a problem with imposing reasonable evidentiary standards, such as those contained in the proposal. Two tax cases decided by Courts of Appeals suggest that an evidentiary standard might help resolve certain tax disputes, but, in certain circumstances, it might be inequitable for the government to refuse to recognize loss of citizenship. *United States v. Rexach*, 558 F.2d 37 (1st Cir. 1977) and *United States v. Matheson*, 532 F.2d 809 (2nd Cir. 1976), cert. denied 429 U.S. 823 (1976), involved situations where in order to collect back taxes the government asserted that an individual was a citizen when the individual claimed to have lost citizenship by performing certain acts.[5] In each case, the court examined the facts. If the individual had performed other acts consistent with being a citizen, such as filing tax returns, applying for a U.S. passport, traveling on a U.S. passport, or registering a yacht as an American, the individual would be estopped from claiming that she had lost American citizenship. If the individual had received benefits of citizenship, the equities favored the imposition of U.S. taxes. If the United States had done something that was inconsistent with the individual's being a citizen, e.g., forcing the individual to surrender a passport because she was not a citizen, then the United States was not entitled to claim that the individual was subject to U.S. taxes on equitable grounds. *Rexach* involved income taxes, and the taxpayer was found to have been a citizen for some years in question and a noncitizen for other years. The court stated that it would be unconscionable to allow the taxpayer to be dunned for taxes to support the government during years that she was denied its protection. 558 F.2d at 43.[6] *Matheson* involved estate taxes, and the taxpayer was found to have been a dual national until the date she died.

A couple of Tax Court decisions seem to indicate that the proposal may be a de facto rule in Tax Court decisions, absent inconsistent behavior by the U.S. government. *Vriniotis v. Commissioner*, 70 T.C. 298 (1982), involved a naturalized U.S. citizen who retired to Greece, indicating to his family, but not to the U.S. government, that he intended "to remain there permanently." When he died, the State Department issued a "Report of Death of an American Citizen." The report indicated that his passport had been canceled and destroyed, but that his naturalization certificate had not been surrendered. Based on lack of any evidence of renunciation of citizenship, and a presumption against loss of citizenship in the

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[5] Both *Rexach* and *Matheson* involved years when expatriation law was in flux because at times performing an "expatriating" act had been sufficient to result in automatic loss of citizenship. After *Afroyim v. Rusk*, it was unclear whether those who had lost citizenship automatically, but involuntarily, were retroactively made citizens.

[6] Compare this to *Rexach v. United States*, 390 F.2d 631 (1st Cir. 1968), cert. denied 393 U.S. 833 (1968), involving the husband of the decedent in the other *Rexach* case. The taxpayer asked to have a CLN, which had been granted at his request, cancelled. The court ruled that he became liable for taxes for the years he was retroactively made a citizen. Even though the government may not have offered him its protection during the 2 or 3 years he was temporarily a noncitizen, the government had done nothing which estopped it from claiming taxes for those years.

absence of direct evidence, the Tax Court held that the decedent died a dual American-Greek citizen, subject to U.S. estate taxes.

In *Dacey v. Commissioner*, T.C. Memo 1992-187, the taxpayer moved to Ireland in 1980. Dacey, author of *How to Avoid Probate*, applied for and received a U.S. passport in 1980 and in 1985. In order to receive a passport, one must declare that one is a U.S. citizen, has not sworn allegiance to a foreign state, and has not made a renunciation of nationality. Ireland issued Dacey a passport in 1986. In 1988, Dacey formally renounced his U.S. citizenship before a U.S. vice consul in Ireland. The facts in the case do not indicate the effective date of the CLN. Income and self-employment taxes for tax years 1981-1985 were at stake. Dacey claimed to have sent the State Department a letter in 1981 renouncing U.S. citizenship. The State Department had no record of receiving such a letter, but the Tax Court said, even assuming that such a letter had been sent and received, it did not comply with the statutory evidentiary requirements which require compliance with State Department regulations. The Tax Court held that Dacey did not lose his U.S. citizenship until he complied with the procedures in 8 U.S.C. § 1481 in 1988. The court noted that being issued a passport by Ireland was not evidence of renunciation of U.S. citizenship because it might only be evidence of dual citizenship, but in any case, 1986 was after the tax years in question.

There is some precedent in existing law for the divergence of the tax and nationality law definitions of citizenship. Section 511(g)(3)(A) of P.L. 104-191 contains a transition rule for individuals who committed a potentially expatriating act prior to the effective date of the Act (February 6, 1995), but who did not notify the State Department of their intent to expatriate until after the effective date. Under the transition rule, individuals claiming exemption from IRC § 877 (expatriation for tax avoidance purposes) must file a form 1040NR for the year they notify the State Department and include certain information. The 10-year period in IRC § 877 does not begin running until the date that the State Department is notified. In a sense, the proposal would simply make the transition rule permanent policy.

We are unaware of an constitutional law challenges to this transition rule, but the prior law version of IRC § 877 imposing U.S. taxes for 10-years after expatriation on those who could not prove that loss of citizenship was not motivated by tax-avoidance purposes was upheld against equal protection and due process challenges in *Di Portanova v. United States*, 690 F.2d 169, 231 Ct. Cl. 623 (1982).

A subsidiary constitutional law concern might be raised by an effective date provision. It has been suggested that if the proposal were enacted, even with a date of enactment effective date, it would have retroactive effect on those who claim to have lost nationality prior to the effective date of the law. We do not think that this is a serious constitutional concern. The Supreme Court has held that Congress has the power to enact retroactive tax legislation in situations where the taxpayer is on notice that he may be subject to some kind of tax on the activity or transaction. The most recent Supreme Court case, *United States v. Carlton*, 512 U.S. 26 (1994), upheld a retroactive estate tax increase. That decision and others contain warnings that retroactive tax increases may not always survive constitutional challenge, but in most instances Congress is able to articulate rational and serious reasons for enacting tax legislation with a retroactive effect or effective date. (The date is usually more important than the effect.) Since the enactment of P.L. 104-191, on August 21, 1996, which itself had a retroactive effect date of February 6, 1995, citizens have been on notice that they have tax obligations if they choose to expatriate and that their 10-

year period might not start running until Form 8854 is filed with the IRS. The proposal would not impose a vastly different tax regime which might come as a surprise to expatriating citizens.

International Law concerns. International law recognizes the right of all persons to leave any country, including their native country, subject to limited restrictions. The Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, recognizes a right to physically leave the country, "emigration," and a right to give up citizenship, "expatriation." Article 13(2) provides "Everyone has the right to leave any country, including his own, and to return to his country." Article 15(2) provides, "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 12 of the International Covenant on Civil and Political Rights contains a similar right to leave any country and provides that this right should not be subject to any restrictions except those which are provided by law, are necessary to protect national security or public order, and are consistent with other rights recognized in the Covenant. The United States recognizes both the right to emigrate and the right to expatriate.

The International Covenant recognizes that some restrictions may be placed on the right to emigrate, and the Universal Declaration suggests that non-arbitrary restrictions may be imposed on the right to expatriate. The question is whether the proposal to deem a person a U.S. citizen for tax purposes until the IRS is made aware of the expatriation would be an arbitrary infringement of the right to expatriate. Intuitively, it does not seem that requiring actual notification of expatriation would be a substantial or arbitrary bar to the right of expatriation. In general, it seems fair that citizens be asked to pay U.S. taxes as long as they are citizens and that the government has the right to presume that citizens continue to be citizens until they notify the government that they are claiming to have lost citizenship. Presumably, the U.S. continues to tender benefits of citizenship to its citizens until it becomes aware that they have renounced U.S. citizenship. Perhaps there are some individuals who are unaware of their U.S. citizenship[7], and it may be inequitable to require such individuals to renounce a status when neither they nor the government have knowledge of such status. Although, as a general policy, the proposal seems to be a reasonable way to prevent expatriation from being used as a method of tax avoidance, if it is possible that it could operate in an arbitrary or discriminatory way or could operate in conjunction with other provisions of tax law to discourage or punish expatriation, the proposal could raise international law concerns.

As noted in the previous section of this paper, the transition rule provided by the P.L. 104-191, § 511(g)(3)(A) may provide some precedent for requiring expatriating citizens to provide notice before they are treated as beginning their period of expatriation. We are unaware of any constitutional or international law challenges to this provision.

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[7] Department of Treasury, Office of Tax Policy, INCOME TAX COMPLIANCE BY U.S. CITIZENS AND U.S. LAWFUL PERMANENT RESIDENTS RESIDING OUTSIDE THE UNITED STATES AND RELATED ISSUES (May 4, 1998) refers to "unknowing" citizens, including those born outside the U.S. who are unaware of the identity, much less the U.S. citizenship of a biological parent. The report suggests that equity may require that such an individual be given a certain amount of time to renounce U.S. citizenship after having been made aware of its existence without being subject to a tax regime from which the individual received no benefits.

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Memorandum

May 10, 2000

TO : Joint Committee on Taxation
Attention: Lindy Paull

FROM : Marie B. Morris
Legislative Attorney
American Law Division

SUBJECT : Constitutionality of Proposed Exit Tax

This is the second of two memoranda requested by your staff in connection with proposals to change the way U.S. citizens who choose to give up their citizenship might be taxed. This memorandum explores the constitutionality of the Administration and the Rangel proposals to impose a mark-to-market capital gains exit tax on those who are U.S. citizens for tax purposes. As we understand it, the Joint Committee studied a similar proposal in 1995 (the study hereinafter is referred to as *Issues*).[1]

Summary of Two Proposals

The Administration's proposal contained in the fiscal year 2001 budget would repeal the current expatriation tax provisions for individuals and in their place impose a mark-to-market exit tax on unrealized gains existing at the time of expatriation, without regard to the expatriate's subjective motivation. The proposal would also treat certain gifts made by an expatriate to U.S. persons as taxable income to the recipient.

Treasury explained the proposal as follows:

> The proposal would simplify the taxation of expatriates by repealing the current regime and imposing a one-time tax on accrued gains at the time of expatriation, regardless of the taxpayer's subjective motivation for expatriating. The proposal would provide certain rules and exclusions similar to those provided in the Senate amendment to the Health Insurance Portability Act of 1996 (H.R. 3103). In addition, if an expatriate subsequently makes a gift or bequest to a U.S. person, the proposal would treat the gift as gross income to the U.S. recipient, taxable at the

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[1] Staff of the Joint Committee on Taxation, *Issues Presented by Proposals to Modify the Tax Treatment of Expatriation,* JCS-17-95 (June 2, 1995) [hereinafter "*Issues*"]. The Senate-passed version of H.R. 831 (104th Congress) contained such a provision, but the enacted law, P.L. 104-7, did not. Section 6 of the law requested the Joint Committee staff to study issues presented by these proposals.

highest marginal rate applicable to gifts and bequests. Finally, the proposal would amend the Reed Amendment to coordinate it with the tax proposal, thereby improving the enforceability of both the tax proposal and the Reed Amendment.

The proposal would apply to individuals expatriating on or after the date of first committee action.[2]

The Reed Amendment is an amendment to the Immigration and Nationality Act that bars those who have given up U.S. citizenship for tax avoidance purposes from entry into the United States.

In October 1999, Representative Rangel introduced H.R. 3099. According to Mr. Rangel's summary of the bill, the bill would impose a tax on the unrealized appreciation in the value of an expatriate's assets. The amount of that tax would be determined as if the expatriate had sold his assets for their fair market value on the date that he expatriated. To the extent that those assets were capital assets, the preferential capital gains tax rates would apply. The bill would exempt the first $600,000 ($1.2 million for a married couple) of appreciation from the tax. It would also exempt U.S. real property interests and interests in retirement plans. The expatriate would be provided an election to defer the tax with interest until the property was sold.

The bill would eliminate the ability to avoid estate and gift taxes through expatriation by imposing a tax on the receipt by U.S. citizens of gifts or bequests from expatriates. The proposed tax would not apply in circumstances where the gift or bequest was otherwise subject to U.S. estate or gift taxes. In addition, the tax would be reduced by any foreign estate or gift tax paid on the gift or bequest.

The bill would eliminate the ability to expatriate on an informal basis. It would require a formal renunciation of citizenship before an individual could avoid tax as a U.S. citizen.

Generally, the bill would apply to individuals formally renouncing their citizenship after the date of action by the Committee on Ways and Means. The provisions designed to prevent avoidance of estate and gift taxes would apply to gifts and bequests received after such date.

Unlike the Treasury proposal, the Rangel-Matsui proposal does not appear to repeal existing IRC § 877.

Constitutional Issues Presented

The constitutional and international law issues implicated by these proposals were ably explored by the staff of the Joint Committee on Taxation in 1995.[3] The issues raised in that report should be raised in any discussion of these proposals: 1) Does *Eisner v. Macomber*, 252 U.S. 189 (1920), which held that it was unconstitutional to impose an income tax on

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[2] General Explanations Of Clinton Administration's Fiscal Year 2001 Revenue Proposals, And Excerpts From President Clinton's FY 2001 Budget Submitted To Congress Feb. 7, 2000, as reprinted in Tuesday, February 8, 2000 *BNA Daily Tax Report* at

[3] *Issues*, n. 1 supra, at 77-116.

unrealized income, present an obstacle to imposing an exit tax such as those described in the Administration's budget or in H.R. 3099? 2) Would an exit tax violate any equal protection requirement in the Constitution because it would tax American citizens who are renouncing their citizenship differently than it would tax those who are not? 3) Does the proposal violate any due process requirements in the Constitution that the government not deprive persons of property without due process of law?

We agree with the conclusions reached in the *Issues* report and are unaware of any recent constitutional case law or scholarly discussions which would contradict those conclusions. 1) Although *Eisner v. Macomber* has not be overturned, it is probably a relic of history rather than a valid statement of constitutional law. This is especially true in light of the number of tax code provisions in existing law which require taxpayers to recognize "deemed income" or "constructively received" income, or to explicitly require certain gains to be "marked to market."[4] 2) Equal protection considerations for federal tax legislation come within the ambit of the due process clause. When a protected class does not appear to be involved, there is no heightened scrutiny of the legislation. In other words, if there is a rational basis for the legislation, Congress is viewed as having wide latitude to create classifications and distinctions in tax legislation. 3) Although the Supreme Court often reserves its right to find tax legislation "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property,"[5] it has not found any federal tax statutes to violate the due process clause since the early 1930s.[6] Those statutes that were found to be fundamentally unfair usually were found to be so because of their retroactive application, because a taxpayer could not have been on notice that particular actions would be subject to tax, or because it disturbed the taxpayer's interest in "finality and repose."[7]

Conclusions

Issues correctly found the possible application of the exit tax scheme to those retroactively continued as U.S. citizens for tax purposes to be the point most vulnerable to constitutional challenge. The changes made to IRC § 877 in 1996, the reporting requirements, the possible 10-year liability for U.S. taxes under existing law, and the public discussion of these issues since 1995 may weaken the arguments against unfairness and lack of notice in many cases, however. As *Issues* pointed out, taxation is a way of apportioning the costs of government among those who bear its burdens. It does not strike us as fundamentally unfair for the government to presume that an individual who continues as a citizen ought to share in the burdens of that government until the government is put on notice that the individual is no longer a citizen.[8] The 1996 legislation put expatriating individuals

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[4] *Issues*, 86-87.

[5] *Brushaber v. Union Pacific RR*, 240 U.S. 1 at 24-25 (1916).

[6] *Nichols v. Coolidge*, 274 U.S. 531 (1927), invalidated the retroactive application of the first estate tax law; *Untermyer v. Anderson*, 276 U.S. 440 (1928), invalidated the retroactive application of the first gift tax law; and *Heiner v. Donnan*, 285 U.S. 312 (1932), invalidating inclusion of certain gifts in the taxable estate.

[7] *United States v. Carlton*, 512 U.S. 26, 37-38 (1994).

[8] We have not examined the arguments for proposing similar rules for long-term residents,

(continued...)

on notice that it is in their interest to promptly notify the government of their loss of citizenship.

Although working from summaries is fraught with dangers, we believe that the Administration proposal calls for replacing existing IRC § 877 with an exit tax effective for all those relinquishing citizenship on or after the date of first committee action. Generally, limited retroactivity for the period of time it takes to get legislation through the legislative process does not raise due process concerns. In some expatriates' cases, this trade off between 10 years of additional U.S. tax liability and a one-time exit tax may result in lower costs. For others, the opposite would be true. Existing law does not tax those who are not expatriating for tax avoidance purposes, while the Administration proposal would tax everyone expatriating who possesses over $600,000 in assets. The expatriates lacking a tax avoidance purpose have a stronger expectation of no change in the law than do those potentially subject to current IRC § 877. In addition, those who think they lost citizenship years ago and are not expatriating for tax avoidance purposes may be less likely to be well advised (and therefore be on notice of possible tax law changes).[9] Careful consideration should be given to whether it is fair to impose such a tax retroactively on the non-avoiders.

We believe that the exit tax in the Rangel proposal is supposed to be on top of the tax in IRC § 877. If this is correct, the Rangel proposal would impose a new exit tax on everyone expatriating while continuing the existing regime for those who expatriate with tax avoidance purposes. The same objections that might be raised against the Administration proposal might be raised against the Rangel proposal as well. In addition, the arguments that the Rangel exit tax is a new tax, and the arguments that it is not fair to impose a new tax retroactively, seem stronger. This is not to say that imposing such a tax retroactively for a limited period would necessarily be found unconstitutional, but it raises more questions about the fairness of retroactive imposition than does the Administration proposal.

International Law Considerations

Issues notes that the U.S. asserts about the broadest jurisdiction to tax citizens, non-citizen residents, and expatriates of any country. It suggests that a non-confiscatory exit tax would not raise any insurmountable international law concerns and, in fact, might align the U.S. practice with that of some western nations, such as Canada and Australia, more than does our current 10 years of additional taxes regime. To the extent that the exit tax is in addition to our current tax system, our assertion of tax jurisdiction will be seen as that much more outside the world norm.

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[8] (...continued)
but it strikes us that retroactively treating long-term residents who some time ago returned to their home country as never having left the U.S. tax system is problematic.

[9] On the other hand, they can remain outside the tax system by never appearing before a government official to obtain a Certificate of Loss of Nationality.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

May 16, 2000

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, DC 20515-6453

Dear Ms. Paull:

This is in response to your letter dated May 11, 2000, in which you requested additional information regarding the 1996 expatriation tax laws.

Pursuant to sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code of 1986, this letter contains tax return information (which is underlined). Any disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

1. In your responses to Questions 1, 2, 3(b), 9 and 10 of the March 31 letter, you described various IRS processes, actions, or steps with respect to enforcing, and monitoring compliance of expatriates under the 1996 expatriate tax rules. Describe when and for which specific cases the IRS implemented these various processes, actions, or steps. With respect to Questions 9 and 10 of the March 31 letter, also describe whether (and if so, when) the IRS (i) has assessed any tax liability after issuing an adverse ruling, or (ii) has subsequently determined that an individual expatriated principally to avoid tax after issuing a fully submit ruling.

The Private Letter Ruling Process

Notice 97-19, 1997-1 C.B. 394, which sets forth procedures for submitting a request for a private letter ruling that an individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes, was issued on March 10, 1997. Notice 98-34, 1998-2 C.B. 29, which modified the expatriation ruling procedures, was issued on July 6, 1998. The first private letter ruling under Notice 97-19 was issued on March 18, 1997, to _____. The first private ruling issued under the procedures of Notice 98-34 outlined in Question 10 was on November 4, 1998, to _____

The practice of sending copies to the Assistant Commissioner (International) of all private letter rulings issued under I.R.C. § 877(c)(1) has been in place since the first ruling was issued on March 18, 1997. The practice of sending a copy of the case file to

the Assistant Commissioner (International) after issuance of an adverse ruling has been in place since the first adverse ruling was issued on April 22, 1999, to _____. The practice of notifying and sending the case file to the Assistant Commissioner for cases in which the applicant withdrew a ruling request has been in place since the first withdrawn request on October 27, 1997, involving _____ and _____ _____.

Although this response highlights certain cases, we have processed over 160 private letter ruling requests since March 1997. We would be happy to provide you with details of these cases at your request.

Operational Process

As discussed in our prior letter, the IRS has implemented numerous programs and/or processes under the 1996 expatriation tax laws. The programs and/or processes were implemented at various times as shown below:

- November 1996: Agreement reached on receiving information with the Department of State.
- December 1996: Agreement reached on receiving information with the Immigration and Naturalization Service.
- December 1996: Database for capturing Certificate of Loss Nationality (CLN) forms implemented. This database collects information contained on and attached to the CLN, including the expatriation information statement required by IRC §6039G.
- January 1997: Began publishing the quarterly listing of expatriates in the Federal Register. The first publication related to the quarter ending December 31, 1996.
- January to May 1998: Developed and implemented the following processes:
  - Review of average tax for 5 year period prior to expatriation.
  - Return filing compliance check for 6 year period prior to expatriation.
  - In-depth review of the data received from INS, which resulted in a decision to only work a sample in detail.
  - Process to capture copies of filed tax returns annotated with "Expatriate Return" at the top of the return.
- August 1999: Proposal to establish a Compliance Improvement Project (CIP) to determine levels of compliance with the expatiation tax laws. The proposal was approved in November 1999.
- Letter developed and approved for mailing to individuals who failed to provide the information statement required by IRC §6039G. First letters mailed January 2000.

The processes listed above are used to filter the large volume of data down to the few items worthy of audit. However, it should be noted from our response dated May 5, 2000, that we also identify audit worthy cases in our regular classification process, and that we have concerns with the administrability of the 1996 expatriating tax rules.

The IRS has not yet been able to identify any post-expatriation tax liabilities for persons who have received adverse rulings. This is due, in part, to the lag time inherent in the examination cycle (as noted above, the first adverse ruling was issued in 1999). It is important to note, however, that a significant number of expatriates who have received adverse rulings hold significant portions of their wealth in the form of foreign assets or trust assets that are not taxable under the 1996 expatriation tax law. Accordingly, it is not expected that the IRS could assess significant tax liabilities with respect to these persons. Additional details regarding this problem were set forth in our May 5 response to Question 22 of your March 31 letter. The IRS has not yet made a determination that an individual expatriated principally to avoid tax after issuing a fully submit ruling.

2. Question 3(c) of the March 31 letter requested information about information exchanges between the INS and the IRS. Your response states that "[t]he IRS loads the data into a database and discards the records for individuals who do not meet the residence requirement of I.R.C. § 877(e)(2)." However, the GAO recently reported to the Joint Committee staff that "IRS does not use the data [from INS] to track expatriates because the data do not distinguish former long term residents from other former green card holders and generally do not include tax identification numbers." In addition, the Treasury Department's May 1998 report on income tax compliance by U.S. citizens and U.S. lawful permanent residents residing outside the United States, stated: "the information currently provided by INS to IRS is not sufficient in itself for IRS to determine whether the former green card holder may be subject to continued U.S. taxation under section 877 of the Code as amended by the Act."

Describe whether the IRS is able to use INS records to identify whether a person is a former long-term resident. If so, identify when the IRS began to use such information and when the IRS began to maintain and use a database for former long-term residents. Identify what percentage of the information obtained by the IRS from the INS lacks social security numbers, and describe what the IRS does with the information from the INS that does not contain social security numbers.

The IRS has made significant efforts to utilize the information obtained from the INS. From January to May 1998 we conducted an in-depth review of the data received in order to determine the most appropriate and efficient way to analyze it. As a result of that review, and because of the large volume of records received, the IRS decided to focus on processing only a sample of the records to determine overall filing compliance. Analyses took place in 1998 and again in 1999.

The IRS receives a large volume of data from the INS. For example, approximately 123,000 records were received in 1999. The data received from the INS contains both the individual's original entry date as well as the most current arrival date. In order to reduce the number of records to be processed, the IRS uses this information to help identify whether an individual was a lawful permanent resident for at least 8 years, and

thus is likely to be a long-term resident under section 877(e)(2). The information does not, however, conclusively answer whether an individual is a long-term resident under section 877(e)(2) because, for example, he could have been treated as a resident of a foreign country pursuant to a tax treaty during some of those years. This initial determination is conducted without regard to whether the record contains a social security number (SSN).

Once records that are most likely to reflect long-term resident status are selected through this process (approximately 70,000 in 1999), the IRS attempts to link the records with specific taxpayer records through the SSN in order to determine filing compliance. (For 1999, for example, we received SSNs from only 33% (approximately 23,000) of those persons who were most likely to have been long-term residents.) Because of the large volume involved, a sample is selected to determine filing compliance. For the records selected where no SSN has been provided we conduct labor-intensive manual research to attempt to locate the individual's SSNs. If an SSN is located we continue the research to determine the level of compliance. This process involves securing the individual's tax return from a Service Center and physically reviewing the attached documents.

As evidenced by this experience, the process of checking for filing compliance by former lawful permanent residents under IRC §6039G and 877 is time consuming and resource intensive. For similar reasons, it is difficult to use this data to identify whether particular persons may be subject to tax under the 1996 expatriation tax law, particularly because a significant number of records do not contain SSNs and may not contain current overseas mailing addresses.

3. Question 14 of the March 31 letter requested information about coordinated enforcement efforts with respect to the 1996 expatriate rules with other countries, including treaty partners. Your response states that the IRS receives routine exchanges of information from foreign taxing authorities pursuant to tax treaties. Describe when and for which specific cases the Treasury Department or the IRS has requested information from another country concerning an expatriate subject to the 1996 expatriate tax rules.

At this time, the IRS has not yet utilized exchange of information procedures under a treaty to solicit information regarding a citizen who we believe has expatriated to avoid tax pursuant to the 1996 expatriation tax law. However, we shall take full advantage of this capability at the appropriate time.

I hope this information is helpful. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Charles O. Rossotti

Charles O. Rossotti

United States Department of State

Washington, D.C. 20520

May 18, 2000

Mr. Oren Penn
Joint Committee on Taxation
U.S. Congress

Dear Mr. Penn:

Reference is made to your telephone conversation with Mr. Luke Bellocchi of my staff concerning the numbers of approved Certificates of Loss of Nationality (CLN) approved by this office in 1995, 1996 and 1997.

We currently record information on each CLN that we approve. That information includes the name of the expatriate, the section of nationality law under which the loss occurred, and the name of the mission at which the CLN was produced. In the distant past, we had collected statistics on the annual numbers of CLNs for provision to the Immigration and Naturalization Service (INS) at their request. INS discontinued their request for this information sometime in the 1980's. While we continued to collect the information for some time after, this practice was discontinued after 1994 because it did not serve any specific need of which we were aware. Thus, we are unable to provide a yearly breakdown of CLNs approved for the years 1995, 1996 and 1997.

I regret that there is no practical method to produce yearly breakdown of CLNs for the years 1995, 1996 and 1997. If you have any questions regarding this matter, please contact Luke Bellocchi at 202-647-6478.

Sincerely,

Edward A. Betancourt

Edward A. Betancourt
Director
Office of Policy Review and Interagency Liaison

U.S. Department of Justice
Immigration and Naturalization Service

Office of Congressional Relations

425 I Street N.W.
Washington, D.C. 20536

MAY 23 2000

Lindy L. Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Ms. Paull:

This is in response to your April 13, 2000 letter requesting information that would help your review of existing tax and immigration laws and procedures related to section 212(a)(10)(E) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which deems inadmissible to the United States individuals who have renounced their citizenship to avoid taxation. Your letter requested a response by April 28, 2000 due to the time-sensitive nature of your review. Please accept my apology for not meeting that deadline. The numerous questions posed in your letter required collaboration between several different offices within Immigration and Naturalization Service (INS). The following is an item-by-item response to your questions.

1. **Provide a general description of the various types of visas available to individuals who wish to enter the United States, including eligibility criteria and the length of time that an individual may remain in the United States under each type of visa.**

The various types of visas available to individuals who wish to enter the United States permanently include family-based, special immigrant, and employment-based immigrant visas. The various types of visas available to individuals who wish to enter the United States temporarily include employment-based, visitor for pleasure or business, exchange-program, academic student, vocational student, fiancée, foreign government official, representative of international organization, foreign information media, continuous transit, crewmember, informant, and treaty trader and investor nonimmigrant visas. The eligibility criteria and the length of time that an individual may remain in the United States under each type of visa varies widely, and is beyond the scope of this letter. See INA sections 101(a)(15), 201, 203 and 204, and 8 CFR, Parts 204 and 214. For more information, please contact Kevin J. Cummings in the INS Headquarters Office of Adjudications, Residence and Status Branch, at 202-305-3175.

2. Describe the procedures to determine if an individual has remained in the United States beyond the time permitted under his or her visa.

The procedures to determine if an individual has remained in the United States beyond the time permitted under his or her visa depend upon whether the individual was admitted for a "date-certain" period or for "duration of status" (D/S). When an individual has been admitted for a "date certain" or D/S period, this information is noted on his or her Form I-94 Arrival/Departure Record. The Form I-94 is issued to either "date-certain" or D/S visa holders upon their arrival at a port of entry (POE). When an individual remains in the United States beyond the date listed on his or her Form I-94, that individual begins to accrue unlawful presence in the United States as of that date. In contrast, when an individual has been admitted to the United States as a D/S nonimmigrant, unlawful presence begins to accrue as of the date that the INS finds a status violation while adjudicating a request for another immigration benefit, or the date that an Immigration Judge finds the status violation during proceedings.

3. With regard to former U.S. citizens, provide information regarding the types of visas for which they may be eligible, and the nature of any records regarding their movement into or out of the United States and/or the length of their stays.

Former U.S. citizens may apply for all types of nonimmigrant or immigrant visas for which they are eligible, provided that they are not inadmissible under any of the grounds listed in section 212(a) of the Immigration and Nationality Act (the Act). If a former U.S. citizen is inadmissible under one or more of the grounds listed in section 212(a) of the Act, he or she must apply for and be granted a waiver of the applicable ground(s) of inadmissibility, if available.

If a former U.S. citizen entered the United States as a nonimmigrant subsequent to losing U.S. citizenship, the INS will maintain that individual's admission and departure records in the Nonimmigrant Information System (NIIS). Former U.S. citizens who are found inadmissible under section 212(a)(10)(E) of the Act will most likely seek admission to the United States only as nonimmigrants.

In order to enter the U.S. as a nonimmigrant, a former U.S. citizen who is subject to section 212(a)(10)(E) of the Act will need to secure a waiver of inadmissibility under section 212(d)(3) of the Act. The Act does not provide for any waivers for such former U.S. citizens seeking immigrant visas or adjustment of status to that of a LPR. Therefore, a former U.S. citizen found inadmissible under section 212(a)(10)(E) of the Act is ineligible to receive a waiver if he or she seeks an immigrant visa or adjustment of status to LPR.

4. Describe in detail the circumstances under which an individual may enter the United States without a visa (e.g., the Visa Waiver Pilot Program, Canadian residents, etc.), the amount of time such individuals may remain in the United States, and the nature of any records that are kept with respect to such individuals. List the countries and the factual scenarios under which such entry would be permitted.

Because this question is rather broad in nature, we have summarized the information requested in the numbered paragraphs that follow. We hope that this abbreviated summary of individuals and/or groups admitted to the United States without a visa will be helpful to you.

1) The particulars of the Visa Waiver Pilot Program (VWPP) can be found at section 217 of the Act and 8 CFR, Part 217. Additional information relevant to the VWPP can be found in chapter 15.7 of the INS Inspector's Field Manual (IFM). The information listed in all chapters of the IFM is extensive, and well beyond the scope of this letter. However, at the request of the Joint Committee such information can be provided by fax if desired.

2) Guam Visa Waiver Program - Section 212(l) INA, 8 CFR 212.1(e), and IFM Chapter 15.8. Recipients are issued a Form I-94 for 15 days.

3) Canadian citizens - 8 CFR 212.1(a) - All Canadian nonimmigrants are exempt from presentation of a visa except treaty trader/investor and fiancée nonimmigrants. Recipients are admitted for whatever period of time each classification allows. Canadian visitor admissions (and most of those listed below) are normally not documented upon entry, so the INS has no record of their entry. Aliens entering under classifications requiring additional supporting documentation, such as academic students, temporary workers and trainees, exchange visitors, intracompany transferees, vocational students, aliens of extraordinary ability, athletes, artists, entertainers, international cultural exchange program workers, religious workers, and North American Free Trade Agreement Workers are issued a Form I-94, and of course, any petitions are maintained by the Service.

4) British subject resident in Canada or Bermuda - 8 CFR 212.1(a) - Landed immigrants in Canada from commonwealth countries are treated virtually the same as Canadian citizens above.

5) Bahamian nationals or British subject resident of Bahamas who are inspected by a U.S. immigration officer in the Bahamas prior to embarkation are also admitted without a visa. 8 CFR 212.1(a). For documentation purposes, these individuals are treated the same as Canadians above.

6) British subjects residing in, and arriving directly from, the Cayman Islands or Turks and Caicos Islands who present a current certificate from the Clerk of Court of the Cayman Islands indicating no criminal record are admissible without a visa. For documentation purposes, they are treated the same as Canadians above.

7) British, French, or Netherlands nationals and nationals of certain other Caribbean islands who are coming as agricultural workers to the Virgin Islands. 8 CFR 212.1(b)(1)

8) Nationals of British Virgin Islands coming solely to visit U.S. Virgin Islands. 8 CFR 212.1(b)(2).

9) Bearers of Mexican diplomatic or official passport (and family) entering for 6 months or less for a purpose other than an official government assignment to the United States. 8 CFR 212.1(c-1).

10) Mexican crewmen employed on commercial aircraft owned by Mexican company authorized to engage in commercial transportation into the United States. 8 CFR 212.1(c).

11) Aliens entering pursuant to the International Boundary and Water Commission Treaty. 8 CFR 212.1(c-2).

12) Citizens of Freely Associated States - 8 CFR 212.1(d), IFM Chapter 15.13.

13) Aliens entering without visa (TWOV) in immediate and continuous transit through the U.S. - Section 233(c) INA, 8 CFR 212.1(f), IFM Chapter 15.6. Issued Form I-94T. Must normally depart within 8 hours or specified first available transportation, escorted by airline personnel. Certain nationalities may not TWOV at all (8 CFR 212.1(f)(3)), and certain ones must reside in certain countries to be eligible (8 CFR 212.1(f)(2)).

14) Alien members of U.S. Armed Forces who are not LPRs - 22 CFR 41.1(a).

15) Armed services personnel entering under NATO travel orders - 22 CFR 41.1(e).

16) American Indians born in Canada having at least 50% American Indian blood - Section 289 INA.

5. **Provide the number of waivers of inadmissibility granted by type and by year for each of the last three years. Describe any guidelines that may exist in granting these waivers.**

The INS currently maintains statistics regarding the number but not type of inadmissibility waivers granted. For fiscal years 1998, 1999 and as of March 31st for 2000, we have granted 14,938, 11,264 and 4,979 waivers, respectively. During this same period we denied 2,455 waivers (FY 98), 1,866 waivers (FY 99) and 956 waivers (as of March 31st in FT 2000).

The fact that an applicant is statutorily eligible to apply for a waiver does not mean that the waiver will actually be granted. Waivers are by their nature discretionary. Therefore, in each case, the adjudication of a waiver application involves a careful balancing of all negative and positive factors presented.

6. **Describe the circumstances and the number of persons entering on the basis of parole (temporary entry while a determination of admissibility is made), the procedures and time frames for making a determination of admissibility, and the number of entries denied.**

Parole is authorization to physically proceed into the United States under specific safeguards and controls, and is not intended to circumvent the admission and waiver process. Rather than parole an alien into the United States, the INS also has the option of allowing an alien to withdraw his or her application for admission, or of placing an alien in either expedited or non-expedited removal proceedings. The Attorney General is empowered to admit temporarily aliens even if they are statutorily inadmissible on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

With regard to the proposed rule for section 212(a)(10)(E) of the Act, an alien's parole (if granted for either of the aforementioned reasons) would involve a deferred inspection, which means that following the issuance of parole, the INS would require the alien to appear for subsequent processing at a district office. Such cases are usually resolved within two weeks. The most recent statistical information regarding paroles for deferred inspection is from fiscal year 1996, when there were 7,952 individuals paroled for deferred inspection. In fiscal year 1998, the INS denied 428,545 entries due to inadmissibility. In fiscal year 1999, the INS denied 420,015 entries due to inadmissibility; and as of March 31st in fiscal year 2000, the INS denied 210,071 entries due to inadmissibility.

7. **Describe in detail the nature of any records regarding the movement of LPRs ("green card holders") or other resident aliens into or out of the United States, the circumstances under which such status could be revoked or relinquished, and the procedures required for such revocation or relinquishment. In your description, describe how such records are retrieved, e.g., by social security number, name, or other identifier.**

Although lawful permanent residents (LPRs) are inspected upon their arrival at U.S. ports of entry, generally no records are kept regarding the movement of these individuals into or out of the U.S. However, if upon arrival an inspector determines that an LPR has violated any law, he or she is typically referred to secondary inspection for a further determination. As a result of this process, the alien may be denied admission to the United States and placed into removal proceedings. Attempted entries of LPRs with known or suspected criminal record are tracked via the INS Lookout System. Additionally, if an LPR is absent from the U.S. for more than 1 year, he or she may be deemed at inspection to have abandoned their LPR status if not in possession of a re-entry permit.

If a review of the LPR's passport shows a pattern of long absences from the U.S., he or she will likely be sent to secondary inspection at the port of entry. If the inspecting officer determines that an LPR is actually living abroad and has abandoned his or her permanent resident status, then the alien may be asked to complete a Form I-407, Abandonment by Alien of Status as an LPR. If the alien declines to voluntarily relinquish his or her status, they may be placed in removal proceedings and have an opportunity to present their case before an immigration judge. If such aliens are encountered inside the United States when applying for another immigration benefit, and an INS officer determines that based on their past absences from the U.S., they actually reside in another country, the alien may be placed in removal proceedings.

Electronic records maintained by the INS concerning LPRs are typically retrieved by name, alien registration number, and date and place of birth. At times, records may also be located through a search involving use of a social security number.

8. **We understand that the Immigration and Naturalization Service maintains computer databases that contain records of LPRs whose status has been revoked or has been administratively or judicially determined to have been abandoned. Describe the contents of the databases, how such records are retrieved (e.g., by social security number, name, or other identifier) and whether this information is shared with or accessible by the Internal Revenue Service.**

AND

9. **Describe the contents and use of the INS Nonimmigrant Information System (NIIS), the Treasury Enforcement Computer System (TECS), and the CIS (CIS) or their successor systems. Describe how these databases track resident and nonresident aliens, including time spent within and outside the United States, and whether the Internal Revenue Service or Department of Treasury Tax personnel have access to this information.**

The INS maintains electronic records relevant to LPRs in our Central Index System (CIS). These records are retrieved by using the LPR's alien registration number. The information contained in the CIS is not shared with the IRS, nor is the CIS accessible by the IRS. The content of the CIS includes the alien's date of birth, the country of origin, and the date that the INS determines that the alien abandoned residence, if applicable. If a Social Security Number is provided by the alien and keyed into the system, the CIS will contain that as well. In such a case, the INS can access the alien's information through use of a Social Security Number. If an alien's Form I-94 control number is entered, the CIS will also contain that information.

The INS' Nonimmigrant Information System (NIIS) tracks only nonimmigrants; it is primarily accessed by a combined name, date of birth, or country of birth query, but the alien's Form I-94 control number can also be used to access the system. NIIS tracks admission and departure dates of nonimmigrants, as well as each nonimmigrant's stated destination in the United States. As noted previously, with limited exceptions, LPR arrival and departure records are not tracked by any INS computer system. Neither the IRS nor the Department of Treasury tax personnel have access to the NIIS or CIS.

Finally, in order to provide the Joint Committee with the most in-depth and accurate information on the Treasury Enforcement Computer System (TECS), we encourage you to contact the U.S. Customs Service, which maintains the TECS.

10. Describe what INS immigration records, if any, contain social security numbers, and to what extent such records are retrievable or organized by social security number? If social security numbers are not collected, retrievable, or otherwise used, explain why.

The INS' CIS will show a social security number only if such a number was provided by the alien and keyed into the system. The INS Computer Linked Application Information Management System 3 (CLAIMS-3) will also show a social security number where it was provided by the alien and keyed into the system. Generally, the INS computer systems are based on alien numbers, arrival/departure numbers, or application or petition receipt numbers.

[*REDACTED INFORMATION***]**

Since the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act on September 30, 1996, the INS has held several interagency meetings in an effort to reach consensus regarding the implementation of INA 212(a)(10)(E). Attendees at the interagency meetings included representatives from the Department of State's (DOS) Office of Overseas Citizenship Services and Visa Office, the Internal Revenue Service (IRS), the Department of Treasury Office of International Tax Counsel, and the Department of Justice Tax Division.

The current INA 212(a)(10)(E)-project coordinator within the INS Headquarters Adjudications Office assumed his duties in April 1999. Since that time, the project coordinator has met with attendees of the interagency meetings on several occasions, and hosted numerous teleconferences, to discuss the logistics involved in setting up a system for enforcement of INA 212(a)(10)(E).

Disclosure of confidential taxpayer information by the IRS to other agencies (primarily the DOS and the INS) has always been problematic. The statute, as written, requires the Attorney General to determine whether or not a former U.S. citizen has renounced citizenship for the purpose of avoiding taxation. However, the Attorney General does not have access to confidential taxpayer information. Without assistance from the IRS, such a determination by the Attorney General would be extremely difficult to make, and would also be potentially subject to legal challenges.

During initial interagency meetings, there was much discussion regarding what constitutes "officially renouncing" U.S. citizenship. Clearly, the DOS handles most renunciation cases. It also issues Certificates of Loss of Nationality (CLN's) confirming the loss of an individual's U.S. citizenship. In this regard, the DOS' main function is to determine whether or not a particular individual intended to renounce his or her U.S. citizenship. However, the DOS is not necessarily concerned with why the person might be inclined to renounce their citizenship.

Other discussions focused on who on behalf of the Attorney General should actually determine when renunciation was undertaken to avoid taxation. Some suggested that the DOJ Tax Division should act on the AG's behalf, which would not be contrary to the statute. The INS could then adopt the determination of the Tax Division. The idea of a technical amendment requiring the DOS to make adopt this function was also proposed. However, access to confidential taxpayer information by the Secretary of State or the Attorney General remained a major road block in either scenario.

In a letter dated January 16, 1998, from the Deputy Assistant Secretary of International Tax Affairs to the INS General Counsel, the IRS expressed its willingness to work with the INS to formulate a taxpayer consent form which could be requested of former United States citizens to allow for the release of confidential taxpayer information to the INS/DOS.

[*REDACTED INFORMATION***]**

[***REDACTED INFORMATION***]

several options were considered. These options included having the expatriate complete a questionnaire designed to determine his or her motivation for renouncing citizenship. relying upon the list of expatriates published by the Secretary of the Treasury in the Federal Register, or creating a "watch list" of former U.S. citizens. Each of these options was determined to be impractical.

Interpretation of section 877 of the Internal Revenue Code (IRC) is also a controversial issue for the three coordinating agencies. The Health Insurance Portability and Accountability Act (HIPA), enacted on August 21, 1996, amended section 877 of the Internal Revenue Code. IRC 877 relates to former U.S. citizens who are presumed to have expatriated with the principal purpose of avoiding taxes. Under 26 USC 6039G, which was part of HIPA, the Secretary of the Treasury must publish in the Federal Register, on a quarterly basis, the names of expatriates that the Secretary has determined fall within the scope of IRC 877(a), which relates to individuals who will be treated as having expatriated principally to avoid taxation.

The INS and the IRS disagreed on what 26 USC 6039G means. It is the INS position, based upon the clear wording of 26 USC 6039G, that the Secretary of the Treasury is required to publish only the names of those expatriates who renounced citizenship principally to avoid taxation (within the meaning of IRC 877(a)). The IRS referenced the legislative history and stated that this indicates that they are required to publish the names of *all* expatriates from whom it receives expatriate information statements.

Apparently all parties were initially reluctant to rely upon the IRC 877 criteria to determine tax avoidance for the purposes of section 212(a)(10)(E) enforcement. The reason for this is that the IRS, more often than not, does not make a definitive determination as to whether or not an expatriate is presumed subject to IRC 877, and they certainly do not do so immediately upon receiving the information statements and CLN from the DOS. The INS and the IRS have since agreed upon a mechanism by which INA 212(a)(10)(E) will be enforced, and the two agencies have agreed to execute a Memorandum of Understanding (MOU) which will effectively "spell out" the roles each agency will play in the implementation. The INS has been advised that the MOU is currently in the drafting stage within IRS.

A final "problem" that arose between DOS and INS is the interpretation of what it means to "officially renounce" U.S. citizenship. DOS is of the opinion that "officially renounce[s]" means *only* a formal renunciation of U.S. citizenship before a U.S. consular officer abroad, in accordance with section 349(a)(5) of the Act. However, it is the position of INS that "officially

renounce[s]" means any one of several potentially expatriating acts currently listed in section 349(a) of the Act, or any act defined as an expatriating act in any other statute that Congress may enact in the future. However, the expatriating act must have been performed voluntarily and with the intent to expatriate. If the expatriating act is subsequently confirmed by the issuance of a CLN by the DOS, the INS maintains that the person has "officially renounced" U.S. citizenship.

An advance electronic copy of the proposed regulation for implementation of section 212(a)(10)(E) has been provided to the Department of Justice Office of Policy Development (DOJOPD). A copy of the letter from DOS reflecting that agency's view regarding what it means to "officially renounce" U.S. citizenship has also been provided to DOJOPD. Both the DOS and the INS have agreed to accept the DOJOPD's position on this issue as final.

Despite extensive discussions involving the DOJ, the INS, the IRS and the DOS, no final regulation to implement section 212(a)(10)(E) of the Act has yet been promulgated. We are unable at this time to provide you with a draft of this proposed regulation. However, at your request, we would be happy to brief the Joint Committee on Taxation staff on the INS' view of the proposed regulation.

12. Provide by year the number of persons, if any, that have been found inadmissible as a result of section 212(a)(10)(E) of the Act since its enactment on September 30, 1996. For any persons found inadmissible, provide the number of waivers granted, if any.

To date, no persons have been found inadmissible under section 212(a)(10)(E), since final regulations relative to this provision have not yet been promulgated.

[*REDACTED INFORMATION***]**

[***REDACTED INFORMATION***]

[***REDACTED INFORMATION***]

Aliens who are found inadmissible under section 212(a)(10)(E) of the Act may apply for a nonimmigrant waiver under section 212(d)(3)(A) or (B) of the Act. See 8 CFR 212.4 for a description of the waiver criteria. Waivers are discretionary in nature, and the adjudication of each request for a waiver involves a delicate balancing of both the favorable and unfavorable factors relevant to the particular case. The mere fact that an alien meets the threshold requirements that enable he or she to apply for a waiver of inadmissibility does not establish that favorable discretion should be exercised on the alien's behalf.

14. Describe how the Immigration and Naturalization Service defines the phrase "officially renounces United States citizenship" for purposes of section 212(a)(10)(E) of the Act.

Section 349 of the Act identifies several ways in which a person may renounce his or her citizenship. One way is by making a "formal renunciation" before a consular officer abroad. The proposed rule makes it clear that this is not the only form of expatriation that may render a former citizen inadmissible under section 212(a)(10)(E) of the Act. Section 212(a)(10)(E) of the Act refers to an official renunciation, which is not necessarily the same as a "formal" renunciation under section 349(a)(5) of the Act.

Section 349 of the Act defines the specific acts that, if performed voluntarily and with the intent to expatriate, result in loss of U.S. nationality. Each of these acts has the same legal consequence. For example, a person may renounce his or her citizenship after their 18th birthday if they accept an office, post or employment with a foreign government voluntarily and with the intent to expatriate. While the person has not made a "formal renunciation" as described in section 349(a)(5) of the Act, the described action is just as "official" as a formal declaration before a consular officer. In any event, a person's renunciation of U.S. citizenship will not be considered official unless the DOS has issued a confirming CLN.

The INS is reluctant to create a "loophole" that would permit citizens who seek to renounce citizenship to avoid taxation to escape legally mandated immigration consequences. For this reason, the proposed rule specifies that a citizen who performs any of these acts of expatriation with the intent to expatriate will be considered, for purposes of section 212(a)(10)(E) of the Act, to have "officially renounce[d]" U.S. citizenship. The same principle applies to any act defined as an expatriating act in any other statute that Congress may enact. This interpretation of section 212(a)(10)(E) of the Act is consistent with the IRS code. The text of 26 U.S.C. 877 does not distinguish among different means of expatriation. It is clear from 26 U.S.C. 6039G(c)(2) and (3) that *any* expatriating act can make a former citizen subject to the presumption under 26 U.S.C. 877 that the former citizen expatriated to avoid taxation. The proposed rule, therefore, interprets the "officially renounces" element of section 212(a)(10)(E) of the Act in light of these related provisions.

15. Describe any studies or projects (public or nonpublic) that have examined compliance with section 212(a)(10)(E) of the Act.

The INS is not aware of any public or private studies examining compliance with section 212(a)(10)(E) of the Act, except for the General Accounting Office study and report.

I hope you find our answers helpful. Should you need clarification of anything provided in this response or have additional questions, please feel free to contact me or my office any time.

Sincerely,

FOR THE COMMISSIONER

Gerri L. Ratliff

Gerri L. Ratliff
Acting Director
Congressional Relations

United States Department of State

Washington, D.C. 20520

MAY 24 2000

Dear Mr. Vice Chairman:

This is in response to your letter of April 13 to the Department requesting information regarding our efforts to implement section 212(a)(10)(E) of the Immigration and Nationality Act. That section pertains to denial of visas and entry to persons who have renounced U.S. nationality for purposes of tax avoidance. Our answers to your questions are enclosed. We have also enclosed additional materials relevant to question 13.

We hope you will find this information useful. We would be pleased to continue to work with you to insure the effective implementation of this important provision of the Immigration and Nationality Act.

Sincerely,

Barbara Larkin

Barbara Larkin
Assistant Secretary
Legislative Affairs

Enclosures:

1. Answers to questions.
2. Volume 9 Foreign Affairs Manual, Sections 41.1, 41.2 and 41.3 - laws, regulations and interpretative notes.

The Honorable
Bill Archer,
Vice Chairman, Joint Committee on Taxation,
House of Representatives.

Enclosure 1

Q1: Describe in detail the records relating to the relinquishment of an individual's U.S. citizenship that are maintained by the Department of State. Describe to what extent information from such records is shared with the Internal Revenue Service (IRS). Describe what laws prevent the IRS access to such information. Describe what laws or procedures, if any, may need to be changed to enhance access to such information by the IRS.

A1: When it comes to the attention of a consular officer at an overseas Foreign Service mission that an individual has possibly committed an expatriating act with the intention of relinquishing U.S. citizenship, the officer prepares a Certificate of Loss of Nationality (CLN) (FS-348) and submits it to the Department of State pursuant to Section 358 of the Immigration and Nationality Act (INA). If approved, the Department of State's Passport Services retains the original CLN and forwards a copy to both the Internal Revenue Service (IRS), as well as to the Immigration and Naturalization Service (INS).

Q2: Section 212(a)(10)(E) of the Immigration and Naturalization Act (INA) deems inadmissible former U.S. citizens whom the Attorney General determines renounced their citizenship for tax avoidance purposes. Describe in detail the steps the Department of State has taken to implement section 212(a)(10)(E) of the INA, including any difficulties that have been encountered in implementing to provision. Describe what laws or procedures, if any, may need to be modified or promulgated to facilitate enforcement of the provision.

A2: To date the Department's attempts to implement INA section 212(a)(10)(E) have been confined to discussions with INS regarding the formulation by that agency of implementing regulations pursuant to which this section may be enforced and to the addition of appropriate codes to our lookout system, "CLASS", so that when this section is fully implemented we will be able to identify aliens found inadmissible based upon tax avoidance. Because under the requirements of the statute the Attorney General (INS), and not the Department, is responsible for making the determination of whether an alien is inadmissible for tax avoidance, the Department cannot proceed further at this time.

[***REDACTED INFORMATION***]

As noted above, the Department of State does not make and does not plan to make determinations that renunciation is done for tax avoidance. The statute requires the Attorney General (INS) to make such determinations.

[***REDACTED INFORMATION***]

[***REDACTED INFORMATION***]

Q5: Describe how the Department of State defines the phrase, "officially renounces United States citizenship" for purposes of section 212(a)(10)(E) of the INA.

A5: The Department of State "defines 'officially renounces United States citizenship' for purposes of section 212(a)(10)(E) of the INA" to mean the formal renunciation of nationality as set out in section 349(a)(5) of the INA.

Q6: Describe whether the Department of State is bound by IRS determinations as to tax avoidance presumptions, including cases in which individuals contest such IRS determinations.

A6: See answers to questions 3 and 4, above.

Q7: Describe the circumstances or cases in which the Department of State relies (or has relied in the past) on another agency to determine whether an individual is inadmissible.

A7: There are many instances in which the Department of State, and the INS, rely or have relied on determinations of other agencies or bodies in applying grounds of inadmissibility. The health related provisions of 212(a)(1) are applied based upon medical determinations of physicians acting pursuant to regulations promulgated by the Secretary of Health, Education and Welfare (Center for Disease Control). Criminal grounds of inadmissibility in 212(a)(2) are applied based upon court conviction records. Determinations on drug trafficking, terrorism, espionage and other grounds found in 212(a)(2) and (3) are based largely on records of other agencies. Labor certification grounds in 212(a)(5) are based upon the absence of appropriate documentation from the Department of Labor. For the purposes of 212(a)(8), draft evasion determinations were, and desertion determinations are, based upon Selective Service and military records. Inadmissibility under 212(a)(10)(D) for unlawful voting is based upon Federal, State and local voting records.

Q8: For nonimmigrants, describe the criteria for waivers of inadmissibility and the length of time such waivers are valid.

A8: The Department has recently provided the Committee with a copy of the existing criteria for nonimmigrant waivers taken from the Foreign Affairs Manual (FAM), (9 FAM 40.111, notes).

Q9: Describe any projects or studies that indicate what country or countries expatriates become nationals and/or residents.

A9: In recent years, the Department of State's Bureau of Consular Affairs has maintained a record of all individuals who have expatriated themselves under the provisions of section 349 of the INA. This record reflects the Foreign Service post that prepared the CLN. In most instances, the expatriating act is committed in the country of the individual's other (i.e., non-U.S.) nationality.

Q10: Provide the number of persons, if any, that have been found inadmissible as a result of section 212(a)(10)(E) of the INA since its enactment on September 30, 1996. For any persons found inadmissible, provide the number of waivers granted, if any.

A10: To date, for the reasons stated in answer 4 above, no persons have been found inadmissible as the result of section 212(a)(10(E). Consequently, no waivers have been granted.

Q11: Provide the number of expatriates since September 30, 1996 that have obtained visas.

A11: The Department cannot supply this figure since in the absence of regulations to implement 212(a)(10(E) we have not tracked visa issuance to renunciants. Nevertheless, once it is implemented we will be able to assist INS in making determinations of inadmissibility regarding those aliens who renounced their US nationality after the date on which 212(a)(10)(E) became effective and prior to the effective date of the INS regulation. We can place the names of all such renunciants in the lookout system as being potentially ineligible. That action would prevent them from entering the United States without coming to the attention of INS for the purpose of review of their immigration status. It will also prevent renewal of their visa without such a review.

Q12: Identify the countries that require an individual to give up his or her U.S. citizenship in order to become a national or resident of such country.

A12: The following list, which is not necessarily a definitive one, sets forth the countries that require individuals to relinquish their U.S. citizenship in order to acquire host country nationality: Austria; Belarus; Denmark; Finland; Georgia; Germany; the Netherlands; Norway, Moldova; Sweden; Indonesia; the Bahamas; Costa Rica; Haiti; Honduras; Nicaragua; Peru; Suriname; Papua New Guinea; Solomon Islands; South Korea; Vanuatu; Botswana; Mozambique; Namibia; Zimbabwe; Kuwait; Quatar; and Saudi Arabia. The Department of State has been advised by a number of its missions abroad that the extent and circumstances under which this requirement is enforced varies from country to country.

Q13: Identify the countries from which an individual can legally enter the United State without a visa and the method by which this is done.
A13: There are many categories of aliens who may enter the United States without visas as the result of law, treaty, bilateral agreement or emergency or other administrative discretion. The major categories include, Canadian nationals, certain Mexican nationals, NATO personnel on official duty, nationals of the 29 countries participating in the Visa Waiver Pilot Program (VWPP) pursuant to INA section 217, certain residents of Canada or of islands contiguous to the United States, aliens from almost all countries who are in "transit without visa" status (brief stopover in the US for connecting flight to foreign country, etc.), foreign military personnel invited to the United States by US military authorities (usually for large military exercises), aliens granted individual waivers in emergent circumstances by joint action of consular and INS personnel. Enclosed with this letter are the portions of the FAM containing the laws, regulations, procedures and foreign country information pertinent to entry into the United States without a visa.

Q14: Describe to what extent the Department of State could require an expatriating citizen to provide a social security number or other tax identifying information as part of the process of expatriation. Describe what limitations might apply to the type or scope of information provided or to IRS access to such information.

A14: The Department of State asks the renunciant to provide his/her social security or taxpayer identity number on the statement setting forth his/her average net tax liability and net worth. This document is attached to the CLN that is forwarded to IRS. It must be emphasized, however, that many individuals who expatriate themselves have a very tenuous nexus to the U.S. and have never resided here. As a result, it is not uncommon for these individuals not to have either a social security or taxpayer identity number.

Enclosure 2

9 FAM 41.0

9 FAM 41.1 EXEMPTION BY LAW OR TREATY FROM PASSPORT AND VISA REQUIREMENTS

(TL:VISA-47; 8-30-91)

Nonimmigrants in the following categories are exempt from the passport and visa requirements of INA 212(a)(7)(B)(i)(I), (i)(II):

(a) Alien members of the U.S. Armed Forces.

(TL:VISA-135; 2-29-96)

An alien member of the U.S. Armed Forces in uniform or bearing proper military identification, who has not been lawfully admitted for permanent residence, coming to the United States under official orders or permit of such Armed Forces. (Sec. 284, 86 Stat. 232; 8 U.S.C. 1354.)

[Amended by 61 FR 1834, Jan. 24, 1996.]

(b) American Indians born in Canada.

(TL:VISA-2; 8-30-87)

An American Indian born in Canada, having at least 50 per centum of blood of the American Indian race (Sec. 289, 66 Stat. 234; 8 U.S.C. 1359.)

(c) Aliens entering from Guam, Puerto Rico, or the Virgin Islands.

(TL:VISA-2; 8-30-87

An alien departing from Guam, Puerto Rico, or the Virgin Islands of the United States, and seeking to enter the continental United States or any other place under the jurisdiction of the United States (Sec. 212, 66 Stat. 188; 8 U.S.C. 1182.)

(d) Armed Services personnel of a NATO member.

(TL:VISA-2; 8-30-87)

Personnel belonging to the armed services of a government which is a Party to the North Atlantic Treaty and which has ratified the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed at London on June 19, 1951, and entering the United

States under Article III of that Agreement pursuant to an individual or collective movement order issued by an appropriate agency of the sending state or of NATO (TIAS 2846; 4 U.S.T. 1792.)

(e) Armed Services personnel attached to a NATO Headquarters in the United States.

(TL:VISA-2; 8-30-87)

Personnel attached to a NATO Headquarters in the United States set up pursuant to the North Atlantic Treaty, belonging to the armed services of a government which is a Party to the Treaty and entering the United States in connection with their official duties under the provisions of the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty (TIAS 2978; 5 U.S.T. 875.)

(f) Aliens entering pursuant to International Boundary and Water Commission Treaty.

(TL:VISA-2; 8-30-87)

All personnel employed either directly or indirectly on the construction, operation, or maintenance of works in the United States undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission, and entering the United States temporarily in connection with such employment (59 Stat. 1252; TS 994.)

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9 FAM 41.1 Related Statutory Provisions

INA 212(a)(7)(B)(i)

(TL:VISA-47; 8-30-91)

(a) Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:...

(7) DOCUMENTATION REQUIREMENTS.—

...(B) NONIMMIGRANTS.—

(i) In general.- Any nonimmigrant who is (I) not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is excludable.

[Amended by Pub. L. 101-649, Sec. 601(a), 104 Stat. 5074; 8 U.S.C. 1182; November 29, 1990.]

INA 212(d)(7)

(TL:VISA-47; 8-30-91)

(7) The provisions of subsection (a) (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by section 237(a) of this Act.

[Amended by Pub. L. 101-649, Sec. 601(d), 104 Stat. 5076; 8 U.S.C. 1182; November 29, 1990.]

INA 284

(TL:VISA-2; 8-30-87)

Nothing contained in this title shall be construed so as to limit, restrict,deny, or affect the coming into or departure from the United States of an alien member of the Armed Forces of the United States who is in the uniform of, or who bears documents identifying him as a member of, such Armed Forces,and who is coming to or departing from the United States under official orders or permit of such Armed Forces: Provided, That nothing contained in this section shall be construed to give to or confer upon any such alien any other privileges, rights, benefits, exemptions, or immunities under this Act, which are not otherwise specifically granted by this Act.

INA 289

(TL:VISA-2; 8-30-87)

Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Article III, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed at London on June 19, 1951, in part

(TL:VISA-2; 8-30-87)

Paragraph 1

1. On the conditions specified in paragraph 2 of this Article and subject to compliance with the formalities established by the receiving State relating to entry and departure of a force or the members thereof, such members shall be exempt from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State....

Paragraph 2

2. The following documents only will be required in respect of members of a force. They must be presented on demand:

(a) personal identity card issued by the sending State showing names, date of birth, rank and number (if any), service, and photograph;

(b) individual or collective movement order, in the language of the sending State and in the English and French languages, issued by an appropriate agency of the sending State or of the North Atlantic Treaty Organization and certifying to the status of the individual or group as a member or members of a force and to the movement ordered. The receiving State may require a movement order to be countersigned by its appropriate representative....

Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty

(TL:VISA-2; 8-30-87)

Article 2

Subject to the following provisions of this Protocol, the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces shall apply to Allied Headquarters in the territory of a Party to the present Protocol in the North Atlantic Treaty area, and to the military and civilian personnel of such Headquarters and their dependents included in the definitions in sub-paragraphs (a),(b) and (c) of paragraph 1 of Article 3 of this Protocol, when such personnel are present in any such territory in connection with their official duties or, in the case of dependents, the official duties of their spouse or parent.

Treaty between the United States of America and Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, February 3, 1944, in part

(TL:VISA-2; 8-30-87)

Article 20

The whole of the personnel employed either directly or indirectly on the construction, operation or maintenance of the works may pass freely from one country to the other for the purpose of going to and from the place of location of the works, without any immigration restrictions, passports or labor requirements.

9 FAM 41.1 Notes

(TL:VISA-2 8-30-87)

9 FAM 41.1 N1 Countries Signatory to NATO Agreements

For a listing of the parties to the North Atlantic Treaty, the NATO Status-of-Forces Agreement and the Protocol on the Status of International Military Headquarters, see 22 CFR 41.25 Notes.

9 FAM 41.1 N2 Documentation Required of Armed Services Personnel of NATO Members

Armed services personnel of NATO members entering pursuant to 22 CFR 41.1(d) and (e) must present on demand the following documents:

(a) the personal identity card issued by the sending state showing names, date of birth, rank and serial number (if any), service, and photograph;

(b) the individual or collective movement order, showing the movement ordered and the status of the individual or group as member(s) of a force.

9 FAM 41.1 N3 Dependents of Armed Services Personnel; Members of a Civilian Component and Their Dependents

The exemptions from passport and visa requirements provided in 22 CFR 41.1(d) and (e) for armed services personnel do not extend to the dependents of such members or to the members of a civilian component and their dependents. Such persons must apply for nonimmigrant visas and present valid passports. [See 22 CFR 41.25(e) and (d) NOTES, respectively, for classification.]

9 FAM 41.1 N4 Definitions Contained in the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty

[See 22 CFR 41.25 N3.]

9 FAM 41.1 N5 Definitions Contained in the NATO Status-of-Forces Agreement

[See 22 CFR 41.25 N4.]

9 FAM 41.1 N6 Visa Issuance to Aliens Entitled to Exemption From Visa Requirements

[See 22 CFR 41.2 N8.]

9 FAM 41.2
Waiver by Secretary of State and Attorney General of passport and/or visa requirements for certain categories of nonimmigrants.

(TL:VISA-195; 06-18-1999)

(TL:VISA-47; 08-30-1991)

Pursuant to the authority of the Secretary of State and the Attorney General under INA 212(d)(4), the passport and/or visa requirements of INA 212(a)(7)(B)(i)(I), (i)(II) are waived as specified below for the following categories of nonimmigrants:

(a) Canadian nationals.

(TL:VISA-2; 08-30-1987)

A passport is not required except after a visit outside the Western Hemisphere. A visa is not required.

(b) Aliens resident in Canada or Bermuda having a common nationality with nationals of Canada or with British subjects in Bermuda.

(TL:VISA-2; 08-30-1987)

A passport is not required except after a visit outside the Western Hemisphere. A visa is not required.

(c) Bahamian nationals and British subjects resident in the Bahamas.

(TL:VISA-2; 08-30-1987)

A passport is required. A visa is not required if, prior to the embarkation of such an alien for the United States on a vessel or aircraft, the examining U.S. immigration officer at Freeport or Nassau determines that the individual is clearly and beyond a doubt entitled to admission.

(d) British subjects resident in the Cayman Islands or in the Turks and Caicos Islands.

(TL:VISA-2; 08-30-1987)

A passport is required. A visa is not required if the alien arrives directly from the Cayman Islands, or the Turks and Caicos Islands and presents a current certificate from the Clerk of Court of the Cayman Islands or the Turks and Caicos Islands indicating no criminal record.

(e) British, French, and Netherlands nationals and nationals of certain adjacent islands of the Caribbean which are independent countries.

(TL:VISA-2; 08-30-1987)

A passport is required. A visa is not required of a British, French or Netherlands national, or of a national of Antigua, Barbados, Grenada, Jamaica, or Trinidad and Tobago, who has residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area, or has residence in Antigua, Barbados, Grenada, Jamaica, or Trinidad and Tobago, if the alien:

(1) Is proceeding to the United States as an agricultural worker; or

(2) Is the beneficiary of a valid, unexpired, indefinite certification granted by the Department of Labor for employment in the Virgin Islands of the United States and is proceeding thereto for employment, or is the spouse or child of such an alien accompanying or following to join the alien.

(f) Nationals and residents of the British Virgin Islands.

(TL:VISA-187; 03-30-1999)

(1) A national of the British Virgin Islands and resident therein requires a passport but not a visa if proceeding to the United States Virgin Islands.

(2) A national of the British Virgin Islands and resident therein requires a passport but does not require a visa to apply for entry into the United States if such applicant:

(i) Is proceeding by aircraft directly from St. Thomas, U.S. Virgin Islands;

(ii) Is traveling to some other part of the United States solely for the purpose of business or pleasure as described in INA 101(a)(15)(B);

(iii) Satisfies the examining U.S. Immigration officer at that port of entry that he or she is admissible in all respects other than the absence of a visa; and

(iv) Presents a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department indicating that he or she has no criminal record.

[Amended by 64 FR 7998, 2-18-99.]

(g) Mexican nationals.

(TL:VISA-177; 04-30-1998)

(1) A visa and a passport are not required of a Mexican national in possession of a border crossing identification card and applying for admission as a temporary visitor for business or pleasure from contiguous territory.

(2) A visa is not required of a Mexican national possessing a border crossing identification card and applying for admission to the United States as a temporary visitor for business or pleasure or in transit from noncontiguous territory.

(3) A visa and a passport are not required of a Mexican national who is entering solely for the purpose of applying for a Mexican passport or other official Mexican document at a Mexican consular office on the United States side of the border.

(4) A passport is not required of a Mexican national who is applying for a B-1/B-2 Visa/BCC and who meets the conditions for waiver of the passport requirement in section 41.32(a)(2)(iii).

(5) A visa is not of a Mexican national employed as a crew member on an aircraft belonging to a Mexican company authorized to engage in commercial transportation into the United States.

(6) A visa is not required of a Mexican national bearing a Mexican diplomatic or official passport who is a military or civilian official of the Federal Government of Mexico entering the United States for a stay of up to 6 months for any purpose other than on assignment as a permanent employee to an office of the Mexican Federal Government in the United States. A visa is also not required of the official's spouse or any of the official's dependent family members under 19 years of age who hold diplomatic or official passports and are in the actual company of the official at the time of entry. This waiver does not apply to the spouse or any of the official's family members classifiable under INA 101(a)(15)(F) or (M).

[Amended by 63 FR 19862, 4-7-98.]

(h) Natives and residents of the Trust Territory of the Pacific Islands.

(TL:VISA-2; 08-30-1987)

A visa and passport are not required of a native and resident of the Trust Territory of the Pacific Islands who has proceeded in direct and continuous transit from the Trust Territory to the United States.

(i) Aliens in immediate transit without visa (TWOV).

(TL:VISA-94; 09-30-1994)

A passport and visa are not required of an alien in immediate and continuous transit through the United States in accordance with the terms of an agreement entered into between the carrier and INS on Form I-426, Immediate and Continuous Transit Agreement Between a Transportation Line and United States of America, pursuant to INA 238(d) to ensure transit through and departure from the United States en route to a specified foreign country. The alien must be in possession of travel documentation establishing identity, nationality, and ability to enter a country other than the United States. This waiver of visa and passport requirement is not available to an alien who is a citizen of Afghanistan, Bangladesh, Cuba, India, Iran, Iraq, Libya, Pakistan, Sri Lanka or a citizen of the former Socialist Federal Republic of Yugoslavia which includes Bosnia, Croatia, Serbia, Montenegro, Slovenia, and Macedonia. This waiver of visa and passport requirements is also not available to an alien who is a citizen of North Korea ("Democratic peoples' Republic of Korea") or Vietnam ("Socialist Republic of Vietnam"), and is a resident of one of the said countries. It is, on a basis of reciprocity, available to a national of Albania, Bulgaria, Czechoslovakia, Estonia, the German democratic Republic, Hungary, Latvia, Lithuania, Mongolian People's Republic, people's Republic of China, Poland, Romania, or the Union of Soviet Socialist Republics, resident in one of those countries, only if he is transiting the United States by aircraft of a transportation line or signatory to an agreement with the Immigration and Naturalization Service on Form I-426 on a direct through flight which will depart directly to a foreign place from the port of arrival.

(j) Individual cases of unforeseen emergencies.

(TL:VISA-195; 06-18-1999)

Except as provided in paragraphs (a) through (i) and (k) through (m) of this section, all aliens are required to present a valid, unexpired visa and passport upon arrival in the United States. An alien may apply for a waiver of the visa and passport requirement if, either prior to the alien's embarkation abroad or upon arrival at a port of entry, the responsible district director of the Immigration and Naturalization Service (INS) in charge of the port of entry concludes that the alien is unable to present the required document

because of an unforeseen emergency. The INS district director may grant a waiver of the visa or passport requirement pursuant to INA 212(d)(4)(A), without the prior concurrence of the Department of State, if the district director concludes that the alien's claim of emergency circumstances is legitimate and that approval of the waiver would be appropriate under all of the attendant facts and circumstances.

[Amended by 64 FR 28915, 5-28-99.]

(k) Fiancé(e) of a U.S. citizen.

(TL:VISA-2; 08-30-1987)

Notwithstanding the provisions of paragraphs (a) through (h) of this section, a visa is required of an alien described in such paragraphs who is classified, or who seeks classification, under INA 101(a)(15)(K).

(l) Visa Waiver Pilot Program.

(TL:VISA-177; 04-30-1998)

(1) Notwithstanding the provisions of paragraphs (a) through (k) of this section, a visa is not required of any person who seeks admission to the United States for a period of 90 days or less as a visitor for business or pleasure and who is eligible to apply for admission to the United States as a Visa Waiver Pilot Program applicant.

Countries designated as pilot program countries under (l)(1) of this section, are: the United Kingdom (effective July 1, 1988); Japan (effective December 15, 1988); France and Switzerland (effective July 1, 1989); The Federal Republic of Germany and Sweden (effective July 15, 1989); Italy and The Netherlands (effective July 29, 1989); Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, and Spain (effective October 1, 1991); Brunei (effective July 29, 1993); Ireland (effective April 1, 1995); Argentina (effective July 8, 1996); Australia (effective July 29, 1996) and Slovenia (effective September 30, 1997.

[Amended by 62 FR 51031, 9-30-97.]

(m) Treaty trader and treaty investor.

(TL:VISA-33; 06-29-1990)

Notwithstanding the provision of paragraph (a) of this section, a visa is required of a Canadian national who is classified, or who seeks classification, under INA 101(a)(15)(E).

9 FAM 41.2 Related Statutory Provisions

INA 212(a)(7)(B), in part

(TL:VISA-47; 08-30-1991)

For the provisions of INA 212(a)(7)(B)(i), see 9 FAM 41.1 Related Statutory Provisions.

INA 212(d)(3), in part

(TL:VISA-159; 12-20-1996)

(3) Except as provided in this subsection, an alien....

(B) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), 3(A)(iii), 3(C), and 3(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

[Amended by Pub. L. 101-649, Sec. 601(D), 104 Stat. 5076; 8 U.S.C. 1182; Nov. 29, 1990; as amended by Pub. L. 102-232, Sec. 307(c), 105 Stat. 1754; 8 U.S.C. 1182; Dec. 12, 1991.] [Amended by Sec. 308(d) of Pub. L. 104-208, Sept. 30, 1996.]

INA 212(d)(4)

(TL:VISA-177; 04-30-1998)

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly

(A) on the basis of unforeseen emergency in individual cases, or

(B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or

(C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 233(c).

[Amended by Pub. L. 101-649, Sec. 601(D), 104 Stat. 5076; 8 U.S.C. 1182; Nov. 29, 1990.]

INA 212(d)(8)

(TL:VISA-177; 04-30-1998)

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

[Amended by Pub. L. 101-649, Sec. 601(d), 104 Stat. 5076; 8 U.S.C. 1182; Nov. 29. 1990.]

INA 212(l), in part

(TL:VISA-159; 12-20-1996)

(1) The requirement of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General, the Secretary of State, and the Secretary of the Interior, acting jointly, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry and stay on Guam for a period not to exceed fifteen days, if the Attorney General, the Secretary of State and the Secretary of the Interior, after consultation with the Governor of Guam, jointly determine that—

(A) an adequate arrival and departure control system has been developed on Guam, and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) An alien may not be provided a waiver under this subsection unless the alien has waived any right—

(A) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam, or

(B) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

[Amended by Pub. L. 101-649, Sec. 601(D), 104 Stat. 5077; 8 U.S.C.1182; Nov. 29, 1990.]
[Amended by Sec. 308(e) of Pub. L. 104-208, Sept. 30, 1996.]

INA 214(a), in part

(TL:VISA-47; 08-30-1991)

(a) No alien admitted to the United States without a visa pursuant to section 217 may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

[Added by Pub. L. 99-603, Sec. 313(B), 100 Stat. 3438; 8 U.S.C. 1184(a); Nov. 6, 1986.]

INA 217, in part

(TL:VISA-177; 04-30-1998)

(a) ESTABLISHMENT OF PILOT PROGRAM.—The Attorney General and the Secretary of State are authorized to establish a pilot program (hereinafter in this section referred to as the "pilot program") under which the requirement of paragraph (7)(B)(i)(II) of section 212(a) may be waived by the Attorney General, in consultation with the Secretary of State, and in accordance with this section, in the case of an alien who meets the following requirements:

(1) SEEKING ENTRY AS TOURIST FOR 90 DAYS OR LESS.—The alien is applying for admission during the pilot program period (as defined in subsection (e)) as a nonimmigrant visitor (described in section 101(a)(15)(B)) for a period not exceeding 90 days.

(2) NATIONAL OF PILOT PROGRAM COUNTRY.—The alien is a national of and presents a passport issued by a country which—

(A) extends (or agrees to extend) reciprocal privileges to citizens and national of the United States, and

(B) is designated as a pilot program country under subsection (c).

(3) EXECUTES IMMIGRATION FORMS.—The alien before the time of such admission completes such immigration form as the Attorney General shall establish.

(4) ENTRY INTO THE UNITED STATES.—If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier which has entered into an agreement with the Service to guarantee transport of the alien out of the United States if the alien is found inadmissible or deportable by an immigration officer.

(5) NOT A SAFETY THREAT.—the alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(6) NO PREVIOUS VIOLATION.—If the alien previously was admitted

without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(7) ROUND-TRIP TICKET.—The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Attorney General under regulations).

(b) WAIVER OF RIGHTS.—An alien may not be provided a waiver under the pilot program unless the alien has waived any right—

(1) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien....

(f) DEFINITION OF PILOT PROGRAM PERIOD.—For purposes of this section, the term "pilot program period" means the period beginning on October 2, 1988, and ending on September 30, 1997.

[Amended by sec. 210 of Pub. L. 103-416, Oct. 25, 1994 and sec. 635(a) and (c) of Pub. L. 104-208, Sep. 30, 1996.]

(g) DURATION AND TERMINATION OF DESIGNATION OF PILOT PROGRAM COUNTRIES.—

(1) IN GENERAL.—

(A) DETERMINATION AND NOTIFICATION OF DISQUALIFICATION RATE.—Upon determination by the Attorney General that a pilot program country's disqualification rate is 2 percent or more, the Attorney General shall notify the Secretary of State.

(B) PROBATIONARY STATUS.—If the program country's disqualification rate is greater than 2 percent but less that 3.5 percent, the Attorney General shall place the program country in probationary status for a period not to exceed 2 full fiscal years following the year in which the determination under subparagraph (A) is made.

(C) TERMINATION OF DESIGNATION.—Subject to paragraph (3), if the program country's disqualification rate is 3.5 percent or more, the Attorney General shall terminate the country's designation as a pilot program country effective at the beginning of the second fiscal year following the fiscal year in which the determination under subparagraph (A) is made.

(2) TERMINATION OF PROBATIONARY STATUS.—

(A) IN GENERAL.—If the Attorney General determines at the end of the probationary period described in paragraph (1)(B) that the program country placed in probationary status under such paragraph has failed to

develop a machine-readable passport program as required by section (c)(2)(C), or has a disqualification rate of 2 percent or more, the Attorney General shall terminate the designation of the country as a pilot program country. If the Attorney General determines that the program country has developed a machine-readable passport program and has a disqualification rate of less than 2 percent, the Attorney General shall redesignate the country as a pilot program country.

(B) EFFECTIVE DATE.—A termination of the designation of a country under subparagraph (A) shall take effect on the first day of the first fiscal year following the fiscal year in which the determination under such subparagraph is made. Until such date, a national of the country shall remain eligible for a waiver under subsection (a).

(3) NONAPPLICABILITY OF CERTAIN PROVISIONS.—Paragraph (1)(C) shall not apply unless the total number of nationals of a pilot program country described in paragraph (4)(A) exceeds 100.

(4) DEFINITION.—For purposes of the subsection, the term "disqualification rate" means the percentage which—

(A) the total number of nations of the pilot program country who were—

(i) excluded from admission or withdrew their application for admission during the most recent fiscal year for which data are available; and

(ii) admitted as nonimmigrant visitors during such fiscal year and who violated the terms of such admission; bears to

(B) the total number of nationals of such country who applied for admission as nonimmigrant visitors during such fiscal year.

[Amended by Sec. 635(c)(2) of Pub. L. 104-208, Sep. 30, 1996.]

Sec. 635(c) of Pub. L. 104-208

(TL:VISA-177; 04-30-1998)

(2) Transition.—A country designated as a pilot program country with probationary status under section 217(g) of the Immigration and Nationality Act (as in effect on the day before the date of the enactment of this Act) shall be considered to be designated as a pilot program country on and after such date, subject to placement in probationary status or termination of such designation under such section (as amended by paragraph (1)).

INA 233(c)

(TL:VISA-159; 12-20-1996)

(c) The Attorney General shall have power to enter into contracts including bonding agreements with transportation lines to guarantee the passage through the United States in immediate and continuos transit of aliens destined to foreign countries. Notwithstanding any other provision of this Act, such aliens may not have their classification changed under section 248.

[Renumbered by Pub. L. 104-208, Sep. 30, 1996.]

INA 245, in part

(TL:VISA-112; 05-26-1995)

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence....

(c) Subsection (a) shall not be applicable to....

(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217.

[Amended by Pub. L. 99-603, sec. 313(c), 100 Stat. 3438; 8 U.S.C. 1255(c); Nov. 6, 1986.]

INA 248, in part

(TL:VISA-159; 12-20-1996)

The Attorney General may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible under section 212(a)(9)(B)(i) (or whose inadmissibility under such section is waived under section 212(a)(9)(B)(V)), except in the case of—....

(4) an alien admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217.

[Amended by Pub. L. 99-603, sec. 313(D), 100 Stat. 3439; 8 U.S.C.1258; Nov. 6, 1986 and Amended by Sec. 301(b)(2) of Pub. L. 104-208, Sept. 30, 1996.]

9 FAM 41.2 Notes

(TL:VISA-187; 03-30-1999)

9 FAM 41.2 N1 Waiver for Aliens Residing in Canada or Bermuda

9 FAM 41.2 N1.1 Common Nationality Includes Commonwealth Countries and Ireland

(TL:VISA-164; 4-25-97)

The waiver of passport and visa requirements provided by 22 CFR 41.2(b) for permanent residents of Canada or Bermuda who have a common nationality with Canadians or with British subjects in Bermuda, is considered to include citizens of all Commonwealth countries, as well as citizens of Ireland. [See 9 FAM 41.2 Exhibit I.]

9 FAM 41.2 N1.2 Stateless Alien Resident of Canada or Bermuda Not Entitled to Waiver

(TL:VISA-164; 4-25-97)

Permanent residents of Canada or Bermuda who are nationals of one of the countries listed in 9 FAM 41.2 Exhibit I may be granted a waiver of visa and passport requirements. An alien resident of Canada or Bermuda who is the bearer of a certificate of identity or other stateless person's document issued by the government of one of these countries may not benefit from the waiver.

9 FAM 41.2 N2 Waiver for British Subjects Attached to Canadian and British Government Organizations in Canada

(TL:VISA-164; 4-25-97)

British subjects and their families attached to Canadian or British Government organizations in Canada, including the military, though not "permanent residents," may be regarded as nationals of Canada and eligible for the waiver provided under 22 CFR 41.2(a).

9 FAM 41.2 N3 Conditions for Admission of Aliens Under Direct Transit Waiver

9 FAM 41.2 N3.1 Not All Aliens Eligible for Transit Without Visa (TWOV)

(TL:VISA-164; 4-25-97)

8 CFR 212.1(f) is the INS companion regulation to 22 CFR 41.2(i). The privilege of TWOV is not available to certain aliens and is available to certain others only on a limited basis. [See 9 FAM 41.2 Exhibit II.]

9 FAM 41.2 N3.2 Conditions for TWOV

(TL:VISA-164; 4-25-97)

The conditions under which TWOV will be authorized for aliens to whom the privilege of TWOV may be made available without limitation pursuant to 22 CFR 41.2(i) are set forth in INS regulations 8 CFR 214.2(c)(1). [See Exhibit 9 FAM 41.2 Exhibit III.]

9 FAM 41.2 N3.3 Guidelines for Interpretation of 8 CFR 214.2(c)

9 FAM 41.2 N3.3-1 Journey Continued Within 8 Hours

(TL:VISA-2; 8-30-87)

If an alien intends to transit the United States using the same conveyance throughout, the journey must be continued within 8 hours after arrival from foreign territory.

9 FAM 41.2 N3.3-2 Scheduled Stops

(TL:VISA-2; 8-30-87)

The number of times the same conveyance on which the alien is traveling makes scheduled stops after leaving the port of entry is irrelevant, as is the total elapsed time at subsequent stopovers.

9 FAM 41.2 N3.3-3 Change of Transportation

(TL:VISA-2; 8-30-87)

Should the alien find it necessary to transfer to connecting transportation to accomplish the trip, equipment may be changed no more than twice, and the total elapsed on-ground time spent in transferring must not exceed 8 hours. However, if there is no scheduled transportation in that 8-hour period, continuation of the journey thereafter on the first available transport is acceptable. Time spent at the point of entry and at stopovers, for reasons other than for change of equipment, need not be computed in determining whether TWOV is permissible.

9 FAM 41.2 N3.3-4 Scheduled Change of Transportation and 8-Hour Rule

(TL:VISA-2; 8-30-87)

If more than one conveyance is required for transit, the alien must be scheduled to leave the port of entry within 8 hours, and the total amount of time scheduled for stops at points where transfers of equipment occur must be less than 8 hours.

9 FAM 41.2 N3.4 Exception to 8-Hour Rule for Crew Members Joining Vessel or Aircraft

(TL:VISA-187; 03-30-1999)

An exception to the 8-hour rule is provided for crew members arriving in transit to join a vessel or aircraft. Such crew members arriving in transit *need not be in possession of a C-1 visa*. To qualify for admission in TWOV status, they must have valid D visas, and applicable clearances must have been processed.

9 FAM 41.2 N3.5 TWOV Not Applicable to Cruise Ship Passengers

(TL:VISA-187; 03-30-1999)

Passengers on cruise ships *that* call at U.S. ports for brief periods and then proceed abroad do not qualify for TWOV status.

9 FAM 41.2 N3.6 Liability of Carrier in TWOV Cases

(TL:VISA-164; 4-25-97)

A carrier bringing aliens to the United States under this provision may be subject to a civil penalty of $2,000.00 if the alien does not comply with the terms of the regulations. Aliens under the bonded transit waiver may not, under any circumstance, change classification to another nonimmigrant status under INA 248.

9 FAM 41.2 N3.7 TWOV Procedure Does Not Justify Refusal to Accept Visa Application

(TL:VISA-33; 6-29-90)

The consular officer may not use the existence of the TWOV procedure to justify a refusal to accept an application for a transit visa.

9 FAM 41.2 N4 List of Signatory Transportation Lines

(TL:VISA-164; 4-25-97)

See 9 FAM 41.2 Exhibit IV for a list of carriers which have contracts, including bonding agreements, with the Attorney General pursuant to INA 233(c) regarding aliens who are being transported in immediate and continuous transit through the United States. [See also 9 FAM 41.2 Exhibit II for aliens of countries excepted from these contracts.]

9 FAM 41.2 N5 Natives and Residents of Trust Territory of the Pacific Islands Not Proceeding in Direct Transit to the United States

(TL:VISA-187; 03-30-1999)

A native and resident of the Trust Territory traveling to the United States, but not in direct and continuous transit from the Trust Territory, may be issued a nonimmigrant visa *without being charged the reciprocity* fee. *The visa may be* valid for a period and number of applications for admission consistent with the traveler's needs. *[See 9 FAM PART IV Appendix C under country concerned for the number of applications and validity of visa.] The applicant, however, must pay the MRV fee, which is currently $45.00.*

9 FAM 41.2 N6 Parole Procedure Under INA 212(d)(5)

(TL:VISA-187; 03-30-1999)

Consular officers may answer questions about the relationship between the parole procedure and the regular visa procedure under the INA with a reference to INA 212(d)(5) *that* contains the statutory authority for the parole procedure. Consular officers shall not give more information in answer to inquiries from the general public, nor shall consular officers suggest parole to an alien or an interested party. In appropriate cases, consular officers may refer inquirers to INS. [See 9 FAM 42.1 N5.]

9 FAM 41.2 N7 Restrictions on British Virgin Islands Nationals Entering U.S. Virgin Islands Under Waiver

(TL:VISA-187; 03-30-1999)

a. A national of the British Virgin Islands, and resident therein, requires a passport, but not a visa if proceeding to the U.S. Virgin Islands.

b. A national of the British Virgin Islands, and resident therein, requires a passport, but does not require a visa to apply for entry into the United States if such applicant:

(1) Is proceeding by aircraft directly from St. Thomas, U.S. Virgin Islands;

(2) Is traveling to some other part of the United States solely for the purpose of business or pleasure as described in INA 101(a)(15)(B);

(3) Satisfies the examining U.S. Immigration officer at that port of entry that he or she is admissible in all respects other than the absence of a visa; and

(4) Presents a current Certificate of Good Conduct issued by the Royal Virgin Islands Police Department indicating that he or she has no criminal record.

9 FAM 41.2 N8 Visa Issuance to Aliens Entitled to Documentary Waiver

(TL:VISA-187; 03-30-1999)

An alien entitled to a waiver of documentation may apply for and receive the type of visa *that* would otherwise be waived. If a visa is issued notwithstanding the waiver, the consular officer shall make a notation on Form OF-156, indicating that the visa was issued at the request of the applicant.

9 FAM 41.2 N9 K Visa Alien Not Entitled to Nonimmigrant Visa Waiver

(TL:VISA-164; 4-25-97)

An alien qualifying for a K visa as the fiancé or fiancee of a U.S. citizen is not entitled to a waiver of the nonimmigrant visa requirement regardless of circumstances.

9 FAM 41.2 N10 Guam Visa Waiver Program

(TL:VISA-187; 03-30-1999)

The Guam Visa Waiver Program, as authorized by the Omnibus Territories Act of 1986 (Pub. L. 99-396), was implemented on October 1, 1988. The program allows citizens of designated countries to make a temporary visit to Guam provided that they:

(1) Visit for business or pleasure for a period of no*t* more than 15 days;

(2) Travel aboard a participating airline;

(3) Waive any right otherwise provided in the Act to administrative or judicial review, or appeal of an immigration officer's determination of admissibility; and

(4) Do not apply for an extension of stay, adjustment of status, change of nonimmigrant status, or onward travel to another destination in the United States.

For INS regulations regarding the Guam Visa Waiver Program see 9 FAM 41.2 Exhibit V.

9 FAM 41.2 N11 Visa Waiver Pilot Program (VWPP)

(TL:VISA-187; 03-30-1999)

a. The VWPP was established by section 313 of the Immigration Reform and Control Act of 1986 (Pub. L. 99-603). It provided for the visa free entry of nationals of designated countries coming to the United States for tourism or business (B visa purposes) for a period not to exceed 90 days, provided they arrive on a participating carrier and are in possession of a round-trip or onward ticket.

b. The Immigration Act of 1990 (Pub. L. 101-649) removed the eight-country cap and extended the program for the original eight countries as well as any other countries designated by the Secretary of State and the Attorney General until September 30, 1994.

c. The Immigration and Nationality Technical Corrections Act of 1994 (Pub. L. 103-416) further extended the program through September 30, 1996 and created a probationary status for participating countries in the Visa Waiver Pilot Program.

d. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104-208) eliminated the joint action requirement by amending the law to allow the Attorney General to act "in consultation with the Secretary of State" rather than "jointly with the Secretary of State" in designating the countries eligible to participate in the program. The program was further extended until September 30, 1997 and repealed section 217(f) which permitted countries to enter the program in probationary status.

e. Public Law 105-173 of April 28, 1998, amended the Immigration and Nationality Act to modify and extend the VWPP through April 30, 2000.

9 FAM 41.2 N11.1 Countries Eligible to Participate in VWPP

(TL:VISA-164; 4-25-97)

The VWPP waives the nonimmigrant visa requirement for admission of certain aliens into the United States for a period not to exceed ninety days. The Attorney General, after consulting with the Secretary of State, is authorized to designate those countries eligible to participate in the VWPP. A list of the countries currently eligible to participate in the VWPP is shown in 9 FAM 41.2 Exhibit VI.

9 FAM 41.2 N11.2 Eligibility Requirements

9 FAM 41.2 N11.2-1 General

(TL:VISA-187; 03-30-1999)

An alien who is a national of a participating VWPP country does not require a visa, provided the alien:

(1) Is classifiable as a visitor under INA 101(a)(15)(B);

(2) Seeks to enter the United States for a period not to exceed 90 days;

(3) Possesses a valid passport issued by a VWPP designated country;

(4) Completes and signs Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form;

(5) Waives any right otherwise provided in the Act to administrative or judicial review or appeal of an immigration officer's determination of admissibility; and

(6) Waives any right to contest any action for deportation.

(7) If arriving by air or sea, arrives on a carrier *that* has entered into an agreement with the INS to guarantee transport of the alien if found inadmissible or removable. [See 9 FAM 41.2 Exhibit VII for a list of signatory carriers.]

9 FAM 41.2 N11.2-2 Applicants Arriving by Air or by Sea

(TL:VISA-64; 4-25-97)

VWPP participants arriving by air must have:

(1) A round-trip, non-transferable transportation ticket valid for a period of not less than one year;

(2) Airline employee passes indicating return passage;

(3) Individual vouchers;

(4) Group vouchers for charter flights only; or

(5) Military travel orders (which include military dependents) for return to duty stations outside the United States on U.S. military flights.

9 FAM 41.2 N11.2-3 Applicants Arriving at Land Border Ports-of-Entry

(TL:VISA-164; 4-25-97)

Any alien arriving at a land border port of entry must provide evidence of:

(1) Financial solvency; and

(2) A domicile abroad.

9 FAM 41.2 N11.3 Form I-94W Required

(TL:VISA-187; 03-30-1999)

Applicants for entry under the VWPP must complete Form I-*94W*, Visa Waiver Pilot Program Information Form, prior to arriving at the port of entry, and must undergo screening at the port of entry by the INS. Form I-*94W* makes clear that the waiver traveler surrenders the right to an exclusion hearing.

9 FAM 41.2 N11.4 Round-Trip Ticket

(TL:VISA-164; 4-25-97)

For purposes of the VWPP, a round-trip ticket means any non-transferable ticket, valid for a period of not less than one year, which takes the traveler out of the United States to an onward destination, including foreign contiguous territory or adjacent island, if he or she is resident there. If the traveler is not resident in contiguous territory or adjacent islands, the ticket must transport him or her to a foreign location outside contiguous territory or adjacent islands.

9 FAM 41.2 N11.5 Port of Embarkation for United States

(TL:VISA-187; 03-30-1999)

Participants in the VWPP may embark for the United States from anywhere in the world, *provided* they arrive aboard a participating carrier.

9 FAM 41.2 N11.6 Aliens Transiting United States

(TL:VISA-33; 6-29-90)

Qualified travelers may elect to use the VWPP instead of TWOV when transiting the United States.

9 FAM 41.2 N11.11 Maintenance of Status

(TL:VISA-164; 4-25-97)

An alien admitted to the United States under the VWPP:

(1) Is admitted as a visitor for business or pleasure for a period not to exceed 90 days;

(2) May not engage in activities inconsistent with status as a visitor;

(3) Is not eligible for an extension of temporary stay in the United States;

(4) Is not eligible for adjustment of status to that of a lawful permanent resident alien (other than as an immediate relative as defined under INA 201(b) or under the provisions of INA 245(i)); and

(5) Is not eligible for change of nonimmigrant status.

9 FAM 41.2 N12 Canadian Citizens Seeking Admission as Treaty Traders or Treaty Investors

(TL:VISA-164; 4-25-97)

During the United States-Canada Free Trade Agreement negotiations, it was recognized that the E visa classification is extremely technical and sometimes quite complex. All parties agreed that the visa process was the best way to accord this classification. 22 CFR 41.2(m) removes the visa exemption for Canadian citizens who seek to enter the United States as treaty traders/investors under INA 101(a)(15)(E). Such Canadian citizens must apply for an E visa at a U.S. embassy or consulate. [See 9 FAM 41.51 Regs/Statutes and 9 FAM 41.51 Notes.]

9 FAM 41.2 N13 Canadian Citizens Seeking Admission Under NAFTA

(TL:VISA-164; 4-25-97)

Citizens of Canada seeking admission to the United States under the provisions of the North American Free Trade Agreement (NAFTA) are exempt from the visa requirement, unless seeking classification under INA 101(a)(15)(E). [See also 9 FAM 41.59 and 9 FAM PART IV Appendix P, Services for INS - NAFTA.]

9 FAM 41.2 N11.7 Side Trips Permitted Within 90-day Limit

(TL:VISA-164; 4-25-97)

Travelers participating in the VWPP must make their initial entry into the United States aboard one of the participating carriers. After their initial entry into the United States, temporary departure to, and return from, Canada, Mexico or adjacent islands by car or other carriers is permitted, as long as the total stay (in the United States, plus contiguous territory and adjacent islands) does not exceed 90 days.

9 FAM 41.2 N11.8 Nationality and Passport Requirements

(TL:VISA-187; 03-30-1999)

a. The traveler's nationality, not place of birth, determines entitlement to participate in the VWPP. Passports must reflect the nationality of a participating country. British passports must reflect "BRITISH CITIZEN", or be annotated with the phrase "HOLDER HAS THE RIGHT OF ABODE IN THE UNITED KINGDOM."

b. Bearers of official and diplomatic passports can use the VWPP, *provided* they are entering the United States for a B visa purpose. If they are coming for a(n) A or G purpose, including a temporary assignment of less than 90 days, the appropriate visa must be stamped in the passport.

9 FAM 41.2 N11.9 Aliens Requiring Waiver of Ineligibility

(TL:VISA-164; 4-25-97)

Persons for whom a waiver of ineligibility is required must apply for and receive a visa; they are not eligible to participate in the VWPP. Persons covered by the blanket waiver of INA 212(a)(1) for mentally retarded individuals can participate in the VWPP, if otherwise qualified, and accompanied by a responsible adult; the blanket waiver will be noted on Form I-94, Arrival-Departure Record, at the port of entry.

9 FAM 41.2 N11.10 Travelers Not to be Discouraged from Seeking Visas

(TL:VISA-187; 03-30-1999)

Although use of the VWPP is encouraged, travelers availing themselves of it *should be made aware of the risks involved* and *the surrendering of* certain rights. Consequently, they should not be discouraged from seeking normal visa services.

9 FAM 41.3
Waiver by joint action of consular and immigration officers of passport and/or visa requirements.

(TL:VISA-184; 01-22-1999)

(TL:VISA-47; 8-30-91)

Under the authority of INA 212(d)(4), the documentary requirements of INA 212(a)(7)(B)(i)(I), (i)(II) may be waived for any alien in whose case the consular officer serving the port or place of embarkation is satisfied after consultation with, and concurrence by, the appropriate immigration officer, that the case falls within any of the following categories:

(a) Residents of foreign contiguous territory; visa and passport waiver.

(TL:VISA-2; 8-30-87)

An alien residing in foreign contiguous territory who does not qualify for any waiver provided in section 41.1 and is a member of a visiting group or excursion proceeding to the United States under circumstances which make it impractical to procure a passport and visa in a timely manner.

(b) Aliens for whom passport extension facilities are unavailable; passport waiver.

(TL:VISA-47; 8-30-91)

An alien whose passport is not valid for the period prescribed in INA 212(a)(7)(B)(i)(I) and who is embarking for the United States at a port or place remote from any establishment at which the passport could be revalidated.

(c) Aliens precluded from obtaining passport extensions by foreign government restrictions; passport waiver.

(TL:VISA-47; 8-30-91)

An alien whose passport is not valid for the period prescribed in INA 212(a)(7)(B)(i)(I) and whose government, as a matter of policy, does not revalidate passports more than 6 months prior to expiration or until the passport expires.

(d) Emergent circumstances; visa waiver.

(TL:VISA-2; 8-30-87)

An alien well and favorably known at the consular office, who was previously issued a nonimmigrant visa which has expired, and who is proceeding directly to the United States under emergent circumstances which preclude the timely issuance of a visa.

(e) Members of armed forces of foreign countries; visa and passport waiver.

(TL:VISA-184; 01-22-1999)

An alien on active duty in the armed forces of a foreign country and a member of a group of such armed forces traveling to the United States, on behalf of the alien's government or the United Nations, under advance arrangements made with the appropriate military authorities of the United States. The waiver does not apply to a citizen or resident of Cuba, *Mongolia*, North Korea (Democratic People's Republic of Korea), Vietnam (Socialist Republic of Vietnam), or the People's Republic of China.

[Amended by 63 FR 48577; Sept. 11, 1998.]

(f) Landed immigrants in Canada; passport waiver .

(TL:VISA-9; 3-23-88)

An alien applying for a visa at a consular office in Canada:

(1) Who is a landed immigrant in Canada;

(2) Whose port and date of expected arrival in the United States are known; and

(3) Who is proceeding to the United States under emergent circumstances which preclude the timely procurement of a passport or Canadian certificate of identity.

(g) Authorization to individual consular office; visa and/or passport waiver.

(TL:VISA-2; 8-30-87)

An alien within the district of a consular office which has been authorized by the Department, because of unusual circumstances prevailing in that district, to join with immigration officers abroad in waivers of documentary requirements in specific categories of cases, and whose case falls within one of those categories.

9 FAM 41.3 Related Statutory Provisions

INA 212(a)(7)(B)(i)

(TL:VISA-47; 8-30-91)

For provisions of INA 2I2(a)(7)(B)(i), see section 41.1 Related Statutory Provisions.

INA 212(d)(4)

(TL:VISA-9; 3-23-88)

For provisions of INA 212(d)(4), see section 41.2 Related Statutory Provisions.

9 FAM 41.3 Notes

9 FAM 41.3 N1 Transporting Undocumented Aliens to United States

(TL:VISA-47; 8-30-91)

Posts must inform carriers inquiring about transporting an undocumented alien that they would be subject to a fine unless such alien is within one of the categories listed in 22 CFR 41.2 or 41.3.

9 FAM 41.3 N2 Areas of Responsibility of Immigration Officers

(TL:VISA-47; 8-30-91)

Consular officers shall address requests for concurrence in waivers of passport and visa requirements to the immigration officer in charge, in care of the appropriate post as indicated in 9 FAM PART IV.

9 FAM 41.3 N3 Furnishing Information Concerning Waivers to Immigration Officers

(TL:VISA-47; 8-30-91)

a. Consular officers shall furnish the following information to immigration officers when requesting concurrence in waivers of passport and visa requirements:

(1) Alien's full name with all aliases;

(2) Date and place of birth;

(3) Nationality;

(4) Date and port of expected arrival in the United States;

(5) Nonimmigrant classification;

(6) Documents to be waived;

(7) A brief summary of the emergent circumstances surrounding the case which must include information indicating that all of the requirements of the subparagraph of 22 CFR 41.3 under which the waiver is recommended have been met; and

(8) Name, address and telephone number of the person the alien intends to visit in the United States.

b. In cases falling within 22 CFR 41.3(e), consular officers shall also furnish the following information:

(1) Name, nationality and type of carrier, if any (for example, battleship, training vessel, or aircraft);

(2) The purpose of entry;

(3) Date and port of expected arrival in the United States, other ports of call in the United States, if any, and period of anticipated stay in each port; and

(4) Number, rank, if any, and nationality of members of group.

9 FAM 41.3 N4 Issuing Documents to Waiver Beneficiaries

(TL:VISA-47; 8-30-91)

In cases in which a waiver has been granted under 22 CFR 41.3, the consular officer shall give the alien concerned, or the leader of a group, a signed letter stating that a waiver has been granted under the provisions of INA 212(d)(4)(A) and including the name, title and location of the immigration officer who joined in the waiver. In cases of waivers granted pursuant to 22 CFR 41.3(a), the letter shall list all persons included in the waiver and show the date and place of birth and nationality of each alien and the function or position of each alien in the group. If the waiver covers more than one application for admission, the consular officer shall provide a copy of the letter for each application. The consular officer shall retain one copy of the letter in the consular files. If circumstances do not permit the issuance of a letter, the consular officer shall make a memorandum for the consular files including the items listed in N3 above. The consular officer shall request the immigration officer joining in a waiver under 22 CFR 41.3(d) to forward appropriate information to the immigration officer at the expected port of arrival in the United States.

9 FAM 41.3 N5 Issuing Visas to Aliens Entitled to Documentary Waiver

(TL:VISA-47; 8-30-91)

See section 9 FAM 41.2 N8.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

COMMISSIONER

OCT 24 2002

August 14, 2002

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515-6453

Dear Ms. Paull:

I am responding to your letter dated June 28, 2002, asking for information on the tax and immigration rules enacted in 1996 relating to tax-motivated expatriation.

Under sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code (the Code), this letter contains tax return information which is in the chart included in the response to Question #5. Disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

1. Provide the number of former U.S. citizens who received certificates of loss of nationality for the years 2000, 2001, and 2002 (through June 30, 2002).

Through June 30, 2002, the number of former U.S. citizens who received certificates of loss of nationality (CLN) was:

Year	Number
2000	473
2001	319
2002	51

2. For 2000 and 2001, provide the number of former U.S. citizens who provided to the IRS an IRS Form 8854 or other information statement relating to their loss of nationality.

Through June 30, 2002, the number of former U.S. citizens who provided to the IRS a Form 8854 or other information statements on their loss of nationality was:

Year	Number
2000	402
2001	284
2002	43

3. For 2000 and 2001, provide the number of former U.S. citizens who provided an IRS Form 8854 or other information statement and who also (a) identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) of the Internal Revenue Code (the "Code"), or (b) included a social security number.

The number of individuals who provided a Form 8854 or other information statement and also (a) identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) of the Internal Revenue Code, or (b) included a social security number was:

Year	Number
2000	45
2001	31

4. For 2000 and 2001, provide the number of individuals who identified themselves as meeting one or more of the monetary thresholds under section 877(a)(2) of the Code and who submitted ruling requests to the IRS.

In 2000, 65 individuals identified themselves as meeting one or more of the monetary thresholds and requested rulings from the IRS. Of this number, 13 were former U.S. citizens and 52 were former long-term U.S. residents. In 2001, 77 individuals identified themselves as meeting one or more of the monetary thresholds and requested rulings from the IRS. Of this number, 31 were former U.S. citizens and 46 were former long-term U.S. residents.

5. The Joint Committee staff understands that the IRS previously identified 11 cases that are potentially not in compliance with the expatriation tax rules (10 cases relating to the 1997 tax year, and 1 case relating to the 1996 tax year). Describe the current status of these cases, and whether any of these cases has resulted in proposed adjustments or in the collection of tax. Also describe any other cases that the IRS has identified as potentially not in compliance with the expatriation tax rules, including the status and nature of such cases.

Status report on expatriate cases
KEY TO SOURCE:

EC = EXAM CLASSIFICATION
CC = REFERRAL FROM OFFICE OF CHIEF COUNSEL
EXP = FROM EXPATRIATE DATA BASE

CASES INCLUDED IN MAY 2000 REPORT

IRC 6103 b(3)

[redacted]

Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code.

IRC
6103
b(3)

[redacted]

Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code.

IRC
6103
b(3)

[redacted]

Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code.

Cases Not Included in May 2000 Report

IRC 6103 (b)(3)

[redacted]

Chart contains taxpayer information protected under Section 6103 of the Internal Revenue Code

6. The Joint Committee staff understands that in January 2000, the IRS began sending notices to persons who failed to provide required information statements. Provide the number of notices that have been sent to persons who failed to provide required information statements, the number of penalties assessed and collected, and whether any information was obtained as a result of the notices.

We mailed approximately 125 letters to people who failed to provide required information statements. There were 74 responses to these letters, which brought the individuals into full compliance with the reporting requirements of section 6039G of the Code. No penalties were assessed against these individuals. For the individuals who did not respond to the letters, our compliance efforts were hampered by lack of social security numbers and our inability to properly identify the individuals. Because of the difficulty of assessing penalties in these cases, we focused our resources on other areas of noncompliance.

7. Describe whether IRS practices with respect to administering and enforcing the expatriation tax rules, based on Notice 97-19 and Notice 98-34 have changed since January 1, 2000, and if so, describe the nature of such changes and whether any further administrative guidance is expected to be issued.

The administration and enforcement of the expatriation tax rules, based on Notice 97-19 and Notice 98-34, have not changed in any significant way from the process described in my letters dated May 5, 2000 and May 16, 2000. I enclosed copies of these letters. A group of six attorneys and three reviewers in the Chief Counsel's office work the section 877 ruling requests and are responsible for a number of other international tax provisions. Centralizing the ruling process in a small group results in consistency in the evaluation procedure and in conclusions.

With one possible exception, we do not plan to issue additional administrative guidance in the near future. Section 877(e)(4) authorizes the Secretary of the Treasury to provide regulations exempting from the tax avoidance presumptions former long-term residents of the United States who are now expatriates. As the Chief Counsel's office gains experience with the various situations in which long-term residents become expatriates, it may provide exemptions for them from the presumptions and rulings process.

8. The Joint Committee staff understands that the IRS receives certain information from the Immigration and Naturalization Service ("INS") with respect to former green card holders. Describe any modifications or changes in administrative practices since January 1, 2000, with respect to the sharing of information between the IRS and the INS for the purpose of identifying individuals who are former long-term residents subject to the expatriation tax rules.

As I described in my letter to you dated May 5, 2000, the information exchange program with INS began in November 1996. The INS agreed to provide annually the information we requested. We received the data for 1996 and 1997 in 1998 as a single package and the data for 1998 in June 1999. We received the data for 1999 in 2000. The data we received was generally for all individuals who gave up their green cards during the previous year. We loaded this information into a database and discarded the records for individuals who did not meet the residence requirements of section 877(e)(2) of the Code. We then conducted a statistically valid sample of the remaining records, drawing separate samples for abandoned and revoked cards.

In 1999, the last year we sampled green card data from the INS, we had 1,730 records for individuals who had abandoned their green cards and for whom we received social security numbers. We conducted a filing compliance review of 67 of these records. We found this population was generally filing compliant. We also received from the INS 18,202 records for individuals whose green cards were revoked and for whom the IRS received social security numbers. Of this number, we selected a sample of 205 for a filing compliance review. We encountered numerous problems in using the data for revocations from 1996 - 1999, including:

- Invalid social security numbers
- Social security numbers/name mismatches (the last name on the Social Security Administration's records did not match the name on IRS records)
- No record of filings

Because the sample of individuals who abandoned their green cards was generally compliant and because of the considerable difficulties in using the data for individuals with revoked green cards, we decided to redirect our resources to other areas of noncompliance.

9. The Joint Committee staff understands that the IRS initiated a project in December 1999 to assess compliance with the expatriation tax rules by individuals who have supplied information concerning their net worth and their income tax liability. Provide a copy of the report associated with this project, or if not complete or available, describe what has been done with respect to this project, the current status of the project, and any results or conclusions that have been reached.

The compliance improvement program (CIP) project resulted in 11 examinations. We included these taxpayers in the list provided in the response to Question #5. Of the 11 cases, we have closed 8, and the examinations in the remaining 3 are still in progress. The CIP project was not renewed.

10. Provide the number and describe the nature of cases since January 1, 2000, in which the IRS has utilized exchange of information procedures under a tax treaty to solicit information regarding whether an individual may be subject to the expatriation tax rules.

We have not used the treaty exchange of information procedures to solicit information on whether particular individuals may be subject to the expatriation tax rules.

I hope this information is helpful. Please contact me at (202) 622-9511, if I can assist you further.

Sincerely,

Bob Wenzel

Acting for Charles O. Rossotti

Enclosures (2)

NATIONAL DIRECTOR
FOR LEGISLATIVE
AFFAIRS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OCT 2 4 2002

SEP 1 6 2002

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515

Dear Ms. Paull:

At the September 3, 2002 meeting with your staff, you requested additional information about the expatriates we selected for examination and identified in our response to question 5 of your June 28, 2002 letter.

Under sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code (the Code), this letter contains tax return information. Disclosure of this information (even to the taxpayers involved) is subject to the limitations of section 6103.

The following expatriates we selected for examination also requested private letter rulings from the IRS under section 877(c)(1) of the Code:

IRC 6103 b(3) [redacted]

The following is information these individuals submitted in connection with their ruling requests.

IRC 6103 b(3) [redacted]

IRC
6103
(b)(3)

[redacted]

[redacted]

IRC
6103
(b)(3)

[redacted]

JRC
6103
(b)(3)

5

[redacted]

IRC
6103
(b)(3)

IRC
6103
(b)(3)

[redacted]

IRC
6103
(b)(3)

[redacted]

[redacted]

IRC
6103
(b)(3)

[redacted]

IRC 6103 (b)(3) [redacted]

I hope this information is helpful. Please contact Ed Williams at (202) 622-3268, if you need additional information.

Sincerely,

Floyd Williams

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

NATIONAL DIRECTOR
FOR LEGISLATIVE
AFFAIRS

September 20, 2002

Ms. Lindy Paull
Chief of Staff
Joint Committee on Taxation
Washington, D.C. 20515

Dear Ms. Paull:

I am providing you with additional information that you have requested in order to assist the staff in preparation of its expatriation study.

Enclosed is a document that describes the processing of expatriation cases. That document describes the process that was in place prior to the IRS reorganization, the process we follow today, and the process that we plan to implement.

IRC 6103
(b)(3)

Also enclosed, is additional tax information you requested regarding certain expatriation cases. These cases involve [redacted]

Under sections 6103(f)(2) and (f)(4)(A) of the Internal Revenue Code, this letter contains tax return information. Disclosure of this information (even to the taxpayers involved) is subject to the limitations of Code section 6103.

I hope this information is helpful to you. Please call me at (202) 622-4725, if we can be of additional assistance.

Sincerely,

Floyd L. Williams

Enclosures

[ENCLOSURES REDACTED IN THEIR ENTIRETY]

U.S. Department of Justice
Immigration and Naturalization Service

HQADN 70/21.1.24

Office of Congressional Affairs

425 I Street NW
Washington, DC 20536

OCT 8 2002

Ms. Lindy L. Paull
Chief of Staff
Joint Committee on Taxation
1015 Longworth House Office Building
Washington, D.C. 20515

Dear Ms. Paull,

This letter will serve as a formal response to your faxed letter dated July 15, 2002, in which you requested information from the Immigration and Naturalization Service (the INS) to assist you in updating and completing a draft report on the rules related to tax-motivated expatriation enacted in 1996. Your letter requested a response by July 26, 2002 due to the time-sensitive nature of your review. Please accept my apologies for the delay in responding. The answers to your questions are as follows.

1. **The Joint Committee staff understands that, in the early part of 2000, the INS was in the process of publishing proposed regulations to implement section 212(a)(10)(E) of the Immigration and Nationality Act. Indicate when the regulations were issued and in what form, i.e., proposed, temporary or final. Describe the regulation including, but not limited to, the process used to determine that a person renounced his or her U.S. citizenship for tax-avoidance purposes, whether and how such a determination can be rebutted by the person seeking reentry, and the availability of and criteria for the waiver of inadmissibility under sections 212(d)(3)(A) or (B) of the Immigration and Nationality Act. Please provide a copy of the regulation.**

In the early part of 2000, the Department of Justice (DOJ) forwarded the proposed regulation to the Office of Management and Budget (OMB) for clearance for publication. Since OMB did not clear that proposed rulemaking before the change of administration, the INS updated and resubmitted the proposed regulation to the Department for comments and clearance. In the course of Department and interagency review of the regulation, suggestions were made to

simplify the approach taken in the earlier drafts. In light of those discussions, the proposed rule is being restructured to establish a streamlined process for determining whether a former U.S. citizen's expatriation was tax-motivated. The INS, DOJ, Department of the Treasury, Internal Revenue Service (IRS), and the Department of State (DOS) have been working diligently to develop the regulations necessary to implement section 212(a)(10)(E) of the Act, and hope to publish a notice of proposed rulemaking some time during the next six months.

In establishing a streamlined process, the INS is drawing from the tax codes at 26 U.S.C. 877 relative to the tax consequences of expatriation. In some instances, certain acts or statements on the part of the former U.S. citizen will be sufficient, in and of themselves, to result in a finding of inadmissibility under section 212(a)(10)(E) of the Act. In other instances, the INS may need to consult with the DOS and/or the IRS to obtain the information needed to make an informed and accurate determination. With these considerations in mind, the proposed rule will also have to take into account the procedures that must be established to facilitate not only interagency data sharing, but also the release of confidential taxpayer information by the IRS to the INS.

Under the proposed rule, a former U.S. citizen will be inadmissible under section 212(a)(10)(E) of the Act if there is an indication in any signed statement that he or she planned to expatriate, was expatriating, or had actually expatriated, to avoid paying U.S. taxes. A former U.S. citizen who fails or refuses to submit any IRS forms required of all expatriates will be presumed inadmissible under section 212(a)(10)(E) of the Act. No further determination can be made until those forms have been properly filed.

Section 212(a)(10)(E) of the Act will also apply in those cases where the IRS issues a private letter ruling, as provided under 26 U.S.C. 877(c), that the former citizen expatriated with a principal purpose to avoid taxation. Similarly, a former citizen who withdrew a pending request for a private letter ruling, after the IRS indicated that the decision would not be in his or her favor, will be presumed inadmissible under section 212(a)(10)(E) of the Act, with no provision for rebuttal.

In addition, the proposed rule draws from the thresholds established with respect to net worth on the date of expatriation and the average annual net income tax liability for the 5 years preceding expatriation. These thresholds, at 26 U.S.C. 877(a)(2)(A) and (B), respectively, are set at $500,000 and $100,000, and are adjustable annually for inflation. If either of these two thresholds are met, the former U.S. citizen will be presumed inadmissible under section 212(a)(10)(E) of the Act, but may rebut this presumption if among any of the classes described at 26 U.S.C. 877(c).

Former U.S. citizens who are found inadmissible under section 212(a)(10)(E) of the Act may apply for a nonimmigrant waiver under section 212(d)(3)(A) or (B) of the Act, if they seek admission to the United States on a temporary basis. This waiver provision is broad and covers most grounds of inadmissibility, including section 212(a)(10)(E) of the Act.

Waivers are discretionary and involve a delicate balance of the underlying ground of inadmissibility and any other unfavorable factors against the equities. The general waiver procedures for nonimmigrants are found at 8 CFR § 212.4.

2. Provide the number of persons, if any, who have been found inadmissible as a result of section 212(a)(10)(E) for 2000, 2001 and 2002 through June 30, 2002. Provide the number of waivers of inadmissibility granted by type for 2000, 2001 and 2002 through June 30, 2002. Describe the tracking system of individuals granted waivers and whether any changes in guidelines have occurred since 2000 and the nature of such change.

Because the proposed regulation has yet to be published, no former U.S. citizens have been found inadmissible under section 212(a)(10)(E) of the Act since its enactment on September 30, 1996. The total number of waivers granted for all grounds of inadmissibility are as follows:

Type of Waiver	FY 00	FY 01	FY 02 *(through May 02)*
Visa/Passport	20,688	21,181	5,761
Non-Criminal	6,718	8,819	5,874
Criminal	4,415	4,864	3,968
TOTAL	31,821	34,864	15,603

The INS maintains a Computer Linked Application Information Management System (CLAIMS), which indicates whether an individual alien has been granted a waiver of inadmissibility in the course of pursuing an immigration benefit, such as admission or adjustment of status. For non-criminal waivers, however, the INS currently does not maintain statistics regarding the number of waivers of inadmissibility granted by type.

As part of a larger project, the INS is consolidating many of the forms currently used to apply for various criminal and non-criminal waivers under a new Form I-724 series. Because each form in the series will address separate grounds of inadmissibility, the INS will be able to compile more accurate statistics on the number of waivers sought for each ground of inadmissibility, as well as the number of approvals and denials.

3. **Provide the circumstances and number of persons entering on the basis of parole (temporary entry while a determination of admissibility is made) since January 2000.**

There are several different types of parole. Under section 212(d)(5) of the Act, the Attorney General may, in his discretion, and on a case-by-case basis, parole any individual into the United States temporarily, for urgent humanitarian reasons or significant public benefit. An individual whose inspection is deferred pending a determination of inadmissibility is also deemed to be paroled. From January 1, 2000, through April 30, 2002, 25,114 individuals were paroled for deferred inspection.

4. **The Joint Committee staff understands that, although lawful permanent residents ("green card holders") are inspected upon their arrival in U.S. ports of entry, no records historically were kept regarding the movement of lawful permanent residents or other resident aliens into or out of the United States. Describe whether a system has been put in place to track the movement of green card holders or other resident aliens into or out of the United States. Describe the system used and procedures for retrieving records to such individuals (e.g., by social security number, name, or other identifier).**

Historically, there has not been any statutory requirement that the INS track the movement of lawful permanent residents (LPRs) in and out of the United States. However, in connection with the implementation of section 402 of the Enhanced Border Security and Visa Reform Act of 2002, the INS plans to propose that LPR arrivals and departures be tracked at air and seaports beginning on January 1, 2003. ADIS, the Arrival/Departure Information System, will be the repository and retrieval mechanism for the arrival/departure data on all aliens, including LPRs. The LPR's Alien Registration Receipt Number will serve as the identifier for retrieving the record.

5. **The Joint Committee staff understands that the INS maintains computer databases that contain records of green card holders whose status has been revoked or has been administratively or judicially determined to have been abandoned. Describe whether any changes have occurred since January 1, 2000, with respect to the maintenance of such databases.**

The INS maintains a computer database, the Central Index System (CIS), which contains records of lawful permanent residents whose status has been revoked or has been administratively or judicially determined to have been abandoned. INS Service Center Operations reports no CIS maintenance changes since January 1, 2000.

6. **The Joint Committee staff understands that the INS' Central Index System reveals a social security number only if such number was provided by the alien and "keyed" into the system, and that the INS' computer systems are based on alien numbers, arrival/departure numbers, application or petition receipt numbers. Describe any changes in procedure since January 2000 for determining whether immigration records contain social security numbers.**

The Service Center Operations Branch of the Immigration Services Division at INS Headquarters reports that there have been no changes in procedure since January 2000 relative to whether immigration records contain social security numbers.

7. **The Joint Committee staff understands that, as of January 2000, no studies or projects (public or nonpublic) had been conducted by the INS or any other agency (except for the General Accounting Office) that examined compliance with section 212(a)(10)(E) of the Immigration and Nationality Act. Please identify any studies or projects conducted by the INS, or if you are aware, studies or projects conducted by another Federal agency, that have examined compliance with this provision since January 2000.**

The INS is unaware of any studies or projects (public or nonpublic) that have been conducted by any Agency to examine compliance with section 212(a)(10)(E) of the Immigration and Nationality Act since January 2000 (other than the General Accounting Office.)

I hope that you find the answers to your inquiry responsive. If you need additional information, please let me know.

Sincerely,

FOR THE COMMISSIONER

Joseph Karpinski
Director
Congressional Relations and Public Affairs

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

NATIONAL DIRECTOR
FOR LEGISLATIVE
AFFAIRS

OCT 10 2002

OCT 24 2002

Ms. Lindy Paull
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Joint Committee on Taxation
Washington, D.C. 20515-6453

Dear Ms. Paull:

I am writing to give you additional information on the expatriation tax rules for individuals. I have organized the information in three sections:

- Follow-up questions to the September 16, 2002 letter from Floyd Williams
- Follow-up questions to the August 14, 2002 letter from Commissioner Rossotti
- Additional information requested during the September 23, 2002 conference call

<u>Follow-up questions relating to the September 16, 2002 letter from Floyd Williams</u>

1. As part of the ruling process, does the IRS check or test the estimates provided by the taxpayer? Has the IRS sought additional information regarding the estimates from those who submitted letter-ruling requests?

We assign every ruling request to a docket attorney and a reviewer in Branch 1 of the Office of the Associate Chief Counsel (International). As part of the process, a docket attorney reviews all information an expatriate or representative submits and discusses the information with his or her reviewer. Frequently, we request additional information from the expatriate. However, the office cannot independently verify all estimates and calculations of U.S. and foreign income and estate tax liabilities. The estimates relate to future tax periods for which the individuals have not filed returns and are based on a number of assumptions concerning income, deductions, and the tax laws of both the United States and other countries. The amount and nature of the information the office receives is under the control of the expatriate. Finally, the Chief Counsel's office does not usually have the resources to verify complicated income and estate tax computations under U.S. and foreign laws. However, individuals must submit the estimates under penalties of perjury, and we have found that the calculations are generally reasonable.

2. Were the summaries of projected tax liabilities provided to us in the September 16, 2002, letter the estimates provided by the taxpayers? If not, please indicate on what basis these projected tax liabilities were calculated.

RC
6103
(b)(3)

[redacted]

IRC 6103 (b)(3)

[redacted]

IRC 6103 (b)(3)

[1] This information corrected of the [redacted] stated in our letter of September 16, 2002.

IRC
6103
(b)(3)

[redacted]

[redacted]

IRC
6103
(b)(3

4. In the letter, Floyd Williams related that these estimates are factors in determining the IRS' decision with respect to the letter-ruling request. Please elaborate on the factors that are used in analyzing a letter-ruling request. Is there a main criterion? What factors are most relevant?

Notices 97-19 and 98-34 contain information explaining the process for requesting a ruling under IRC § 877(c)(1). The latter describes information that an individual must include in a request in response to 23 specific questions. As explained in Commissioner Rosotti's letter dated May 5, 2000, after we make a determination that a submission is complete and submitted in good faith, we examine the request to determine whether we can make a substantive determination in the ruling process as to whether one of the principal purposes of expatriating was to avoid U.S. taxes. Under IRC § 877(f), a taxpayer must prove the absence of a principal purpose of tax avoidance if the IRS establishes that it is reasonable to believe that a taxpayer's expatriation will result in a significant reduction in taxes on his probable income.

We examine all the facts submitted with a request for a ruling before we reach a conclusion on whether an expatriate had a principal purpose of avoiding U.S. tax. No single factor is determinative, although a substantial and verifiable nontax reason for expatriation will carry substantial weight. In certain circumstances, the facts clearly establish the existence of a principal purpose of tax avoidance. For example, the submission might indicate that the taxpayer might significantly reduce taxes (including transfer taxes, which are not specifically referred to in section 877(f) by expatriating, with no objective evidence of significant non-tax avoidance purposes. In some cases, it might be clear that no principal purpose of tax avoidance existed, either because the facts do not indicate a significant reduction in taxes, or because objective evidence is presented of significant non-tax avoidance purposes. In other cases, the facts submitted in the ruling process do not clearly indicate either the absence or existence of a principal purpose of tax avoidance.

Questions relating to information in the letter of August 14, 2002, from Commissioner Charles O. Rossotti to Lindy Paull

1. For all the individuals referenced in the letter of August 14, 2002, provide the individual's date of expatriation and age on the date of expatriation.

See Enclosure I.

How many of these individuals are subject to the 1996 expatriation tax rules as compared with the pre-1996 expatriation tax rules?

All of the individuals were subject to the 1996 expatriation rules. In this regard, the 1996 expatriation rules (IRC Sections 877, 2107 and 2501, as amended by the Health Insurance Portability and Accountability Act of 1996) apply to individuals who expatriate after February 5, 1995, and to individuals subject to § 511(b)(1)(A) of the Act. Section 511(b)(1)(A) of the Act provides a special transition provision in the case of a former citizen who performed an expatriating act specified in Paragraphs (1) – (4) of § 349(a) of the Immigration and Nationality Act before February 6, 1995, but who did not, on or before that date, confirm the act by providing the U.S. Department of State a signed statement voluntarily relinquishing his or her U.S. nationality. Such an individual would not come within the general effective date of the amendments to §§ 877 and 6039F because, under the provisions for determining the date of loss of citizenship (which were not modified by the Act), the date of loss of citizenship is retroactive to the date of the expatiating act (i.e., prior to February 6, 1995).

2. For all the individuals referenced in the letter of August 14, 2002, describe in detail how the individual was identified as potentially subject to the expatriation tax rules.

The information requested in Questions 2-5 (Pages 8-9 of this memorandum) is contained in Enclosure II.

During 1996, former International District Office developed a database to capture information from the Department of State on Certificate of Loss of Nationality (CLN) forms. During 1999, we conducted a Compliance Initiative Project (CIP) to determine levels of compliance with the expatriation tax laws. The test sample was pulled from the CLN database. During investigation of internal information on the sample cases, we determined that many of these cases were already in the examination process. Column 3 on Enclosure II identifies the original source for each of the individuals: regular classification by DIF score, referrals, or other compliance projects.

3. Has each individual filed a return for the year of expatriation and each year subsequent to expatriation?

See Enclosure II, Column 5.

4. Please report the tax remitted by each individual for the year of expatriation and each year subsequent to expatriation.

See Enclosure II, Column 7. All of these individuals have paid their tax balances on filed returns except for:

IRC 6103 (b)(3) [redacted]

5. Has the IRS audited any of these returns for compliance with Section 877?

Enclosure II, Column 8 identifies cases selected and not selected for examination. We determine expatriation status during the course of the examination and taxpayer interview. Compliance with § 877 is a component of the "full compliance" check performed in all examinations.

6. For the individuals not covered in the letter of September 16, 2002, please provide summaries similar to those provided in that letter, along with explanations of estimates of projected tax liabilities in the case of those individuals submitting ruling requests.

We have provided summaries for those cases in the possession of Compliance Area 15. We will provide additional summaries as we retrieve cases from record retention.

7. The May 5, 2000, letter stated that the IRS routinely "conducts a check of the average tax for the five-year period prior to expatriation as part" of your review process. Please provide the five-year average income tax liability for the five years preceding expatriation for each individual referenced in your letter of August 14, 2002.

See Enclosure II, Column 4.

8. The August 14, 2002, letter provided information on all of the individuals identified in the letter of May 5, 2002, to whom the IRS had issued an adverse ruling (or who withdrew their requests for rulings upon being informed that an adverse ruling would be issued) except for [redacted] Please provide information on [redacted] comparable to the information provided on the other individuals.

IRC 6103 (b)(3)

The following facts are contained in a ruling request [redacted] submitted.

FOR OFFICIAL USE ONLY

IRC
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(b)(3)

[redacted]

IRC 6103 (b)(3)

[redacted]

Requests for additional information arising during the conference call of September 23, 2002

1. Page 13 of the September 20, 2002, letter indicates that the Philadelphia Service Center has drafted first, second, and third notices, along with a Form 886E, "Explanation of Requested Items, " which are to be issued to expatriates regarding their filing requirements, penalty issues, and information that they may have omitted on their Form 8854. We would like to have copies of these proposed notices and the Form 886E.

See Enclosures III (a) – (d). As part of the program move from our field office to the Philadelphia campus, our Compliance operation is developing policies and procedures for working these expatriate cases. These letters represent a first draft of the type of letters we might send taxpayers to gather additional information.

2. Please provide us with a flow chart, or schematic, detailing the flow of information relating to expatriates into the IRS and within the IRS. For example, it is our understanding based on recent correspondence and conversations with IRS personnel that letter ruling requests go to the National Office. Rulings determinations by the National Office are sent to Philadelphia Service Center for entry into the CLN database. Separately, the Department of State collects CLNs and forwards them to the Philadelphia Service Center for entry into the CLN database. The flowchart should show this information flow and other expatriate related information flows within the IRS and to other government agencies.

We are reviewing the flow chart of this process and will forward it to you at a later date.

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3. The IRS indicated that, in the past, some compliance initiatives related to expatriating individuals were initiated as the result of other compliance efforts, such as tax shelter investigations. It was indicated that perhaps 12 investigations were initiated related to expatriating individuals in 1999. Please provide us with detailed information relating to these cases, including a description of each initiative, how individuals were identified as potentially subject to the expatriation tax rules under these initiatives, the nature and status of these cases, and the handling of oversight of these cases.

We may select expatriated taxpayers whose accounts fall into high-risk categories for audit through programs other then the expatriate program. Enclosure II shows four examples of expatriated taxpayers we selected for audit through other programs. For example, [redacted] is listed as an expatriate but was identified for examination through the Non-Filer Program. In addition, Appeals Division referred his case for exam.

IRC 6103 (b)(3)

I hope this information answers your questions. If you have any questions, please contact me at (202) 622-3720.

Sincerely,

Floyd L. Williams

Enclosures (3)

FOR OFFICIAL USE ONLY

IRC 6103

(b)(3)

[redacted]

IRC 6103 (b)(3)

Enclosure II

[redacted]

IRC 6103 (b) (3)

[redacted]

ENCLOSURE III (a)

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Philadelphia, PA 19164

SMALL BUSINESS/SELF-EMPLOYED DIVISION

Letter Date

Person to Contact:
The IRS Customer Service Office at

Dear First Name Middle Name Last Name
Address
City
Country Postal Code

Under Internal Revenue Code Section 6039G, individuals who expatriate are required to provide an information statement.

A review of the package provided by the Department of State indicates that you failed to provide some or all of this statement. To assist you in providing this information we have enclosed F8854 and instructions.

Please provide this office with your completed Expatriation Information Statement (F8855) and Private Letter Ruling if it applies by (date.)

If you have any questions, you can call our Customer Service Site in The United States at 215-516-3998.

Enclosures:
Envelope
F8854
Instructions
Copy of this letter

ENCLOSURE III (b)

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Philadelphia, PA 19154

SMALL BUSINESS/SELF-EMPLOYED DIVISION

Letter Date

Person to Contact
The IRS Customer Service Office at

Dear First Name Middle Name Last Name
Address
City
Country Postal Code

Under Internal Revenue Code Section 6039G, individuals who expatriated are required to provide an information statement (F8854).

A review of the package provided by the Department of State indicates that you failed to provide some or all of this statement.

To assist you in providing this information, we previously sent you F8854 and instructions.

Please provide this office with your completed Expatriation Information Statement (F8854) and the Private Letter Ruling if it applies by (date).

The penalty for failure to provide this information is a minimum of $1,000.00.

If you have any questions, you can call our Customer Service site in the United States at 215-516-3998.

Enclosures:
Envelope
F8854
Instructions
Copy of this letter

ENCLOSURE III (c)

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Philadelphia, PA 19154

SMALL BUSINESS/SELF-EMPLOYED DIVISION

Date

Person to Contact:
The IRS Customer Service office at

Dear First Name Middle Name Last name
Address
City
Country Postal Code

Under Internal Revenue Code Section 6039G, individuals who expatriate are required to provide an information statement.

A review of our files indicates that you have failed to comply with our previous requests for the missing information.

This notice is to inform you of our intent to assess a Failure to File penalty. The assessed penalty will be the greater of $1,000.00 or 5% of the total tax required to be paid under Section 877 for that year.

If you can show that your failure to file was due to reasonable cause and not willful neglect, the penalty will not be imposed.

If you do not agree with this notice, call us immediately at 215-516-3998.

Enclosures
Copy of this letter

ENCLOSURE III (d)

Form 886-EP	EXPLANATION OF ITEMS	Schedule Number or Exhibit 8854

Name of taxpayer | Tax Identification Number

A review of your F8854 is incomplete. For your convenience, we are returning your F8855 to you with specific areas highlighted which need to be completed.

Please provide this information to us by (date).

If you have any questions, call our Customer Service site in the United States at 215-516-3998.

Guidance for Expatriates Under Sections 877, 2501, 2107 and 6039F

Notice 97-19, 1997-1 C.B. 394

March 10, 1997

PURPOSE

The Health Insurance Portability and Accountability Act of 1996 (the "Act") recently amended sections 877, 2107 and 2501 of the Internal Revenue Code ("Code"), and added new information reporting requirements under section 6039F.[1] This notice provides guidance regarding certain federal tax consequences under these sections and section 7701(b)(10) for certain individuals who lose U.S. citizenship, cease to be taxed as U.S. lawful permanent residents, or are otherwise subject to tax in the manner provided by section 877.

This notice has eleven sections. Section I provides background regarding the general application of sections 877, 2107 and 2501. Section II explains how to compute tax under section 877. Section III explains how an individual must determine his or her tax liability and net worth for purposes of sections 877, 2107 and 2501. Section IV explains the procedures that an individual must use to request a private letter ruling that the individual's loss of U.S. citizenship did not have for one of its principal purposes the avoidance of U.S. taxes. Section IV also provides that certain former long-term U.S. residents may use this ruling procedure to request a ruling that cessation of long-term U.S. residency did not have for one of its principal purposes the avoidance of U.S. taxes. Section V provides that certain transactions are treated as exchanges of property under section 877 and explains how to enter into a gain recognition agreement to avoid the immediate recognition of gain on exchanges of property. Section VI provides anti-abuse rules that apply to contributions made to certain foreign corporations. Section VII sets forth annual filing requirements for certain individuals subject to section 877. Section VIII explains how new section 877 interacts with certain U.S. income tax treaties. Section IX explains how to file information statements in accordance with section 6039F and describes the information that must be included on such statements. Section X explains how the transition provision of the Act affects certain individuals who performed an expatriating act prior to February 6, 1995. Section XI explains the application of section 7701(b)(10) and how that section interacts with section 877, as amended by the Act.

Treasury and the Service expect to issue regulations under sections 877 and 6039F, and amend regulations under sections 2107 and 2501, to incorporate the guidance set forth in this notice. Until regulations are issued, taxpayers must comply with the guidance set forth in this notice.

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[1] There are currently two provisions of the Internal Revenue Code designated as section 6039F. Treasury intends to seek a technical correction to the Act to redesignate section 6039F, as added by the Act, as section 6039G. All subsequent references to section 6039F in this notice relate to section 6039F as contained in the Act.

SECTION I. GENERAL APPLICATION OF SECTIONS 877, 2107 and 2501

Section 877 generally provides that a citizen who loses U.S. citizenship or a long-term resident who ceases to be taxed as a U.S. resident (collectively, individuals who "expatriate") within the 10-year period immediately preceding the close of the taxable year will be taxed on all of his or her U.S. source income (as modified by section 877(d)) for such taxable year, unless such loss or cessation did not have for one of its principal purposes the avoidance of U.S. taxes.

Section 877(a)(2) provides that a former citizen is considered to have lost U.S. citizenship with a principal purpose to avoid U.S. taxes if the former citizen's tax liability or net worth exceeded certain amounts on the date of expatriation. However, a former citizen will not be considered to have expatriated with a principal purpose to avoid U.S. taxes as a result of the individual's tax liability or net worth if he or she qualifies for an exception under section 877(c). To qualify for an exception, a former citizen must be described in certain statutory categories and submit a ruling request for a determination by the Secretary as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes. Section 877(c).

Section 2107(a)(1) generally provides that U.S. estate tax will be imposed on the transfer of the taxable estate of every nonresident decedent if, within the 10-year period ending with the date of death, the decedent lost U.S. citizenship, unless such loss did not have for one of its principal purposes the avoidance of U.S. taxes. Unless a former citizen qualifies for an exception as provided by section 877(c), such individual will be considered to have expatriated with a principal purpose to avoid U.S. taxes for purposes of section 2107 if the individual's tax liability or net worth exceeded certain amounts on the date of expatriation. Sections 2107(a)(2)(A) and (a)(2)(B).

Section 2501(a)(1) generally provides that a tax will be imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident. Section 2501(a)(2) provides that section 2501(a)(1) will not apply to the transfer of intangible property made by a non-resident not a citizen of the United States. Section 2501(a)(3)(A) provides that this exception does not apply in the case of a donor who, within the 10-year period ending with the date of a transfer, lost U.S. citizenship, unless such loss did not have for one of its principal purposes the avoidance of U.S. taxes. Unless a former citizen qualifies for an exception as provided by section 877(c), such individual shall be treated as having a principal purpose to avoid U.S. taxes for purposes of section 2501 if the individual's tax liability or net worth exceeded certain amounts on the date of expatriation. Sections 2501(a)(3)(B) and (a)(3)(C).

Section 877(e) provides comparable treatment for long-term residents. A long-term resident of the United States will be treated as if such resident lost U.S. citizenship for purposes of sections 877, 2107, 2501 and 6039F if the resident (i) ceases to be a lawful permanent resident of the United States, or (ii) commences to be treated as a foreign resident under the provisions of an income tax treaty between the United States and a foreign country and does not waive the benefits of such treaty applicable to residents of the foreign country.

Section 877(e)(1) defines a long-term resident as a non-U.S. citizen who was a lawful permanent resident of the United States in at least 8 taxable years during the period of 15 taxable years, ending with the taxable year in which such individual ceases to be a lawful permanent resident of the United States or commences to be treated as a resident of another country under an income tax treaty and does not waive the benefits of such treaty applicable to residents of the foreign country. For purposes of section 877, an individual is considered a lawful permanent resident in a taxable year if he or she is a lawful permanent resident during any portion of that year.

Section 877(e)(3)(B) provides that property held by a long-term resident on the date that such individual first became a resident of the United States (whether or not a lawful permanent resident) shall be treated for purposes of section 877 as having a basis of not less than the fair market value of the property on such date. A long-term resident may elect not to have this treatment apply. Such an election, once made, is irrevocable.

Sections 877, 2107 and 2501, as amended by the Act, apply to individuals who expatriate after February 5, 1995, and to individuals subject to section 511(g)(3)(A) of the Act (see section X of this notice).

SECTION II. COMPUTING TAX UNDER SECTION 877

Individuals who expatriate with a principal purpose to avoid U.S. taxes will be subject to tax on U.S. source income (as modified by section 877(d)) under sections 1, 55 or 402(d)(1)[2] of the Code (the "alternative tax"), or under section 871 of the Code, depending on which method results in the highest total tax. Sections 877(a)(1) and (b).

An expatriate is subject to the alternative tax under section 877 only if the total tax imposed thereunder on all items of income for the taxable year exceeds the total tax under section 871 for those same items of income. The following example illustrates how to compute tax under section 877.

> *Example 1.* A, a former U.S. citizen, expatriated with a principal purpose to avoid U.S. taxes on December 31, 1996. In 1997, A earns $100,000 of U.S. source dividend income and $50,000 of U.S. source interest income that qualifies as portfolio interest under section 871(h). After taking into account the deductions and credits allowed under section 877(b)(2), A's net tax liability under section 1 on the dividend and portfolio interest income is $40,000.

The tax imposed under section 871 on A's dividend income is $30,000 (30 percent of

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[2] Section 402(d)(1) of the Code generally provides for 5-year income averaging with respect to certain lump-sum distributions from qualified retirement plans. Section 1401(b)(1) of the Small Business Job Protection Act of 1996 amended section 877(b) by striking "section 1, 55, and section 402(d)(1)" and inserting "section 1 or 55." This amendment applies to taxable years beginning after December 31, 1999.

$100,000). Section 871(a)(1)(A). No tax is imposed on A's portfolio interest under section 871 because section 871(h)(1) exempts portfolio interest received by a nonresident alien from U.S. tax. Thus A's tax liability under section 871 is $30,000.

Since A's total tax liability computed under section 1 exceeds A's total tax liability computed under section 871, A must pay the higher tax. Thus A must report $40,000 of U.S. tax on his 1997 U.S. income tax return (Form 1040NR) as a result of section 877.

SECTION III. TAX LIABILITY AND NET WORTH TESTS

Background. Section 877(a)(2) provides that a former citizen is considered to have expatriated with a principal purpose to avoid U.S. taxes if (i) the individual's average annual net U.S. income tax (as defined in section 38(c)(1)) for the five taxable years prior to expatriation is greater than $100,000 (the "tax liability test"), or (ii) the individual's net worth on the date of expatriation is $500,000 or more (the "net worth test"). The $100,000 and $500,000 amounts are subject to cost-of-living adjustments determined under section 1(f)(3) for calendar years after 1996. An individual who does not satisfy the tax liability or net worth test, but expatriates with a principal purpose to avoid U.S. taxes, is also subject to section 877.

Section 2107(a)(2)(A) provides that an individual shall be treated as having a principal purpose to avoid U.S. taxes for purposes of section 2107 if such individual satisfies either the tax liability test or the net worth test under section 877(a)(2). Likewise, section 2501(a)(3)(B) provides that an individual shall be treated as having a principal purpose to avoid U.S. taxes for purposes of section 2501 if such individual satisfies either the tax liability test or the net worth test under section 877(a)(2). The tax liability and net worth tests also apply for purposes of determining whether a former long-term resident is subject to sections 877, 2107, and 2501. Section 877(e)(1).

Determination of tax liability. For purposes of the tax liability test, an individual's net U.S. income tax is determined under section 38(c)(1). An individual who files a joint income tax return must take into account the net income tax that is reflected on the joint income tax return for purposes of the tax liability test.

Determination of net worth. For purposes of the net worth test, an individual is considered to own any interest in property that would be taxable as a gift under Chapter 12 of Subtitle B of the Code if the individual were a citizen or resident of the United States who transferred the interest immediately prior to expatriation. For this purpose, the determination of whether a transfer by gift would be taxable under Chapter 12 of Subtitle B of the Code must be determined without regard to sections 2503(b) through (g), 2513, 2522, 2523, and 2524.

An interest in property includes money or other property, regardless of whether it produces any income or gain. In addition, an interest in the right to use property will be treated as an interest in such property. Thus, a nonexclusive license to use property is treated as an interest in the underlying property attributable to the value of the use of such property.

tax liability test or the net worth test will not be considered to have a principal purpose of tax avoidance as a result of one of those tests if that former citizen submits a request for a ruling within one year of the date of loss of U.S. citizenship for the Secretary's determination as to whether such loss had for one of its principal purposes the avoidance of U.S. taxes. To be eligible to request a ruling, an individual must be within one of the following categories: (1) the individual became at birth a citizen of the United States and a citizen of another country and continues to be a citizen of such other country, (2) the individual becomes (not later than the close of a reasonable period after loss of U.S. citizenship) a citizen of the country in which the individual, the individual's spouse or one of the individual's parents was born, (3) the individual was present in the United States for no more than 30 days during each year of the 10-year period ending on the date of expatriation, (4) the individual lost U.S. citizenship before reaching age 18 1/2, or (5) the individual is described in a category prescribed by regulation. For purposes of sections 2107 and 2501, a former citizen who meets the requirements of section 877(c)(1) will not be considered to have expatriated with a principal purpose to avoid U.S. taxes. Sections 2107(a)(2)(B) and 2501(a)(3)(C).

Section 877(e)(3)(A) provides that the exception set forth in section 877(c) with respect to U.S. citizens shall not apply to former long-term residents. However, section 877(e)(4) gives the Secretary the authority to exempt categories of former long-term residents from section 877. In addition, section 877(c)(5) authorizes the Secretary to prescribe appropriate regulations to carry out the purposes of section 877(e).

Additional categories of individuals eligible to submit ruling requests. Treasury and the Service expect to issue regulations that will permit a former long-term resident who is within certain categories to request a ruling under sections 877, 2107 and 2501 as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes. Until such regulations are issued, a former long-term resident may request a ruling if:

(1) on the date of expatriation, the individual is a citizen of:

(a) the country in which the individual was born,

(b) the country where the individual's spouse was born, or

(c) the country where either of the individual's parents was born, and the individual becomes (not later than the close of a reasonable period after the individual's expatriation) fully liable to tax in such country by reason of the individual's residence;

(2) the individual was present in the United States for no more than 30 days during each year of the 10-year period prior to expatriation; or

(3) the individual ceases to be taxed as a lawful permanent resident, or commences to be treated as a resident of another country under an income tax treaty and does not waive the benefits of such treaty applicable to residents of the foreign country, before the individual reaches age 18 1/2.

In addition, former long-term residents and former citizens who narrowly fail to satisfy the criteria of an enumerated category may also submit ruling requests. The Secretary, in his or her sole discretion, may decline to rule on any request if the Secretary determines that the individual does not narrowly fail to satisfy the criteria of one of those categories. If the Secretary declines to rule on an individual's ruling request for this reason, the individual will not be considered to have "submitted" a ruling request within the meaning of section 877(c)(1)(B). Accordingly, if that

individual satisfies either the tax liability or net worth test, the individual will be considered to have expatriated with a principal purpose to avoid U.S. taxes under section 877(a)(2).

Examples. The following examples illustrate circumstances in which an individual narrowly fails to satisfy the criteria of an enumerated category, and thus eligible to request a ruling.

> *Example 3.* D, a former citizen of the United States by birth, expatriated on February 15, 1997. D satisfied the tax liability test on the date of her expatriation and thus, will be considered to have expatriated with a principal purpose to avoid U.S. taxes unless she qualifies for an exception under section 877(c). D has resided in the United Kingdom since 1985. D is not a citizen by birth of another country and does not plan to become a citizen of a country in which one of her parents or her spouse was born. D did not spend any time in the United States during the 10-year period prior to her expatriation, except for one year when she vacationed in Hawaii for 35 days. D narrowly fails to satisfy the criteria of section 877(c)(2)(B) because she spent only 35 days in the United States during one year of the 10-year period ending on the date of her expatriation. Thus, D is eligible to submit a ruling request.
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> *Example 4.* E is a citizen of France and a long-term resident of the United States. E's parents emigrated from Africa to France in 1950 and acquired French citizenship in 1960. E's parents were employed by the French government and often travelled outside of France. In 1965, E was born while E's parents were stationed outside of France on a short-term assignment. By virtue of his parents' French citizenship, E became a citizen of France at birth. E resided in France from age 1 until age 21. E became a lawful permanent resident of the United States at age 21. E is now 31 years old and wishes to relinquish his green card and return to France. E will satisfy the net worth test on the date of his expatriation.
>
> Although E is not a citizen of France by virtue of being born in France, E narrowly fails to satisfy the criteria of an enumerated category because he was born outside of France only because his parents were temporarily absent from France during an overseas assignment for the French government. E is a citizen of France by birth, became a resident of France at age 1, and plans to become a resident of France after terminating his U.S. residency. Thus, E is eligible to submit a ruling request.

Effect of rulings and pending ruling requests. An expatriate who satisfies the tax liability or net worth test will be subject to new sections 877, 2107 or 2501, unless such individual obtains a favorable ruling, rather than merely submits a request, that the individual did not expatriate with a principal purpose to avoid U.S. taxes. If an individual's ruling request is pending before the Service at the time prescribed for filing the individual's income tax return for a particular year, the individual must report income on his or her U.S. income tax return for that year as if section 877 applied to him or her. If the individual obtains a favorable ruling at a later date, the individual may then amend that previous year's U.S. income tax return accordingly.

Challenging an adverse ruling. An individual who obtains an adverse ruling may challenge the ruling by initiating a refund suit to recover any taxes paid by reason of section 877. See H.R. Conf. Rep. No. 736 104th Cong., 2d Sess. 325 (1996).

Time for submitting ruling requests. Ruling requests must be submitted no later than one year following the date of expatriation. If an individual does not submit a ruling request within this prescribed period and satisfies either the tax liability test or the net worth test, such individual will be treated as having a principal purpose to avoid U.S. taxes. However, an individual subject to new section 877 who expatriated after February 5, 1994, but on or before July 8, 1996, and who wishes to submit a ruling request as to whether such expatriation had for one of its principal purposes the avoidance of U.S. taxes must do so by July 8, 1997.

Ruling requests may be submitted prior to the expected date of expatriation, provided that the individual submitting the request has formed a definite intention to expatriate. The Service will not rule on requests involving alternative plans of proposed transactions or hypothetical situations. See section 7.02 of Rev. Proc. 97-1, 1997-1 I.R.B. 11, 24.

Procedures for submitting ruling requests. Individuals should refer to section 8 of Rev. Proc. 97-1, 1997-1 I.R.B. 11, 25, for general instructions on the proper procedures to follow when submitting ruling requests. Individuals should also consult section 15 of Rev. Proc. 97-1, 1997-1 I.R.B. 11, 46, for information on user fees.

Information that must be included in ruling requests. The burden of proof is on the individual requesting the ruling to establish to the satisfaction of the Secretary that the individual's expatriation did not (or will not) have for one of its principal purposes the avoidance of U.S. taxes under Subtitle A or Subtitle B of the Code. Therefore, individuals should submit any relevant information that will help the Secretary make a determination as to whether the individual's expatriation (or planned expatriation) had (or will have) for one of its principal purposes the avoidance of U.S. taxes. The ruling request must include the following information:

(1) the date (or expected date) of expatriation;

(2) a full explanation of the individual's reasons for expatriating;

(3) the individual's date of birth;

(4) all foreign countries where the individual is a resident for tax purposes and/or intends to obtain residence for tax purposes;

(5) all foreign countries of which the individual is a citizen and/or intends to acquire citizenship after expatriation;

(6) the countries where the individual's spouse (if any) and parents were born;

(7) a description of the individual's ties to the United States and the individual's ties to the foreign country where the individual resides (or intends to reside) for the period that begins five years prior to expatriation and ends on the date that the ruling request is submitted, including the location of the individual's permanent home, tax home (within the meaning of section 911(d)(3)), family and social relations, occupation(s), political, cultural, or other activities, business activities, personal belongings, the place from which the individual administers property, the jurisdiction in which the individual holds a driver's license, the location where the individual conducts routine personal banking activities, the location of the individual's cemetery plot (if any), and any other

similar information;

(8) a balance sheet, at fair market value, that sets forth by category (e.g., cash, marketable securities, closely-held stock, business assets, qualified and nonqualified deferred compensation arrangements, individual retirement accounts, installment obligations, U.S. real property, foreign real property, etc.) the individual's assets and liabilities immediately prior to expatriation. The balance sheet must also set forth the following:

(i) the source of income and gain, without applying the source provisions of section 877, that such property would have generated during the 5-year period prior to expatriation and immediately after expatriation,

(ii) the source of income and gain, assuming that the source provisions of section 877 applied (as modified by section V of this notice), that such property would have generated during the 5-year period prior to expatriation and immediately after expatriation, and

(iii) the gain or loss that would be realized if the assets were sold for their fair market values on the date of expatriation.

The individual must separately list (not by category) each partnership in which the individual holds an interest, each trust that the individual is considered to own under sections 671 through 679, each trust that the individual is considered to own under Chapter 12 of Subtitle B of the Code, and each trust in which the individual holds a beneficial interest (as determined under the procedures described in section III of this notice). The individual must also describe the types of assets held by each partnership or trust, and indicate the methodology (as described in section III of this notice) used to determine the individual's beneficial interest in each trust. In addition, the individual should indicate whether there have been (or are expected to be) significant changes in the individual's assets and liabilities for the period that began five years prior to expatriation and ends ten years following the date of expatriation. If so, the individual should attach a statement explaining the changes in the individual's assets and liabilities during such period;

(9) a description of all exchanges described in section 877(d)(2)(B) and all removals of appreciated tangible personal property from the United States (as described in section V of this notice), that:

(i) occurred at any time beginning 5 years prior to expatriation (but not including exchanges that took place prior to February 6, 1995) and ending on the date that the ruling request is submitted, or

(ii) occurred, or are expected to occur, during the 10-year period following expatriation.

If the individual is subject to new section 877 because of section 511(g)(3)(A) of the Act (see section X of this notice), the individual must also include a description of all exchanges described under section 877(d)(2)(B) that occurred on or after the date of the individual's expatriating act (see section X of this notice) and before February 6, 1995;

(10) a description of all occurrences under section 877(d)(2)(E)(ii) that are treated as exchanges under section 877(d)(2) (as described in section V of this notice) that:

(i) occurred at any time beginning 5 years prior to expatriation (but not including occurrences that took place prior to February 24, 1997) and ending on the date that the ruling request is submitted, or

(ii) occurred, or are expected to occur, during the 10-year period following expatriation:

(11) a statement describing the nature and status of any ongoing audits, disputes or other matters pending before the Internal Revenue Service;

(12) a statement as to whether the individual satisfied his or her U.S. tax liability during the

period that he or she was a U.S. citizen or lawful permanent resident of the United States;

(13) copies of the individual's U.S. tax returns for each of the three years prior to expatriation;

(14) a copy of the information statement filed in accordance with section 6039F, as described in section IX of this notice (if such statement has not yet been filed, provide a draft copy of such statement);

(15) in the case of an individual with gross assets that have an aggregate fair market value in excess of $10,000,000, a calculation of the individual's projected U.S. and foreign income tax liability for the taxable year of expatriation (or expected expatriation) and the two taxable years following expatriation under each of the following circumstances:

(i) if it is determined that the individual expatriated with a principal purpose to avoid U.S. taxes under section 877,

(ii) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes under section 877, and

(iii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident.

The individual must also indicate whether the individual expects a substantial change in the individual's projected U.S. and foreign income tax liability as a result of a change in income for the remainder of the 10-year period following expatriation;

(16) in the case of an individual with gross assets that have an aggregate fair market value in excess of $10,000,000, an actuarial estimate of U.S. and foreign estate and other death taxes that would be owed on the individual's property, calculated based on the assumption that the individual owns the same property on the date of death that the individual owned (or expects to own) on the date of expatriation, under each of the following circumstances:

(i) if it is determined that the individual expatriated with a principal purpose to avoid U.S. taxes under section 2107,

(ii) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes under section 2107, and

(iii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident domiciled in the United States; and

(17) in the case of an individual with gross assets that have an aggregate fair market value in excess of $10,000,000, a statement as to whether the individual expects to make a gift during any year of the 10-year period following expatriation that would be subject to tax under section 2501 if the individual is determined to have expatriated with a principal purpose to avoid U.S. taxes. If so, the individual should describe the gift, provide an estimate of its fair market value, and indicate when and to whom the individual expects to make the gift.

The foregoing list of information must be provided with ruling requests submitted after March 10, 1997. Although individuals must provide good faith estimates of fair market values, formal appraisals are not required. In processing ruling requests, the Service may ask individuals with gross assets that have an aggregate fair market value of $10,000,000 or less to supply the information described in (15), (16) and (17) above. If an individual fails to provide the aforementioned information or any other information that may be reasonably required, the individual's ruling request may be closed pursuant to section 10.06(3) of Rev. Proc. 97-1, 1997-1 I.R.B. 11, 39. If an individual's ruling request is closed, that individual will not be considered to have "submitted" a ruling request within the meaning of section 877(c)(1)(B). Accordingly, if that individual satisfies either the tax liability test or the net worth test, the individual will be

considered to have expatriated with a principal purpose to avoid U.S. taxes under section 877(a)(2).

Finally, an individual must attach his or her ruling to the individual's U.S. income tax return for the year in which the individual expatriates. See section 8.05 of Rev. Proc. 97-1, 1997-1 I.R.B. 11, 33. If the individual has already filed a U.S. income tax return for such year, the individual must attach the ruling to the individual's U.S. income tax return for the year in which he or she obtains the ruling.

SECTION V. EXCHANGES AND GAIN RECOGNITION AGREEMENTS

Background. Section 877(d)(1)(A) provides that gains on the sale or exchange of property (other than stock or debt obligations) located in the United States shall be treated as from sources within the United States. Section 877(d)(1)(B) provides that gains on the sale or exchange of stock issued by a domestic corporation or debt obligations of United States persons, or of the United States, a State, a political subdivision thereof, or the District of Columbia, shall be treated as from sources within the United States. Section 877(d)(1)(C) provides that income or gain derived from a foreign corporation will be from sources within the United States if an expatriate owned or is considered to own (under the principles of sections 958(a) and (b)), at any time during the 2-year period ending on the date of expatriation, more than 50 percent of (i) the total combined voting power of all classes of stock entitled to vote of such corporation, or (ii) the total value of the stock of such corporation. The amount of income or gain that is considered U.S. source is limited, however, to the amount that does not exceed the earnings and profits attributable to such stock earned before the date of the individual's expatriation and during periods that the ownership requirements are met.

Section 877(d)(2) generally provides that certain property transferred in nonrecognition exchanges by an individual subject to section 877 during the 10-year period referred to in section 877(a) will be treated as sold for its fair market value on the date of the exchange. Thus, any gain must be recognized by the individual in the taxable year of the exchange. Section 877(d)(2) applies to exchanges that, without regard to section 877, are nontaxable under subtitle A of the code and involve the exchange of property that would produce U.S. source income or gain for property that would produce foreign source income or gain.

Under section 877(d)(2)(C), however, an individual is not required to immediately recognize gain if the individual enters into an agreement with the Secretary specifying that any income or gain derived from the property acquired in the exchange (or any other property that has a basis determined in whole or in part by reference to such property) during the 10-year period referred to in section 877(a) shall be treated as U.S. source income. In addition, if the transferred property is disposed of by the acquiror, the gain recognition agreement will terminate and any gain not recognized by reason of the agreement must be recognized by the individual as of the date of such disposition.

Section 877(d)(2)(D) provides the Secretary with regulatory authority to substitute the 15-year period beginning five years prior to expatriation for the 10-year period referred to in

section 877(a), and to apply section 877(d)(2) to all exchanges that occur during such 15-year period. Section 877(d)(2)(E) also authorizes the Secretary to issue regulations to treat as a taxable exchange the removal of appreciated tangible personal property from the United States, and any other occurrence that results in a change in the source of income or gain from property from U.S. source to foreign source without recognition of gain.

Fifteen-year period and expanded definition of "exchanges". Treasury and the Service expect to issue regulations under sections 877(d)(2)(D) and (E) that extend the 10-year period referred to section 877(a) and provide an expanded definition of exchanges. The regulations will apply to individuals who expatriate after February 5, 1995, and to individuals subject to section 511(g)(3)(A) of the Act (see section X of this notice). Until regulations are issued, taxpayers must comply with the rules set forth below.

Section 877(d)(2) must be applied by substituting the 15-year period beginning five years prior to expatriation for the 10-year period referred to in section 877(a). In addition, removal of appreciated tangible personal property from the United States with an aggregate fair market value in excess of $250,000 within this 15-year period must be treated as an exchange to which section 877(d)(2) applies. Accordingly, any gain derived from removal of property with an aggregate fair market value of $250,000 or less during this 15-year period will not be taxable under section 877. If an individual removes property with an aggregate fair market value in excess of $250,000 during this 15-year period, the individual must recognize a pro rata portion of the gain attributable to the value in excess of $250,000, unless he or she enters into a gain recognition agreement. A pro rata portion of the gain must be calculated by multiplying the total gain on the removed property by a fraction, the numerator of which is the excess of the aggregate fair market values of all removed property over $250,000 and the denominator of which is the aggregate fair market values of all removed property. Removal of appreciated tangible personal property during the 5-year period prior to expatriation (whether or not the fair market values exceed $250,000) will not be treated as an exchange if the removal occurred prior to February 6, 1995.

Any other occurrence (within the meaning of section 877(d)(2)(E)(ii)) within the 15-year period that results in a change of the source of income or gain from U.S. source to foreign source must also be treated as an exchange to which section 877(d)(2) applies. However, an occurrence during the 5-year period prior to expatriation will not be treated as an exchange if the occurrence took place prior to February 24, 1997.

Determination of source of certain gains. The principles of section 877(d)(1) generally apply for purposes of determining whether any exchange of property changes the source of income or gain from U.S. source to foreign source during the 15-year period beginning five years prior to expatriation. Thus, solely for purposes of determining the source of the expatriate's income or gain with respect to any exchange within this 15-year period, (i) the source of any gain on the sale or exchange of tangible personal property will be based on the physical location of the property, (ii) the source of gain from the sale or exchange of stock will be based on the corporation's place of incorporation (except as otherwise provided in section 877(d)(1)(C)), and (iii) the source of gain from the sale or exchange of debt obligations will be based on the residence of the issuer of such obligations. The source of gain on the sale or exchange of an interest in a

partnership during the 15-year period will be determined as if the partner directly disposed of his or her share of the partnership's assets. In determining the partner's share of gain recognized from each partnership asset, the gain on the sale or exchange of the partnership interest shall be allocated among the assets of the partnership in proportion to the gain that the partner would have recognized had the partnership sold each asset for its fair market value. In all other cases, the source of an expatriate's income or gain with respect to any other transaction will be determined under the general source provisions of the Code (e.g., sections 861 through 865).

Recognition of gain. Except as otherwise indicated below, an individual must recognize any realized or unrealized gains, but not losses, as a result of any "exchange" described in section 877(d)(2)(B), (d)(2)(E)(i), or (d)(2)(E)(ii), in the year of the exchange unless that individual enters into a gain recognition agreement. If an exchange occurs during the 5-year period prior to expatriation, the individual must recognize any gain from the exchange in the taxable year of the individual's expatriation unless the individual enters into a gain recognition agreement.

Examples. The following examples illustrate transactions that are treated as exchanges under section 877(d)(2) and when gain from such transactions must be recognized.

> *Example 5.* F, a U.S. citizen by birth, enters into a notional principal contract in March 1997. Under the terms of that contract, F is obligated to make specified annual payments to an unrelated party in exchange for specified annual payments from the unrelated party for a period of five years. F is a calendar year taxpayer who uses the cash method of accounting. F moves her tax home to a foreign country in May 1997. F renounces her U.S. citizenship in 1998 with a principal purpose to avoid U.S. taxes.
>
> The source of income from a notional principal contract is generally determined by reference to the residence of the taxpayer. For this purpose, the residence of an individual is the country in which the individual's tax home is located. See Treas. Reg. § 1.863-7(a)(1).
>
> Before F changed her tax home in May 1997, F's income earned under the contract was treated as U.S. source income. After F changed her tax home, the source of this income became foreign source. Because F's change in tax home changed the source of her income from U.S. source to foreign source, it is an occurrence that is treated as an exchange to which section 877(d)(2) applies. Since this occurrence occurred in the 5-year period prior to her expatriation, F must recognize any gain from the contract in 1998 (the taxable year of her expatriation), unless she enters into a gain recognition agreement.
>
> However, if F also owned stock in a foreign corporation, her change in tax home coupled with her expatriation would not be an occurrence that is treated as an exchange to which section 877(d)(2) applies with respect to such stock. Pursuant to the special source rules described in this notice, the source of gain on the sale or exchange of stock is based on the corporation's place of incorporation. Thus, the gain on the sale or exchange of foreign stock would be foreign source for the entire 15-year period beginning five years prior to expatriation. Accordingly, there would not be an occurrence during this period that would

change the source of such gain from U.S. source to foreign source.

Example 6. G is a U.S. citizen by birth. G owns a home in the United States that he uses as his principal residence. In April 1997, G sells his principal residence in the United States at a gain of $1,000,000. In June 1997, G purchases a new principal residence located abroad. G's purchase of the new residence satisfies the requirements of section 1034, and thus G does not recognize the $1,000,000 gain on the sale of his old residence. G expatriates in 1999 with a principal purpose to avoid U.S. taxes.

Under section 861(a)(5), gain from the disposition of a United States real property interest is treated as U.S. source income. A United States real property interest includes real property that is located in the United States. Section 897(c). Gain from the sale or exchange of real property located outside the United States is considered foreign source income. Section 862(a)(5).

Since G is not required to recognize the gain on the sale of his old residence by reason of section 1034, and the source of this gain would change from U.S. to foreign if G sold his new residence, it is an occurrence that is treated as an exchange to which section 877(d)(2) applies. Accordingly, G must recognize the gain from the sale of his old residence in 1999 (the taxable year of his expatriation), unless he enters into a gain recognition agreement.

Example 7. H is a former long-term resident of the United States. H owns a valuable painting that she purchased in 1965 for $500,000. H became a resident of the United States and brought the painting to the United States in 1975. The fair market value of the painting in 1975 was $2,000,000. H became a lawful permanent resident of the United States in 1980. On January 1, 1996, H expatriates with a principal purpose to avoid U.S. taxes. On January 1, 1997, H removes the painting from the United States. On that date, the fair market value of the painting is $5,000,000.

Under section 877(d)(1)(A), H's unrealized gain in the painting is U.S. source so long as the painting is located in the United States. Since the removal of H's appreciated painting from the United States changed the source of the unrealized gain thereon from U.S. source to foreign source, it is considered an exchange to which section 877(d)(2) applies. For purposes of section 877, H's basis in the painting is the painting's fair market value on the date that H first became a U.S. resident (i.e., $2,000,000). Section 877(c)(3)(B). Thus, H's unrealized gain on the painting on the date of removal is $3,000,000 ($5,000,000-$2,000,000).

Because the value of H's painting on the date of removal exceeds $250,000, H must recognize a pro rata portion of the gain attributable to the value in excess of $250,000, unless she enters into a gain recognition agreement. The pro rata portion of such gain is $2,850,000, determined by multiplying the total gain ($3,000,000) by a fraction, the numerator of which is the excess of the fair market value of the painting over $250,000 ($4,750,000) and the denominator of which is the fair market value of the painting

foreign source);

(2) a good faith estimate of the relevant fair market values of the property transferred and acquired in the exchange (formal appraisals are not required), their adjusted basis for U.S. tax purposes, and a calculation of the gain not recognized by reason of the gain recognition agreement (the "deferred gain") on a property-by-property basis;

(3) a statement that the individual agrees to recognize, under section 877, any income or gain during the 15-year period that begins five years prior to expatriation as U.S. source income if it is derived from property that was acquired in an exchange (as described in this notice);

(4) a statement that the individual agrees to recognize, under section 877, a proportionate amount of the deferred gain as U.S. source income as of the date of disposition if the acquiror of the transferred property disposes of all or a portion of the property in any manner during the 15-year period beginning five years prior to expatriation;

(5) a statement that the individual agrees to file a U.S. income tax return (normally Form 1040NR) for each year of the 10-year period following expatriation (whether or not such individual is otherwise required to file a return) that includes an annual certification each year describing any income or gain that is taxable pursuant to the gain recognition agreement. If the individual did not derive any income or gain that is taxable pursuant to the gain recognition agreement, the certification must provide a statement to that effect;

(6) if an exchange to which the gain recognition agreement applies occurred during the 5-year period prior to expatriation, a certification describing any income or gain during this 5-year period that is taxable pursuant to the gain recognition agreement. If the individual did not derive any income or gain that is taxable pursuant to the gain recognition agreement during this period, the certification must provide a statement to that effect;

(7) a representation that all records relating to the property to which the gain recognition agreement applies, including those of the acquiror (if any), will be made available for inspection by the Service during the period that ends 3 years from the date on which a U.S. income tax return is filed for the year(s) in which any income or gain that is taxable pursuant to the gain recognition agreement is recognized;

(8) a statement that the individual agrees to furnish a bond or other security that satisfies the requirements of Treas. Reg. § 301.7701 1 if the District Director determines that such security is necessary to ensure the payment of tax upon the deferred gain and any other income or gain that is taxable pursuant to the gain recognition agreement; and

(9) if applicable, the name, address, and U.S. taxpayer identification number (if any) of the acquiror of any property subject to the agreement.

If, during the period that the agreement is in force, the individual disposes of the property acquired in the exchange in a transaction in which gain or loss is not recognized under U.S. income tax principles, then the individual shall not be required to recognize gain, provided that the individual notifies the Secretary of the transfer with his or her next annual certification and modifies the gain recognition agreement accordingly.

Example. The following example illustrates how to enter into a gain recognition agreement.

Example 9. Assume the same facts as in example 8 above. To avoid the immediate

($5,000,000). Thus, H must recognize $2,850,000 in 1997 (the taxable year of the removal) unless she enters into a gain recognition agreement.

Example 8. J, a U.S. citizen by birth, expatriates on January 1, 1999, with a principal purpose to avoid U.S. taxes. On the date of J's expatriation, J owns appreciated stock in a domestic corporation. On January 1, 2000, J creates a foreign trust, FT, and contributes the stock to FT. Under the terms of the trust instrument, the income and corpus from FT may be distributed at the discretion of the trustee to J. J's spouse, or J's children.

If J had directly disposed of the domestic stock instead of contributing it to FT, the gain realized thereon would be treated as U.S. source income. Section 877(d)(1)(B). However, if FT disposed of the stock, the gain realized would be foreign source because FT is not a resident of the United States. See sections 865(a)(2) and (g)(1)(B). If FT then distributed the proceeds to J, his gain would also be foreign source.

Since J's contribution of the domestic stock to FT is nontaxable under subtitle A of the Code and changed the source of gain on the stock from U.S. to foreign, it is an occurrence that is treated as an exchange to which section 877(d)(2) applies. For this purpose, J's beneficial interest in FT is treated as property acquired in the exchange, and the stock contributed to FT is treated as property transferred in the exchange. Therefore, J must recognize the pre-contribution gain on the appreciated stock in 2000 (the taxable year of the exchange), unless he enters into a gain recognition agreement.

Guidance on gain recognition agreements. An individual who wishes to enter into a gain recognition agreement with the Secretary with respect to any exchange described in section 877(d)(2) must submit the agreement with the individual's U.S. income tax return (normally Form 1040NR) for the taxable year of the exchange. If an exchange occurred during the 5-year period prior to expatriation, the individual must submit a gain recognition agreement with his or her U.S. income tax return for the taxable year of the individual's expatriation. If an exchange occurred before the individual's 1996 taxable year, the individual must submit a gain recognition agreement with his or her 1996 Form 1040NR to avoid the recognition of gain.

The gain recognition agreement will be triggered if the individual disposes of the property to which the gain recognition agreement applies. In addition, any disposition of the transferred property by the acquiror of such property will also trigger gain, even if the disposition is otherwise part of a nonrecognition transaction. For purposes of the gain recognition agreement, property removed from the United States and property the source of income or gain from which changed from U.S. to foreign will be treated as property acquired in an exchange.

All gain recognition agreements must be signed under penalties of perjury and set forth the following information:

(1) a description of all property subject to the agreement, (i.e., a description of property both transferred and acquired in an exchange, a description of any appreciated tangible personal property that was removed from the United States, and/or a description of all property affected by an occurrence that changed the source of income or gain from the property from U.S. source to

recognition of gain on the contribution of stock to FT. J must attach a gain recognition agreement to his U.S. tax return for the year 2000 (the taxable year of the exchange). As part of such agreement, J must agree to recognize any income on gain that J derives from his beneficial interest in FT as U.S. source income during the remainder of the 10-year period following expatriation. J must also agree to recognize the pre-contribution gain on the transferred stock as U.S. source income if FT directly or indirectly disposes of the stock. In addition, J must agree to file an annual certification for each year of the remaining 10-year period following expatriation that indicates whether J derived any income or gain from his beneficial interest in FT and whether FT disposed of the stock. J must represent that all records relating to the transferred stock, including the trust's records, will be made available for inspection by the Service for the period ending 3 years from the date on which J files a U.S. income tax return for the year in which he recognizes the deferred gain as a result of a direct or indirect disposition of the stock by FT. J must also represent that all records relating to his beneficial interest in FT will be made available for inspection by the Service for the period ending 3 years from the date(s) on which J files a U.S. income tax return for the year(s) in which he recognizes any income or gain from his beneficial interest in FT.

SECTION VI. CONTRIBUTIONS TO CONTROLLED FOREIGN CORPORATIONS

Background. Section 877(d)(4) generally provides that when an expatriate contributes U.S. source property ("contributed property") to a corporation that would be a controlled foreign corporation (as defined in section 957) and the individual would be a United States shareholder (as defined in section 951(b)) but for the individual's expatriation, then any income or gain on such property (or any other property that has a basis determined in whole or in part by reference to such property) received or accrued by the corporation during the 10-year period following expatriation shall be treated as received or accrued directly by the individual and not by the corporation. If the individual disposes of any stock in the corporation (or other stock that has a basis determined in whole or part by reference to such stock) during the 10-year period referred to in section 877(a) and while the contributed property is held by the corporation, the individual is taxable on the gain that would have been recognized by the corporation had it sold a pro rata share of the property (determined by comparing the value of the stock disposed of to the value of the stock held by the individual immediately prior to the disposition) immediately before the disposition. Section 877(d)(4)(D) provides that the Secretary may prescribe such regulations as may be necessary to prevent the avoidance of the purposes of section 877(d)(4), including where the property is sold to the corporation and where the contributed property is sold by the corporation. Section 877(d)(4)(E) provides that the Secretary shall require such information reporting as is necessary to carry out the purposes of section 877(d)(4).

Anti-abuse rules and reporting requirement. Treasury and the Service intend to issue regulations under sections 877(d)(4)(D) and (E) that extend the 10-year period referred to in section 877(d)(4), set forth reporting requirements, and provide anti-abuse rules intended to prevent individuals from utilizing controlled foreign corporations to hold or dispose of property that would otherwise produce income or gain from sources within the United States. The regulations will provide that if an individual acts with a principal purpose to avoid section

877(d)(4), then the Commissioner may redetermine the U.S. tax consequences of that action as appropriate to achieve the purposes of section 877(d)(4). The regulations will apply to individuals who expatriate after February 5, 1995, and to individuals subject to section 511(g)(3)(A) of the Act (see section X of this notice).

Until regulations are issued, individuals must comply with the rules set forth below. Individuals must apply section 877(d)(4) by substituting the 15-year period beginning five years prior to expatriation for the 10-year period referred to in section 877(d)(4). However, section 877(d)(4) will not apply to any contribution during the 5-year period prior to expatriation if the contribution occurred prior to February 24, 1997.

Moreover, an individual who makes a contribution described in section 877(d)(4)(A)(i) must attach the following information to the individual's U.S. tax return for the year in which such contribution occurs (whether or not the individual is otherwise required to file a U.S. tax return):
(1) the date of the contribution;
(2) a description of the property contributed, including a good faith estimate of its fair market value (formal appraisals are not required) and a statement of its adjusted basis for U.S. tax purposes on the date of the contribution;
(3) a description of the foreign corporation to which the property is contributed, including its name, address, place of incorporation, and its U.S. employer identification number, if any; and
(4) a description of the percentage interest, by vote and by value, owned or treated as owned by the individual under section 958 (determined as if such individual were a U.S. person).

If a contribution occurs prior to expatriation, this statement must be attached to the individual's U.S. income tax return for the taxable year of the individual's expatriation. If a contribution occurred prior to 1996, the individual must attach this statement to the individual's 1996 U.S. tax return (whether or not the individual is otherwise required to file a U.S. tax return).

SECTION VII. ANNUAL INFORMATION REPORTING

Background. Section 6001 generally provides that the Secretary may require any person, by notice upon such person or by regulations, to make such returns, render such statements, or keep such records as the Secretary deems sufficient to show whether or not the person is liable for tax under the Code. Section 6011(a) generally provides that any person who is liable for tax imposed by the Code, or with respect to the collection thereof, shall make a return or statement according to forms and regulations prescribed by the Secretary. Section 6012(a)(1) generally provides that every individual whose gross income for the taxable year equals or exceeds the exemption amount must file a U.S. income tax return for such year. Section 6012(a)(1) further provides, in part, that nonresident individuals subject to tax imposed by section 871 may be exempted from making returns under section 6012 subject to conditions, limitations, and exceptions and under such regulations as may be prescribed by the Secretary. Treas. Reg. § 1.6012-1(b)(2)(i) generally provides, in part, that a nonresident alien individual who was not engaged in a trade or business in the United States during a taxable year is not required to file a return for such year if the nonresident's tax liability for the year is fully satisfied by the withholding of tax at the source under Chapter 3 of the Code.

Section 874(a) generally provides that a nonresident alien individual will receive the benefit of deductions and credits allowed to him by Subtitle A of the Code only if such individual files a true and accurate return, including all the information that the Secretary may deem necessary for the calculation of such deductions and credits.

Annual reporting of income. Because an individual who is liable for U.S. taxes is generally required to file a return and other such statements as the Secretary may prescribe, Treasury and the Service intend to issue regulations under section 877 that will require expatriates who are liable for tax to annually report certain information for the 10-year period following expatriation. Until the issuance of such regulations, taxpayers must report information in compliance with the rules set forth below and any other information that the Secretary may require at a later date. At such time that Form 1040NR is modified to reflect the rules described below, taxpayers must report information in accordance with the instructions to Form 1040NR instead of the procedures described below. The rules below apply to expatriates who are subject to section 877 as in effect before the Act, as well as those subject to section 877 as revised by the Act.

Beginning with the 1996 taxable year, an individual who expatriated with a principal purpose to avoid U.S. taxes under section 877 as in effect before the Act must annually file a U.S. income tax return (Form 1040NR), with the information described below, for each year of the remaining 10-year period following expatriation if such individual is liable for U.S. tax under any provision of the Code (e.g., section 871(a)) for such year. An individual who expatriated with a principal purpose to avoid U.S. taxes under section 877 as amended by the Act must also annually file a U.S. income tax return (Form 1040NR), with the information described below, for each year of the 10-year period following expatriation if such individual is liable for U.S. tax under any

provision of the Code (e.g., section 871(a)) for such year.[3]

The return must bear the statement "Expatriation Return" across the top of page 1 of Form 1040NR. In addition, a statement must be attached to the return that sets forth by category (e.g., dividends, interest, etc.) all items of U.S. and foreign source gross income (whether or not taxable in the United States). The statement must identify the source of such income (determined under section 877 as modified by section V of this notice) and those items of income subject to tax under section 877. In addition, any expatriate who has not previously filed an information statement under section 6039F should also attach to his or her first nonresident return a statement containing the information described in section IX of this notice.

Treasury and the Service intend to amend Treas. Reg. § 1.6012-1(b)(2)(i) in accordance with the rules of this notice. Until the regulation is modified, an expatriate who is otherwise required to report information in accordance with this section of the notice must attach a statement to Form 1040NR, even if the individual has fully satisfied his or her tax liability through withholding of tax at source.

An expatriate who fails to furnish a complete statement in any year for which he or she is liable for any U.S. taxes will not be considered to have filed a true and accurate return. Therefore, such an individual will not be entitled to the benefit of any deductions or credits if the individual's tax liability for that year is later adjusted. See section 874(a).

An individual who is required to file the above statement for the taxable year that begins in 1995 will be considered to have timely filed his or her statement for that year if the individual files such statement by the due date (including extensions) for filing the individual's U.S. income tax return for the taxable year that begins in 1996.

SECTION VIII. INTERACTION WITH TAX TREATIES

Background. The legislative history of the Act indicates that Congress believed that section 877, as amended, is generally consistent with the underlying principles of U.S. income tax treaties to the extent that section 877 provides for a foreign tax credit for items taxed by another country. To the extent that there is a conflict with U.S. income tax treaties in force on August 21, 1996 (the date of enactment of section 877), Congress intended that "the purpose of section 877, as amended...[is] not to be defeated by any treaty provision." H.R. Rep. No. 496, 104th Cong., 2d Sess. 155 (1996). See also, H.R. Conf. Rep. No. 736, 104th Cong., 2d Sess. 329 (1996). However, any conflicting treaty provisions that remain in force 10 years after August 21, 1996, will take precedence over section 877, as revised. Id.

Coordination with tax treaties. In accordance with Congressional intent, Treasury and the Service will interpret section 877 as consistent with U.S. income tax treaties. To the extent that there is a conflict, however, all provisions of section 877, as amended, prevail over treaty

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[3] Individuals should refer to Treas. Reg. § 1.6012-1(b)(2)(ii) for guidance on how to file a U.S. income tax return for the taxable year of the individual's expatriation.

provisions in effect on August 21, 1996. This coordination rule is effective until August 21, 2006, and applies to those provisions of section 877 that were amended by the Act as well as those that were not amended by the Act. In addition, Treasury and the Service will interpret all treaties, whether or not in force on August 21, 1996, that preserve U.S. taxing jurisdiction with respect to former U.S. citizens or former U.S. long-term residents who expatriate with a principal purpose to avoid U.S. taxes as consistent with the provisions of section 877, as amended.

SECTION IX. INITIAL INFORMATION REPORTING

Background. Section 6039F(a) requires each individual who loses U.S. citizenship to provide an information statement to the U.S. Department of State or a federal court, as applicable. The information reporting requirements of section 6039F apply to individuals who expatriate after February 5, 1995, and to individuals subject to section 511(g)(3)(A) of the Act (see section X of this notice).

Section 6039F(a)(1) requires that this information must be provided not later than the earliest date on which such individual (1) renounces the individual's U.S. nationality before a diplomatic or consular officer of the United States, (2) furnishes to the U.S. Department of State a statement of voluntary relinquishment of U.S. nationality confirming an act of expatriation, (3) is issued a certificate of loss of U.S. nationality by the U.S. Department of State, or (4) loses U.S. nationality because the individual's certificate of naturalization is cancelled by a U.S. court (collectively, the "reporting date").

Section 6039F(b) requires a former citizen to report his taxpayer identification number, mailing address of principal foreign residence, foreign country in which the individual is residing, foreign country of citizenship, information on the individual's assets and liabilities if such individual's net worth exceeds $500,000 (as adjusted by section 1(f)(3) for taxable years after 1996), and such other information as the Secretary may prescribe. Section 6039F(f) requires long-term residents who expatriate after February 5, 1995, to provide a similar statement with their U.S. tax returns for the taxable year of expatriation.

If a former citizen fails to provide the required information statement, section 6039F(d) generally provides that the individual will be subject to a penalty equal to the greater of (1) five percent of the tax required to be paid under section 877 for the taxable year ending during such year, or (2) $1,000. The penalty will be assessed for each year during which such failure continues for the 10-year period beginning on the date of loss of citizenship. The penalty will not be imposed if it is shown that such failure is due to reasonable cause and not willful neglect. Section 6039F(f) also applies this penalty to former long-term residents.

Information Statements. Until such time that a form is issued for providing the statement required by section 6039F, individuals must file an information statement that includes the information set forth below.

(1) A former U.S. citizen whose reporting date is on or before March 10, 1997, must provide the information statement to the Internal Revenue Service, 950 L'Enfant Plaza SW, Washington, D.C. 20224, ATTN: Compliance Support & Services, by June 8, 1997. Former U.S. citizens who

furnished the information enumerated in section 6039F(b) to the appropriate entity prior to February 24, 1997, are not required to provide an additional statement.

(2) A former U.S. citizen whose reporting date is after March 10, 1997, and on or before June 8, 1997, must provide the information statement to (i) the American Citizens Services Unit, Consular Section, of the nearest American Embassy or consulate, (ii) Office of Policy Review and Interagency Liaison (CA/OCS/PRI), Room 4817, Department of State, Washington D.C., 20520-4818, or (iii) a federal court (if the expatriate's certificate of nationality was cancelled by such court), on or before June 8, 1997.

(3) A former U.S. citizen whose reporting date is after June 8, 1997 must provide the information statement to the (i) American Citizens Services Unit, Consular Section, of the nearest American Embassy or consul, or (ii) a federal court (if the expatriate's certificate of nationality was cancelled by such court) on or before such reporting date.

(4) A former long-term resident who expatriated after February 5, 1995, and before January 1, 1996, must attach the information statement to either a 1996 Form 1040NR (whether or not the individual is otherwise required to file a U.S. tax return) or an amended 1995 U.S. income tax return. To comply with new section 877, an individual whose 1995 tax liability changed as a result of new section 877 must amend the individual's 1995 return accordingly and include the information statement with that amended return. A former long-term resident who expatriated in the 1995 taxable year will be deemed to have timely furnished the information statement if a statement is filed by the due date (including extensions) for filing the individual's 1996 return. A former long-term resident who expatriated after 1995 must attach an information statement to the former resident's U.S. income tax return for the year of expatriation. Former long-term residents who have already furnished the information enumerated in section 6039F(b) to the Internal Revenue Service prior to February 24, 1997, are not required to provide an additional statement.

Former citizens and former long-term residents must include the following information in their information statements;

(1) name;

(2) date of birth;

(3) taxpayer identification number;

(4) mailing address prior to expatriation;

(5) address where the individual resided prior to expatriation, if different from (4) above;

(6) mailing address of principal foreign residence, if any;

(7) address where the individual expects to reside after expatriation, if different from (6) above;

(8) all foreign countries of which the individual is a citizen and the dates and methods by which such citizenship was acquired;

(9) the number of days (including vacation and nonwork days) that the individual was physically present in the United States during the year of expatriation (up to and including the date on which the information statement is filed) and each of the two preceding taxable years;

(10) in the case of an individual whose average annual net U.S. income tax (as defined in section 38(c)(1)) for the five taxable years prior to expatriation exceeded $100,000, the net U.S. income tax for each of these years (rounded to the nearest $50,000). If the individual's average annual net U.S. income tax liability for the preceding five taxable years did not exceed $100,000, the individual must provide a representation to that effect;

(11) in the case of an individual with gross assets that have an aggregate fair market value in

excess of $500,000, a balance sheet, using good faith estimates of fair market values (formal appraisals are not required), that sets forth by category (e.g., cash, marketable securities, closely-held stock, business assets, qualified and nonqualified deferred compensation arrangements, individual retirement accounts, installment obligations, U.S. real property, foreign real property, etc.) the individual's assets and liabilities immediately prior to expatriation. The balance sheet must also set forth the following:

(i) the source of income and gain, without applying the provisions of section 877, that such property would have generated during the 5-year period prior to expatriation and immediately after expatriation,

(ii) the source of income and gain, assuming that the provisions of section 877 applied (as modified by section V of this notice), that such property would have generated during the 5-year period prior to expatriation and immediately after expatriation, and

(iii) the gain or loss that would be realized if the assets were sold for their fair market values on the date of expatriation.

The individual must separately list (not by category) each partnership in which the individual holds an interest, each trust that the individual is considered to own under sections 671 through 679, each trust that the individual is considered to own under Chapter 12 of Subtitle B of the Code, and each trust in which the individual holds a beneficial interest (as determined under the procedures described in section III of this notice). The individual must also describe the types of assets held by each partnership or trust, and indicate the methodology (as described in section III of this notice) used to determine the individual's beneficial interest in each trust. In addition, the individual should indicate whether there have been significant changes in the individual's assets and liabilities for the period that began five years prior to expatriation and ends on the date that the information statement is filed. If so, the individual should attach a statement explaining the changes in the individual's assets and liabilities during such period;

(12) in the case of a former long-term U.S. resident, a representation as to whether the former resident was treated as a resident of a foreign country under a U.S. income tax treaty for any year in the preceding 15 years. If so, the individual must list the foreign countries and years when this occurred. The individual must also list any year(s) that the former resident waived the benefits of that treaty; and

(13) a representation, signed under penalties of perjury by the individual, that the facts contained in the information statement are true, correct and complete to the best of the individual's knowledge and belief.

An individual who timely files a statement in accordance with the above guidelines will not be subject to the penalties described in section 6039F(d). All individuals whose reporting dates occur after such time that a form is issued for reporting information under section 6039F must complete and submit that form to comply with their reporting requirements under section 6039F.

SECTION X. TRANSITION PROVISION

Background. Sections 877 and 6039F generally apply to individuals who expatriate after February 5, 1995. However, section 511(g)(3)(A) of the Act provides a special transition provision in the case of a former citizen who performed an expatriating act specified in paragraph (1), (2), (3), or (4) of section 349(a) of the Immigration and Nationality Act (8 U.S.C.

1481(a)(1)-(4)) before February 6, 1995, but who did not on or before such date furnish to the U.S. Department of State a signed statement of voluntary relinquishment of U.S. nationality confirming the performance of such act. Such an individual would not come within the general effective date of the amendments to sections 877 and 6039F because, under the provisions for determining the date of loss of citizenship (which were not modified by the Act), the date of loss of citizenship is retroactive to the date of the expatriating act (i.e., prior to February 6, 1995). See Treas. Reg. § 1.1-1(c).

The transition provision states that section 6039F and the amendments made to section 877 by the Act shall apply to such an individual, except that the 10-year period referred to in section 877(a) shall not expire before the end of the 10-year period beginning on the date the signed statement of voluntary relinquishment is furnished to the U.S. Department of State. Thus, such an individual is subject to new section 877 as of the date of loss of citizenship and the 10-year period referred to in section 877(a) shall not expire before the end of the 10-year period beginning on the date the signed statement of voluntary relinquishment is furnished to the U.S. Department of State.

Section 511(g)(3)(B) of the Act states that the transition provision of section 511(g)(3)(A) will not apply if the individual establishes to the satisfaction of the Secretary of the Treasury that the individual's loss of U.S. citizenship occurred before February 6, 1994. Accordingly, section 6039F will not apply to such an individual and he will be subject to section 877 as in effect before the amendments made by the Act.

Example. The following example illustrates the application of section 511(g)(3)(A) of the Act.

> *Example 10.* K joined a foreign army on October 1, 1994, with the intent to relinquish his U.S. citizenship, but did not furnish a statement of voluntary relinquishment of citizenship to the U.S. Department of State until October 1, 1995. K is subject to new section 877 beginning on October 1, 1994, the date that K performed the expatriating act. However, the 10-year period referred to in section 877(a) will not expire before the end of the 10-year period beginning on the date that K furnished a statement of voluntary relinquishment of citizenship to the U.S. Department of State. K furnished this statement on October 1, 1995. Thus, K is subject to new section 877 for the period that began on October 1, 1994, and ends on September 30, 2005.

Special rule for individuals who claim to be within the exception under section 511(g)(3)(B) of the Act. An individual who (i) furnished a signed statement of voluntary relinquishment of U.S. nationality to the U.S. Department of State after February 5, 1995, and (ii) claims that new section 877 does not apply because of the exception to the transition provision in section 511(g)(3)(B) of the Act, must (whether or not the individual is otherwise required to file a U.S. tax return) attach a statement to Form 1040NR for the year in which the signed statement of voluntary relinquishment is furnished to the U.S. Department of State (or to the individual's 1996 Form 1040NR if the statement of voluntary relinquishment was furnished during 1995). The return must bear the statement "Expatriation Return" across the top of page 1 of such return. The

statement attached to the return must include the nature and date of the expatriating act, the date the signed statement of voluntary relinquishment was furnished to the U.S. Department of State, and a copy of the individual's certificate of loss of nationality. An individual who does not file a statement in the manner prescribed above will not be considered to have established to the satisfaction of the Secretary of the Treasury that the individual lost U.S. citizenship before February 6, 1994.

SECTION XI. INTERACTION WITH SECTION 7701(b)(10)

Background. Section 7701(b)(10) applies to an alien individual who was treated as a resident of the United States during any period that includes at least three consecutive calendar years (the "initial residency period") and ceased to be treated as a U.S. resident, but subsequently becomes a U.S. resident before the close of the third calendar year beginning after the initial residency period. Under section 7701(b)(10), such an individual will be taxed in the manner provided by section 877(b) for the period after the close of the initial residency period and before the date on which the individual subsequently becomes a U.S. resident. This provision applies only if the tax imposed pursuant to section 877(b) exceeds the tax imposed under section 871.

Application of section 7701(b)(10). An individual described in section 7701(b)(10) will be subject to tax on U.S. source income in the manner provided by section 877(b) (as modified by section 877(d)) for the period after the close of the initial residency period and before the date on which the individual subsequently becomes a U.S. resident (the "intervening period"). Because the tax imposed by reason of section 7701(b)(10) applies regardless of whether the individual had a principal purpose to avoid U.S. taxes, sections 877(a), (c), and (f), as amended, do not apply to an individual who is subject to tax in the manner provided by section 877(b) solely by reason of section 7701(b)(10).

Section 877(e) also does not generally apply to an individual who is subject to tax in the manner provided by section 877(b) solely by reason of section 7701(b)(10). However, to treat former residents who are subject to tax by reason of section 7701(b)(10) in a similar manner as former long-term residents who are subject to section 877, all property held by an individual on the date that such individual first became a resident of the United States shall be treated solely for purposes of section 7701(b)(10) as having a basis of not less than the fair market value of the property on such date, unless the individual elects not to have this treatment apply.

Reporting requirements for individuals subject to section 7701(b)(10). An individual who is liable for U.S. tax by reason of section 7701(b)(10) during any year of the intervening period must file U.S. income tax returns (Form 1040NR) reporting such tax liability for each of those years by the due date (including extensions) for filing the individual's U.S. income tax return for the year that the individual subsequently becomes a U.S. resident. If tax returns for the years of the intervening period have already been filed, the individual must amend those returns accordingly to comply with section 7701(b)(10).

An individual described in section 7701(b)(10) who is liable for U.S. taxes under any provision of the Code during the intervening period (e.g., section 871(a)) must attach a statement

to his or her U.S. tax return that sets forth, by category (e.g., dividends, interest, etc.), all items of U.S. and foreign source gross income (whether or not taxable in the United States) derived during each year of the intervening period. Such statement must identify the source of such income (determined under section 877 as modified by section V of this notice), the items of income subject to tax in the manner provided by section 877(b), and any other information that the Secretary may prescribe at a later date.

The statement must be filed even if the individual has fully satisfied his or her U.S. tax liability for a taxable year through withholding at source. As discussed in section VII of this notice, Treasury and the Service expect to modify Treas. Reg. § 1.6012-1(b)(2)(i) in accordance with rules of this notice.

Any individual who fails to furnish a complete statement, as described above, for the years of the intervening period will not be considered to have filed a true and accurate return. Therefore, such an individual will not be entitled to the benefit of any deductions or credits if the individual's return is later adjusted. See section 874(a).

An individual who is required to file the above statement for the taxable year that begins in 1995 will be considered to have timely filed his or her statement for that year if the individual files such statement by the due date (including extensions) for filing the individual's U.S. income tax return for the taxable year during which the individual subsequently becomes a U.S. resident.

Exchanges under section 877(d)(2) and contributions under section 877(d)(4). An individual subject to tax by reason of section 7701(b)(10) must recognize any gain realized during the intervening period on exchanges of property described in section 877(d)(2), unless the individual enters into a gain recognition agreement in accordance with section V of this notice. The gain recognition agreement must be submitted with the individual's U.S. income tax return (Form 1040NR) for the year of the exchange. The gain recognition agreement and the return must be filed by the due date (including extensions) for filing the individual's U.S. income tax return for the year during which the individual subsequently becomes a U.S. resident. If a tax return for the year of the exchange has already been filed, the individual must amend that return and attach a gain recognition agreement to the amended return to comply with section 7701(b)(10).

The period of such a gain recognition agreement will be for the intervening period, and not the 15-year period beginning five years prior to expatriation. Moreover, annual certification is not required. Rather, the individual must submit with the gain recognition agreement a certification that the acquiror (if any) has not disposed of the transferred property, and that the individual did not dispose of the property acquired in the exchange (or any other property that has a basis determined in whole or in part by reference to such property). In addition, the certification must also state whether the individual derived any income or gain from the property acquired in the exchange during the intervening period.

If any property to which the gain recognition applies was disposed of during any year of the intervening period, the individual must recognize gain for the year of disposition. Any income or gain derived during the intervening period from a contribution described under section

877(d)(4) must also be recognized for the relevant year. However, section 7701(b)(10) will not cause an individual to recognize any income or gain with respect to any exchange under section 877(d)(2) or contribution of property under section 877(d)(4) that occurred prior to the beginning of the individual's initial residency period or after the date on which the individual subsequently becomes a U.S. resident.

Example. The following example illustrates how section 7701(b)(10) interacts with section 877 and when income that arises by reason of section 7701(b)(10) must be recognized.

> *Example 11.* L was a resident alien of the United States in 1994, 1995 and 1996 because she satisfied the substantial presence test of section 7701(b)(3) for each of those years. In 1997 and 1998, L was not a resident of the United States. In 1999, L re-establishes residency in the United States. L is subject to tax in the manner provided by section 877(b) by reason of section 7701(b)(10). On February 1, 1997, L contributed property to a "controlled foreign corporation" in a transaction described in section 877(d)(4).
>
> Any income or gain derived from the property that L contributed to the foreign corporation during the intervening period is subject to tax in the manner provided by section 877(d)(4). Thus, L must report such income or gain by filing income tax returns for 1997 and 1998 by the due date (including extensions) for filing her 1999 U.S. income tax return. If income tax returns for 1997 and 1998 have already been filed, L must amend those returns to comply with section 7701(b)(10). Any income or gain derived after the intervening period is not taxable under section 877(d)(4).

Coordination with income tax treaties. The rules of section VIII (interaction with tax treaties) of this notice do not apply to an individual who is subject to tax in the manner provided by section 877(b) solely by reason of section 7701(b)(10). Accordingly, such an individual may claim benefits under a U.S. income tax treaty for transactions that occur during the intervening period if such individual is otherwise eligible for benefits as a foreign resident under the terms of such treaty.

Effective date. New section 877 will apply to an individual subject to tax thereunder by reason of section 7701(b)(10) if the individual's initial residency period ended after August 20, 1996.

REQUEST FOR COMMENTS

Treasury and the Service invite public comments on the guidance provided in this notice. Comments should be submitted by June 8, 1997, to:

Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Attn: CC:CORP:T:R, (Notice 97-19)
Room 5228
Washington,D.C. 20044;

or, alternatively, via the internet at:
http://www.irs.ustreas.gov/prod/tax regs/comments.html

The comments you submit will be available for public inspection and copying.

DRAFTING INFORMATION

The principal authors of this notice are Trina L. Dang and Michael Kirsch of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Ms. Dang or Mr. Kirsch at (202) 622-3860 (not a toll-free call).

PAPERWORK REDUCTION ACT

The collections of information contained in this notice have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1531.

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 collection of information related to the submission of ruling requests is required to help the Secretary make a determination as to whether an individual expatriated with a principal purpose to avoid U.S. taxes. The collections of information related to gain recognition agreements, initial information reporting and reporting of information with respect to contributions to certain foreign controlled foreign corporations are prescribed by statute. The collection of annual reporting information is necessary to monitor compliance with the provisions of section 877, as amended. The collections of information for individuals subject to section 7701(b)(10) are necessary to administer the provisions of section 7701(b)(10) that interact with section 877. This information will be used by the Service for tax administration purposes.

The respondents will be individuals who lose U.S. citizenship, cease to be taxed as lawful permanent residents of the United States, or cease to be taxed as residents of the United States. The estimated total annual burden for all respondents is 6,300 hours. The estimated annual burden per respondent varies from 0.5 hour to 2.5 hours, depending on individual circumstances, with an estimated average of 31 minutes. The estimated number of responses is 12,300. The estimated annual frequency of responses is annually or on occasion.

Books or records relating to collections 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 section 6103 of the Code.

Notice 98-34, 1998-2 C.B. 29

July 06, 1998

SECTION I. PURPOSE

Sections 877, 2107, and 2501(a)(3) of the Internal Revenue Code (Code) govern the federal tax treatment of certain former U.S. citizens and former U.S. long-term residents. Section IV of Notice 97-19, 1997-1 C.B. 394, provides guidance regarding the ruling request process under these sections, including the procedures for submitting a ruling request and the effect of a favorable ruling.

This notice modifies certain portions of section IV of Notice 97-19 by providing that certain individuals, in order to rebut the presumption of tax motivation under sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B), are no longer required to obtain a substantive ruling that the individual did not have a principal purpose of tax avoidance. Rather, these individuals may rebut the presumption of tax avoidance if they submit a complete ruling request in good faith. The Service will rule as to whether a submission was complete and provided in good faith. However, unless the Service also issues a substantive ruling that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes, an individual who receives a ruling that his or her request is complete and was submitted in good faith may, in a subsequent examination of the individual's returns, ultimately be found to have had a principal purpose of tax avoidance based on all the facts and circumstances.

This notice also specifies the information required to be submitted in order to receive a ruling from the Service that a request is complete and was submitted in good faith, as well as modifies the categories of former long-term residents eligible to submit ruling requests.

Treasury and the Service expect to issue regulations to incorporate the guidance set forth in this notice. Until such regulations are issued, taxpayers may rely on the guidance set forth in this notice.

SECTION II. BACKGROUND

Section 877 generally provides that a citizen who loses U.S. citizenship or a long-term resident (as defined in section 877(e)(2)) who ceases to be taxed as a U.S. resident (collectively, individuals who "expatriate") within the 10-year period immediately preceding the close of the taxable year will be taxed on U.S. source income (as modified by section 877(d)) for such taxable year, unless such loss or cessation did not have for one of its principal purposes the avoidance of U.S. taxes. Sections 2107 and 2501(a)(3) provide special estate and gift tax regimes, respectively, for individuals who expatriate with a principal purpose to avoid U.S. taxes.

A former citizen is considered to have expatriated with a principal purpose to avoid U.S. taxes for purposes of sections 877, 2107 and 2501(a)(3) if the individual's average income tax liability (the "tax liability test") or the individual's net worth (the "net worth test") on the date of

expatriation exceed certain thresholds. See sections 877(a)(2), and 2107(a)(2)(A) and 2501(a)(3)(B).

A former U.S. citizen whose net worth or average tax liability exceeds these thresholds, however, will not be considered to have a principal purpose of tax avoidance by reason of one of those tests if that former citizen is described within certain statutory categories and submits a request for a ruling within one year of the date of loss of U.S. citizenship for the Secretary's determination as to whether such loss had for one of its principal purposes the avoidance of U.S. taxes. See sections 877(c)(1), 2107(a)(2)(B), and 2501(a)(3)(C).

The tax liability and net worth tests also apply for purposes of determining whether a former long-term resident is considered to have a principal purpose of tax avoidance. Section 877(e)(3)(A) provides that the exception set forth in section 877(c) with respect to U.S. citizens who submit a request for a ruling shall not apply to former long-term residents. However, section 877(e)(4) gives the Secretary the authority to exempt categories of former long-term residents from section 877. In addition, section 877(e)(5) authorizes the Secretary to prescribe appropriate regulations to carry out the purposes of section 877(e).

In section IV of Notice 97-19, Treasury and the Service announced that, until regulations are issued, a former long-term resident may request a ruling for a determination as to whether such individual had a principal purpose of tax avoidance if the individual is within certain categories enumerated in section IV of Notice 97-19. Section IV of Notice 97-19 also provides detailed guidance on ruling requests under sections 877, 2107 and 2501(a)(3), including the procedures for submitting a request, the information that must be submitted with a request, and the effect of a favorable determination.

SECTION III. RULING REQUEST SUBMISSIONS

Difficulties of current ruling practice. Since the issuance of Notice 97-19, the Service has received a substantial number of requests for rulings under sections 877(c)(1), 2107(a)(2)(B), and 2501(a)(3)(C). In considering these requests, the Service has found that making a determination regarding tax avoidance in an advance ruling presents difficulties due to the inherently factual and subjective nature of the inquiry. In some cases, the Service has been able to reach a determination as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes based on the information submitted with the ruling request. In other cases, however, the Service has not been able to make a definitive advance determination regarding a principal purpose of tax avoidance because the information submitted with the ruling request did not clearly establish the existence or lack of such a principal purpose.

Under section IV of Notice 97-19, an expatriate eligible to submit a ruling will be subject to sections 877, 2107, or 2501, unless such individual obtains a favorable ruling, rather than merely submits a request, that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes. Thus, under current law, an expatriate would be adversely affected (i.e., the presumption of tax avoidance would apply) if the Service were unable to make an advance determination regarding tax motivation in certain cases because of the inherently

factual and subjective nature of such an inquiry.

Modification of current ruling practice. Due to the foregoing reasons, Treasury and the Service have decided to modify the current ruling practice. Under the modified ruling practice, an individual may overcome the presumption of tax avoidance under sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B) by submitting a request for a ruling as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes, provided that such individual's ruling request is complete and was submitted in good faith.

Under such circumstances, the presumption of tax avoidance under sections 877(a)(2), 2107(a)(2)(A), and 2501(a)(3)(B) will not apply even if the individual does not receive a substantive ruling that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes. However, in a subsequent examination of such an individual's returns, the individual may ultimately be found to have had a principal purpose of tax avoidance based on the individual's facts and circumstances. Treasury and the Service believe that this approach is supported by section 877(c)(1)(B), which contemplates that the Service may determine that the conclusive presumption of tax avoidance under section 877(a)(2) does not apply if an eligible individual submits a ruling request for a determination as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes.

Effect of ruling request submissions and administration of rulings under new ruling practice. To reflect the change in the Service's ruling practice, this notice modifies section IV of Notice 97-19 as set forth below.

Under this notice, if an expatriate's tax liability or net worth exceeds the applicable thresholds, the presumption in sections 877(a)(2), 2107(a)(2)(A) and 2501(a)(3)(B) that the expatriate had a principal purpose of tax avoidance will not apply if the expatriate (i) is eligible to submit a ruling request that his or her expatriation did not have for one of its principal purposes the avoidance of U.S. taxes, (ii) submits such a request in a timely manner, and (iii) provides the Service with a complete and good faith ruling request submission.

The Service will rule as to whether a submission was complete and provided in good faith. A ruling that a request constitutes a complete and good faith submission may, depending on the information submitted, also contain either:

(1) a substantive ruling that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes in those cases where the information submitted clearly establishes the lack of such a principal purpose; or

(2) a substantive ruling that the individual's expatriation did have for one of its principal purposes the avoidance of U.S. taxes in those cases where the information submitted clearly establishes the existence of such a principal purpose.

Alternatively, a ruling that a request constitutes a complete and good faith submission may express no opinion as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes in those cases where the information submitted clearly establishes neither the existence nor lack of such a principal purpose. If the Service rules solely that a request

was complete and submitted in good faith, such a ruling is not conclusive as to whether the individual ultimately can be found to have a principal purpose of tax avoidance under sections 877(a)(1), 2107(a)(1), and 2501(a)(3)(A) based on the individual's facts and circumstances. See section 877(c)(1).

If, for any reason, the Service does not issue a favorable substantive ruling that the individual's expatriation did not have for one of its principal purposes the avoidance of U.S. taxes, information collected as part of the ruling process may be forwarded to the Office of Assistant Commissioner (International) to consider in any later examination of the individual's returns.

Content of ruling request submissions. In addressing the numerous requests received after the issuance of Notice 97-19, the Service has found that the information required in section IV of Notice 97-19 to be submitted with ruling requests was insufficient in many instances for the Service to make a substantive determination as to whether an individual's expatriation had for one of its principal purpose the avoidance of U.S. taxes. Accordingly, this notice modifies the information that must be submitted with ruling requests to ensure that all useful information is submitted with these requests. Much of the information requested below was also requested in Notice 97-19. For convenience, however, the list below sets forth all of the information that must be included with ruling requests submitted after July 6, 1998.

To be considered a complete and good faith submission by the Service, a request submitted by a citizen or long-term resident for a ruling as to whether the individual's expatriation had for one of its principal purposes the avoidance of U.S. taxes must contain the following information, with paragraphs labeled to correspond with the numbers set forth below:

(1) the date (or expected date) of expatriation;

(2) a full explanation of the individual's reasons for expatriating;

(3) the individual's date of birth;

(4) all foreign countries of which the individual is a resident for tax purposes and/or intends to obtain residence for tax purposes, and a statement as to whether the individual is subject to worldwide income and estate taxation in the country of residence. If the individual is not subject to worldwide taxation, attach an explanation of the manner in which the individual is taxed (e.g., whether foreign source pension income or capital gains are exempt from tax);

(5) all foreign countries of which the individual is a citizen and/or intends to acquire citizenship after expatriation;

(6) the countries where the individual's spouse (if any) and parents were born, the countries of citizenship and residence of the individual's spouse (if any), and a statement as to whether the individual's spouse has expatriated or intends to expatriate;

(7) the country where the individual's tax home is located (within the meaning of section 911(d)(3));

(8) a description of the individual's ties to the United States and the individual's ties to the foreign country where the individual resides (or intends to reside) for the period that began five years prior to expatriation and ends on the date that the ruling request is submitted, including the location of the individual's permanent home, family and social relations, occupation(s), political, cultural, or other activities, business activities, personal belongings, the place from which the individual administers property, the jurisdiction in which the individual holds a driver's license, the

location where the individual conducts routine personal banking activities, the location of the individual's cemetery plot (if any), and any other similar information;

(9) a balance sheet, in substantially the following format, that sets forth the individual's assets and liabilities immediately prior to expatriation:

Assets	(a) Fair Market Value (FMV)	(b) U.S. Adjusted Basis	(c) Gain (Loss) [col. (a) less col. (b)]
1 Cash, including bank deposit			
2 Marketable stock and securities issued by U.S. companies			
3 Marketable stock and securities issued by foreign companies			
4 Nonmarketable stock and securities issued by U.S. companies			
5 Nonmarketable stock and securities issued by foreign companies			
6 Pensions from services performed in the U.S.			
7 Pensions from services performed outside the U.S.			
8 Partnership interests (attach statement as described below)			
9 Assets held by trusts you own under sections 671 through 679 (attach statement as described below)			
10 Beneficial interests in nongrantor trusts (attach statement as described below)			
11 Intangibles used in the U.S.			
12 Intangibles used out-side the U.S.			
13 Loans to U.S. persons			
14 Loans to foreign persons			
15 Real property located in the U.S.			
16 Real property located outside the U.S.			
17 Business property located in the U.S.			
18 Business property located outside the U.S.			
19 Other assets (attach statement)			
20 Total assets (add lines 1 through 19)			

Liabilities	Amount		
21 Installment obligations		----------	----------
22 Mortgages, etc.		----------	----------
23 Other liabilities		----------	----------
24 Total liabilities (add lines 21 through 23)		----------	----------
25 **Net worth** (subtract line 24 from line 20)		----------	----------

For purposes of allocating the property interests of a nongrantor trust to a beneficiary, use the methodology described under section III of Notice 97-19 (i.e., based on facts and circumstances where possible). To determine the value of a beneficial interest in a nongrantor trust, use the valuation principles under section 2512 and the regulations thereunder without regard to any prohibitions or restrictions on such interest. See section III of Notice 97-19. In addition, the individual must attach to the balance sheet a statement that separately identifies each partnership interest, each portion of a trust that the individual is considered to own under sections 671 through 679, and each nongrantor trust in which the individual holds a beneficial interest. This statement must identify:

(i) the EIN of the partnership or trust (if any),

(ii) the assets and liabilities of each partnership or trust (categorized according to the categories of the balance sheet) attributable to the individual's interest in the partnership or trust,

(iii) in the case of a grantor trust, an explanation of the facts and law (including the applicable section of the Internal Revenue Code) that establishes that the trust (or portion of a trust) is treated for U.S. tax purposes as owned by the individual, and

(iv) in the case of a nongrantor trust, the methodology used to determine the individual's beneficial interest in each trust;

(10) a statement as to whether there have been (or are expected to be) significant changes in the individual's assets and liabilities for the period that began five years prior to expatriation and ends ten years following the date of expatriation. If so, the individual should attach an explanation of such changes;

(11) a description of all exchanges described in section 877(d)(2)(B) and all removals of appreciated tangible personal property from the United States (as described in section V of Notice 97-19), that:

(i) occurred at any time beginning 5 years prior to expatriation (but not including exchanges that took place prior to February 6, 1995) and ending on the date that the ruling request is submitted, or

(ii) occurred, or are expected to occur, during the 10-year period following expatriation.

If the individual is subject to section 877 because of section 511(g)(3)(A) of the Health Insurance Portability and Accountability Act of 1996 (see section X of Notice 97-19), the individual must also include a description of all exchanges described under section 877(d)(2)(B) that occurred on or after the date of the individual's expatriating act (see section X of Notice 97-19) and before February 6, 1995;

(12) a description of all occurrences under section 877(d)(2)(E)(ii) that are treated as exchanges under section 877(d)(2) (as described in section V of Notice 97-19) that:

(i) occurred at any time beginning 5 years prior to expatriation (but not including occurrences that took place prior to February 24, 1997) and ending on the date that the ruling request is submitted, or

(ii) occurred, or are expected to occur, during the 10-year period following expatriation;

(13) a statement describing the nature and status of any ongoing audits, disputes or other matters pending before the Internal Revenue Service;

(14) a statement as to whether the individual satisfied his or her U.S. tax liability during the period that he or she was a U.S. citizen or lawful permanent resident of the United States;

(15) a copy of the individual's U.S. tax returns (including all attachments and schedules) for each of the three years prior to expatriation, and, if filed or required to be filed prior to the date the ruling request is submitted, the U.S. tax returns for the year during which the individual expatriated and for all years subsequent to expatriation. If Form 1116, *Foreign Tax Credit*, was filed with these income tax returns, provide copies of documents required to be attached to Form 1116 (e.g., foreign income tax return, receipt for payment of foreign tax, or other secondary evidence of payment or accrual of foreign taxes accepted by the District Director, as described in Treas. Reg. § 1.905-2). If there is a discrepancy between the income or gain reported for tax purposes with respect to the assets set forth in the balance sheet in paragraph (9) above and the income or gain that reasonably would be expected to be generated by such assets, provide a complete explanation of such discrepancy;

(16) a copy of the information statement filed in accordance with section 6039G of the Code. If the information statement has not been filed, a statement as to when the individual intends to file the information statement;

(17) a calculation of the individual's projected U.S. and foreign income tax liability upon a deemed disposition at fair market value of all of the individual's assets immediately following expatriation, including a description of the foreign income tax treatment (e.g., tax-exempt income and rates of tax) that would arise as a result of such disposition, under each of the following circumstances:

(i) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes, and

(ii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident;

(18) a projection of the individual's U.S. and foreign income tax liability for each of the three years following expatriation, including a description of the foreign income tax treatment (e.g., tax-exempt income and rates of tax), under each of the following circumstances:

(i) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes, and

(ii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident.

If the individual expects a substantial change in his or her projected U.S. or foreign income tax liability as a result of a change in income for the remainder of the 10-year period, attach an explanation;

(19) a statement indicating whether the individual has transferred any property by gift with an aggregate value of $100,000 or more (including gifts to the individual's spouse), regardless of whether or not such transfers were taxable under subtitle B of the Code, during the period that began five years prior to expatriation and ending on the date that the ruling request is submitted. If so, include a description of the gift, provide an estimate of its fair market value, indicate when and to whom the gift was made, and attach copies of the relevant U.S. gift tax returns (if any);

(20) a statement indicating whether the individual expects to make any substantial gifts during any year of the 10-year period following expatriation. If so, include a projection of the U.S. and foreign gift and other transfer taxes that would be owed on the expected transfer of property by gift during this period, including a description of the foreign tax treatment (e.g., manner and rates of tax) that would result upon the transfer of such property, under each of the following circumstances:

(i) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes, and

(ii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident domiciled in the United States.

The individual should also describe the expected gift, provide an estimate of its fair market value, and indicate when and to whom the individual expects to make the gift;

(21) in the case of an individual age 60 or older on the date of expatriation, the present value (determined as of the date of expatriation) of the estimated U.S., foreign and other death taxes that would be imposed as a result of the individual's death, and a description of the foreign tax treatment that would arise as a result of the individual's death, under each of the following circumstances:

(i) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes, and

(ii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident domiciled in the United States.

For purposes of this calculation, the estimated death tax is determined based on the assumption that the individual's taxable estate consists of the value of property that would comprise the taxable estate if the individual died immediately before the date of expatriation without taking into account any potential marital or charitable deduction. The present value of the estimated death tax liability as of the date of expatriation is determined under the tables prescribed by section 7520 and Treas. Reg. § 20.2031-7, using the appropriate interest rate under section 7520 for that date and the individual's age as of that date;

(22) in the case of an individual who would be considered to own a trust under sections 671 through 679 if the individual had remained a U.S. citizen or U.S. resident, a description of the U.S. and foreign tax treatment to both the trust and the individual (in the country of organization of the trust and the individual's country of residence) of the expected trust income and distributions for each of the three years following expatriation, under each of the following circumstances:

(i) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S. taxes, and

(ii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident.

If the individual expects a substantial change in the projected U.S. or foreign income tax liability of such trust income and distributions for the remainder of the 10-year period following expatriation, attach an explanation;

(23) in the case of an individual who is a beneficiary (as determined under section III of Notice 97-19) of a trust, a description of the U.S. and foreign tax treatment of the expected trust distributions to the individual for each of the three years following expatriation, under each of the following circumstances:

(i) if it is determined that the individual did not expatriate with a principal purpose to avoid U.S.

taxes, and

(ii) if the individual had remained a U.S. citizen or U.S. lawful permanent resident.

If the individual expects a substantial change in the projected U.S. or foreign income tax liability of such trust distributions for the remainder of the 10-year period following expatriation, attach an explanation; and

(24) any other information reasonably required by the Service after its review of the submission.

Although individuals must provide good faith estimates of fair market values, formal appraisals are not required. If an individual fails to provide the aforementioned information, including information reasonably required by the Service, the individual's ruling request may be closed pursuant to section 10.06(3) of Rev. Proc. 98-1, 1998-1 I.R.B. 7. If an individual's request is closed, the individual will not be considered to have submitted a complete and good faith ruling request. Accordingly, the individual will be considered by the Service to have expatriated with a principal purpose to avoid U.S. taxes under sections 877(a)(2), 2107(a)(2)(A) and 2501(a)(3)(B).

Procedures for submitting ruling requests and user fees. Individuals should refer to section 8 of Rev. Proc. 98-1, 1998-1 I.R.B. 7, 24, for general instructions on the proper procedures to follow when submitting ruling requests. Individuals should also consult section 15 of Rev. Proc. 98-1, 1998-1 I.R.B. 7, 51 for information on the applicable user fee that must be submitted with a ruling request.

Effective date. Section III of this notice is effective for pending ruling requests and requests submitted after July 6, 1998. However, an individual with a request currently pending with the Service as of July 6, 1998 is not required to submit any additional information unless requested to do so.

This notice does not affect the validity of any rulings previously issued by the Service. An individual who previously withdrew a ruling request is not considered to have submitted a complete and good faith request. However, such individual may resubmit a ruling request in accordance with this notice. Such a resubmission must be filed by the later of October 6, 1998 or the date that is one year following the date of the individual's expatriation.

SECTION IV. LONG-TERM RESIDENTS ELIGIBLE TO SUBMIT RULING REQUESTS

Modification of categories of individuals eligible to submit ruling requests. Section IV of Notice 97-19 provides that long-term residents within certain categories are eligible to submit a ruling request. Under Category (1) of Notice 97-19, long-term residents who are citizens of certain countries and become fully liable to tax in such country by reason of the individual's residence are eligible to submit a ruling request. This notice modifies Category (1) to read as follows:

(1) the individual becomes (not later than the close of a reasonable period after the individual's expatriation) a resident fully liable to income tax in one of the following countries:

(a) the country in which the individual was born,

(b) the country where the individual's spouse was born, or

(c) the country where either of the individual's parents was born.
For this purpose, a resident who is not domiciled in a country is not considered a resident fully liable to income tax in such country if his or her income is subject to tax in a different manner than the income of a resident who is domiciled in the country.

If a former long-term resident within the aforementioned category expatriated prior to July 6, 1998 such individual will be considered to have submitted a timely ruling request if such request is filed by the later of January 6, 1999 or the date that is one year following the date of the individual's expatriation.

The following example illustrates circumstances under which an individual is not considered a resident fully liable to income tax in a foreign jurisdiction:

> *Example 1.* A, a former long-term resident, expatriated on January 1, 1998. A exceeded the threshold of the net worth test on the date of her expatriation. After A expatriated, A moved to Country B. A was born in Country B. A is considered a resident of Country B, but is not domiciled in Country B. Under Country B's income tax laws, nondomiciliary residents of Country B are not taxed on foreign source income unless such income is remitted to Country B. Residents of Country B who are also domiciled in Country B, however, are liable to tax in Country B on worldwide income, regardless of whether such income is remitted to Country B. Since A is not liable to tax on foreign source income in the same manner as a domiciliary resident of Country B, A is not considered a resident fully liable to income tax in Country B. Accordingly, A is not eligible to submit a ruling request under paragraph (1) above.

SECTION V. EFFECT ON OTHER DOCUMENTS

Section IV of Notice 97-19 is modified.

REQUEST FOR COMMENTS

Treasury and the Service invite public comments on the guidance provided in this notice. Comments should be submitted by September 6, 1998 to:

Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Attn: CC:CORP:T:R, (Notice 98-34)
Room 5228
Washington, DC 20044

or, alternatively, via the internet at: http://www.irs.ustreas.gov/prod/tax_regs/comments.html

The comments you submit will be available for public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Trina Dang of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Ms. Dang or Willard Yates at (202) 622-3880 (not a toll-free call).

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1531.

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 collection of information related to the submission of ruling requests is required to help the Secretary make a determination as to whether an individual submitted a complete and good faith request and to help the Secretary make a determination as to whether the individual expatriated with a principal purpose to avoid U.S. taxes. This information will be used by the Service for tax administration purposes.

The respondents will be eligible individuals who lose U.S. citizenship or cease to be taxed as lawful permanent residents of the United States. The estimated total annual reporting burden is 350 hours. The estimated annual burden per respondent is 3.5 hours. The estimated annual number of respondents is 100. The estimated annual frequency of responses is on occasion.

Books or records relating to collections 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 section 6103 of the Code.

Form **8854**
(Rev. February 2002)
Department of the Treasury
Internal Revenue Service

Expatriation Information Statement

▶ See separate instructions. ▶ Please print or type.

OMB No. 1545-1567

Attachment Sequence No. **112**

Name	Date of birth (mo., day, yr.)	Telephone number	Identifying number

Part I **General Information. All filers must complete Part I.** Complete Part II if, on the date of expatriation, you had gross assets with a collective fair market value of more than $500,000. See instructions.

1 Date of expatriation

2a If you are a former U.S. citizen, check this box . . . . . ▶ ☐
b If you are a former U.S. long-term resident (LTR), check this box . . . . . ▶ ☐

3 Mailing address where you may be reached **after** expatriation

4 Address of tax residence **after** expatriation (if different from **3**)

5 Address of tax residence **before** expatriation

6 List all foreign countries (not the United States) of which you are a citizen.

a Name of country	b How you became a citizen	c Date you became a citizen

7 **Number of days** you were present in the United States during the

a Tax year of expatriation . . . . . a _____
b Tax year before expatriation . . . . . b _____
c Tax year that is 2 years before expatriation . . . . . c _____

8 Was your average annual net U.S. income tax liability (after credits) for the 5-tax-year period that ended before the date of expatriation more than $120,000 (for expatriation in 2002), $116,000 (for expatriation in 2001), or the applicable threshold amount (see instructions for this line) for expatriation before 2001? . . . . . ☐ Yes ☐ No
If "Yes," enter your tax liability for each of those years (rounded to the nearest $50,000).

5th Year Before Expatriation	4th Year Before Expatriation	3rd Year Before Expatriation	2nd Year Before Expatriation	1st Year Before Expatriation
$	$	$	$	$

9 Was your net worth on the date you expatriated equal to or more than $599,000 (for expatriation in 2002), $580,000 (for expatriation in 2001), or the applicable threshold amount (see instructions for this line) for expatriation before 2001? . . . . . ☐ Yes ☐ No

10 If you checked the "Yes" box on line 8 or line 9, see instructions and complete lines 10 a, b, and c. Otherwise, go to line 11.

a Are you eligible to submit a ruling request that your expatriation did not have, as one of its principal purposes, the avoidance of U.S. taxes? . . . . . ☐ Yes ☐ No
b Did you submit or do you intend to submit such a ruling request? . . . . . ☐ Yes ☐ No
c If you submitted a ruling request, did you receive a ruling that either:
(1) Your ruling request was complete and submitted in good faith? . . . . . ☐ Yes ☐ No
(2) Your expatriation did not have as one of its principal purposes the avoidance of U.S. taxes under Internal Revenue Code section 877(a)(1)? . . . . . ☐ Yes ☐ No

11 On the date of expatriation, did you have **gross** assets with an aggregate fair market value of more than $500,000? ☐ Yes ☐ No
If "Yes," complete Part II on the back.

Sign Here

Under penalties of perjury, I declare that I have examined this form, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than filer) is based on all information of which preparer has any knowledge.

Your signature	Date
Preparer's signature	Date

For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 24126N Form **8854** (Rev. 2-2002)

Part II Balance Sheet

- Complete Part II only if you checked the "Yes" box on line 11 in Part I.
- List the amounts of your assets and liabilities in U.S. dollars immediately prior to expatriation.
- If you are a former U.S. long-term resident (LTR), it may benefit you to complete column (d). Only former LTRs should do so.

For more details see the separate instructions.

	Assets	(a) Fair Market Value (FMV) immediately prior to expatriation	(b) U.S. adjusted basis immediately prior to expatriation	(c) Gain or (Loss). Subtract column (b) from column (a)	(d) FMV on beginning date of U.S. residency (optional, for LTRs only)
1	Cash, including bank deposits				
2	Marketable stock and securities issued by U.S. companies				
3	Marketable stock and securities issued by foreign companies				
4	Nonmarketable stock and securities issued by U.S. companies				
5	Nonmarketable stock and securities issued by foreign companies				
6	Pensions from services performed in the United States				
7	Pensions from services performed outside the United States				
8	Partnership interests (see instructions)				
9	Assets held by trusts you own under sections 671–679 (see instructions)				
10	Beneficial interests in nongrantor trusts (see instructions)				
11	Intangibles used in the United States				
12	Intangibles used outside the United States				
13	Loans to U.S. persons				
14	Loans to foreign persons				
15	Real property located in the United States				
16	Real property located outside the United States				
17	Business property located in the United States				
18	Business property located outside the United States				
19	Other assets (see instructions)				
20	Total Assets. Add lines 1 through 19				

	Liabilities	Amount
21	Installment obligations	
22	Mortgages, etc.	
23	Other liabilities (see instructions)	
24	Total Liabilities. Add lines 21 through 23	
25	**Net Worth.** Subtract line 24 from line 20, column (a)	

Instructions for Form 8854

Department of the Treasury
Internal Revenue Service

(Rev. February 2002)

Expatriation Information Statement

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

Use Form 8854, if you expatriate, to provide the information required by section 6039G. These reporting requirements are explained in further detail in Section IX of Notice 97–19, 1997–1 C.B. 394.

*Form 8854 serves only to satisfy the **inital** information reporting requirement of section 6039G. A former U.S. citizen or a former U.S. long-term resident is still required to:*

- Compute any tax due under section 877 (including the recognition of gain in the circumstances described in Section V of Notice 97–19).
- Provide an annual information reporting (Section VII of Notice 97–19).

Expatriation

For purposes of this form, **expatriation** is ceasing to be a U.S. citizen or U.S. long-term resident.

Generally, you must continue to pay U.S. income tax, as if expatriation did not occur, for 10 years after expatriation unless tax avoidance was not one of your principal purposes of expatriating. You **will** generally be treated as having a principal purpose of tax avoidance if the answer to the question on line 8 or line 9 in Part I is "Yes". However, you **will not** be presumed to have a principal purpose of tax avoidance if you submit a ruling request to the IRS to determine whether tax avoidance is a principal purpose of your expatriation. See the instructions for Part I, line 10, to find out if you are eligible to submit a ruling request.

Who Must File

Former U.S. Citizens

You must file Form 8854 if **any** of the following occurs.

1. You renounce your U.S. citizenship before a diplomatic or consular officer of the United States,

2. You furnish to the U.S. Department of State a signed statement of voluntary relinquishment of U.S. nationality confirming an act of expatriation,

3. The U.S. Department of State issues you a certificate of loss of U.S. nationality, **or**

4. A U.S. Federal Court cancels your certificate of naturalization.

Former U.S. Long-Term Residents (LTRs)

You must file Form 8854 if you become a former U.S. LTR. You are a **former U.S. LTR** if you were not a U.S. citizen but were a lawful permanent resident of the United States (defined below) for at least 8 of the 15 consecutive tax years ending with the year you ceased to be a U.S. resident. Do not count as a year of residence any year that you were treated as a resident of another country under a tax treaty and did not waive treaty benefits.

Lawful permanent resident. You are a lawful permanent resident of the United States if you have been given the privilege, according to U.S. Immigration laws, of residing permanently in the United States as an immigrant. You generally have this status if the Immigration and Naturalization Service (INS) has issued you an alien registration card, also known as a "green card."

When To File

Note: *File Form 8854 only once.*

Former U.S. Citizens

File Form 8854 no later than the earliest date that any of the events listed under **Who Must File** occurs.

Former U.S. LTRs

File Form 8854 by the due date (including extensions) of your dual-status income tax return for the year you expatriate.

Where To File

Former U.S. Citizens

File Form 8854 with the American Citizens Services Unit, Consular Section, of the nearest American Embassy or consulate. However, if you are filing Form 8854 because a U.S. Federal Court canceled your certificate of naturalization, file Form 8854 with that court.

Former U.S. LTRs

Attach Form 8854 to your dual-status income tax return for the year in which you ceased to be a U.S. resident. If you have already filed that return, file Form 8854 by itself at the address where you filed the return. For details on dual-status returns, see the instructions for Form 1040NR.

Penalty for Failure To File

You may be assessed a penalty for each year of the 10-year period beginning on the date of expatriation that you have not yet filed Form 8854. For each of those years, the penalty is the **greater** of:

- $1,000 **or**
- Five percent of the tax required to be paid under section 877 for that year.

If you can show that your failure to file was due to reasonable cause and not willful neglect, the penalty will not be imposed.

Specific Instructions

Telephone Number

Enter the complete telephone number, including the country and area codes, at which you can be reached.

Identifying Number

Generally, this number is your U.S. social security number. An incorrect or missing identifying number may result in additional correspondence.

Part I—General Information

Line 1

Former U.S. Citizens

The date of your expatriation is either the date that your certificate of naturalization was canceled by a Federal court or the date that you, with the intention of relinquishing your citizenship, voluntarily took one of several actions. These actions include:

- Obtaining naturalization in a foreign state,
- Taking an oath, affirmation, or other formal declaration of allegiance to a foreign state,
- Entering or serving in the armed forces of a foreign state engaged in hostilities against the United States, or serving as a commissioned or noncommissioned officer in the armed forces of a foreign state,
- Accepting employment with a foreign government if a declaration of allegiance is required in accepting the position or if you have the nationality of that foreign state, or
- Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state.

For more details about voluntarily relinquishing U.S. citizenship, see 8 United States Code section 1481.

Former U.S. LTRs

The date of your expatriation is the earliest of:

1. The date your green card was rescinded by the Immigration and Naturalization Service (INS).

2. The date your green card was administratively or judicially determined to have been abandoned. If you filed **Form I-407,** Abandonment of Lawful Permanent Resident Status, with the INS, the date of the abandonment of your green card is on line 6(c) of that form.

3. The first day of the tax year for which you began to be treated as a foreign resident under the provisions of an income tax treaty and do not waive the benefits of the treaty.

Lines 3 Through 5

P.O. Box

If you have a P.O. box, enter your box number instead of your street address only if your post office does not deliver mail to the street address.

Foreign Address

Enter the information in the following order: street address, city, province or state, and country. Follow the country's practice for entering the postal code. Do not abbreviate the country name.

Line 6, Column (b)

Show how you became a citizen. For example, if you acquired citizenship at birth, write "At Birth." If you acquired citizenship through naturalization, write "Naturalized Citizen."

Line 7

List the number of days you were physically present in the United States (including vacation and nonworkdays) in the tax year you expatriated and in each of the 2 tax years prior to expatriation.

Line 8

The applicable threshold amounts are as follows:

Year of Expatriation	Amount
2002	$120,000
2001	$116,000
2000	$112,000
1999	$110,000
1998	$109,000
1997	$106,000
02/06/1995–12/31/1996	$100,000

Line 9

The applicable threshold amounts are as follows:

Year of Expatriation	Amount
2002	$599,000
2001	$580,000
2000	$562,000
1999	$552,000
1998	$543,000
1997	$528,000
02/06/1995–12/31/1996	$500,000

Line 10

Certain former U.S. citizens and former U.S. LTRs can request a ruling that the avoidance of U.S. taxes was not a principal purpose of their expatriation.

If you are a former U.S. citizen, you are generally eligible to request a ruling (within 1 year after the loss of U.S. citizenship) if:

- You were a citizen of both the United States and a foreign country at birth and you maintained the foreign country citizenship after you expatriated **or**
- You are (or become) a **citizen** of the country where **(a)** you were born, **(b)** one of your parents was born, or **(c)** your spouse was born.

If you are a former U.S. LTR, you are generally eligible to request a ruling if you are (or become) a **resident fully liable for income tax** in the country where **(a)** you were born, **(b)** one of your parents was born, or **(c)** your spouse was born. For this purpose, a resident who is not domiciled in a country is not considered a resident fully liable for income tax in that country if his or her income is subject to tax in a different manner than the income of a resident who is domiciled in the country.

In addition, a former U.S. citizen or former U.S. LTR who spent no more than 30 days in the United States during each year of the 10-year period prior to expatriation or expatriated before reaching age 18½ is also generally eligible to request a ruling. For more details, see section 877, section IV of Notice 97-19, and section IV of Notice 98-34, 1998-2 C.B. 29.

Line 11

Be sure to take into account the aggregate fair market value of **all** your assets, **not your net worth.** If the aggregate value exceeds $500,000, you must complete Part II of Form 8854.

Signature

Form 8854 is not considered valid unless you sign it. If you have someone else prepare Form 8854, you are still responsible for its correctness.

Paid preparers. Generally, anyone you pay to prepare Form 8854 must sign it by hand in the space provided. Signature stamps or labels cannot be used. The preparer must give you a copy for your records. Someone who prepares Form 8854 but does not charge you a fee should not sign it.

Part II—Balance Sheet

If you answered "Yes" to the question on line 11 on the front of Form 8854, you must list your assets and liabilities (in U.S. dollars) immediately prior to your expatriation.

Note: *If there have been significant changes in your assets and liabilities for the period that began 5 years prior to expatriation and ended on the date that you file Form 8854, you must attach a statement explaining the changes. Also, attach a similar statement if you expect significant changes in the 10-year period after expatriation.*

Columns (a) and (b)

List the fair market value of each class of assets and your U.S. adjusted basis in the class of assets. You may use good faith estimates of fair market value and basis (formal appraisals are not required).

Column (c)

Subtract the amounts in column (b) from the amounts in column (a) and show the gain or (loss) in column (c). Enter negative amounts in parentheses.

Column (d)

If you are a former U.S. LTR, it may benefit you to complete column (d). For more details, see section 877(e)(3)(B). **Only** former U.S. LTRs should complete column (d).

Enter in column (d) the fair market value of each asset on the date you first became a U.S. resident for tax purposes.

Note: *The date you first became a U.S. resident for tax purposes is **not always** the same as the date you first became a U.S. lawful permanent resident. For details on U.S. residency (including the substantial presence test), see **Pub. 519,** U.S. Tax Guide for Aliens.*

Line 8

List the total value of all your partnership interests. If you hold an interest in one or more partnerships, you must attach a statement to Form 8854 that lists each partnership separately. Include the employer identification number (EIN), if any, for each partnership. Describe the assets and liabilities of each partnership (using the categories on the balance sheet on page 2 of Form 8854) attributable to your interest in the partnership.

Line 9

List the total value of all assets held by trusts that, you are considered to own for tax purposes. You must attach a statement to Form 8854 that lists each trust separately. Include the EIN (if any) for each trust. Describe the assets and liabilities of each trust (using the categories on the balance sheet on page 2 of Form 8854) attributable to your interest in the trust.

Note: *To determine if you are an owner of a trust, see sections 671 through 679.*

Line 10

List the total value of all assets held by nongrantor trusts in which you are considered to have a beneficial interest. You must attach a statement to Form 8854 that lists each trust separately. Include the EIN (if any) for each trust. Describe the assets and liabilities of each trust (using the categories on the balance sheet on page 2 of Form 8854) attributable to your interest in the trust.

Note: *To determine if you are a beneficiary of a nongrantor trust, you must allocate the property interests of the trust based on all relevant facts and circumstances. To determine the value of your beneficial interest, use the valuation principles under section 2512. See section III of Notice 97-19 for examples of how the property interests of a nongrantor trust should be allocated to the beneficiaries of the trust.*

Lines 11 and 12

Intangible property includes any of the following items that have substantial value independent of the services of any individual.

- Patent, invention, formula, process, design, pattern, or know-how.
- Copyright, literary, musical, or artistic composition.
- Trademark, trade name, or brand name.
- Franchise, license, or contract.
- Method, program, system, procedure, campaign, survey, study, forecast, estimate, customer list, or technical data.
- Any similar item.

Line 19

Attach a statement describing and listing the total value of any other assets you have that are not included on lines 1 through 18.

Line 23

Attach a statement describing and listing the total value of any other liabilities you have that are not included on lines 21 and 22.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average times are:

	Part I	Parts I and II
Recordkeeping	33 min.	2 hr., 57 min.
Learning about the law or the form	13 min.	26 min.
Preparing the form	40 min.	1 hr., 24 min.
Copying, assembling, and sending the form to the IRS	20 min.	35 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **Do not** send the form to this address. Instead, see **Where To File** on page 1.

U.S. Department of State

CERTIFICATE OF LOSS OF NATIONALITY OF THE UNITED STATES

This form is prescribed by the Secretary of State pursuant to Section 501 of the Act of October 14, 1940 (54 Stat. 1171) and Section 358 of the Act of June 27, 1952 (66 Stat. 272).

DEPARTMENT USE ONLY

Consulate _____ of the United States of America

at _____ ss:

I _____ .
(Name)

hereby certify that, to the best of my knowledge and belief,

_____
(Name)

was born at _____ , _____
(Town or City) (Province or County)

_____ , on _____
(State or Country) (Date (mm-dd-yyyy))

That: he/she (never resided in the United States (dates); _____;

That: he/she resides at _____;

That: he/she acquired the nationality of the United States by virtue of _____

_____

That: he/she acquired the nationality of _____ by virtue of

_____

That: he/she _____
(The action causing expatriation should be set forth succinctly)

_____

That: he/she thereby expatriated _____ self on _____ under the provisions of Section _____ of (the Nationality Act of 1940)* (the Immigration and Nationality Act of 1952)*

That the evidence of such action consists of the following:

That attached to and made a part of this certificate are the following documents or _____ copies thereof:

In testimony whereof, I have hereunto subscribed by name and affixed my office seal this _____ day of _____, _____.

_____
(Signature)

[SEAL]

_____
(Title)

*Strikeout inapplicable item.

SEE REVERSE FOR APPEAL PROCEDURES

FS-348

Appeal Procedures

Any holding of loss of United States nationality may be appealed to the Board of Appellate Review of the Department of State within one year after approval of the certificate of loss of nationality. The regulations governing appeals are set forth at Title 22 of the Code of Federal Regulations, Part 7. Notice of appeal should be addressed to the Board of Appellate Review, and may be submitted through an American Embassy or Consulate or through an authorized attorney in the United States or directly to the Board of Appellate Review, Department of State, Washington, D.C. 20520.

The appeal must be in writing and it must state with particularity the reason why it is being made. It may be accompanied by a legal brief. Any statement of facts or circumstances not mentioned when the case was previously considered should be sworn to before an official authorized to take oaths and should be supported by the best evidence obtainable.

For additional information about appeal procedures and to obtain copies of the relevant provisions of the Code of Federal Regulations, consult the nearest American Embassy or Consulate, or write to the Board of Appellate Review, Department of State, Washington, D.C. 20520.

Sample of the Oath Renunciation

OATH OF RENUNCIATION OF THE NATIONALITY
OF THE UNITED STATES

(This form has been prescribed by the Secretary of State pursuant to Section 349 (a) (5) of the Immigration and Nationality Act, 66 Stat. 268, as amended by Public Law 95-432, October 10, 1978, 92 Stat. 1046.)

Embassy/Consulate General of the United States of America at

_____, ss:

I, _____, a national of the United States,
(Name)

solemnly swear that I was born at _____,
(City or town)

_____, _____, on _____.
(Province or country) (State or country) (Date)

That I am a national of the United States by virtue of _____
(Street)

_____.
(City) (State)

That I am a national of the United States by virtue of

_____.

(If a national by birth in the United States, or abroad, so state: if

_____

naturalized, give the name and place of the court in the United States before

_____

which naturalization was granted and the date of such naturalization.)

That I desire to make a formal renunciation of my American nationality, as provided by section 349 (a) (5) of the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely renounce my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

_____
(Signature)

Subscribed and sworn to before me this _____ day of _____,

_____, in the American Embassy/Consulate General at _____.

_____
(Signature of officer)

_____
(Typed name of officer)

SEAL

_____
(Title of officer)

Renunciation of United States Citizenship
Statement of Understanding Concerning the Consequences and Ramifications of Renunciation

I, _____, understand that:

1. I have the right to renounce my United States citizenship.
2. I am exercising my right of renunciation freely and voluntarily without force, compulsion, or undue influence placed upon me by any person.
3. Upon renouncing my citizenship, I will become an alien with respect to the United States, subject to all the laws and procedures of the United States regarding entry and control of aliens.
4. If I do not possess the nationality/citizenship of any country other than the United States, upon my renunciation I will become a stateless person and may face extreme difficulties traveling internationally and entering most countries.
5. If I am found to be deportable by a foreign country, my renunciation may not prevent my involuntary return to the United States.
6. My renunciation may not affect my military or selective service status, if any. I understand that any problems in this area must be resolved with the appropriate agencies.
7. My renunciation may not affect my liability, if any, to prosecution for any crimes which I may have committed or may commit in the future which violate United States law.
8. My renunciation may not exempt me from United States income taxation. With regard to United States taxation consequences, I understand that I must contact the United States Internal Revenue Service. Further, I understand that if my renunciation of United States citizenship is determined by the United States Attorney General to be motivated by tax avoidance purposes, I will be found excludable from the United States under the Immigration and Nationality Act, as amended.
9. The extremely serious and irrevocable nature of the act of renunciation has been explained to me by (Vice) Consul _____ at the American Embassy/Consulate General at _____. I fully understand its consequences.

I (do not) choose to make a separate written explanation of my reasons for renouncing my United States citizenship. I (swear, affirm) that I have (read, had read to me) this statement in the _____ language and fully understand its contents.

Signature

Renunciant's typed name

(1996 Change)

CONSULAR OFFICER'S ATTESTATION

_____ appeared personally and (read, had read to him)
(Name) (Circle one verb)

this Statement after my explanation of its meaning and the consequences of renunciation of United States citizenship and signed this Statement (under oath, by affirmation) before me this
(Circle one)

_____ day of _____ _____.
(Day of month) (Month) (Year)

Seal

_____
(Vice) Consul of the United States of America

WITNESSES' ATTESTATION

The undersigned persons certify that they witnessed the personal appearance of _____ before the consular officer
(Name)

_____, who explained the seriousness and
(Name)

consequences of renunciation of United States citizenship and the meaning of the attached Statement of Understanding, after which this Statement was signed (under oath, by affirmation) before the named
(Circle one)

consular officer and undersigned witnesses this _____ day of
(Day of month)

_____ _____.
(Month) (Year)

Witness _____ _____
(Full name) (Complete address)

Witness _____ _____
(Full name) (Complete address)

VZCZCFSO437

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FM SECSTATE WASHDC

TO ALL DIPLOMATIC AND CONSULAR POSTS PRIORITY

SPECIAL EMBASSY PROGRAM

BT

UNCLASS SECTION 01 OR 03 STATE 238957

INFORM CONSULS

E.O. 12958: N/A

TAGS: CPAS

SUBJECT: LOSS OF NATIONALITY AND TAXATION

REF: A) 7 FAM 1220 AND 1250, SPECIFICALLY 1253 AND 1254.4. B) STATE 219622

1. SUMMARY. Recent legislation potentially affecting the income, estate, and gift taxes of individuals who lost U.S. citizenship was signed into law on August 21, 1996. These changes to the Internal Revenue Code will require the provision of certain information from the former citizen to the Internal Revenue Service (IRS). This cable outlines consular requirements at the time of documentation of loss or renunciation of citizenship. END SUMMARY.

2. This is an action message. Please see paragraphs 8 and 9.

3. The Health Insurance Portability and Accountability Act of 1996, (otherwise known as the Kennedy-Kassebaum Bill), P.L. 104-191 was signed into law on August 21, 1996. It contains changes in the taxation of U.S. citizens who renounce or otherwise lose U.S. citizenship.

4. In general, any person who lost U.S. citizenship within 10 years immediately preceding the close of the taxable year, whose principal purpose in losing citizenship was to avoid taxation, will be subject to continued taxation. For purposes of this statute, persons are presumed to have a principal purpose of avoiding taxation if 1) their average annual net income tax for a five year period before the date of loss of citizenship is greater than $100,000, or 2) their net worth at the date of loss is $500,000 or more. The effective date of the law is retroactive to February 6, 1995. Posts need not concern themselves with cases completed before receipt of this telegram. The Department will retrieve previous files and forward copies of CLNs to IRS.

5. FYI, the presumption of tax avoidance may not apply to certain dual nationals, long term residents, renunciants under age 18.5 and other certain individuals specified in IRS regulation. This exemption requires a ruling by the Secretary of Treasury. Posts are not/not required to determine exemptions; the IRS will decide. Persons seeking an exemption should contact the Treasury Dept, Internal Revenue Service. (See para 13.)

6. The law requires all persons who lose U.S. citizenship to provide a statement which includes:

A. The person's tax identification number (usually his/her social security number);
B. The principal foreign residence mailing address;
C. The foreign country in which the individual is residing;
D. The foreign country of which such individual is a citizen; and
E. For individuals having the net worth dollar amount mentioned in para 4, information detailing their assets and liabilities.

7. To simplify the Department's role in this process, the IRS is developing a form which will assist in obtaining this information. The new form will become an attachment to the IRS' copy of the CLN. If a person refuses to submit the information, a notation reflecting this will be included in the information submitted to the IRS.

8. ACTION REQUEST: A) Effective upon receipt of this message, posts must begin obtaining the information indicated in para 6 from any person who loses his/her citizenship pursuant to any provision of Section 349(a) INA. (The IRS will determine whether an individual falls within one of the exempt categories. Posts should not/not make that determination nor should posts determine whether tax avoidance was a motivation for loss of citizenship.) Until the IRS develops a form, posts should obtain the information in a separate, supplemental statement completed by the potential expatriate at the time of preparation of the CLN either when signing Statement of Voluntary Renunciation or executing Oath of Renunciation and Statement of Understanding.

B) This information should be included in CLN packages sent to the Dept (CA/OCS/ACS) for approval.

C) If the person refuses to provide the information requested, post should so indicate in the CLN package.

D) Posts must also prepare an extra copy of the CLN and its attachments so that we can forward the additional copy to the IRS.

9. In processing renunciation cases, posts should amend the Statement of Understanding (7 FAM 1253(d)) to read verbatim as follows:

THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996
PUBLIC LAW 104-191 SIGNED AUGUST 21, 1996 EFFECTIVE FEBRUARY 6, 1995

THE LAW REQUIRES ALL PERSONS WHO LOSE U.S. CITIZENSHIP TO PROVIDE A STATEMENT WHICH INCLUDES:

A) YOUR U.S. TAX IDENTIFICATION NUMBER OR U.S. SOCIAL SECURITY NUMBER:

B) YOUR PRINCIPAL FOREIGN RESIDENCE MAILING ADDRESS:

C) THE FOREIGN COUNTRY IN WHICH YOU RESIDE:

D) THE FOREIGN COUNTRY OF WHICH YOU ARE A CITIZEN:

E) INFORMATION DETAILING YOUR ASSETS AND LIABILITIES IF:

1. YOUR AVERAGE ANNUAL NET INCOME TAX FOR A FIVE YEAR PERIOD BEFORE THE DATE OF LOSS OF U.S. CITIZENSHIP IS GREATER THAN $100,000 U.S., OR

2. YOUR NET WORTH AT THE DATE OF LOSS OF U.S. CITIZENSHIP IS $500,000 U.S., OR MORE.

_____
SIGNATURE

_____
PRINTED NAME

REN_PL 12/23/96
PUBLIC LAW 104-191 (LOSS CASES)

Please Provide the following information:

A) Your tax identification number (usually your Social Security Number)

_____.

B) Your principal foreign residence mailing address.

_____

_____

_____

C) The foreign country in which you reside._____

D) The foreign country of which you are a citizen._____

E) Please list your assets and liabilities in detail if 1) your average annual net income tax for the five year period before this date was greater than $100,000 (U.S.), or 2) your net worth is $500,000 (U.S.) or more.

_____

_____

_____

_____

_____

Summaries of IRS Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents during the Period from January 1, 1997 through July 1, 2002

Summarized below are IRS private letter rulings that were issued to former citizens and former long-term residents and publicly released during the period from January 1, 1997 through July 1, 2002 under the following categories:

Page

(1) Determinations of a principal purpose of tax avoidance (11 rulings) A-219

(2) Determinations of a lack of a principal purpose of tax avoidance 132 rulings) A-221

(3) Complete and good faith submissions: No opinion as to principal purpose of tax avoidance (127 rulings) A-240

Summaries of IRS Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents during the Period from January 1, 1997 through July 1, 2002

Determinations of a principal purpose of tax avoidance (11 rulings)

For each of the rulings in this category, the holding is the same --A (or the taxpayer) has made a complete and good faith submission and, therefore, will not be treated as having a principal purpose of tax avoidance. However, the information submitted clearly establishes a principal purpose to avoid taxes and, thus, A (or the taxpayer) is subject to the alternative tax regime.

(1) PLR 200137043 (6/20/2001) - A was born in and is a citizen of Country B, by virtue of his birth in Country C. A became a U.S. citizen by virtue of his birth to a U.S. citizen. A formally renounced his U.S. citizenship.

(2) PLR 200110006 (11/15/2000) - A was born in and is a citizen and resident of Country B. A later became a U.S. citizen. A returned to Country B and intends to renounce her U.S. citizenship.

(3) PLR 200103067 (10/26/2000) - A became a U.S. citizen at birth on the basis of her father's U.S. citizenship. A formally renounced her U.S. citizenship. A was not present in the United States for more than 30 days a year during each year of the 10-year period ending on the date of her expatriation. A is a resident subject to Country D income tax.

(4) PLR 200047016 (8/18/2000) - A and A's parents were born in Country F. A became a naturalized U.S. citizen. A later reclaimed his Country F citizenship. A intends to formally renounce his U.S. citizenship.

(5) PLR 200024033 (3/17/2000) - A became a U.S. citizen at birth on the basis of his father's U.S. citizenship. A later became a resident of Country E and formally renounced his U.S. citizenship. A was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of his expatriation.

(6) PLR 200012077 (3/24/2000) - A and his parents were born in Country C. A's wife was born in the United States. A became a U.S. citizen. After residing in the United States for a period of time, A and his wife moved back to Country C. A intends to renounce his U.S. citizenship, but A's wife does not intend to renounce her U.S. citizenship. A intends to live permanently in Country C. A is domiciled in Country C and is subject to Country C income tax on his worldwide income at a rate comparable to that of the United States. A is also subject to Country C estate tax.

(7) PLR 200011042 (3/17/2000) - A was born in and is a citizen of Country B. A became a naturalized U.S. citizen. A later renounced his U.S. citizenship. A was

not present in the United States for more than 30 days a year during each year of the 10-year period ending on the date of his expatriation.

(8) PLR 199948033 (9/2/99) - A is a citizen and resident of Country C. A became a U.S. citizen. A later renounced her U.S. citizenship. A was not present in the United States for more than 30 days a year during each year of the 10-year period ending on the date of her expatriation.

(9) PLR 199933026 (8/20/99) - A was born in the United States. A's mother was born in Country C and his father was born in the United States to parents who were citizens of Country C. A applied for and obtained citizenship in Country C. A later renounced his U.S. citizenship. A's wife is a U.S. citizen who does not intend to expatriate. A has a vacation residence in Country D where he keeps the majority of his personal belongings. A also has a vacation home in the United States. A's family ties are primarily in the United States. A conducts investment activities and administers property from Country B, Country D, and the United States and conducts routine personal banking activities from Country B, Country E, and the United States. It is possible that A may, in the future, become a resident of another country, possibly Country D, Country E, or the United States.

(10) PLR 199930019 (7/30/99) - A was born in Country C and became a dual resident of the United States and Country C at birth. A lived in the United States (12 years), Country C (17 years) and Country D (2 years). A later relinquished his U.S. citizenship when he was 31 years old and a resident of Country D. A is currently a resident of Country C and is subject to tax in Country C on his worldwide income. If A had remained a U.S. citizen, his residual U.S. tax liability with respect to income received in the first taxable year after his expatriation would have been approximately 10.5 percent of his total taxable income.

(11) PLR 199925022 (6/25/99) - A was born in the United States and became a dual resident of the United States and Country C at birth. A later relinquished her citizenship when she was 37 years old and a resident of Country D. A has been a resident of Country D for 10 years but eventually plans to return to Country C. A represented that most of her family, political, and social ties are in Country C and that she relinquished citizenship because she wanted to be an exclusive national of Country C. Because A is a resident not domiciled in Country D, she is not taxed in Country D on non-Country D source income unless she remits such income to Country D.

Summaries of IRS Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents during the Period from January 1, 1997 through July 1, 2002

Determinations of a lack of a principal purpose of tax avoidance (132 rulings)

For each of the rulings in this category, the holding is the same --A (or the taxpayer) has made a complete and good faith submission and, therefore, will not be treated as having a principal purpose of tax avoidance. Furthermore, the information submitted clearly establishes a lack of principal purpose to avoid taxes and, thus, A (or the taxpayer) is not subject to the alternative tax regime.

(1) PLR 200224024 (3/15/2002) - A was born in and is a citizen of Country D. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status by returning his green card to the Immigration and Naturalization Service.

(2) PLR 200225011 (3/11/2002) - A was born in Country C. A came to the United States for employment reasons and obtained a green card. A is also a citizen of Country C where he now lives. A relinquished his lawful permanent U.S. resident status. A is subject to Country C tax on his worldwide income.

(3) PLR 200221037 (2/22/2002) - A was born in and is a citizen of the United States. A later became a resident of Country E. A intends to renounce her U.S. citizenship.

(4) PLR 200218028 (2/1/2002) - A became a lawful permanent resident of the United States and obtained her green card. A later moved to Country C, where A has been a citizen her whole life. A relinquished her lawful permanent U.S. resident status.

(5) PLR 200218024 (1/31/2002) - A was born in Country B. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A has been residing in Country B and is subject to Country B tax on his worldwide income.

(6) PLR 200216021 (1/18/2002) - A and A's parents were born in and are citizens of Country B. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status.

(7) PLR 200216020 (1/18/2002) - A was born in and is a citizen of Country B. A's spouse was born in and is a citizen of Country C. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status.

(8) PLR 200216019 (1/18/2002) - A was born in and is a citizen of Country D. A relinquished his long-term U.S. resident status.

(9) PLR 200214022 (1/3/2002) - A was born in Country B. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A now resides in Country D and is subject to Country D tax on his worldwide income. A narrowly failed to meet the standard that he was not present in the United States for more than 30 days a year during each year of the 10-year period ending on the date of his expatriation.

(10) PLR 200214013 (1/2/2002) - A was born in Country B. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A now resides in Country B and is subject to Country B tax on his worldwide income.

(11) PLR 200212019 (12/20/2001) - A and A's parents were born in Country D. A has been a citizen of Country D his entire life by reason of his birth in Country D. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status.

(12) PLR 200108037 (11/29/2001) - A was born in Country C. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status.

(13) PLR 200109009 (11/24/2001) - A, A's spouse, and A's parents were born in Country D. A has been a citizen of Country D his entire life by reason of his birth in Country D. A became a lawful permanent resident of the United States and obtained his green card. A intends to relinquish his lawful permanent U.S. resident status by returning his green card to the U.S. Embassy in Country D.

(14) PLR 200109008 (11/24/2001) - A, A's spouse, and A's parents were born in Country D. A has been a citizen of Country D her entire life by reason of her birth in Country D. A became a permanent resident of the United States and obtained her green card. A intends to relinquish her lawful permanent U.S. resident status by returning her green card to the U.S. Embassy in Country D.

(15) PLR 200050031 (9/15/2001) - A and A's parents were born in and are citizens of Country D. A relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country D.

(16) PLR 200145021 (8/8/2001) - A has been a citizen of Country C his entire life. A became a permanent resident of the United States and obtained his green card. A later returned to Country C.

(17) PLR 200133024 (8/2/2001) - A was born in and is a citizen of country D. A relinquished his lawful permanent U.S. resident status.

(18) PLR 200133023 (8/2/2001) - A was born in and is a citizen of country D. A relinquished his lawful permanent U.S. resident status.

(19) PLR 200139021 (7/29/2001) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A has now retired and returned to Country B. A will elect to be treated as a resident of Country B under the provisions of the tax treaty between the United States and Country B. A will not waive the benefits of the treaty applicable to residents of Country B. A is subject to Country B tax on his worldwide income.

(20) PLR 2001141042 (7/16/2001) - A was born in and is a citizen of the United States. A is also a citizen of Country D by virtue of his father's Country D citizenship. A later renounced his U.S. citizenship. A is a citizen and resident of Country D for income tax purposes.

(21) PLR 200134011 (5/23/2001) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A is now retired and has returned to Country B. A is subject to Country B tax on his worldwide income.

(22) PLR 200133026 (5/18/2001) - A and A's parents were born in and are citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to tax in Country B.

(23) PLR 200133021 (5/16/2001) - A was born in Country C. A then became a citizen of Country D. A became a lawful permanent resident of the United States and later relinquished his lawful permanent U.S. resident status.

(24) PLR 200133022 (5/16/2001) - A was born in Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status.

(25) PLR 200137030 (5/15/2001) - A was born in and is a citizen of Country C. A applied for and received a United States citizenship by virtue of her mother's U.S. citizenship. A later relinquished her U.S. citizenship.

(26) PLR 200131025 (5/10/2001) - A and A's parents were born in and are citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to tax in Country B.

(27) PLR 200130023 (4/30/2001) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A is now retired and has returned to Country B. A is subject to Country B tax on his worldwide income.

(28) PLR 200130024 (4/27/2001) - A was born in Country B. A became a lawful permanent resident of the United States and obtained her green card. A's husband has now retired and the couple have returned to Country B. A relinquished her

lawful permanent U.S. resident status. A is subject to Country B tax on her worldwide income.

(29) PLR 200128041 (4/16/2001) - A was born in Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status.

(30) PLR 200125059 (3/23/2001) - A was born in Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status.

(31) PLR 200125015 (3/16/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country C.

(32) PLR 200125016 (3/16/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country C.

(33) PLR 200123037 (3/9/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country C.

(34) PLR 200123038 (3/9/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country C.

(35) PLR 200119050 (2/13/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country C.

(36) PLR 200119044 (2/9/2001) - A was born in Country B. A became a lawful permanent resident of the United States and obtained his green card. A has now retired and returned to Country B. A will surrender his green card upon receipt of a favorable ruling. A is subject to Country B tax on his worldwide income.

(37) PLR 200119043 (2/9/2001) - A was born in Country B. A accompanied her husband to the United States for his employment and obtained a green card. A's husband is now retired and the couple have returned to Country B. A will surrender her green card upon the receipt of a favorable ruling. A is subject to Country B tax on her worldwide income.

(38) PLR 200118042 (2/5/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States and obtained her green card. A relinquished her lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country C.

(39) PLR 200116034 (1/22/2001) - A and A's father were born in and are citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country B.

(40) PLR 200116035 (1/22/2001) - A and A's parents were born in and are citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country B.

(41) PLR 200116029 (1/18/2001) - A was born in Country C. A became a dual citizen of the United States and Country C at birth. A intends to relinquish her U.S. citizenship.

(42) PLR 200116030 (1/18/2001) - A was born in Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status.

(43) PLR 200109044 (12/4/2000) - A is a citizen of Country D. A became a lawful permanent resident of the United States and obtained her green card. A intends to expatriate to Country D, relinquish her lawful permanent U.S. resident status and become a resident fully liable to income tax in Country D.

(44) PLR 200111005 (12/1/2000) - A was born in Country B. A became a lawful permanent resident of the United States, obtained her green card, and has lived and worked in the United States since that time. A returned to Country B and commenced to be treated as a nonresident of the United States. A is subject to Country B tax on her worldwide income.

(45) PLR 200105054 (11/3/2000) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A is subject to Country B tax on his worldwide income.

(46) PLR 200105051 (11/3/2000) - A was born in Country B. A's spouse was transferred to the United States for employment reasons and A obtained a green card. A returned to Country B and relinquished her lawful permanent U.S. resident status. A is subject to Country B tax on her worldwide income.

(47) PLR 200111002 (10/31/2000) - A was born in the United States. A became a dual citizen of the United States and Country C at birth. A continues to be a citizen of C and is a resident of D. A has not resided in the United States since infancy. A intends to renounce her U.S. citizenship.

(48) PLR 200114003 (10/31/2000) - A and A's parents were born in and are citizens of Country D. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status.

(49) PLR 200052029 (9/29/2000) - A was born in the United States and became a dual citizen of the United States and Country D on the basis of his parents being citizens of Country D. A is a citizen and resident of Country D for income tax purposes. A renounced his U.S. citizenship when he was less than 18-1/2 years of age.

(50) PLR 200052030 (9/29/2000) - A was born in and is a citizen of Country E. A became a lawful permanent resident of the United States and obtained his green card. A intends to relinquish his lawful permanent U.S. resident status and return to Country E. A is a resident fully liable to income tax in Country E.

(51) PLR 200052033 (9/29/2000) - A and A's parents were born in and are a citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to tax in Country B.

(52) PLR 200052034 (9/29/2000) - A and A's parents were born in and are a citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident fully liable to tax in Country B.

(53) PLR 200045018 (8/10/2000) - A was born in and is a citizen of Country E. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status and moved to Country E. A is a resident fully liable to income tax in Country E.

(54) PLR 200045017 (8/10/2000) - A was born in and is a citizen of Country E. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status and moved to Country E. A is a resident fully liable to income tax in Country E.

(55) PLR 200044037 (8/10/2000) - A was born in and is a citizen of Country D. A became a lawful permanent resident of the United States and obtained his green card. A intends to renounce his U.S. citizenship shortly after issuance of this private letter ruling and move to Country E, the country where he was born. A is a resident fully liable to income tax in Country D.

(56) PLR 200044036 (8/10/2000) - A was born in and is a citizen of Country D. A became a permanent resident of the United States and obtained her green card. A intends to renounce her U.S. citizenship shortly after issuance of this private letter ruling and move to Country E, the country in which A's husband was born. A will become a resident fully liable to income tax in Country D.

(57) PLR 200044027 (8/7/2000) - A and A's parents were born in and are citizens of Country C. A became a citizen of Country B and has lived in Country B. A then became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status.

(58) PLR 200042023 (7/21/2000) - A was born in Country B. A is now a citizen of Country C and subject to Country C tax on her worldwide income. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status and returned to Country B.

(59) PLR 200042022 (7/21/2000) - A was born in Country B. A is now a citizen of Country C and subject to Country C tax on her worldwide income. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status and returned to Country B.

(60) PLR 2000420021 (7/21/2000) - A was born in Country B. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status and returned to Country B. A is a resident fully liable to income tax in Country B.

(61) PLR 200040030 (7/12/2000) - A and A's mother were born in and are citizens of Country E. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country E.

(62) PLR 200037038 (6/16/2000) - A, A's husband, and A's parents were born in Country B. A's husband came to the United States for employment reasons. A and her husband obtained a green card. After 1-1/2 years, A's husband was reassigned to work in Country B. A later relinquished her lawful permanent U.S. resident status when her husband retired.

(63) PLR 200037037 (6/16/2000) - A, A's wife, and A's parents were born in Country B. A came to the United States for employment reasons. A and his wife obtained a green card. After 1-1/2 years, A was reassigned to work in Country B. A later relinquished his lawful permanent U.S. resident status when he retired.

(64) PLR 200036044 (6/13/2000) - A's father and spouse were born in Country D. Although born in Country E, A is citizen of Country D because of his mother and father's Country D citizenship. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to tax in Country D.

(65) PLR 200035032 (6/8/2000) - A, A's wife, and A's parents were born in Country E. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country E.

(66) PLR 200032032 (5/16/2000) - A was born in Country B. A became a naturalized U.S. citizen. A later established residence in Country B and intends to formally renounce his U.S. citizenship.

(67) PLR 200031036 (5/5/2000) - A was born in the United States. A became a citizen of Country C by reason of her marriage to a citizen of County C in 1959. A has lived primarily in Country C since 1959. A narrowly failed to meet the standard that she was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of her expatriation. A intends to formally relinquish her U.S. citizenship.

(68) PLR 200031035 (5/5/2000) - A and A's parents were born in and are a citizens of Country F. A's wife was born in Country G. A became a lawful permanent resident of the United States and obtained his green card. A later relinquished his lawful permanent U.S. resident status. A is a resident fully liable to income tax in Country G.

(69) PLR 200027041 (4/12/2000) - A was born in and has been a citizen of Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status. A intends to live permanently in Country C, where he is domiciled and subject to Country C income tax on his worldwide income at a rate comparable to that of the United States. A narrowly failed to meet the standard that he was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of his expatriation.

(70) PLR 200019030 (2/14/2000) - A and A's parents were born in Country B. A moved to the United States to attend a graduate level degree program and later performed services as an employee in the United States. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a citizen of and intends to live permanently in Country B. A is domiciled in Country B and is subject to Country B income tax on his worldwide income at a rate comparable to that of the United States.

(71) PLR 200019025 (2/11/2000) - A and A's parents were born in Country E. A became a lawful permanent resident of the United States and obtained her green card. A later relinquished her lawful permanent U.S. resident status. A is a citizen and resident of Country E and is fully liable to Country E income tax.

(72) PLR 200017036 (2/2/2000) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status and moved back to Country B. A is a resident fully liable to tax on his worldwide income in Country B.

(73) PLR 200014006 (1/10/2000) - A was born in and is a citizen of Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status when transferred by

his employer to Country B. A is a resident fully liable to tax on his worldwide income in Country B.

(74) PLR 200011045 (12/22/99) - A was born in and is a citizen of Country B. A's husband was born in and is a citizen of Country C. A moved to the United States with her husband for his employment. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status when her husband retired and moved back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to that of the United States.

(75) PLR 200011043 (12/22/99) - A was born in and is a citizen of Country C. A's wife was born in and is a citizen of Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status when he moved with his wife to Country B. A intends to live permanently in Country B and is subject to Country B income tax on his worldwide income at a rate comparable to that of the United States.

(76) PLR 200011039 (12/21/99) - A and his wife were born in Country B and they have been citizens of Country B since birth. A's parents were also born in Country B. A moved with his wife to the United States for employment reasons. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he moved with his wife to back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on his worldwide income at a rate comparable to that of the United States.

(77) PLR 200011038 (12/21/99) - A and her husband were born in Country B and they have been citizens of Country B since birth. A's parents were also born in Country B. A moved with her husband to the United States for employment reasons. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status when her husband was transferred back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to that of the United States.

(78) PLR 200008041 (11/30/99) - A and his wife were born in Country B and they have been citizens of Country B since birth. A moved with his wife to the United States for employment reasons. A became a lawful permanent resident of the United States. A retired from his employer and moved back to Country B. A intends to relinquish his lawful permanent U.S. resident status. A intends to live permanently in Country B and is subject to Country B income tax on his worldwide income at a rate comparable to that of the United States.

(79) PLR 200008035 (11/30/99) - A and her husband were born in Country B and they have been citizens of Country B since birth. A's parents were also born in Country B. A moved with her husband to the United States for employment

reasons. A became a lawful permanent resident of the United States. A relinquished her lawful permanent U.S. resident status when her husband was later transferred back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable that of the United States.

(80) PLR 200003020 (11/27/99) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country B tax on her worldwide income.

(81) PLR 200005032 (11/5/99) - A was born in and is a citizen of Country B. A moved to the United States with her husband for employment reasons and obtained a green card. A later relinquished her lawful permanent U.S. resident status when her husband was transferred back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to that of the United States.

(82) PLR 200003035 (10/26/99) - A was born in County B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is subject to Country B tax on her worldwide income.

(83) PLR 200001034 (10/14/99) - A was born in the United States. A became a dual citizen of the United States and Country B at birth. A intends to renounce his U.S. citizenship. A continues to be a citizen of Country B.

(84) PLR 200001023 (10/7/99) - A was born in and is a citizen of Country B. A became a lawful permanent resident of the United States. A also became a citizen of Country C, which is his wife's country of birth and citizenship. A later relinquished his lawful permanent U.S. resident status. A is subject to Country C tax on his worldwide income.

(85) PLR 199951030 (9/28/99) - A was born in the United States. A relinquished her U.S. citizenship. A became a citizen of the country in which her parents were born.

(86) PLR 199951019 (9/23/99) - A and her husband were born in and are citizens of Country B. A's parents were also born in Country B. A moved with her husband to the United States for employment reasons and obtained a green card. A relinquished her lawful permanent U.S. resident status when her husband was later transferred back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to that of the United States.

(87) PLR 199951016 (9/23/99) - A and his wife were born in and are citizens of Country B. A's parents were also born in Country B. A moved with her husband to the United States for employment reasons and obtained a green card. A

relinquished her lawful permanent U.S. resident status when her husband was later transferred back to Country B. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to that of the United States.

(88) PLR 199946019 (8/20/99) - A was born in the United States. A became a dual citizen of the United States and Country D at birth. A has been a resident of County D since she was born. A later renounced her U.S. citizenship.

(89) PLR 199945044 (8/10/99) - A and A's parents were born in Country B. A married a U.S. citizen and obtained a green card. A returned to Country B to care for her elderly, ailing parents. A later relinquished her lawful permanent U.S. resident status. A is a resident of Country B and is subject to Country B income tax at rates that are comparable to the United States.

(90) PLR 199942014 (7/22/99) - A, A's spouse, and A's parents were all born in Country E. A has been a citizen of Country E since birth. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident fully subject to income tax in Country E.

(91) PLR 199937029 (6/21/99) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent resident status when he retired and returned to Country B to care for his parents. A is a resident subject to Country B tax on his worldwide income. A's estate will be subject to Country B estate tax.

(92) PLR 199936049 (6/10/99) - A was born in and is a citizen of Country B. A's wife was born in and is a resident of Country D. A came to the United States for employment reasons. A and his wife obtained lawful permanent resident status in the United States. A was later transferred to Country D by his employer. A and his wife decided to reside permanently in Country D. A later relinquished his lawful permanent U.S. resident status. A is subject to Country D tax on worldwide income.

(93) PLR 199935074 (6/9/99) - A was born in the United States. A was stationed by the U.S. Army in Country C. A married a Country C citizen and returned to the United States. After his discharge from the Army, A received a college degree and returned with his wife to Country C. A's wife opened a restaurant in Country C. A owns a home in Country C and both of his daughters are Country C citizens. A and his wife intend to live permanently in Country C. A was not present in the United States for more than 30 days during each year of the 10-year period which will end on the date of his expatriation. Under Country C law, it is not possible for A to possess dual citizenship. Accordingly, A intends to renounce his U.S. citizenship. A will be subject to Country C tax on his worldwide income. A's estate will be subject to Country C inheritance tax.

(94) PLR 199935036 (6/4/99) - A, A's wife, and A's parents were born in Country B. A became a professor at a U.S. institution and obtained his green card. After retiring from the university, A relinquished his lawful permanent U.S. resident status and returned to Country B, a jurisdiction with tax rates comparable to the United States. A is subject to Country B tax on his worldwide income. A has a burial plot in Country B, where his wife is buried. A has four brothers, three sisters, and numerous nieces and nephews, all of whom live in Country B.

(95) PLR 199935072 (6/1/99) - A was born in Country B. A's parents were citizens of Country B. A became a lawful permanent resident of the United States. All of A's family lives in Country B. A always planned to retire to Country B to be with his family. A and his sister purchased a home in Country B. A sold his U.S. home and immediately moved to Country B. A later relinquished his lawful U.S. permanent resident status. A became ill shortly after residency termination and died. The executor of A's estate submitted the ruling request on A's behalf.

(96) PLR 199931027 (5/10/99) - A and A's parents were born in Country B. A became a lawful permanent resident of the United States. A later moved to Country B where he is subject to Country B income tax, and has lived there ever since. A relinquished his lawful permanent U.S. resident status.

(97) PLR 199928028 (4/20/99) - A and A's parents were born in and are citizens of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country B income tax.

(98) PLR 199927032 (4/13/99) - A was born in Country B. A left Country B as a refugee and moved to the United States to attend school and work. A became a naturalized U.S. citizen. A was transferred to Country C by his employer and has lived in Country C with his wife and children ever since. A relinquished his U.S. citizenship. A is now a citizen of both Country B and Country C and has paid taxes in Country C, a high tax jurisdiction. A has not spent more than 30 days in the United States in the past ten years. A has no further ties to the United States. A's business and social activities are all based in Country C, where he owns his own home.

(99) PLR 199926052 (4/13/99) - A was born in the United States. A became dual citizen of the United States and Country C at birth by virtue of his father's Country C citizenship. A resided in the United States from birth until the age of 6 months. A returned to the United States for 3 years of college, but spent his summers outside the United States. A has not resided in the United States since graduating from college and has been residing in Country C. A formally renounced his U.S. citizenship. At the time of his expatriation, A was engaged to a citizen of Country C. A was present in the United States for 15 days in the year of expatriation. In the two years prior to expatriation, A was physically present in the United States for 30 days and 29 days, respectively. A has no relationships, affiliations, or ties to the United States.

(100) PLR 199927013 (4/7/99) - A obtained her U.S. citizenship by virtue of her mother's U.S. citizenship. A was born in and is a resident of Country C. A has resided in Country C all her life and has never resided in the United States. A formally renounced her U.S. citizenship. A was present in the United States for 12 days in the year of expatriation. In the two years prior to expatriation, A was physically present in the United States for 18 days and 17 days, respectively. A has no relationships, affiliations, or ties to the United States.

(101) PLR 199926031 (4/5/99) - A became a U.S. citizen at birth by virtue of a parent's U.S. citizenship. A was born in and is a citizen of Country C. A has resided in Country C all her life and has never resided in the United States. A formally renounced her U.S. citizenship. A was present in the United States for 10 days in the year of expatriation. In the two years prior to expatriation, A was physically present in the United States for 12 days and 10 days, respectively. A has no relationships, affiliations, or ties to the United States. A is married to a Country C citizen and intends to live, work, complete her education, and raise her family in Country C.

(102) PLR 199924035 (3/19/99) - A has been a citizen of Country B since birth by virtue of her parent's citizenship. A's husband has been a Country B citizen since birth. A moved to the United States with her husband for employment reasons. A became a lawful permanent resident of the United States. A's husband was transferred to a European post and then a Country B post by his employer. A later relinquished her lawful permanent U.S. resident status. A intends to live permanently in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to the United States.

(103) PLR 199924034 (3/19/99) - A and A's parents were born in Country B. A has been a Country B citizen since birth. A came to the United States for employment reasons. A became a lawful permanent resident of the United States. A was transferred to a European post and then a Country B post by his employer. A later relinquished his lawful permanent U.S. residency. At the time of residency termination, A had lived and worked outside of the United States for nine years. A intends to live permanently in Country B and is subject to Country B tax on his worldwide income at a rate comparable to the United States.

(104) PLR 199924025 (3/19/99) - A was born in Country E. A moved to Country C when he was one year old and subsequently became a naturalized citizen of Country C. Country C taxes its citizens on a worldwide basis. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status.

(105) PLR 199922021 (2/25/99) - A was born in Country B. A's wife was born in the United States and is a U.S. citizen. A received a green card and later became a naturalized U.S. citizen. A moved from the United States to Country B on a foreign assignment and has been a tax resident of Country B ever since. A later formally renounced his U.S. citizenship. A's permanent home, personal

belongings, family and social relations, cultural and business activities, personal banking activities, and property interests are in Country B. A spent less than 20 days per year in the United States during his Country B assignment.

(106) PLR 199921030 (2/25/99) - A was born in and is a citizen of Country B. A moved to the United States to live and work. A became a lawful permanent resident of the United States. After A's employment in the United States terminated, A returned to Country B and relinquished his status as a lawful permanent U.S. resident. A is a Country B resident and is subject to Country B income tax on his worldwide income at a rate that is higher than the applicable U.S. income tax rates.

(107) PLR 199921029 (2/25/99) - A and his wife were born in and are citizens of Country B. A's parents were also born in Country B. A moved to the United States to work for employment reasons and obtained a green card. A later returned to Country B and relinquished his lawful permanent U.S. resident status. A intends to live permanently in Country B and is subject to Country B income tax on his worldwide income at a rate comparable to the United States.

(108) PLR 199918038 (2/5/99) - A and his parents were born in Country B, where A has been a Country B citizen since birth. A became a lawful permanent resident of the United States. A later relocated to Country B with his wife and children. A relinquished his lawful permanent U.S. resident status. A is a resident subject to Country B income tax.

(109) PLR 199917042 (1/29/99) - A and her parents were born in Country I. A married a citizen of Country I and they had two children while living in Country I. A's husband was moved to the United States for employment reasons and A obtained a green card. A later relinquished her lawful permanent U.S. resident status and moved back to Country I. A and her husband intend to dispose of their U.S. home, but are currently maintaining it as a vacation home. A is subject to Country I tax on income and gains. The inheritance tax on A's estate may be slightly less than that of the United States.

(110) PLR 199917041 (1/29/99) - A and his parents were born in Country I. A married a citizen of Country I. A moved to the United States for employment reasons and obtained a green card. A later retired, moved to Country I, and relinquished his lawful permanent U.S. resident status. A and his wife intend to dispose of their U.S. home, but are currently maintaining it as a vacation home. A is subject to Country I tax on income and gains. The inheritance tax on A's estate may be slightly less than that of the United States.

(111) PLR 199917037 (1/28/99) - A was born in and is a citizen of Country B. A became a lawful permanent resident of the United States to spend more time with her three daughters who were attending college in the United States. However, because of her other family, social, and business connections in Country B, she was unable to spend as much time as she had expected in the United States. On

one or more occasions, A was detained for questioning by the U.S. Immigration and Naturalization Service because she was spending too much time in Country B. A was informed that she did not need a green card if she was not going to reside in the United States. A determined she would not be able to reside in the Untied States and relinquished her lawful permanent U.S. resident status. A is a resident subject to Country B on income and gains in accordance with Country B sourcing rules.

(112) PLR 199917035 (1/28/99) - A, A's husband, and A's parents were born in Country B. A resided in the United States from 1975 to 1977 while her husband was employed by a U.S. company. The company transferred A's husband to Country C where she and her husband resided for four years. In 1981, A and her husband returned to the United States, again in connection with her husband's employment. At that time, A became a lawful permanent resident of the United States. In 1986, A and her husband relocated to Country B, where they remained until 1990, when the company again asked A's husband to return to the United States. A's husband retired from the company in 1994. A relinquished her lawful permanent U.S. resident status when she returned to Country B. A is a resident subject to Country B income tax at rates that are comparable to the United States. A's estate will also be taxed as rates that are comparable to the United States.

(113) PLR 199916038 (1/26/99) - A, A's wife, and A's parents were born in Country B. A resided in the United States from 1975 to 1977 while employed by a U.S. company and obtained his green card in 1975. The company transferred A to Country C where he and his family resided for four years. In 1981, A and his family returned to the United States, again in connection with his employment. In 1986, A and his wife relocated to Country B, where they remained until 1990, when the company again asked them to return to the United States. A retired from the company in 1994. A relinquished his lawful permanent U.S. resident status when he returned to Country B. A died after returning to Country B. A was subject to Country B tax at rates comparable to the United States. A's three children are all Country B citizens.

(114) PLR 199915048 (1/21/99) - A and A's parents were born in Country C. A is a citizen and resident of Country C and is subject to Country C tax. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status.

(115) PLR 199914029 (1/11/99) - A, A's wife, and A's parents were born in Country B. A's wife, children, and parents are Country B citizens. A moved to the United States in order to continue working for his employer, who was beginning a business in the United States. A obtained a green card. Due to ill health, A's employer chose to retire from the business and return to Country B. A plans to return to Country B and relinquish his lawful permanent U.S. resident status. A is a resident fully subject to income tax in Country B.

(116) PLR 199912015 (12/21/98) - A was born in and is a citizen of Country C. A came to the United States with her husband, who relocated to manage the U.S. operations of a family-owned business. A obtained a green card. The day-to-day operations of the family-owned business in Country C were managed by older generation family members of A and her husband. Later, in view of the age and health of the older generation family members, it was decided that A's husband should return to Country C to assume management responsibilities with respect to the Country C business operations. Accordingly, A relinquished her lawful permanent U.S. resident status in 1995 and moved with her husband to Country C. A was 31 years old at the time of residency termination. A is subject to Country C tax on her worldwide income. Country C's income tax rates are higher than those of the United States and A's total worldwide income tax liabilities for her 1995, 1996, and 1997 taxable years were higher than what her total worldwide income tax liabilities for each of those years would have been had A remained a lawful permanent U.S. resident.

(117) PLR 199912014 (12/21/98) - A was born in and is a citizen of Country C. A obtained his green card and came to the United States to manage the U.S. operations of a family-owned business. The day-to-day operations of the family-owned business in Country C were managed by older generation family members of A. Later, in view of the age and health of the older generation family members, it was decided that A should return to Country C to assume management responsibilities with respect to the Country C business operations. Accordingly, A relinquished his lawful permanent U.S. resident status in 1995 and moved to Country C. A was 36 years old at the time of residency termination. A is subject to Country C tax on his worldwide income. Country C's income tax rates are higher than those of the United States and A's total worldwide income tax liabilities for his 1995, 1996, and 1997 taxable years were higher than what his total worldwide income tax liabilities for each of those years would have been had A remained a lawful permanent U.S. resident.

(118) PLR 9808016 (11/18/97) - A, A's spouse, and A's parents were born in Country B. A is a citizen of Country B. A became a naturalized citizen of the United States. A later renounced his U.S. citizenship. A lives in and all of his personal belongings are located in Country C. A's social relations, cultural activities, and political interests are located in Country B and Country C. During each of the past five years, A has spent less than 19 days in the United States. A has no substantial social or cultural connections with the United States. A is a resident subject to Country C income tax. A is also subject to estate taxes in Country B or Country C depending on the relevant facts and circumstances at the time of his death.

(119) PLR 9807025 (11/17/97) - A was born in the United States while A's parents, who were both born and living in Country B, were visiting another child (a U.S. resident and citizen by birth) from the mother's prior marriage. A acquired citizenship in Country B by virtue of A's parents' citizenship and registry at a Country B embassy in the United States. A spent the first few months of life in

the United States and then left for Country B, where A has resided and worked ever since. A married a Country C citizen, who was born of Country B parents and educated in Country B. A's children were born in Country B and are engaged in full-time study in Country B. A's parents are now deceased. A relinquished his U.S. citizenship and maintains minimal connections to the United States. A was not present in the United States for more than eight days a year each year prior to the 10-year period ending with his expatriation.

(120) PLR 9807021 (11/4/97) - A was born in Country B and obtained U.S. citizenship by virtue of his father's U.S. citizenship. A was raised entirely outside of the United States, spending only occasional family vacations in the United States totaling approximately 10 weeks throughout the first 24 years of his life. At age 24 he spent approximately four months in a study program in the United States in furtherance of his European university requirements. He has had no other contact with the United States since that time. A intends to relinquish his U.S. citizenship. A has never had any employment in the United States or any other economic or investment activity in the United States. A is subject to Country B tax rates which are higher than the rate applicable in the United States. A is also be subject to Country B wealth tax.

(121) PLR 9807020 (11/4/1997)- A and his parents were born in Country B. A moved to the United States for employment reasons and became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status U.S. lawful permanent resident when he retired and returned to Country B so that he could spend his retirement with his family (which includes his children, grandchildren, and siblings.) A and his wife have committed themselves to living in Country B for the rest of their life. Although A's wife has a cemetery plot in the United States, both A and his wife also have a cemetery plot in Country B. A's wife's assets are in the United States in the event A predeceases her and she desires to return to the United States. A and his wife are trying to sell A's wife's home in the United States. A's wife has no intention of relinquishing her U.S. citizenship.

(122) PLR 9807019 (11/14/97) - A was born in and is a citizen of Country C. In 1981, A came to the United States for employ employment reasons and obtained a green card. In 1987, his employer sent him back to Country C on a temporary assignment through 1991. From 1991 through 1995, A again worked for his employer in the United States. In December 1995, A's employer moved its headquarters from the United States to Country C, and A was transferred back to Country C permanently. A relinquished his lawful permanent U.S. resident status. A is subject to Country C tax on his income. A's wife, a U.S. citizen, moved with A to Country C.

(123) PLR 9807018 (11/14/97) - A was born in and is a citizen of Country C. A had been a green card holder for more than 8 of the 15 years prior to his residency termination. A later relinquished his U.S. lawful permanent resident status. A

became a resident of Country C and is subject to Country C tax on his income. The majority of A's business clients are located outside of the United States.

(124) PLR 9802026 (10/10/97) - Territory C is a dependent territory of Country D. A became of citizen of Country D when she was born in territory C. A also obtained U.S. citizenship by virtue of A's parent's U.S. citizenship. A resided in the United States only for boarding school (three years) and junior college (two years). A has resided in Territory C for over 50 years and has lived in her present home for the past 39 years. A formally renounced her U.S. citizenship.

(125) PLR 9802021 (10/9/97) - A was born in the United States. A's spouse was born in Country E. A and her husband have three children, all of whom were born in, and are residents of Country E. Over the past ten years, A's visits to the United States have been for periods of less than 30 days, except for a year in which she was present in the United States due to the illness and death of her father. A renounced her U.S. citizenship. A is a resident subject to Country E tax.

(126) PLR 9802013 (10/7/97) - A and his parents were born in Country C. A came to the United States for employment reasons and became a lawful permanent resident of the United States in 1982. For approximately nine years prior to 1982, A was employed in the United States and held an employment visa. In 1990, A returned to Country C to work for a company based in the geographic region where Country C is located. A relinquished his lawful permanent U.S. resident status by returning his green card to the U.S. consulate in 1996. A is a resident subject to Country C tax.

(127) PLR 9801049 (10/6/97) - A was born in and is a citizen of Country S. A obtained U.S. citizenship by virtue of his mother's U.S. citizenship. A's father was a citizen of Country S and A's mother subsequently became a citizen of Country S. A resided in Country S from birth until he came to the United States to pursue business studies. After completion of his studies, A resided in Country S and the United States at different times based on employment and business activities. A was transferred by his foreign employer to Country C and has since remained there. A intends to renounce his U.S. citizenship as soon as the ruling is granted. A has no family in the United States. A is subject to Country C tax on his worldwide income.

(128) PLR 9752007 (9/19/97) - A was born in Country B and obtained U.S. citizenship by virtue of a parent's U.S. citizenship. A attended college in the United States and after college A worked in the United States for a subsidiary of a Country B company that is controlled by A's parent. A married a U.S. citizen. A and A's spouse moved to Country B where A obtained an executive position with his parent's company. A formally renounced his U.S. citizenship. A's mother and A's spouse's parents reside in the United States. A's bother is also residing in the United States, but intends to return to work in Country B. A is renting out his former U.S. home.

(129) PLR 9739025 (6/27/97) - A was born in the United States. A's spouse was born in Country B. A has resided in Country B for over 25 years. In 1995, A became a citizen of Country B. In 1996, A relinquished her U.S. citizenship.

(130) PLR 9735014 (5/29/97) - A was born in and is a citizen of Country B. A became a dual citizen of Country B and the United States at birth by virtue of her parents' U.S. citizenship. A has been a resident of Country B since birth and has never resided in the United States. A maintains minimal connections to the United States and has never been physically present in the United States for more than 30 days during any calendar year. In 1994, shortly after her 21st birthday, A swore an oath of allegiance to Country B with the intention of relinquishing her U.S. citizenship.

(131) PLR 9732025 (5/12/97) - A was born in Country B. A became a naturalized U.S. citizen in 1971. A later departed the United States to reside in Country B. In 1973, A left Country B in order to reside and work in Country C. A has resided and worked in Country C continuously since 1973. After completing his employment in Country C, A plans to retire in County B. A's spouse is a citizen of Country B. A maintains minimal connections to the United States and has no assets or family members in the United States. A is 57 years old. A has not visited the United States since 1982. A formally relinquished his U.S. citizenship.

(132) PLR 9724021 (3/18/97) - A was born in the United States. A became a dual citizen of the United States and Country B at birth by virtue of her parents' Country B citizenship. A resided in the United States for a time after her birth and returned to the United States for four years to attend college. A has not resided in the United States since graduating from college. A's husband was born in Country C. A has three minor children, each of whom was born in Country C. A was not present in the United States for more than 30 days during any year of the 10-year period prior to her expatriation. A formally renounced her U.S. citizenship.

Summaries of IRS Private Letter Rulings Issued to Former Citizens and Former Long-Term Residents during the Period from January 1, 1997 through July 1, 2002

Complete and good faith submissions:

No opinion as to principal purpose of tax avoidance (127 rulings)

For each of the rulings in this category, the holding is the same -- A (or the taxpayer) has made a complete and good faith submission and, therefore, will not be treated as having a principal purpose of tax avoidance. Because the information submitted does not clearly establish the existence or lack of a principal purpose to avoid taxes, no opinion is expressed as to whether A's (or the taxpayer's) expatriation (or residency termination) had a principal purpose of tax avoidance.

(1) PLR 200225035 (3/22/2002) - A was born in Country C. A became a naturalized U.S. citizen. A renounced his U.S. citizenship and obtained citizenship in Country C. A is subject to Country C tax on his worldwide income.

(2) PLR 200224015 (3/8/2002) - A was born in Country C. A came to the United States for business reasons and obtained a green card. A is also a citizen of Country C where he now lives. A later relinquished lawful permanent U.S. resident status. A is subject to Country C tax on his worldwide income.

(3) PLR 200222027 (3/4/2002) - A was born in Country C. A became a naturalized U.S. citizen. A intends to renounce his U.S. citizenship. A is subject to Country C tax on his worldwide income.

(4) PLR 200221039 (2/25/2002) - A and A's parents were born in and are citizens of Country C. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A's spouse is a citizen of Country F and A intends to become a citizen of Country F within a reasonable period after his loss of long-term resident status. A is a resident subject to Country F income tax.

(5) PLR 200220017 (2/14/2002) - A was born in and is currently a resident and citizen of Country C. A relinquished his lawful permanent U.S. resident status.

(6) PLR 200219033 (2/12/2002) - A and A's parents were born in Country D. A has been a citizen of Country D by reason of his birth in Country D. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status.

(7) PLR 200219031 (2/12/2002) - A and A's parents were born in Country D. A has been a citizen of Country D by reason of his birth in Country D. A became a lawful permanent resident of the United States. A later relinquished his permanent U.S. resident status.

(8) PLR 200218032 (2/6/2002) - A is a dual citizen of the United States by reason of his birth in Country B. A is subject to Country B tax on his worldwide income. A intends to renounce his U.S. citizenship.

(9) PLR 200217043 (1/24/2002) - A became a permanent resident of the United States. A later moved to Country C, where A has been a citizen her whole life. A relinquished her lawful permanent U.S. resident status.

(10) PLR 200214024 (1/3/2002) - A was born in and is a citizen of Country D. A obtained U.S. citizenship by virtue of his father's U.S. citizenship. A has been a citizen of Country D during her entire life by reason of her birth in Country D. A intends to relinquish her U.S. citizenship.

(11) PLR 200212018 (12/20/2001) - A and A's parents were born in Country D. A has been a citizen of Country D during her entire life by reason of her birth in Country D. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is subject to Country D income tax.

(12) PLR 200211033 (12/17/2001) - A was born in and is a citizen of Country D. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status.

(13) PLR 200211015 (12/7/2001) - A was born in the United States and became a dual citizen of the United States and Country C at birth. A's father was born in Country C and A's mother was born in Country D. A and his family moved back to Europe when A was a child, and A has not lived or attended school in the United States since that time. Since graduation from college, A has been living and working in Country F. A has no direct family or personal ties in the United States apart from business related interactions with contacts. A has never been employed in the United States, voted in an election, registered to vote, or held a driver's license. All of A's family and social ties are located in Countries C, E, and F. A's personal possessions, real estate, bank accounts, and driver's license are in Country F. A is a resident subject to Country F tax. Although A is liable to tax in Country C on income from sources within Country C, the tax is eliminated by a foreign tax credit under a treaty between Country C and F. A has represented that A will not relinquish his Country C citizenship for a period of at least 5 years following A's expatriation from the United States.

(14) PLR 200210050 (12/7/2001) - A and A's parents were born in Country B. A is a citizen of Country B by reason of her birth in Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A was not present in the United States for more than 30 days a year during each year of the 10-year period ending on the date of her expatriation.

(15) PLR 200210049 (12/7/2001) - A and A's parents were born in Country B. A is a citizen of Country B by reason of his birth in Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status.

(16) PLR 200218002 (12/4/2001) - A was born in Country C. A became a naturalized U.S. citizen. A left the United States and is now a resident of Country F.

(17) PLR 200209030 (11/30/2001) - A, A's spouse, and A's father were born in Country C. A was born in City B and is a citizen of Country C. A's mother is a citizen of Country D. A came to the United States with his parents as a child. A became a lawful permanent resident of the United States and completed high school and college in the United States. After graduating from college, A returned to City B for work and married a citizen of Country C. A later relinquished his lawful permanent U.S. resident status. A does not intend to return to the United States to work or live. A is a resident subject to Country C tax on his worldwide income.

(18) PLR 200209027 (11/29/2001) - A was born in and is a citizen and resident of Country B. A became a dual citizen of Country B and the United States at birth by virtue of her mother's U.S. citizenship. A returned to Country B permanently and renounced her U.S. citizenship.

(19) PLR 200208015 (11/20/2001) - A became a U.S. citizen by reason of birth in the United States. A became a citizen of Country B and renounced his U.S. citizenship on the same date.

(20) PLR 200206029 (11/8/2001) - A, A's spouse and A's parents were born in Country B. A's spouse began working for Company C and was transferred to the United States. A became a lawful permanent resident of the United States. A's spouse, senior executive to Company C, was transferred to Country B due to Company C's business operations in Country B. Country B accounted for the majority of C's business. A moved back to Country B with her spouse. A relinquished her lawful permanent U.S. resident status. A has always maintained close ties with Country B and has had property there. A's spouse intends to complete his career and retire in Country B. A is a resident subject to Country B tax on her worldwide income.

(21) PLR 200201029 (10/16/2001) - A and A's parents were born in Country D. A has been a citizen of Country D during her entire life by reason of her birth in Country D. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status.

(22) PLR 200140051 (10/5/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status.

(23) PLR 200210005 (9/24/2001) - A, A's wife, and A's mother, are naturalized citizens of Country C. A is also a naturalized citizen of the United States. A has been residing in Country C since 1989 and relinquished his U.S. citizenship.

(24) PLR 200146035 (8/15/2001) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status when he returned to Country B. A is subject to Country B tax on his worldwide income.

(25) PLR 200143020 (7/27/2001) - A, A's wife, and A's parents were all born in Country B. All of A's family resides in Country B. A and A's wife moved to the United States for employment reasons and obtained a green card. After A retired, A and A's wife spent part of the year in Country B and the other part in the United States. A and A's wife have chosen to live in Country B permanently because it has become difficult to them to travel. A is subject to Country B income tax on his worldwide income.

(26) PLR 2001143022 (7/27/2001) - A, A's wife, and A's parents were all born in Country B. All of A's family resides in Country B. A moved to the United States with her husband for employment reasons. A's husband has retired and, A and A's husband have spent part of the year in Country B and the remaining part in the United States. A and her husband have chosen to live in Country B permanently because it has become difficult to them to travel. A is subject to Country B income tax on his worldwide income

(27) PLR 200208001 (7/20/2001) - A relinquished her U.S. citizenship. A has been living in her native Country C and has no plans to return to the United States.

(28) PLR 200130019 (7/18/2001) - A was born in and is a citizen of the United States. Since early childhood, A has been residing in Country D. A plans to relinquish his U.S. citizenship and has filed an application to become a citizen of Country D, where A's spouse and A's parents were born.

(29) PLR 200146022 (7/17/2001) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status.

(30) PLR 200207001 (7/17/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status when she returned to Country C. A is subject to Country C income tax.

(31) PLR 200140067 (7/10/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he returned to Country C. A is subject to Country C income tax.

(32) PLR 200137029 (6/15/2001) - A acquired dual citizenship in the United States and Country C at birth. A, A's husband, and A's children reside in Country D. Since infancy, A has not resided in the United States and has no intention to return to the United States to live. A intends to relinquish her U.S. citizenship.

(33) PLR 200133027 (5/23/2001) - A was born in Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he returned to Country B. A is subject to Country B tax on his worldwide income.

(34) PLR 200132021 (5/11/2001) - A was born in Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he returned to Country B. A is subject to Country B tax on his worldwide income.

(35) PLR 200132018 (5/10/2001) - A was born in Country B. A came to the United States for employment reasons and obtained his green card. A is now retired, returned to Country B, and relinquished his lawful permanent U.S. resident status. A is subject to Country B tax on his worldwide income.

(36) PLR 200130013 (4/25/2001) - A was born in City B of Country C. A's mother and A's father were Country C citizens. A's father was also a citizen of the United States due to A's father's mother being a U.S. citizen at the time that A was born. A was immediately registered with the U.S. embassy for U.S. citizenship by virtue of A's birth to a U.S. citizen father. A intends to relinquish U.S. citizenship.

(37) PLR 200128027 (4/12/2001) - A and A's parents were born in and are citizens of Country D. A became a lawful permanent resident of the United States. A relinquished her lawful permanent U.S. resident status by returning her green card to the U.S. Embassy in Country D.

(38) PLR 200128022 (4/12/2001) - A was born in and is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status when she returned to Country C.

(39) PLR 200126024 (3/30/2001) - A, A's spouse and A's parents were born in Country C. A came to the United States to be married. The marriage subsequently ended in a divorce. Under the Settlement Agreement, A's spouse could stop making alimony payments and A would lose custody of the minor child if A and the minor child were not physically present in Country G at least 270 days during a calendar year. In the absence of the restrictions, A would have returned to Country C immediately after the divorce. A has visited Country C as much as permitted under the Agreement and has maintained close ties with Country C. A's child has reached majority and B is now free under the Agreement to return to Country C. A is currently married to a citizen of Country C.

(40) PLR 200133046 (3/23/2001) - A was born in Country C. A has been involved with business D for over 40 years. A moved to City F in the United States and started Company G in business D. A contracted to work for Company I, a company located in Country J, for 5 years. A was given the option to purchase Company K, a Country B subsidiary of Company J, in business D, on a fully leveraged basis. A purchased Company K and was its chief executive officer, but the company was managed by his son, daughters, and other family members while A completed his 5 year contract with Company J. A then returned to Country B and took over active management of Company K. A has always maintained close family, personal and business ties with Country B and intends to live there the rest of his life, and to work there until he retires. A is subject to Country B tax on his worldwide income.

(41) PLR 200125051 (3/22/2001) - A is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he returned to Country C. A is a resident subject to Country C income tax.

(42) PLR 200123056 (3/13/2001) - A was born in Country B. A came to the United States for employment reasons and obtained his green card. A returned to Country B and surrendered his green card on that same date. A is subject to Country B tax on his worldwide income.

(43) PLR 200109042 (2/21/2001) - A was born in Country F and is a naturalized citizen of Country E. A's spouse was born in Country E and A's parents were born in Country F. A obtained her green card in order to accompany her spouse to the United States, who in turn obtained a green card for employment purposes. A has not lived in the United States for a number of years. A relinquished her lawful U.S. permanent resident status. A is a resident subject to Country E income tax.

(44) PLR 200121035 (2/21/2001) - A, A's spouse, and A's parents were born in Country B. A began working for Company C and was transferred to the United States. A became a lawful permanent resident of the United States. A was the senior executive for Company C's operations in Country B, which accounted for the majority of its business. Company C and its subsidiaries are in business E. Country B agreed to deregulate business E industry. Therefore, Company C transferred A back to Country B to help position the company to compete effectively. A is a resident subject to Country B income tax.

(45) PLR 200109043 (2/20/2001) - A was born in and is a citizen of Country E. A's spouse and A's parents were born in Country F. A came to the United States for employment reasons and obtained a green card. A relinquished his lawful permanent U.S. resident status. A has not lived in the United States for a number of years. A is a resident subject to Country E income tax.

(46) PLR 200119042 (2/9/2001) - A was born in Country C. A came to the United States and became a lawful permanent resident. A later relinquished her lawful permanent U.S. resident status.

(47) PLR 200119046 (2/9/2001) - A was born in Country C. A became a naturalized citizen of Country D. A also became a lawful permanent U.S. resident. A later relinquished his lawful permanent U.S. resident status.

(48) PLR 200117027 (1/29/2001) - A was born in the United States. A became a naturalized citizen of Country D. A renounced his U.S. citizenship. A is subject to Country D tax on his worldwide income.

(49) PLR 200212020 (1/20/2001) - A was born in the United States. A is also a citizen of Country C where he now lives. A renounced his U.S. citizenship. A is subject to Country B tax on his worldwide income.

(50) PLR 200115024 (1/16/2001) - A was born in Country B. A came to the United States for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. resident status when he returned to Country B. A is subject to Country B tax on his worldwide income.

(51) PLR 200215044 (1/15/2001) - A was born in and is a citizen of the United States. A later became a citizen of Country B. A intends to renounce his U.S. citizenship. A is subject to Country B tax on her worldwide income.

(52) PLR 200111009 (12/6/2000) - A was born in Country B. A came to the United States for employment reasons and acquired a U.S. citizenship. A currently resides in Country F and intends to move back to Country C and relinquish his U.S. citizenship.

(53) PLR 200108036 (11/29/2000) - A was born in Country C. A came to the United States due for employment reasons and obtained a green card. A later relinquished his lawful permanent U.S. residence when he returned to Country C.

(54) PLR 200102030 (10/12/2000) - A's parents were both born in Country C and came to the United States for their college education. A became a dual citizen of the United States and Country C at birth. A remained in the United States and then relocated to Country C when his parents finished their education. A returned to the United States to finish his own college and post-graduate education. Upon graduation from his masters program, A returned to Country C. A obtained employment in Country C, started a separate business, and later sold a portion of the business and retained a minority interest. A's father gave A land in Country C for building a home, and A married a citizen of Country C and is an active participant in one of Country C's political parties. Due to recent changes in Country C law, A intends to renounce his U.S. citizenship and retain only Country C citizenship, in order to run for public office in Country C.

(55) PLR 200102029 (10/12/2000) - A is a dual citizen of Country C and the United States. A's parents were both U.S. citizens. A lived in Country C until World War II broke out and the family moved to the United States. A's family continued to maintain a residence in City G of Country C before, during, and after the war. A graduated from high school in the United States and traveled to Country C, where A met and married his future spouse, who was born in Country C. A spent only 11 years in the United States as a child and has lived in Country C since A's marriage. All of A's children and grandchildren are dual citizens, but have always lived in Country C. A's center of cultural and family interests are in Country C.

(56) PLR 200050044 (9/22/2000) - A was born in and is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country C income tax.

(57) PLR 200032036 (5/17/2000) - A was born in the United States. A became a citizen of Country C by reason of her birth to citizens of Country C. A intends to renounce her U.S. citizenship.

(58) PLR 200032035 (5/17/2000) - A and A's mother were born in Country C. A became a U.S. citizen at birth on the basis of his father's U.S. citizenship. A later became a citizen of Country C. A intends to renounce his U.S. citizenship.

(59) PLR 200030021 (5/1/2000) - A was born in Country C and became a U.S. citizen at birth on the basis of his mother's U.S. citizenship. A renounced his U.S. citizenship when he was less than 18-1/2 years of age.

(60) PLR 200028025 (4/17/2000) - A and A's parents were born in and are citizens of Country E. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country E income tax.

(61) PLR 200028023 (4/17/2000) - A and A's parents were born in and are citizens of Country E. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country E income tax.

(62) PLR 200024038 (3/17/2000) - A was born in Country B and is a citizen of Country B. A is a U.S. citizen as a result of his father's U.S. citizenship. A attended high school and college in the United States, but has otherwise resided in Country B. A intends to renounce his U.S. citizenship.

(63) PLR 200021024 (2/22/2000) - A was born in country B. A was brought to the United States and adopted by U.S. citizens. A became a naturalized U.S. citizen. A went to study in Country C. A's husband is a citizen by birth of Country D, however, he now resides in Country E. Upon marriage to her husband, A

acquired the citizenship in Country D. A and her husband reside in Country E. A formally renounced her U.S. citizenship.

(64) PLR 200020049 (2/22/2000) - A and A's parents are Country C citizens by reason of being born in Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country C income tax.

(65) PLR 200020047 (2/18/2000) - A and A's parents are citizens of Country B by reason of being born in Country B. A moved to the United States in order to marry her second husband who was a U.S. citizen. A became a lawful permanent resident of the United States. After A's husband passed away, A moved back to Country B and relinquished her lawful permanent U.S. resident status. A is domiciled in Country B and is subject to Country B income tax on her worldwide income at a rate comparable to the United States.

(66) PLR 200020021 (2/17/2000) - A was born in the United States. A moved to Country D where A is now resident and domiciled. A became a citizen of Country D and renounced U.S. citizenship. A was not present in the United States for more than 30 days during each year of the 10-year period ending with the day of expatriation.

(67) PLR 200020017 (2/16/2000) - A was born in Country B. A is a U.S. citizen by reason of birth to a U.S. citizen. A renounced his U.S. citizenship. A is a resident subject to Country B tax on his worldwide income.

(68) PLR 200020028 (2/15/2000) - A was born in Country B. A is a U.S. citizen by reason of birth to a U.S. citizen. A renounced her U.S. citizenship. A is a resident subject to Country B tax on her worldwide income.

(69) PLR 200020025 (2/15/2000) - A was born in Country B. A is a U.S. citizen by reason of birth to a U.S. citizen. A renounced his U.S. citizenship. A is a resident subject to Country B tax on his worldwide income.

(70) PLR 200020016 (2/15/2000) - A became a citizen of Country C by reason of his birth in Country C. A moved to the United States and became a naturalized U.S. citizen. A later formally renounced his U.S. citizenship.

(71) PLR 200019008 (2/7/2000) - A was born in Country B. Upon A's marriage to his first wife, a U.S. citizen and resident, A moved to the United States. A became a naturalized U.S. citizen. A divorced his first wife and married his current wife. A's current wife is a citizen by birth of Country B, and is also naturalized U.S. citizen. A later renounced his U.S. citizenship when he and his current wife moved back to Country B.

(72) PLR 200022030 (2/3/2000) - A was born in Country B. A became a naturalized U.S. citizen. A later renounced her U.S. citizenship.

(73) PLR 200017024 (1/28/2000) - A, A's spouse, and A's parents are Country C citizens by reason of their birth in Country C. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country C income tax.

(74) PLR 200016010 (1/20/2000) - A was born in the United States. A's wife and mother were born in Country C. A formally renounced his U.S. citizenship.

(75) PLR 200015036 (1/18/2000) - A is a citizen of Country B by birth. A's parents were born in Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country B income tax.

(76) PLR 200014025 (1/7/2000) - A and A's parents have been citizens of Country E during all of their lives by reason of their birth in Country E. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country E income tax.

(77) PLR 200011020 (12/15/99) - A was born in the United States. A became a dual citizen of the United States and Country B at birth by virtue of her father's Country B citizenship. A moved to Country B. A later relinquished her U.S. citizenship.

(78) PLR 200006038 (11/15/99) - A was born in and is a citizen of Country B. A's parents were born in Country B. A became a lawful permanent resident of the United States. A intends to relinquish his status as a lawful permanent U.S. resident approximately three months following the receipt this ruling. A is subject to Country B tax on his worldwide income.

(79) PLR 200009041 (11/7/99) - A was born in the United States. A's spouse was born in and is a citizen of Country B. A moved to Country B, where she has resided ever since. A became a citizen of Country B. A renounced her U.S. citizenship.

(80) PLR 200005013 (11/4/99) - A was born in Country B. A's parents were born in Country C. A became a dual citizen of Country B and Country C at birth. A then became a naturalized U.S. citizen. A moved to Country B and has lived there ever since. A relinquished his U.S. citizenship and reacquired citizenship in Country C.

(81) PLR 200003027 (10/25/99) - A was born in and is a citizen of Country C. A's spouse and parents were born in Country C. A became a lawful permanent resident of the United States. A intends to relinquish his lawful permanent U.S. resident status. A is a resident subject to Country C income tax.

(82) PLR 200002041 (10/18/99) - A was born in and is a citizen of Country D. A's spouse and parents were born in Country D. A became a lawful permanent

resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country D income tax.

(83) PLR 200002038 (10/18/99) - A was born in and is a citizen of Country D. A's spouse and parents were born in Country D. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country D income tax.

(84) PLR 200002035 (10/15/99) - A was born in and is a citizen of Country E. A's parents were born in Country E. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country E income tax.

(85) PLR 200001033 (10/14/99) - A became a dual citizen of Country F and the United States at birth by virtue of her mother's U.S. citizenship. A is a resident of Country E. A renounced her U.S. citizenship. A resided in the United States for a period of time.

(86) PLR 200001031 (10/13/99) - A became a dual citizen of Country D and the United States at birth by virtue of her mother's U.S. citizenship. A is a resident of Country E. A intends to renounce her U.S. citizenship shortly after the issuance of this ruling. A was not present in the United States for more than 30 days for each year of the 10-year period ending on the date of her expatriation.

(87) PLR 199952065 (10/6/99) - A and his spouse were born in and are citizens of Country B. A obtained lawful permanent resident status in the United States. A later relinquished his lawful permanent U.S. resident status. A is a resident subject to Country B income tax.

(88) PLR 199952064 (10/6/99) - A and her spouse were born in and are citizens of Country B. A obtained lawful permanent resident status in the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country B income tax.

(89) PLR 199952062 (10/5/99) - A became a U.S. citizen at birth. A is a citizen and tax resident of Country C. A renounced his U.S. citizenship. A was not present in the United States for more than 30 days for each year of the 10-year period ending on the date of his expatriation.

(90) PLR 199952052 (10/1/99) - A and A's parents were born in Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he moved back to Country B. A is a resident subject to Country B income tax.

(91) PLR 199952051 (10/1/99) - A and A's parents were born in Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he moved back to Country B. A is a resident subject to Country B income tax.

(92) PLR 199952031 (9/30/99) - A was born in the United States. A's husband was born in and is a citizen of Country B. A became a citizen of Country B. A and her husband moved to Country C, where they presently reside. A renounced her U.S. citizenship.

(93) PLR 199950038 (9/20/99) - A was born in the United States. A moved to Country C and became a resident in Country C. A renounced her U.S. citizenship. A was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of her expatriation.

(94) PLR 199945003 (8/18/99) - A was born in the United States. A's spouse was born in and is a citizen of Country B. A formally renounced his U.S. citizenship and became a citizen of Country B.

(95) PLR 199940038 (7/12/99) - A was born in the United States. A became a citizen of Country F and is a resident of Country F. A renounced his U.S. citizenship. A was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of her expatriation.

(96) PLR 199940019 (7/7/99) - A, A's spouse, and A's parents were born in Country B. A is a citizen of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he moved back to Country B. A is a resident subject to Country B income tax.

(97) PLR 199940017 (7/7/99) - A, A's spouse, and A's parents were born in Country B. A is a citizen of Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status when she moved back to Country B. A is a resident subject to Country B income tax.

(98) PLR 199939022 (7/1/99) - A was born in the United States. A's husband and A's parents were born in and are citizens of Country X. A moved with her parents to Country X, where she has been living all her life. A is a citizen of Country X. A formally renounced her U.S. citizenship.

(99) PLR 199937027 (6/17/99) - A, A's spouse, and A's parents were born in Country B. A is a citizen of Country B. A became a lawful permanent resident of the United States. A later relinquished his lawful permanent U.S. resident status when he moved back to Country B. A is a resident subject to Country B income tax.

(100) PLR 199937021 (6/17/99) -A, A's spouse, and A's parents were born in Country B. A is a citizen of Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status when she moved back to Country B. A is a resident subject to Country B income tax.

(101) PLR 199937046 (6/16/99) - A was born in the United States. A's husband was born and raised in Country C. A became a citizen of Country C. A renounced her U.S. citizenship.

(102) PLR 199935048 (6/7/99) - A was born in the United States to Country B nationals. A is a citizen of and domiciled in Country B where he is subject to tax on worldwide income. A renounced his U.S. citizenship. A was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of his expatriation.

(103) PLR 199935039 (6/4/99) - A and A's parents were born in Country B. A is a citizen and resident of Country B. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is a resident subject to Country B income tax.

(104) PLR 199935038 (6/4/99) - A was born in the United States. A's parents were born in Country C. A is a citizen of Country C. A is living and working in Country D, but intends to move permanently to Country C when her husband retires. A renounced her U.S. citizenship.

(105) PLR 199932040 (5/19/99) - A, A's spouse, and one of A's parents were born in Country X. A is a citizen of Country X. A acquired U.S. citizenship. A later formally renounced her U.S. citizenship.

(106) PLR 199932039 (5/18/99) - A and A's father were born in Country C. A's mother was born in Country D. A is a citizen of Country C. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is subject to Country D income tax.

(107) PLR 199932035 (5/18/99) - A was born in and is a citizen of Country C. A moved to the United States and became a naturalized U.S. citizen. A later formally renounced her U.S. citizenship.

(108) PLR 199932028 (5/13/99) - A became at birth a U.S. citizen on the basis of his father's U.S. citizenship. A became at birth a Country C citizen on the basis of his mother's Country C citizenship. A's spouse was born in Country C. A intends to renounce his U.S. citizenship soon after the issuance of this ruling.

(109) PLR 199932027 (5/13/99) - A was born in the United States. A is a citizen and resident of Country E. A was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of her expatriation. A intends to renounce her U.S. citizenship soon after the issuance of this ruling.

(110) PLR 199931023 (5/6/99) - A was born in Country B. A became a naturalized U.S. citizen. A later renounced her U.S. citizenship.

(111) PLR 199931021 (5/6/99) - A was born in the United States. A's spouse was born in Country C. A and her spouse are Country C citizens and residents. A formally renounced her U.S. citizenship.

(112) PLR 199928008 (4/19/99) - A was born in the United States. A became a dual citizen of the United States and Country B at birth by virtue of a parent's Country B citizenship. A formally renounced his U.S. citizenship.

(113) PLR 199916035 (4/23/99) - A was born in the United States. A became a dual citizen of the United States and Country C at birth by virtue of his parent' Country C citizenship. A's parents were born in Country C. A's wife is a Country C citizen. A formally renounced his U.S. citizenship.

(114) PLR 199923043 (3/16/99) - A was born in and is a citizen of Country B. A came to the United States in 1973 for employment reasons and obtained a green card. A's U.S. employment ended and he returned to Country B. A later relinquished his lawful permanent U.S. resident status. A is subject to Country B income tax.

(115) PLR 199922047 (3/8/99) - A, A's wife, and A's parents were born in Country C. A has been a citizen of Country C since birth. A became a naturalized U.S. citizen. A will formally renounce his U.S. citizenship after the issuance of this ruling.

(116) PLR 199920029 (2/22/99) - A and A's parents were born in Country B. A has been a citizen of Country B during all of her life. A became a lawful permanent resident of the United States. A later relinquished her lawful permanent U.S. resident status. A is subject to Country B income tax.

(117) PLR 199919028 (2/18/99) - A and her parents were born in Country D. A has been a citizen of Country D since birth. A became a U.S. citizen in connection with her marriage to a U.S. citizen. A's husband passed away. A formally renounced her U.S. citizenship.

(118) PLR 199919022 (2/11/99) - A was born in the United States. A has been a citizen of Country C since birth by virtue of her parent's Country C citizenship. A's husband and A's parents were born in Country C. A formally renounced her U.S. citizenship.

(119) PLR 199918044 (2/8/99) - A was born in and is a citizen of Country B. A became a naturalized U.S. citizen. A later formally renounced his U.S. citizenship.

(120) PLR 199918043 (2/8/99) - A became a U.S. citizen by virtue of his parent's citizenship. A resided in the United States for nearly 30 years before moving to Country B. A has lived and worked in Country B since 1986. A became a permanent resident of Country B in 1987 and has filed tax returns as a Country B resident since that time. A became a citizen of Country B in 1993. A's wife and two children are also citizens of Country B and live in Country B on a full time

basis. A's only residence is in Country B. A was present in the United States for 33 days in 1996 and for 31 days in 1991. A was present in the United States for 15 days over the four year period from 1992-1995. A has no intention of returning to the United States. A renounced his U.S. citizenship. A is subject to Country B tax at a rate that is significantly higher than the comparable U.S. rates.

(121) PLR 199918030 (2/3/99) - A, A's husband, and A's parents were born in Country B. A is a Country B citizen. A came to the United States with her husband for employment reasons and obtained a green card in March 1987. A intends to formally renounce her U.S. citizenship soon after the issuance of this ruling.

(122) PLR 199918029 (2/3/99) - A, A's husband, and A's parents were born in Country B. A is a Country B citizen. A came to the United States with her husband for employment reasons and obtained a green card in March 1987. A intends to formally renounce her U.S. citizenship soon after the issuance of this ruling.

(123) PLR 199917047 (2/1/99) - A was born in the United States. A became a citizen of Country B by virtue of his parent's Country B citizenship. A formally renounced his U.S. citizenship.

(124) PLR 199917044 (1/29/99) - A and A's parents were born in Country C. A attended college in the United States and married a U.S. citizen. A and her husband established a residence in New York where their two children were born. A and her husband later divorced. The separation agreement required that the children receive their primary and secondary education in the United States. Based on legal advice received at the time, A became a naturalized U.S. citizen. As her children grew older, A spent increasing amounts of time in Country C and in Europe developing her career. A currently lives in both Country C and Country D where she rents apartments. A is a resident of Country C for tax purposes. A's only remaining tie to the United States is her son who works and resides in the United States. A's son travels to Country C once a year and A intends to visit her son in the United States for four to six weeks annually. A's parents, brother and sister, nieces and nephews are all Country C nationals and have always resided there. A formally relinquished her U.S. citizenship.

(125) PLR 199917040 (1/29/99) - A was born in Country B. A arrived in the United States under a student visa and later was granted U.S. citizenship. A had the opportunity to start a business in Country C and moved there. Since moving to Country C, A married and raised his children who were all born in Country C. A has had no substantial contacts with the United States since moving to Country C, however, he maintained his U.S. citizenship in the event that the political situation in Country C changed such that A felt it necessary to leave Country C. A became a citizen of Country C. A has not had any substantial contacts, either personal or professional, with the United States for over 40 years. A relinquished his citizenship. A was not present in the United States for more than 30 days during each year of the 10-year period ending on the date of his expatriation.

(126) PLR 199917031 (1/28/99) - A was born in the United States. A became a citizen of Country B at birth by virtue of his parents who are life-long Country B nationals and residents. A formally renounced his U.S. citizenship.

(127) PLR 199905028 (11/4/98) - A and A's parents were born in Country C. When A was six months old, A's family emigrated to Country D because of a change in the political climate in Country C. A and A's parents are naturalized citizens of Country D. A became a lawful permanent resident of the United States. A relinquished his U.S. lawful permanent resident status in 1995. A is 37 years old. A is subject to Country D income tax.

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General Government Division

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May 1, 2000

The Honorable William V. Roth, Jr.
Chairman
The Honorable Bill Archer
Vice Chairman
Joint Committee on Taxation

Subject: Information Concerning Tax-Motivated Expatriation

In a December 7, 1999, letter to the Comptroller General, you asked us to assist the staff of the Joint Committee in its review of various issues related to tax-motivated expatriation, that is, leaving the United States and giving up U.S. citizenship or long-term residency status for the purpose of avoiding U.S. taxes. In that regard, you asked that we obtain information on the following areas: (1) the Internal Revenue Service (IRS) procedures relevant to the enforcement of tax-motivated expatriate rules related to income, estate, and gift taxes; (2) IRS' procedures for using the private letter ruling process; and (3) Immigration and Naturalization Service (INS) and Department of State procedures for preventing tax-motivated expatriates from reentering the United States.

To further assist us in focusing our efforts, your staff provided us with a detailed list of questions that related to these general areas and asked that we gather information to respond to the questions. During several subsequent meetings, your staff further clarified some of the questions and advised us to delete others. As agreed, the questions together with the relevant information that we obtained form the substance of this report and are included in the enclosure.

U.S. citizens or long-term permanent residents expatriating on or after February 6, 1995, are generally treated as being tax-motivated if they meet at least one of two financial criteria. The criteria are (1) an average net income tax liability for the prior 5 years greater than $100,000 and (2) a net worth of $500,000 or more on the date of expatriation.[1] Expatriates found to have a tax avoidance motive are subject to special rules for U.S. income, estate, and gift taxes for a period of 10 years after the date of their expatriation. In addition, former U.S. citizens found to have renounced their citizenship for the purpose of avoiding U.S. taxes are not to be allowed to reenter the United States.

[1]The criteria as defined in Internal Revenue Code section 877, Expatriation to Avoid Tax, are adjusted annually for inflation and, as of 1999, stood at $552,000 in net worth and $110,000 in average prior income tax liability.

In summary, IRS' enforcement of tax-motivated expatriate rules has focused on collecting and publishing data on recent expatriates, establishing a process for expatriates to request letter rulings—that is, an IRS determination that they are not tax-motivated expatriates—and maintaining a database of certain information concerning expatriates. IRS does not yet have a systematic compliance effort aimed at enforcing income, estate, or gift tax laws related to tax-motivated expatriation. According to IRS officials, expatriates are subject to IRS' normal enforcement programs for nonresident aliens. In December 1999, IRS initiated a project to assess compliance among expatriates who have self-reported information concerning their income tax liability and assets as required. The project is scheduled to conclude by July 2000.

IRS' private letter ruling process provides expatriates with the opportunity to overcome the treatment of being tax motivated under the law. Expatriates in certain categories described by statute can request a review of the facts and circumstances of their expatriation in order to avoid the tax consequences of being treated as a tax-motivated expatriate. As of December 15, 1999, IRS had issued 113 rulings concerning expatriation.

The State Department and INS have not implemented procedures to prevent former U.S. citizens who are tax-motivated expatriates from reentering the United States. According to INS officials, this inaction has resulted primarily from the lack of any existing mechanism for the Attorney General to obtain the taxpayer information from IRS necessary to carry out the programs. IRS and INS have now identified and agreed upon such a mechanism, and INS has recently drafted proposed regulations. These draft regulations have been reviewed by IRS and the Department of State and are currently under review by the INS Office of General Counsel, which is then to send them to the Department of Justice for review. According to INS officials, the proposed regulations will also be subject to public comment.

In performing our work, we reviewed tax and immigration laws and procedures relating to expatriates; interviewed officials from IRS, the State Department, and INS; and collected relevant information and other data relating to expatriation and expatriates.

In order to answer your questions relating to statistics and other types of data, we analyzed relevant information collected from two samples we drew from original source documents maintained by IRS. Details of the sampling methodology are described in the enclosure.

We conducted our work between December 1999 and March 2000, in accordance with generally accepted government auditing standards. We received oral comments on a draft of this report from IRS, the Department of State, and INS. Where appropriate, we made changes to this report on the basis of these comments.

As agreed, unless you publicly announce its contents sooner, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the Commissioner of IRS, Commissioner of INS, and Secretary of State. We will also send copies to those who request them.

If you have any questions about this letter or the enclosure, you may contact me or Joseph E. Jozefczyk on (202) 512-9110. Wendy Ahmed, Robert Floren, Leon Green, Cheryl Peterson, MacDonald Phillips, and Liz Scullin made key contributions to this report.

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Tax-Motivated Expatriation: Enforcement of IRS and Immigration Act Provisions

GAO Responses to Questions Posed by the Joint Committee on Taxation

1. How many U.S. citizens have expatriated each year since 1991?

Year	Number[a]
1991	619
1992	556
1993	697
1994	858
1995-97[b]	1,903
1998	440
1999	433[c]

[a]Data for 1991-94 are from the State Department, based on the Certificates of Loss of Nationality (CLN) issued each year; data for 1995-99 are from IRS data on expatriates published in the Federal Register each year.

[b]Data for 1995-97 are not distinguished by year because IRS published the total number of expatriates for all 3 years in 1997 (the year after the requirement was enacted).

[c]According to the State Department, the decreased expatriation in the late 1990s may reflect an economic downturn in Asia as fewer people renounced their U.S. citizenship as a condition of employment in an Asian country.

2. What are IRS' procedures for obtaining information on expatriates?

- Certificates of Loss of Nationality and expatriate tax information statements for former U.S. citizens are collected by the State Department from its Foreign Service posts and are to be forwarded to IRS monthly.
- INS provides annually to IRS a computer disc identifying individuals who gave up their residency permits (green cards). However, IRS does not use the data to track expatriates because the data do not distinguish former long-term residents from other former green card holders and generally do not include tax identification numbers.

3a1. How many expatriates self-reported that they met the criteria for presumed tax motivation?

- Based on IRS' expatriate database, of the 1,158 expatriates who provided expatriate tax information statements indicating whether they met the tax-motivation criteria, 182 said they met one or both of the criteria.
- The 1,158 who provided expatriate tax information statements were among the 2,735 individuals who expatriated from 1995 through 1999 and whose names were published in the Federal Register from 1997 through March 2000.[1]

[1]The total of 2,735 takes into account IRS' publication in March 2000 of a corrected listing for the quarter ending in June 1998.

- For the 1,158 who provided expatriate tax information statements, 955 included a Social Security Number.

3a2. How many other expatriates met the criteria but did not self-report?

- IRS' expatriate database indicates that 1,577, or 57 percent, of the 2,735 expatriates listed in the Federal Register did not provide expatriate tax information statements when they expatriated.[2] As a result, IRS does not have their responses to the tax-motivation questions or their Social Security Numbers (SSN). IRS has generally been unable to determine whether these expatriates met the tax-motivation criteria (e.g., by ascertaining prior income tax liabilities) because of the difficulty matching tax records without knowing the taxpayer's SSN.
- In January 2000, IRS mailed notices to the expatriates who had not provided expatriate tax information statements. The effort is part of IRS' Compliance Improvement Project (CIP) for expatriates, started in December 1999. IRS officials said that, as of March 7, 2000, they had reviewed 229 of about 300 responses received. Less than 10 percent of the 229 respondents said they met at least one of the tax-motivation criteria.

3a3. How many of the above expatriates met each tax-motivation criterion?

IRS' expatriate database indicates that, of the 182 expatriates who self-reported that they met the tax-motivation criteria:

- 137 met the income tax liability criterion and
- 177 met the net worth criterion.

3b. How many expatriates were eligible to request rulings under each of the eligibility criteria of section 877(c)?[3]

Information is not available.

[2]Our review of IRS' paper files for a random sample of 200 former U.S. citizen expatriates we selected from the population of 2,735 expatriates listed in the Federal Register (including both those who self-reported that they met the tax motivation criteria and those who did not) yielded similar results, i.e., about 60 percent did not include expatriate tax information statements. However, our sample also found that expatriate tax information statements were generally included with CLNs processed after November 1996 (about 84 percent, +/- 8 percent). See response to question 35 for additional information.

[3]The eligibility criteria include (1) dual citizenship (e.g., citizenship at birth of the United States and another country), (2) long-term foreign residency, and (3) renunciation of citizenship upon reaching the age of majority.

3c. How many expatriates who self-reported meeting the tax-motivation criteria also submitted ruling requests?

Twenty-three persons filing an expatriate tax information statement at the time of their expatriation and self-reporting that they met at least one of the tax-motivation criteria also requested a private letter ruling.

3d1. Where have presumed tax-motivated expatriates relocated, i.e., what countries?

We reviewed a second sample of 242 expatriate tax information statements and found that former U.S. citizen expatriates reported 23 countries of citizenship and 23 countries of residence. We also estimate that 39 percent reported a country of residence different than their country of citizenship.[4] Given questions of disclosure of taxpayer information, we are unable to provide information on specific countries.

3d2. What countries have granted passports to each presumed tax-motivated expatriate?

Information is not available.

3d3. In what countries does each presumed tax-motivated expatriate maintain substantial connections?

IRS does not routinely request each expatriate to provide information about "substantial connections." Under IRS notice 98-34, modifying part IV of notice 97-19,[5] IRS requests information on the expatriates' "ties" to the United States and to the foreign countries where they are citizens and where they reside if they are requesting private letter rulings to avoid being treated as tax-motivated. These "ties" include such information as location of the individual's home, family and social relationships, occupations, political and cultural activities, business activities, and the locations where an individual administers property.

[4]This estimate is based on a sample of 242 former U.S. citizen expatriates, including 27 expatriates who had previously reported annual tax liabilities of at least $100,000 based on data collected by IRS as part of its expatriate CIP and 215 expatriates who were randomly selected from the remainder of the population of 1158 expatriates listed in the Federal Register and who had complete tax information statements. The 95 percent confidence interval around this estimate is 22 percent to 56 percent.

[5]IRS has issued two notices–97-19 and 98-34–to provide guidance for expatriates. Notice 97-19 describes certain federal income, estate, and gift tax consequences of expatriation and procedures for requesting a private letter ruling. Notice 98-34 modifies some of the procedures described in notice 97-19 for requesting a private letter ruling.

3e. What methods of expatriation were used?

According to State Department officials, U.S. citizens desiring to expatriate must sign an oath of renunciation or statement of intent at a U.S. Foreign Service post to receive a CLN. A statement of intent certifies that the expatriates intended to give up their U.S. citizenship when they committed certain expatriating acts, such as naturalization in a foreign country. For tax purposes, the date of the expatriating act, not the signing of the statement is considered the date of expatriation.

4. How much U.S. income tax was collected from expatriates before and after the 1996 amendments?

IRS has not tracked this information.

5. What are IRS' procedures for monitoring tax-motivated expatriates for 10 years after they expatriate?

IRS has no specific procedures in place for monitoring expatriates' tax compliance during the 10-year period.

5a. How many people is IRS monitoring under section 877?

None.

6. What are IRS' procedures for assessing and collecting income tax from tax-motivated expatriates?

No specific procedures exist to date.

7. How does IRS coordinate enforcement with other countries?

No specific procedures exist to date. IRS officials said that its information exchange programs with treaty partners potentially could be used to obtain information on expatriates. IRS also has mutual collection assistance agreements with five countries (Canada, France, Denmark, Sweden, and the Netherlands). However, these agreements are limited to assistance in collecting tax from U.S. citizens residing abroad and do not extend to expatriates.

8. What are IRS' procedures for enforcing the anti-abuse rules of section 877(d)?

No specific procedures exist to date.

8a. How many "gain recognition" agreements[6] have been filed by expatriates to avoid immediate gain recognition on an initial exchange of property?

According to IRS officials, none have been filed.

9. What are IRS' procedures for determining a tax-avoidance motive among expatriates who do not meet the financial criteria of section 877(a)(2)?

No specific procedures exist to date.

10. Of the expatriates IRS has identified as meeting the tax-motivation criteria, how many were U.S. citizens and how many long-term U.S. residents?

- IRS has not independently identified expatriates meeting the tax-motivation criteria. IRS' expatriate database identifies expatriates who self-reported meeting the criteria.
- Based on our analysis of IRS data, the 182 individuals identified in IRS' database as meeting the tax-motivation criteria included some former long-term residents who had requested IRS private letter rulings.[7]
- The 113 expatriates who had received IRS private letter rulings as of December 15, 1999 included 56 citizens and 57 former long-term permanent residents.

11. How much U.S. estate tax (including interest and penalties) was collected from nonresident aliens after 1990?

IRS has generally not tracked the amount of estate tax paid by nonresident aliens. However, according to a study by IRS' Statistics of Income Division,

[6]Gain recognition agreements are an option for expatriate taxpayers who would otherwise be required to immediately recognize income or gain from certain sources. In a gain recognition agreement, the expatriate agrees to recognize as U.S. source income any gain or income derived from the sources in the 10 years following expatriation.

[7]According to IRS officials, the expatriate database was meant to include only former U.S. citizens and any exceptions would be due to the inadvertent inclusion of some former long-term residents who requested IRS private letter rulings.

nonresident aliens reported net estate tax liability of $16.5 million in 1995 and $22.6 million in 1996.[8]

12. How many nonresident aliens paying U.S. estate tax were tax-motivated expatriates?

IRS has not tracked this information.

12a. How much estate tax has been paid by tax-motivated expatriates?

IRS has not tracked this information.

13. How much U.S. gift tax was collected from nonresident aliens after 1990?

IRS has not tracked this information.

14. How many tax-motivated expatriates have paid U.S. gift tax, and how much have they paid?

IRS has not tracked this information.

15. How many tax-motivated expatriates have paid generation-skipping tax?

IRS has not tracked this information.

16. What are IRS' procedures for identifying nonresident aliens who have made a lifetime gift of U.S.-situated property?

IRS has not tracked this information.

16a. Are there different procedures for nonresident aliens who have expatriated within the last 10 years?

No.

[8]Internal Revenue Service, Statistics of Income Bulletin (Winter 1997-1998).

17. How does IRS determine if an expatriate or other nonresident alien with U.S.-situated property has died?

IRS has no procedures for determining if a nonresident alien with U.S.-situated property has died. IRS generally does not receive any third-party information when an expatriate or other nonresident alien with U.S. estate tax obligations dies, although IRS receives some foreign estate tax returns as part of its information exchange with treaty partners.

18. How many tax returns have been received from the estates of expatriates?

IRS officials said that one expatriate estate tax return is currently being audited, but IRS has no data on the number of such returns identified or audited previously. According to the officials, any estate tax return self-identified as an expatriate's return is to be selected for audit.[9]

18a. How many of these returns were for expatriates who reported meeting the tax-motivation criteria?

IRS has not tracked this information.

18b. How many gift tax returns have been received from expatriates?

According to IRS officials, gift taxes are generally reviewed as part of estate tax audits. Some additional gift tax returns are selected for audit annually without regard to the taxpayer's expatriate status.

19. What are IRS' procedures for identifying tax-motivated expatriates who are subject to the old estate and gift tax rules for expatriates?

IRS has not tracked this information.

19a. How many tax-motivated expatriates have been subject to the old estate and gift tax rules for expatriates?

IRS has not tracked this information.

[9]Question 6b of the estate tax return for nonresident aliens (form 706NA) asks whether the decedents lost U.S. citizenship or residency within 10 years of their death.

20. How many estates have been subject to the estate tax rules for tax-motivated expatriates (including those whose estates include stock in a foreign corporation)?

IRS has not tracked this information.

20a. What is the total value of their interests in foreign corporations?

IRS has not tracked this information.

21. Of the tax-motivated expatriates identified by IRS as being subject to estate and gift taxes, how many were U.S. citizens and how many were long-term residents?

IRS has not tracked this information.

22. How many private letter rulings have been issued to expatriates under section 877, by year?

Year	Rulings
1997	17
1998	3
1999	93[a]

[a]During 1998, IRS revised its private letter ruling procedures for expatriates and deferred rulings until the revision was completed. Also, the 93 rulings in 1999 were as of December 15, 1999.

22a. How were these cases concluded?

As of December 15, 1999, 113 cases had been decided as follows:

- 22 favorable and 30 "fully submit" to citizens (see response to question 22b),
- 36 favorable and 21 "fully submit" to long-term residents, and
- 4 unfavorable (all to citizens).

22b. What were IRS' rationales for the rulings issued?

- According to IRS Chief Counsel officials, each ruling is based on the unique facts and circumstances of the case, including the factors noted in questions 25a.

- The officials said that the rationale for a "fully submit" ruling is that the evidence provided is inconclusive as to tax motivation. A "fully submit" ruling allows IRS to reassess tax motivation based on a subsequent audit of an individual's return, while favorable and unfavorable rulings are final determinations not subject to such reassessments.

23. How many expatriates requesting rulings were previously identified as tax-motivated by IRS?

IRS has relied on self-reporting and the ruling process to identify tax-motivated expatriates, although the recently initiated expatriate CIP may identify some who did not self-report. As discussed in question 3c, 23 persons who self-reported meeting the tax-motivation criteria also requested rulings.

23a. Explain cases where expatriates requesting rulings did not self-identify.

One explanation is that a few expatriates requested rulings in advance of their expatriation. IRS officials said that advance ruling requests have been relatively rare, although they have not tracked the exact number. However, we cannot explain other inconsistencies from our review of IRS files.

24. What are IRS' procedures for identifying and following up on expatriates who met the tax-motivation criteria but did not submit a ruling request?

No specific procedures exist to date. IRS' database of expatriate information only includes individuals who self-reported that they met the tax-motivation criteria and also indicates whether they have requested a ruling.

24a. What are IRS' procedures for following up on expatriates who received an unfavorable ruling?

No specific procedures exist to date.

24b. What are IRS' procedures for reconsidering an expatriate's tax motivation in later audits, where the expatriate previously received an IRS ruling, and how often has this occurred?

No specific procedures exist to date. Under notice 98-34, IRS can reconsider "fully submit" rulings in later audits of the taxpayer. However,

IRS has not done so to date and has had no special procedures for selecting such cases for audit. In any case, it may be too early for returns from "fully submit" recipients to have been audited because returns to be audited typically are not selected until about one year after returns are filed and "fully submit" rulings were not issued before November 1998.

25. What are IRS' procedures for reviewing section 877 ruling requests?

- IRS' Office of Chief Counsel said it first screens ruling requests to ensure that the expatriate is eligible to request a ruling under section 877(c)(2).
- A request from an eligible expatriate is assigned to an attorney with experience in the key issues applicable to the request (e.g., income taxes, estate taxes, or foreign corporations).
- The attorney's preliminary decision is reviewed by one of two attorney-managers and circulated to other managers in the Office of Associate Chief Counsel (International) and to the Office of Assistant Commissioner (International). Final ruling decisions are signed by one of the two attorney-managers.

25a. In these reviews, what criteria does IRS use to determine whether a tax-avoidance motive exists?

According to IRS Chief Counsel officials, there is no "bright line" test for determining whether someone expatriated with a tax motivation. Rulings are based on the unique facts and circumstances of each case, including

- U.S. and worldwide tax liabilities before and after expatriation;
- countries of residence and citizenship;
- nontax reasons cited for expatriation;
- amount of unrealized gain in assets removed from the United States and the tax result of the immediate disposition of such assets, should the taxpayer receive a favorable ruling, compared to the tax result if the taxpayer had not expatriated; and
- potential U.S. estate tax savings for expatriates who are 60 years of age or older.

26. What factors has IRS found to be most relevant in making rulings on whether expatriates were tax-motivated?

IRS officials said that all factors are considered, but a key factor is the expatriate's U.S. income tax liability in the years following expatriation,

should the taxpayer receive a favorable ruling, compared to the tax result if the taxpayer had not expatriated.

27. Have IRS' written procedures changed with the issuance of notice 98-34?

Yes. IRS added a category of ruling in which it expresses that the principal purpose of tax avoidance is not deemed to exist. IRS plans to retain the right to reassess motivation in a subsequent audit. IRS officials describe these as "fully submit" rulings.

27a. Have IRS' procedures changed in practice with the issuance of notice 98-34?

Yes, as of December 15, 1999, 51 "fully submit" rulings have been issued.

28. How many expatriates, of those whose names have been published in the Federal Register, have applied for U.S. visas?

According to State Department officials, data on visa applicants is not centralized and does not distinguish former U.S. citizens from other applicants. In particular, the data do not include Social Security Numbers or other means of positively identifying former U.S. citizens.

29. What are the INS and State Department procedures for granting each type of visa to nonresident aliens?

- U.S. consular officers stationed at 207 Foreign Service posts throughout the world are directly responsible for the issuance or refusal of visas. The two types of visa are the (1) immigrant visa, which is required when the applicant intends to become a permanent resident of the United States, and (2) nonimmigrant visa, which is required when the applicant intends to stay in the United States temporarily.
- According to State Department officials, consular officers are required to check for each visa applicant in an automated "Lookout" system to determine whether the applicant is known to be excludable from the United States under the Immigration and Nationality Act (e.g., known terrorists are restricted from obtaining a U.S. visa). Immigrant visas are also subject to certain overall and per-country numerical limits. The Lookout system currently does not identify individuals who expatriated with a tax motivation.

30. What are the INS and State Department procedures for enforcing the 1996 amendments to the Immigration and Nationality Act?

INS and the State Department currently have no procedures for denying visas to applicants who renounced their U.S. citizenship with a tax motivation, as provided in the amendments. The act requires the Attorney General to determine whether an individual's renunciation of U.S. citizenship was tax-motivated. However, according to INS officials, no mechanism exists for the Attorney General to obtain from IRS the taxpayer information necessary to make such determinations. IRS and INS have recently identified and agreed upon a possible mechanism—under proposed regulations currently in draft form–that the Attorney General might use to obtain taxpayer information from IRS.

31. What are the procedures for determining whether visa applicants are former U.S. citizens who renounced their U.S. citizenship with a tax motivation?

No procedures exist for identifying former U.S. citizens, including those who renounced their citizenship with a tax motivation. Under the Immigration and Nationality Act, INS is responsible for determining whether visa applicants renounced their U.S. citizenship with a tax motivation. INS has recently drafted proposed regulations in this regard, and according to INS officials, they have been reviewed by IRS and the Department of State. The proposed regulations are currently being reviewed by INS' Office of General Counsel before being sent to the Department of Justice for further review. The proposed regulations will also be subject to public comment.

31a. Who makes the decision on whether to issue a visa?

U.S. consular officers stationed at Foreign Service posts abroad approve or disapprove visa applications, although prior renunciation of U.S. citizenship is currently not a factor in these decisions.

31b. How many visa applicants have been denied a visa because they had renounced their U.S. citizenship?

None.

31c. How many of these were denied because they renounced their U.S. citizenship with a presumed tax motivation?

None.

32. Are the types and numbers of visas issued to former U.S. citizens monitored by the State Department?

No.

32a. If yes, how do they monitor such information?

Not applicable.

33. What are IRS' procedures for sharing information with the State Department and INS for the purpose of enforcing the 1996 amendments to the Immigration and Nationality Act?

IRS officials said that IRS has no procedures for sharing information on former U.S. citizens for the purpose of enforcing the 1996 amendments and that sharing tax information with other federal agencies generally violates the disclosure restrictions of section 6103 of the Internal Revenue Code, aside from specific exceptions noted in the law. However, as noted in response to questions 30 and 31, INS and IRS have recently identified a potential mechanism for the Attorney General to receive taxpayer information without violating the disclosure restrictions.

34. What are the State Department and INS procedures for sharing information with IRS for the purpose of enforcing the 1996 amendments to the Immigration and Nationality Act?

The State Department and INS currently have no procedures for sharing information with IRS for the purpose of enforcing the 1996 amendments. As noted previously in response to questions 30 and 31, INS and IRS recently identified a potential mechanism for the Attorney General to receive from IRS the taxpayer information necessary to enforce the act.

35. What are the IRS and State Department procedures for ensuring that the Form 8854, Expatriation Information Statement, is filed?

- The State Department's guidance to its consular posts, as of November 1996, calls for them to obtain tax information statements, as required in

Internal Revenue Code section 6039G, from any person who loses U.S. citizenship. The expatriate tax information statements are then to be forwarded with the Certificates of Loss of Nationality to the Internal Revenue Service. Based on our sample of 200 IRS CLN files, we estimate that 84 percent of those processed after November 1996 did include expatriate tax information statements (see question 3a2). The State Department's guidance also required posts to note in the CLN file when expatriates refused to provide statements. However, we found no such reports in the sample files we reviewed at IRS.

- Former long-term U.S. residents are required to file form 8854 by the due date of their income tax return for the year in which they gave up their U.S. residency.
- Also, IRS has not assessed the penalty for not filing an expatriation tax information statement.[10] IRS officials said that there are difficulties in assessing the penalty, such as the lack of a Social Security number or other definitive means of identifying the expatriate.

35a. How many expatriates have filed a form 8854?

- IRS data indicate that 1,158, or 42 percent, of the 2,735 expatriates published in the Federal Register filed an expatriate tax information statement indicating whether they met the tax-motivation criteria.
- Form 8854 did not exist before January 1999, and IRS has not tracked the number filed. The expatriate tax information statements we sampled were generally provided on State Department forms.

[10]In 1999, the penalty was the greater of $1,000 or 5 percent of the tax required to be paid under section 877 for the year.

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9 FAM 41.2 Exhibit I
LIST OF COMMONWEALTH COUNTRIES AND IRELAND

(TL:VISA-463; 09-18-2002)

Antigua and Barbuda
Australia
Bahamas
Bangladesh
Barbados
Belize
Botswana
Brunei
Cameroon
Canada
Cyprus
Dominica
Fiji
Gambia
Ghana
Grenada
Guyana
India
Ireland
Jamaica
Kenya
Kiribati
Lesotho
Malawi
Malaysia
Maldives
Malta
Mauritius
Mozambique
Namibia
Nauru
New Zealand
Nigeria
Pakistan
Papua New Guinea
Samoa
St. Kitts and Nevis
St. Lucia
St. Vincent and the Grenadines
Seychelles

Continuation – 9 FAM 41.2 Exhibit I

Sierra Leone
Singapore
Solomon Islands
South Africa
Sri Lanka
Swaziland
Tanzania
Tonga
Trinidad and Tobago
Tuvalu
Uganda
United Kingdom (including colonies, territories, and dependencies)
Vanuatu
Zambia
Zimbabwe

9 FAM 41.2 Exhibit II
LIST OF COUNTRIES PARTICIPATING IN THE VISA WAIVER PROGRAM

(TL:VISA-463; 09-18-2002)

The following is an alphabetized list of countries that are participating in the Visa Waiver Program.

1. Andorra
2. Australia
3. Austria
4. Belgium
5. Brunei
6. Denmark
7. Finland
8. France
9. Germany
10. Iceland
11. Ireland
12. Italy
13. Japan
14. Liechtenstein
15. Luxembourg
16. Monaco
17. Netherlands
18. New Zealand
19. Norway
20. Portugal

Continuation – 9 FAM 41.2 Exhibit II

21. San Marino
22. Singapore
23. Slovenia
24. Spain
25. Sweden
26. Switzerland
27. United Kingdom
28. Uruguay

Order Code RS21205
April 22, 2002

CRS Report for Congress

Received through the CRS Web

Immigration: Visa Waiver Program

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Summary

Since the events of September 11, concerns have been raised about the ability of terrorists to enter the United States under the visa waiver program. The visa waiver program allows nationals from certain countries to enter the United States as temporary visitors for business or pleasure without first obtaining a visa from a U.S. consulate abroad. By eliminating the visa requirement, this program facilitates international travel and commerce and eases consular office workloads abroad, but it also bypasses the first step by which foreign visitors are screened for admissibility to enter the United States. In 2001, 17.1 million visitors entered the United States under this program, more than half of all overseas visitors. This tracking report will be updated as legislative action occurs.

Current Law[1]

Under the visa waiver program (VWP), the Attorney General, in consultation with the Secretary of State, may waive the "B" nonimmigrant visa requirement for aliens traveling from certain countries as temporary visitors for business or pleasure (tourists).[2] Nationals from participating countries simply complete an admission form before their arrival and are admitted for up to 90 days. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) offices at a consular post abroad before coming to the United States.[3] The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa.

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[1] An earlier version of this report was written by William J. Krouse.

[2] "B" visa refers to the subsection in the Immigration and Nationalization Act (INA §101(a)(15)(B)).

[3] To obtain a nonimmigrant visa, individuals submit written applications and undergo interviews and background checks. For more information on temporary admissions see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

Although the VWP greatly eases the documentary requirements for nationals from participating countries, it has important restrictions. Normally aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status. Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.[4] Additionally, with some limited exceptions, aliens entering through VWP are not permitted to adjust status. An alien entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).

Travelers under the VWP do not need a visa, and thus no background checks are done prior to arrival at ports of entry, which allows only one opportunity — INS inspectors at port of entry — to identify inadmissable aliens. At port of entry, INS inspectors observe and question applicants, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States.[5]

To qualify for the VWP, the INA specifies that a country must:

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past 2 fiscal years with neither year going above 2.5%;
- certify that the country issues, or will issue by October 1, 2003, machine-readable passports; and
- be determined, by the Attorney General, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program.

Countries can be immediately terminated from the VWP if an emergency occurs in the country that the Attorney General in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.[6] For example, because of the recent economic collapse in Argentina and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission, that country was removed from the VWP in February 2002. Additionally, there is probationary status for VWP countries that do not maintain a low visa refusal rate. Countries on probation are determined by a formula based on a disqualification rate of 2%-3.5%.[7] Probationary countries with a

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[4] This provision was amended by P.L. 106-406 to provide extended voluntary departure to nonimmigrants who enter under the VWP and require medical treatment.

[5] Although aliens who enter under the VWP do not need a visa, all visa waiver program applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

[6] An emergency is defined as: (1) the overthrow of a democratically elected government; (2) war; (3) a severe breakdown in law and order in the country; (4) a severe economic collapse; and (5) any other extraordinary event in the program country where that country's participation could threaten the law enforcement or security interests of the United States. INA §217(c)(5)(B).

[7] "Disqualification rate" is defined as the percentage of nationals from a country who applied for

(continued...)

disqualification rate less than 2% over a period not to exceed 3 years may remain VWP countries.[8]

Legislative History

The Visa Waiver Program (VWP) was established as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). Congress periodically enacted legislation to extend the program's authorization, and program participation grew to include 29 countries.[9] The program was scheduled to expire on September 30, 1997, but temporary extensions were included in both Continuing Resolutions passed in the 105th Congress. The Commerce, Justice, State, and Judiciary (CJS) FY1998 appropriations act (P.L. 105-119) also contained an extension through April 30, 1998. In 1998, Congress enacted legislation (P.L. 105-173) that not only extended the program through April 30, 2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.[10]

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the INS Commissioner exercised the Attorney General's parole authority to extend the program temporarily.[11] Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included other provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that: 1) mandate that by October 1, 2007 all entrants under the VWP must have machine-readable passports; 2) require that all visa waiver program applicants be checked against lookout systems; 3) require ongoing evaluations of participating countries (not less than once every 5 years); 4) require the collection of visa waiver program arrival/departure data at air and sea ports of entry; and 5) require that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.[12]

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[7] (...continued)
admission as a nonimmigrant who either violated the terms of the nonimmigrant visa, who were excluded from admission or who withdrew their application for admission as a nonimmigrant.

[8] The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

[9] As of April 2002, 28 countries were eligible to participate in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, United Kingdom, and Uruguay. Argentina was removed from the VWP in February 2002.

[10] For further information, see CRS Report 97-309, *Immigration: Visa Waiver Pilot Program*, by Ruth Ellen Wasem.

[11] Parole is a temporary authorization to enter the United States and is normally granted when the alien's entry is determined to be in the public interest (Immigration and Nationality Act §212(d)(5)(A)).

[12] Many of these requirements were included as a manner in which to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

Issues

The VWP is supported by the U.S. travel and tourism industry, the business community, and DOS. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the United States.[13] DOS argues that by waiving the visa requirement for high volume/low risk countries, consular workloads are significantly reduced, allowing for streamlined operations and cost savings, and concentration of resources on greater-risk nations in the visa process. Additionally, some contend that DOS does not have the resources to resume issuing visas to all the visitors from VWP countries.[14]

Nonetheless, while the program has significantly reduced the consular workload and facilitated travel to the United States, it has increased the workload of INS inspectors at ports of entry. Furthermore, others contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security. INS inspectors have stated that terrorist and criminals believed they would receive less scrutiny during the immigration inspection process if they applied for admission into the United States under the VWP.[15] On February 28, 2002, the House Judiciary Committee's Immigration and Claims Subcommittee held a hearing on the VWP. Testimony by the Inspector General of the Department of Justice pointed out several shortcomings in the current program. Of particular concern were INS's inability to account for nonimmigrant overstays, stolen passports from VWP countries, and INS's ability to correctly and consistently check applicants against the lookout system.

Overstays. Some maintain that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers rather than the actual behavior of nonimmigrants. When the program was conceived, it was expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation. Others point out that the latter data are imperfect and currently exist only as *estimates of visa overstays*.[16]

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[13] The example of Argentina was frequently used to illustrate this relationship; during the first year Argentina was in the VWP, tourism from that country to the United States grew by 11.5%. Some cite Korea as a country that should be participating in VWP because of the trade and tourism growth it could generate, and contend that this factor should be added to the criteria used to select participating countries. Other proponents of the VWP, however, contend that the criteria should not be broadened to include tourism potential if the thresholds of refusal rates and visa overstay violations are weakened, arguing that these provisions are essential to safeguard and control our borders.

[14] In his testimony before the House Immigration and Claims Subcommittee on February 28, 2002, William S. Norman, President and Chief Executive Officer of the Travel Industry Association of America, stated that it would take hundreds of new consular staff and tens of millions of dollars to issue visas to visitors currently entering under the VWP.

[15] U.S. Department of Justice. Office of Inspector General Report I-2002-002. *Follow-Up Report on the Visa Waiver Program*, December 2001. (Hereafter cited as DOJ, *Follow-Up Report*)

[16] Problems that INS has in meeting VWP data requirements are discussed in the Inspector (continued...)

Until an automated entry-exit system is fully operational, it is difficult for INS to identify those who have overstayed their 90-day admission periods. Thus, aliens could enter under the VWP and stay indefinitely.[17]

Stolen Passports. Document venders and alien smugglers have targeted the passports of visa waiver countries.[18] The DOS system that keeps track of stolen blank passports reports contains approximately 260,000 reports of stolen passports, of which approximately 44,500 are from VWP countries.[19] Many were not machine-readable. Coupled with the fact that Justice's Inspector General reported that INS inspectors, who have less than a minute to complete most inspections, were not entering the non-machine-readable VWP passport numbers into lookout systems, it is possible that an inadmissible person with such a fraudulent VWP country passport could enter into the country. Indeed, the DOJ documented that a terrorist associated with the World Trade Center bombing in the 1993 conspiracy entered into the United States as a VWP applicant using a photo-substituted Swedish passport.[20]

Querying Lookout System. A December 2001 DOJ Office of Inspector General report on the visa waiver program found that INS inspectors were not consistently querying passport numbers against the lookout system. Additionally, not all information about missing and stolen passports was being forwarded for entry into the lookout system, and the information was not always entered into the system within a specified time frame. The report concludes that INS has failed to enter information on lost or stolen passports in a timely, accurate, or consistent manner, and the problem is exacerbated by the fact that there is no single entity within INS charged with the task of maintaining a single database of stolen passports.[21] Additionally, although only one VWP country, Switzerland, does not have machine-readable passports, many passports presented to inspectors were issued before countries began issuing machine-readable passports.[22]

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[16] (...continued)
General's report. See: U.S. Department of Justice. Office of Inspector General Report No. 1-97-08. *Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays*, September 1997.

[17] For further information, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William J. Krouse and Raphael F. Perl; and CRS Report 98-89, *Immigration: Visa Entry/Exit Control System*, by William J. Krouse and Ruth Ellen Wasem.

[18] Testimony of Peter M. Becraft, Deputy Commissioner Immigration and Naturalization Service, before the House Immigration and Claims Subcommittee on February 28, 2002.

[19] Information provided in a telephone conversation with John Brennon at Department of State, April 16, 2002.

[20] For further information, see: U.S. Department of Justice. Office of Inspector General Report I-99-10. *The Potential for Fraud and INS's Efforts to Reduce Risks of the Visa Waiver Pilot Program*, March 1999.

[21] DOJ, *Follow-Up Report.*

[22] Testimony of Glenn A. Fine, Inspector General, Department of Justice, before the House Immigration and Claims Subcommittee on February 28, 2002.

Legislation in the 107th Congress

The USA Patriot Act (P.L. 107-56), signed into law on October 26, 2001, directs the Secretary of State each year until 2007 to ascertain that designated VWP countries have established programs to develop tamper-resistant passports. Additionally, there are several bills pending in the 107th Congress that seek to reduce the likelihood that terrorists and criminals will be able to enter into the United States under the VWP.

On December 19, 2001, the House passed the Enhanced Border Security and Visa Entry Reform Act of 2001 (H.R. 3525), sponsored by Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, and it has been sent to the Senate. This bill is nearly identical to a bipartisan Senate bill (S. 1749, also titled the Enhanced Border Security and Visa Entry Reform Act of 2001). Senate floor action on H.R. 3525 began on April 15, 2002. H.R. 3525 would require all VWP countries to implement systems for the timely reporting of stolen passports, and would require, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system.

Also under consideration in the 107th Congress, H.R. 3077/S. 1518 and H.R. 3229/S. 1627 would require VWP countries to employ tamper resistant passports, and establish a program to reduce passport theft. Additionally, H.R. 3229/S. 1627 would require countries in the VWP to incorporate a biometric identifier into the passports, and would allow the Attorney General to terminate any VWP participant if the inclusion of that country in the VWP poses a national security risk. Finally, H.R. 3286 would make any alien who is a national or was a national in the previous 15 years of Afghanistan, Algeria, Egypt, Lebanon, Saudi Arabia, Somalia, United Arab Emirates, Yemen, or any country designated as a state sponsor of terrorism ineligible to participate in the VWP.

Order Code RL31381

Report for Congress
Received through the CRS Web

U.S. Immigration Policy on Temporary Admissions

Updated May 8, 2002

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U.S. Immigration Policy on Temporary Admissions

Summary

The September 11, 2001, terrorist attacks — apparently conducted by foreign nationals legally admitted to the United States — are raising a series of questions about aliens in the United States and the extent that the federal government monitors their admission and presence in this country. Passage of the Enhanced Border Security and Visa Entry Reform Act (H.R. 3525) and the Bush Administration's recently announced regulations on visitor visas and foreign students are examples of tightening policies toward aliens temporarily admitted to the United States.

There are 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas issued currently. These visa categories are commonly referred to by the letter and numeral that denotes their subsection in the Immigration and Nationality Act (INA), e.g, B-2 tourists, E-2 treaty investors, F-1 foreign students, H-1B temporary professional workers, J-1 cultural exchange participants, or S-4 terrorist informants.

The U.S. Department of State (DOS) consular officer, at the time of application for a visa, as well as the Immigration and Naturalization Service (INS) inspectors, at the time of application for admission, must be satisfied that the alien is entitled to nonimmigrant status. The burden of proof is on the applicant to establish eligibility for nonimmigrant status and the type of nonimmigrant visa for which the application is made. Both DOS consular officers (when the alien is petitioning abroad) and INS inspectors (when the alien is entering the United States) must confirm that the alien is not ineligible for a visa under the so-called "grounds for inadmissibility" of the INA, which include criminal, terrorist, and public health grounds for exclusion.

During FY1999 (the most recent year for which INS data are published), a record 31.4 million nonimmigrants entered the United States, and the overwhelming majority — 76.7% — were tourists. Of that number, over 16 million aliens entered as visitors through the Visa Waiver Program. Preliminary data from DOS indicate that 7.1 million nonimmigrant visas were issued in FY2000. Of FY2000 nonimmigrant visa issuances, the combination of all visitors for tourism and business constituted the largest group, about 5.7 million, or 58.7%. Aliens from neighboring countries with Border Crossing Cards made up the next largest group (21.3%), followed by students (8.4%) and workers (4.9%).

The law and regulations usually set strict terms for nonimmigrant lengths of stay in the United States, typically have foreign residency requirements, and often limit what the aliens are permitted to do in the United States (e.g., gain employment or enroll in school), but many observers assert that the policies are not uniformly or rigorously enforced. Agreement on the proper balance among major policy priorities, such as ensuring national security, facilitating trade and commerce, protecting public health and safety, and fostering international cooperation, may be difficult to reach and maintain.

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U.S. Immigration Policy on Temporary Admissions

Overview

The September 11, 2001 terrorist attacks — apparently conducted by foreign nationals legally admitted to the United States — are raising a series of questions about aliens in the United States and the extent that the federal government monitors their admission and presence in this country. Passage of the Enhanced Border Security and Visa Entry Reform Act (H.R. 3525)[1] and the Bush Administration's recently announced interim regulations on visitor visas and foreign students are examples of tightening policies towards aliens temporarily admitted to the United States.

Foreign nationals may be admitted to the United States temporarily or may come to live permanently. Those admitted on a permanent basis are known as immigrants or legal permanent residents (LPRs), while those admitted on a temporary basis are known as nonimmigrants.[2] Aliens who are in the United States without authorization, i.e., illegal aliens, are not discussed in this report. Nonimmigrants include a wide range of people, such as tourists, foreign students, diplomats, temporary agricultural workers, exchange visitors, internationally-known entertainers, foreign media representatives, intracompany business personnel, and crew members on foreign vessels.

U.S. immigration policy, embodied in the Immigration and Nationality Act (INA), presumes that all aliens seeking admission to the United States are coming to live permanently.[3] As a result, nonimmigrants must demonstrate that they are coming for a temporary period and for a specific purpose. The U.S. Department of State (DOS) consular officer, at the time of application for a visa, as well as the Immigration and Naturalization Service (INS) inspectors, at the time of application for admission, must be satisfied that the alien is entitled to a nonimmigrant status.[4] The burden of proof is on the applicant to establish eligibility for nonimmigrant status and the type of nonimmigrant visa for which the application is made. The law

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[1]For background and tracking of this legislation, see CRS Electronic Briefing Book, *Terrorism*, pages on "Border Security Issues and Options," by Lisa Seghetti and William Krouse, and "Foreign Nationals in the United States," by Ruth Ellen Wasem, available at [http://www.congress.gov/brbk/html/ebter1.shtml].

[2]For more information, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

[3]§214(b) of INA.

[4]22 CFR §41.11(a).

exempts only the H-1 workers, L intracompany transfers, and V family members from the requirement that they prove that they are not coming to live permanently.[5]

This report begins with a synthesis of the nonimmigrant categories according to the purpose of the visa. It discusses the periods of admission and length of stay and then summarizes grounds for inadmissibility and removal as well as reasons for termination of status. It describes the circumstances under which nonimmigrants may work in the United States and follows with an analysis of nonimmigrant admissions. The narrative concludes with a discussion of emerging issues, followed by two detailed tables analyzing key admissions requirements across all nonimmigrant visa types.

Broad Categories of Nonimmigrants

There are 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas issued currently.[6] Most of these nonimmigrant visa categories are defined in §101(a)(15) of INA. These visa categories are commonly referred to by the letter and numeral that denotes their subsection in §101(a)(15), e.g., B-2 tourists, E-2 treaty investors, F-1 foreign students, H-1B temporary professional workers, J-1 cultural exchange participants, or S-4 terrorist informants. These temporary visas may be grouped under the broad labels described below.

Diplomats and Other International Representatives. Ambassadors, consuls, and other official representatives of foreign governments (and their immediate family and servants) enter the United States on A visas. Official representatives of international organizations (and their immediate family and servants) are admitted on G visas. Those nonimmigrants entering under the auspices of the North Atlantic Treaty Organization (NATO) have their own visa categories. Aliens who work for foreign media use the I visa.

Visitors as Business Travelers and Tourists. B-1 nonimmigrants are visitors for business and are required to be seeking admission for activities other than purely local employment or hire. The difference between a business visitor and a temporary worker depends also on the source of the alien's salary. To be classified as a visitor for business, an alien must receive his or her salary from abroad and must not receive any remuneration from a U.S. source other than an expense allowance and reimbursement for other expenses incidental to temporary stay.

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[5]§214(b) of INA. Nonimmigrant visas are commonly referred to by the letter and numeral that denotes their subsection in §101(a)(15), hence "H-1" workers, "L" intracompany transfers, and "V" family members.

[6]Law on nonimmigrants dates back to the Immigration Act of 1819. An immigration law enacted in 1924 defined several classes of nonimmigrant admission. The disparate series of immigration and nationality laws were codified into INA in 1952. Major laws amending INA are the Immigration Amendments of 1965, the Refugee Act of 1980, the Immigration Reform and Control Act of 1986, the Immigration Act of 1990, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The newest nonimmigrant visa — known as the V visa — was folded into the District of Columbia FY2001 appropriations conference agreement (H.R. 4942, H.Rept. 106-1005), which became P.L. 106-553.

The B-2 visa is granted for temporary visitors for "pleasure,"otherwise known as tourists. Tourists, who are encouraged to visit as a boon to the U.S. economy, have consistently been the largest nonimmigrant class of admission to the United States. A B-2 nonimmigrant may not engage in any employment in the United States.

Many visitors, however, enter the United States without nonimmigrant visas through the Visa Waiver Program. This provision of INA allows the Attorney General to waive the visa documentary requirements for aliens coming as visitors from 28 countries, e.g., Australia, France, Germany, Italy, Japan, New Zealand, Switzerland, and the United Kingdom.[7]

Multinational Corporate Executives and International Investors. Intracompany transferees who are executive, managerial, and have specialized knowledge and who are continuing employment with an international firm or corporation are admitted on the L visas. Aliens who are treaty traders enter as E-1 while those who are treaty investors use E-2 visas.

Temporary Workers. The major nonimmigrant category for temporary workers is the H visa. Professional specialty workers (H-1B), nurses (H-1C) agricultural workers (H-2A) and unskilled temporary workers (H-2B) are included.[8] Persons with extraordinary ability in the sciences, arts, education, business, or athletics are admitted on O visas, while internationally recognized athletes or members of an internationally recognized entertainment group come on P visas. Aliens working in religious vocations enter on R visas. Temporary professional workers from Canada and Mexico may enter according to terms set by the North American Free Trade Agreement (NAFTA) on TN visas.

Cultural Exchange. The broadest category for cultural exchange is the J visa. The J visa includes professors and research scholars, students, foreign medical graduates, teachers, camp counselors and au pairs who are participating in an approved exchange visitor program. Participants in special international cultural exchange programs from the former Soviet Union and Eastern bloc countries enter on Q-1 visas. Q-2 visas are for Irish young adults from the border counties who participate in approved cultural exchange programs.

Foreign Students. The most common visa for foreign students is the F-1 visa. It is tailored for international students pursuing a full-time academic education. Those students who wish to pursue a non-academic, e.g., vocational, course of study

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[7]See CRS Report RS21205, *Immigration: Visa Waiver Program*, by Alison Siskin.

[8]See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*; CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, both by Ruth Ellen Wasem; and CRS Report RS20164, *Immigration: Temporary Admission of Nurses for Health Shortage Areas (P.L. 106-95)*, by Joyce Vialet.

apply for an M visa. Foreign students are just one of many types of aliens who may enter the United States on a J-1 visa for cultural exchange.[9]

Family-Related. Fiances and fiancees of U.S. citizens come in on K visas. The 106th Congress added a transitional nonimmigrant visa — the V visa — for immediate relatives (spouse and children) of LPRs who have had petitions to also become LPRs pending for 3 years.

Law Enforcement-Related. The law enforcement-related visas are among the most recently created. The S visa is used by informants in criminal and terrorist investigations.[10] Victims of human trafficking who participate in the prosecution of those responsible may get a T visa. Victims of other criminal activities, notably domestic abuse, who cooperate with the prosecution are eligible for the U visa.

Aliens in Transit and Crew Members. Two miscellaneous nonimmigrant categories are some of the earliest nonimmigrant categories enacted. The C visa is for aliens traveling through the United States en route to another destination, and the D visa is for alien crew members on vessels or aircraft.

Exclusion and Removal

Inadmissibility. Both DOS consular officers (when the alien is petitioning abroad) and INS inspectors (when the alien is entering the United States) must confirm that the alien is not ineligible for a visa under the so-called "grounds for inadmissibility" of the INA.[11] These criteria categories are:

- health-related grounds;
- criminal history;
- security and terrorist concerns;[12]
- public charge (e.g., indigence);
- seeking to work without proper labor certification;
- illegal entrants and immigration law violations;
- lacking proper documents;
- ineligible for citizenship; and,
- aliens previously removed.

The law provides waiver authority of these grounds (except for most of the security and terrorist-related grounds) for nonimmigrants on a case-by-case basis.[13]

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[9]For further discussion and analysis, see CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Ruth Ellen Wasem.

[10]For more information, see CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*, by Karma Ester.

[11]§212(b) of INA.

[12]For more information, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William J. Krouse and Raphael Perl.

[13]§212(d)(3) and (4) of INA.

Termination of Status. Consistent with the grounds of inadmissibility, the legal status of a nonimmigrant in the United States may be terminated based upon the nonimmigrant's behavior in the United States. Specifically, the regulations list national security, public safety and diplomatic reasons for termination. If a nonimmigrant who is not authorized to work does so, that employment constitutes a failure to maintain a lawful status. A crime of violence that has a sentence of more than 1 year also terminates nonimmigrant status.[14]

Periods of Admission

Length of Stay. Congress has enacted amendments and the executive branch has promulgated regulations governing areas such as the length and extensions of stay. For example, A-1 ambassadors are allowed to remain in the United States for the duration of their service, F-1 students to complete their studies, R-1 religious workers for up to 3 years, and D crew members for 29 days. Many categories of nonimmigrants are required to have a residence in their home country that they intend to return to as a stipulation of obtaining the visa. The law actually requires J-1 cultural exchange visa holders to go home for 2 years prior to returning to the United States (with some exceptions).

On April 12, 2002, the INS proposed regulations on the length of stay for aliens on visitor visas (B-2) aimed at curbing abuses in that nonimmigrant visa category, such as working, enrolling in school, or overstaying. The rule would eliminate the minimum 6-month admission period and would replace it with "a period of time that is fair and reasonable for the completion of the purpose of the visit." The burden would be on the alien to explain to the INS inspector the nature and purpose of visit so the inspector can determine an appropriate time limit. In those cases where the inspector cannot determine the time needed to complete the visit, the visitors would be limited to 30-day periods.[15]

Duration of Visa. Separate from the length of stay authorized for the various nonimmigrant visas is the validity period of the visa issued by DOS consular officers. These time periods are negotiated country-by-country and category-by-category, generally reflecting reciprocal relationships for U.S. travelers to these countries. For example, a B-1 and B-2 visitor visa from Germany is valid for 10 years while B-1 and B-2 visas from Indonesia are valid for 5 years. The D crew member visa is valid for 5 years for Egyptians, but only 1 year for Hungarians.

Employment Authorization

Permission to Work. With the obvious exception of the nonimmigrants who are temporary workers or the executives of multinational corporations, most nonimmigrants are not allowed to work in the United States. Exceptions to this policy are noted in **Table 2**, which follows at the end of this report. As stated above,

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[14]§214.1 of 8 CFR.

[15]*Federal Register*, v. 67, n. 71, April 12, 2002, p.18065-18069.

working without authorization is a major violation of law and results in loss of nonimmigrant status.

Labor Market Tests. The H-2 visas require that employers conduct an affirmative search for available U.S. workers and that DOL determine that admitting alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Under this process — known as labor certification — employers must apply to the U.S. Department of Labor for certification that unemployed domestic workers are not available and that there will not be an adverse effect from the alien workers' entry.

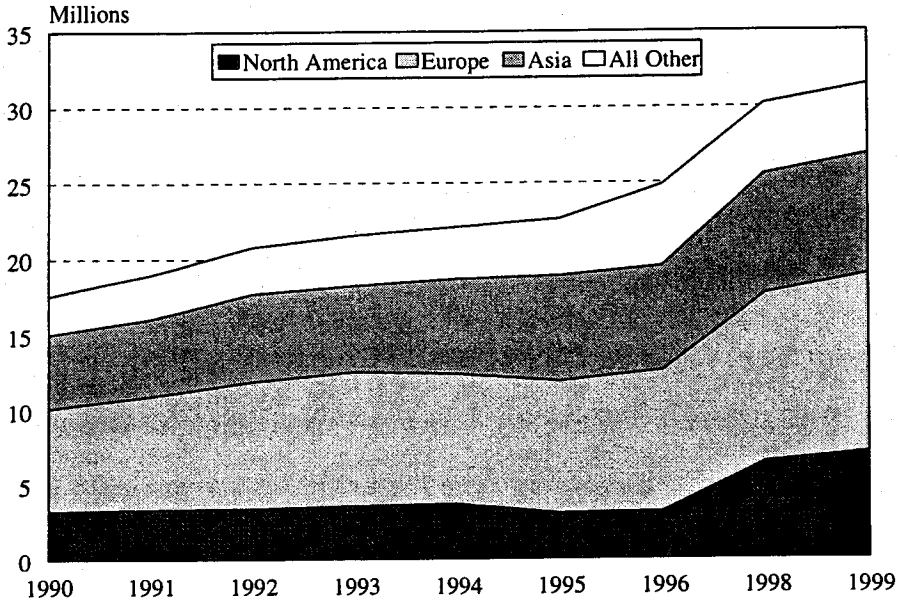
The labor market test required for H-1 workers, known as labor attestation, is less stringent than labor certification. Any employer wishing to bring in an H-1B nonimmigrant must attest in an application to the DOL that: the employer will pay the nonimmigrant the greater of the actual compensation paid other employees in the same job or the prevailing compensation for that occupation; the employer will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected; and, there is no strike or lockout. Employers recruiting the H-1C nurses must attest that: their employment will not adversely affect the wages and working conditions of similarly employed registered nurses; the H-1C nurses will be paid the wage rate paid by the facility to similarly employed U.S. registered nurses; the facility is taking significant steps to recruit and retain sufficient U.S. registered nurses; and the facility is abiding by specified anti-strike and layoff protections.

Statistical Trends

Numerical Limits. Unlike immigrant admissions that are subject to a complex set of numerical limits, only a few nonimmigrant admissions are subject to numerical limits. In 1990, numerical restrictions were first placed on annual admissions on some work-related categories — the H-1B and H-2B categories. Subsequently, numerical limits were set for the North American Free Trade workers from Mexico, the S visas for criminal informants, the H-1C nurses, and the U and T visas for victims of criminal activity and human trafficking.

FY1999 Entries. During FY1999 (the most recent year for which INS data are published), a record 31.4 million nonimmigrants entered the United States, and the overwhelming majority — 76.7% — were tourists. Of that number, over 16 million aliens entered as visitors through the Visa Waiver Program. Because these data are INS admissions numbers, they include multiple entries by the same person; however, they do not enumerate nonimmigrants already present in the United States who entered in a prior year.

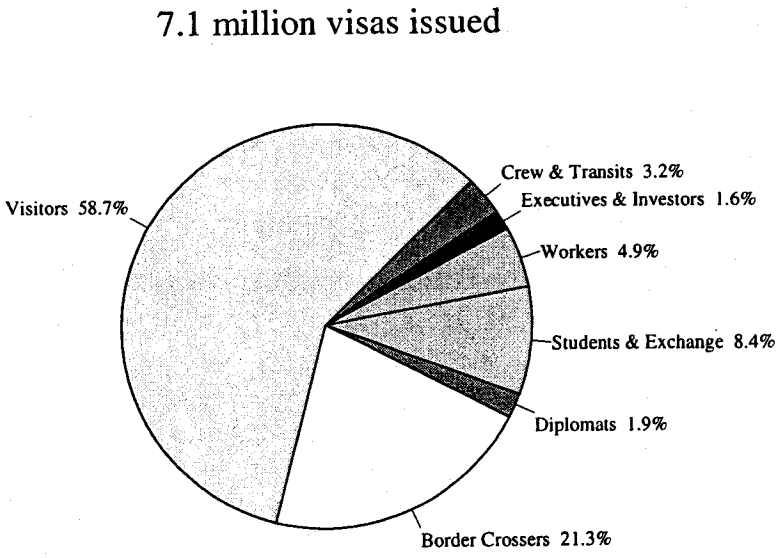
Figure 1. Nonimmigrant Admissions by World Region, FY1990-FY1999



Source: published data from INS Statistical Yearbooks, FY1994-FY1999.

Note: INS has not published nonimmigrant data for FY1997.

Figure 2. Preliminary FY2000 Visa Issuances by Major Categories



Source: CRS analysis of U.S. Department of State Bureau of Consular Affairs preliminary FY2000 data.

As **Figure 1** illustrates, the number of nonimmigrant entries has steadily grown over the past decade. Most nonimmigrant admissions in FY1999 are from Europe (11.8 million), as has been the case for the entire decade. Asians make up the next largest group of nonimmigrants over the decade, growing from 4.9 million in FY1990 to 7.9 million in FY1999. The number of nonimmigrants from North America, however, have more than doubled, jumping from 3.2 million in FY1990 to 7.1 million in FY1999.

FY2000 Issuances. Preliminary data from DOS indicate that 7,141,636 nonimmigrant visas were issued to individuals in FY2000. The combination of all visitors for tourism and business comprised the largest group of nonimmigrants, about 5.7 million. As **Figure 2** presents, aliens from neighboring countries with Border Crossing Cards make up the next largest group (21.3%), followed by students (8.4%) and workers (4.9%). As stated above, some of these visas are valid for up to 10 years even if the periods of stay in the United States are limited, e.g., 6 months.

Emerging Issues

The September 11, 2001 terrorist attacks — apparently conducted by foreign nationals legally admitted to the United States — are raising a series of questions about aliens in the United States and the extent that the federal government monitors their admission and presence in this country. Thus far, legislative and administrative actions have centered on issues surrounding specific visa classifications, such as F, J, and M foreign students, or specific policy procedures, such as an entry-exit control system for the admission and departure of nonimmigrants.[16] Congressional action on the Enhanced Border Security and Visa Entry Reform Act (H.R. 3525/S. 1749) and the Bush Administration's recently announced regulations on visitor visas and foreign students are examples of tightening policies towards aliens temporarily admitted to the United States.[17]

Some are advocating a closer monitoring of those present in the United States on nonimmigrant visas. Supporters of this view continue to focus on foreign students as the nonimmigrants most likely to include spies and terrorists, and they argue that increased monitoring of aliens on F, J, and M visas is essential to national security. Others warn that such scrutiny may lead to excessive government intrusion. Many also question the feasibility of systems for nonimmigrant tracking, citing the work that remains on the reporting system for foreign students.

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[16]A series of CRS products track these developments. For example, see CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Ruth Ellen Wasem; CRS Report RS21043, *Immigration: S Visas for Criminal and Terrorist Informants*, by Karma Ester; and CRS Report RS21205, *Immigration: Visa Waiver Program*, by Alison Siskin.

[17]See CRS Electronic Briefing Book, *Terrorism*, pages on "Border Security Issues and Options," by Lisa Seghetti and William Krouse, and "Foreign Nationals in the United States," by Ruth Ellen Wasem, available at: [http://www.congress.gov/brbk/html/ebter1.shtml].

Efforts to establish a comprehensive automated system that tracks the arrival and departure of nonimmigrants have not been successful, although legislation to do so was first enacted in 1996.[18] The Bush Administration has requested a total of $380 million for FY2003 to develop an automated entry-exit control system. Some are calling for the use of biometric technology in developing entry-exit data systems. Others would require a biometric identifier be collected from all nonimmigrant applicants and would also require that the visa holder's biometric characteristic be matched with the biometric on the nonimmigrant visa prior to admission.

Quite separate from issues arising from September 11 are policies toward temporary workers that traditionally prompt major immigration proposals every few years. For example, there are renewed discussions on revising the guest worker programs, notably as part of United States-Mexico border talks. As the economy pulls out of the recession, attention may again turn to the professional temporary H-1 workers who frequently are employed in the information technology and healthcare sectors.[19]

While currently the law and regulations usually set strict terms for nonimmigrant lengths of stay in the United States, typically have foreign residency requirements, and often limit what the aliens are permitted to do in the United States (e.g., gain employment or enroll in school), many observers assert that these policies are not uniformly or rigorously enforced. Some maintain that further legislation is not necessary so long as the laws currently in place are fully enforced.

The two tables that follow, among other things, illustrate the complexity and diversity of policy on temporary admissions, and the challenge for policy makers who may seek to revise it. **Table 1** indicates whether the INA or regulations set any limits or requirements on how long nonimmigrants may stay in the United States and whether they must maintain a residence in their home country for each of the 70 visa classifications. **Table 2** details whether there are any labor market tests or any limits on the numbers of aliens who can enter the United States according to each of the 70 visa classifications. **Table 2** also presents DOS data on the number of nonimmigrant visas issued in FY2000. *When a cell in the table is blank, it means the law and regulations are silent on the subject.*

Agreement on the proper balance among major policy priorities, such as ensuring national security, facilitating trade and commerce, protecting public health and safety, and fostering international cooperation (as well as the goal of meeting the needs of U.S. employers while not undercutting U.S. workers) may be difficult to reach and maintain.

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[18]See CRS Report RS20627, *Immigration: Integrated Entry and Exit Data System*, by William J. Krouse.

[19]See CRS Report RL30498, *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers*; CRS Report RL30852, *Immigration of Agricultural Guest Workers: Policy, Trends, and Legislative Issues*, both by Ruth Ellen Wasem; and CRS Report RS20164, *Immigration: Temporary Admission of Nurses for Health Shortage Areas (P.L. 106-95)*, by Joyce Vialet.

Table 1. Periods of Stay and Foreign Residency Requirements for Nonimmigrant Visas

Visa	Class description	Period of stay	Renewal option	Foreign residence required
A-1	Ambassador, public minister, career diplomat, consul, and immediate family	Duration of assignment		
A-2	Other foreign government official or employee, and immediate family	Duration of assignment		
A-3	Attendant, servant or personal employee of A-1/A-2, and immediate family	up to 3 years	up to 2 year intervals	
B-1	Visitor for business	up to 1 year	up to 6 months	Yes
B-2	Visitor for pleasure	6 months to 1 year	up to 6 months	Yes
B-1/B-2	Business and pleasure	6 months to 1 year	up to up to 6 months	Yes
BCC	Border Crossing Cards	72 hours [unless coupled with B-1 or B-2]		Yes
C-1	Alien in transit	up to 29 days		
C-1/D	Transit/crew member	up to 29 days		
C-2	Person in transit to United Nations Headquarters	up to 29 days		
C-3	Foreign government official, immediate family, attendant, servant, or personal employee in transit	up to 29 days		
D	Crew member	up to 29 days		
E-1	Treaty trader, spouse and child, and employee	up to 2 years	up to 2 years	
E-2	Treaty investor, spouse and child, and employee	same as E-1	same as E-1	
F-1	Foreign student (academic or language training program)	Period of study (1 year secondary students)		Yes
F-2	Spouse or child of F-1	same as F-1		Yes
G-1	Principal resident representative of recognized foreign member government to international organization, staff, and immediate family	Duration of assignment		

Visa	Class description	Period of stay	Renewal option	Foreign residence required
G-2	Other representative of recognized foreign member government to international organization, and immediate family	Duration of assignment		
G-3	Representative of nonrecognized or nonmember foreign government to international organization, and immediate family	Duration of assignment		
G-4	International organization officer or employee, and immediate family	Duration of assignment		
G-5	Attendant, servant, or personal employee of G-1 through G-4, and immediate family	up to 2 years	up to 2-year intervals	
H-1A	Temporary worker — nurse (statutory authority expired)	up to 3 years	up to 2-year intervals; up to 5 years max	
H-1B	Temporary worker — professional speciality occupation	up to 3 years	up to 3-year intervals; up to 6 years max	
H-1C	Temporary worker — nurse (new category)	3 years		
H-2A	Temporary worker — agricultural workers	up to 1 year	up to 1 year; 3 years total	Yes
H-2B	Temporary worker — non- agricultural workers	up to 1 year	up to 1 year; 3 years total	Yes
H-3	Temporary worker — trainee	up to 2 years		Yes
H-4	Spouse or child of H-1A/B/C, H-2A/B, or H-3	Same as principal		
I	Representative of foreign information media, spouse and child	Duration of employment		
J-1	Cultural exchange visitor	Period of program		Yes
J-2	Spouse or child of J-1	Same as J-1		Yes
J-3	Au Pair	14 months		Yes

Visa	Class description	Period of stay	Renewal option	Foreign residence required
K-1	Fiancé(e) of U.S. citizen	Valid for 4 months; must marry within 90 days to adjust status		
K-2	Child of K-1	Same as K-1		
L-1	Intracompany transferee (executive, managerial, and specialized knowledge personnel continuing employment with international firm or corporation)	up to 3 years	up to 2-year extension; 5 years max; executives 7 years	
L-2	Spouse or child of L-1	Same as L-1		
M-1	Vocational student	Duration of study		Yes
M-2	Spouse of child of M-1	Same as M-1		Yes
NATO-1	Principal permanent representative of member nations to NATO, high ranking NATO officials, and immediate family	tour of duty		
NATO-2	Other representatives of member states to NATO (including any of its subsidiary bodies), and immediate family; dependents of member of a force entering in accordance with provisions of NATO agreements; members of such force if issued visas	tour of duty		
NATO-3	Official clerical staff accompanying a representative of member state to NATO, and immediate family	tour of duty		
NATO-4	Officials of NATO (other than those classifiable as NATO-1), and immediate family	tour of duty		
NATO-5	Experts, other than NATO-4 officials, employed in missions on behalf of NATO, and their dependents	tour of duty		
NATO-6	Civilian employees of a force entering in accordance with the provisions of NATO agreements or attached to NATO headquarters, and their immediate family	tour of duty		
NATO-7	Attendants, servants, or personal employees of NATO-1 through NATO-6, and immediate family	up to 3 years	2-year intervals	
N-8	Parent of certain special immigrants (pertaining to international organizations)	up to 3 years	up to 3-year interval until child becomes an adult	

Visa	Class description	Period of stay	Renewal option	Foreign residence required
N-9	Child of N-8 or of certain special immigrants (pertaining to international organizations)	up to 3 years	up to 3-year interval until child becomes an adult	
O-1	Person with extraordinary ability in the sciences, arts, education, business, or athletics	up to 3 years	up to 1 year	
O-2	Person accompanying and assisting in the artistic or athletic performance by O-1	up to 3 years	up to 1 year	Yes
O-3	Spouse or child of O-1 or O-2	same as O-1 or O-2	up to 1 year	
P-1	Internationally recognized athlete or member of an internationally recognized entertainment group and essential support	up to 5 years individual athlete; up to 1 year group or team	up to 5 years, not to exceed 10 years	Yes
P-2	Artist or entertainer in a reciprocal exchange program and essential support	up to 1 year	1-year increments	Yes
P-3	Artist or entertainer in a culturally unique program and essential support	up to 1 year	1-year increments	Yes
P-4	Spouse or child of P-1, P-2, or P-3	same as P-1, P-2 or P-3	1-year increments	Yes
Q-1	International cultural exchange program participant	duration of program; up to 15 months		Yes
Q-2	Irish Peace Process Program participant	duration of program; up to 3 years		Yes
Q-3	Spouse or child of Q-2	same as Q-1		Yes
R-1	Religious worker	up to 3 years	up to 2-year intervals; up to 5 years max	
R-2	Spouse or child of R-1	same as R-1	same a R-1	
S-5	Criminal informant	up to 3 years		
S-6	Terrorist informant	up to 3 years		

Visa	Class description	Period of stay	Renewal option	Foreign residence required
S-7	Spouse or child of S-5 and S-6	same as S-5 and S-6		
T-1	Victim of human trafficking	If T-1 cooperates and is needed in prosecution of traffickers, may lead to adjustment to legal permanent residence		
T-2	Immediate family of T-1			
TN	NAFTA professional	1 year	1 year	
TD	Spouse or child of TN	1 year	1 year	
U-1	Victim or informant of criminal activity	May lead to adjustment to legal permanent residence if specified conditions are met.		
U-2	Spouse or child of U-1			
V-1	Spouse of Legal Permanent Resident (LPR) who has petition pending for 3 years or longer	Transitional nonimmigrant visa that leads to adjustment to legal permanent residence status when visa become available		
V-2	Child of LPR who has petition pending for 3 years or longer			
V-3	Child of V-1 or V-2			

Note: Information presented in this table comes from §101(a)(15), §212, and §214 of the Immigration and Nationality Act and §214 of 8 CFR. When a cell in the table is blank, it means the law and regulations are silent on the subject.

Table 2. Employment Authorization, Numerical Limits, and FY2000 Issuances for Nonimmigrant Visas

Visa	Class description	Employment authorization	Labor market test	Annual numerical limit	FY2000 issuances
A-1	Ambassador, public minister, career diplomat, consul, and immediate family	Within scope of official duties			10,698
A-2	Other foreign government official or employee, and immediate family	Within scope of official duties			69,079
A-3	Attendant, servant or personal employee of A-1/A-2, and immediate family	Within scope of official duties			2,486
B-1	Visitor for business				75,919
B-2	Visitor for pleasure	No			509,031
B-1/B-2	Business and pleasure				3,567,578
BCC	Border Crossing Cards				1,510,135
C-1	Alien in transit				26,407
C-1/D	Transit/crew member				165,556
C-2	Person in transit to United Nations Headquarters				37
C-3	Foreign government official, immediate family, attendant, servant, or personal employee in transit				6,606
D	Crew member of vessel or aircraft	Only as employee of carrier			31,012
E-1	Treaty trader, spouse and child, and employee	Within the scope of treaty conditions			9,539
E-2	Treaty investor, spouse and child, and employee	Within the scope of treaty conditions			26,981

Visa	Class description	Employment authorization	Labor market test	Annual numerical limit	FY2000 issuances
F-1	Foreign student (academic or language training program)	Off campus work is restricted, with limited exceptions			284,053
F-2	Spouse or child of F-1				24,891
G-1	Principal resident representative of recognized foreign member government to international organization, staff, and immediate family	Within scope of official duties			5,166
G-2	Other representative of recognized foreign member government to international organization, and immediate family	Within scope of official duties			11,225
G-3	Representative of nonrecognized or nonmember foreign government to international organization, and immediate family	Within scope of official duties			258
G-4	International organization officer or employee, and immediate family	Within scope of official duties			16,960
G-5	Attendant, servant, or personal employee of G-1 through G-4, and immediate family	Within scope of official duties			1,737
H-1A	Temporary worker — nurse (statutory authority expired)	Yes	Yes		3
H-1B	Temporary worker — professional speciality occupation	Yes	Yes	65,000 (195,000 through FY2003)	133,290
H-1C	Temporary worker — nurse (new category)	Yes	Yes	500	NA
H-2A	Temporary worker — agricultural worker	Yes	Yes		30,200
H-2B	Temporary worker — non- agricultural worker	Yes	Yes	66,000	45,037
H-3	Temporary worker — trainee	Yes, as part of the training program			1,514
H-4	Spouse or child of H-1A/B/C, H-2A/B, or H-3	No			79,518

Visa	Class description	Employment authorization	Labor market test	Annual numerical limit	FY2000 issuances
I	Representative of foreign information media, spouse and child	Only as employee of foreign media			13,928
J-1	Cultural exchange visitor	Yes, if program has work component			236,837
J-2	Spouse or child of J-1	Only as approved by INS			37,122
J-3	Au Pair				NA
K-1	Fiancé(e) of U.S. citizen				21,471
K-2	Child of K-1				3,275
L-1	Intracompany transferee (executive, managerial, and specialized knowledge personnel continuing employment with international firm or corporation)	Yes			54,963
L-2	Spouse or child of L-1	No			57,069
M-1	Vocational student	Only practical training related to degree			6,107
M-2	Spouse of child of M-1	No			358
NATO-1	Principal permanent representative of member nations to NATO, high ranking NATO officials, and immediate family	Within scope of official duties			17
NATO-2	Other representatives of member states to NATO (including any of its subsidiary bodies), and immediate family; dependents of member of a force entering in accordance with provisions of NATO agreements; members of such force if issued visas	Within scope of official duties			5,031
NATO-3	Official clerical staff accompanying a representative of member state to NATO, and immediate family	Within scope of official duties			0
NATO-4	Officials of NATO (other than those classifiable as NATO-1), and immediate family	Within scope of official duties			97

Visa	Class description	Employment authorization	Labor market test	Annual numerical limit	FY2000 issuances
NATO-5	Experts, other than NATO-4 officials, employed in missions on behalf of NATO, and their dependents	Within scope of official duties			33
NATO-6	Civilian employee of a force entering in accordance with the provisions of NATO agreements or attached to NATO headquarters, and their immediate family	Within scope of official duties			209
NATO-7	Attendants, servants, or personal employees of NATO-1 through NATO-6, and immediate family	Within scope of official duties			3
N-8	Parent of certain special immigrants (pertaining to international organizations)	Yes			12
N-9	Child of N-8 or of certain special immigrants (pertaining to international organizations)	Yes			8
O-1	Person with extraordinary ability in the sciences, arts, education, business, or athletics	Yes			6,466
O-2	Person accompanying and assisting in the artistic or athletic performance by O-1	Yes			1,894
O-3	Spouse or child of O-1 or O-2	Only as approved by INS			2,101
P-1	Internationally recognized athlete or member of an internationally recognized entertainment group and essential support	Yes			23,786
P-2	Artist or entertainer in a reciprocal exchange program and essential support	Yes			238
P-3	Artist or entertainer in a culturally unique program and essential support	Yes			10,501
P-4	Spouse or child of P-1, P-2, or P-3	Only as approved by INS			868
Q-1	International cultural exchange program participant	Yes, with employer approved by program			2,024
Q-2	Irish Peace Process Program participant	Yes, with employer approved by program			358

Visa	Class description	Employment authorization	Labor market test	Annual numerical limit	FY2000 issuances
Q-3	Spouse or child of Q-2	No			3
R-1	Religious worker	Yes			7,418
R-2	Spouse or child of R-1	No			2,489
S-5	Criminal informant	Yes		200	NA
S-6	Terrorist informant	Yes		50	NA
S-7	Spouse or child of S-5 or S-6				NA
T-1	Victim of human trafficking	Yes		5,000	NA
T-2	Immediate family of T-1	Yes			NA
TN	NAFTA professional	Yes		Canada unlimited; Mexico 5,000	907
TD	Spouse or child of TN				1,127
U-1	Victim or informant of criminal activity	Yes		10,000	NA
U-2	Spouse or child of U-1	Yes			NA
V-1	Spouse of Legal Permanent Resident (LPR) who has petition pending for 3 years or longer	Yes			NA
V-2	Child of LPR who has petition pending for 3 years or longer	Yes, assuming they meet age requirements			NA
V-3	Child of V-1 or V-2	Yes, assuming they meet age requirements			NA

Note: Information presented in this table comes from §101(a)(15), §212, and §214 of the Immigration and Nationality Act and §214 of 8 CFR. When a cell in the table is blank, it means the law and regulations are silent on the subject.

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Visa Issuances: Policy, Issues, and Legislation

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Visa Issuances: Policy, Issues, and Legislation

Summary

Since the September 11 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States legally despite provisions in immigration laws that bar the admission of terrorists. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to further terrorist attacks have led many to call for revisions in the policy and possibly changes in who administers immigration law.

Foreign nationals not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted, with certain exceptions noted in law. Under current law, two departments — the Department of State (DOS) and the Department of Justice (DOJ) — each play key roles in administering the law and policies on the admission of aliens. DOS's Bureau of Consular Affairs is the agency currently responsible for issuing visas, and DOJ's Immigration and Naturalization Service (INS) plays a key role in approving immigrant petitions and in inspecting all people who enter the United States. In FY2000, DOS issued approximately 7.5 million visas and rejected over 2 million aliens seeking visas.

House Majority Leader Dick Armey, Chair of the Select Committee on Homeland Security, introduced the President's proposal for a new Department of Homeland Security (DHS) as **H.R. 5005**. As introduced, H.R. 5005 would bifurcate visa issuances so that DHS would set the policies and DOS would retain responsibility for implementation. It would give the Secretary of the new department exclusive authority through the Secretary of State to issue or refuse to issue visas. The House Committees on Judiciary, International Relations, and Government all approved language on visa issuances that retained DOS's administrative role in issuing visas, but added specific language to address many of the policy and national security concerns raised during their respective hearings. Breaking with the Administration, the House Judiciary Committee approved language that would place much of INS's adjudication and service responsibilities — including its role in approving petitions — with a new Bureau of Citizenship and Immigration Services headed by an Assistant Attorney General at DOJ. When the House Select Committee on Homeland Security marked up H.R. 5005 on July 19, 2002, it approved language on immigrant processing and visa issuances consistent with the House Judiciary Committee recommendations. An amendment to move the consular affairs visa function to DHS failed when the House passed H.R. 5005 on July 26.

The latest version of **S. 2452**, the National Homeland Security and Combating Terrorism Act of 2002 (as acted on by Senate Governmental Affairs Committee July 25), differs somewhat on the issues of immigration adjudications and visa issuances from the Administration's proposal and H.R. 5005 as passed. The Senate draft substitute would not alter the State Department's administrative role in issuing visas but would establish an Under Secretary for Immigration Affairs in DHS who would issue regulations on visa issuance, oversee immigration enforcement and border functions, and be responsible for all immigration and naturalization adjudications.

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Visa Issuances: Policy, Issues, and Legislation

Introduction

In the months following the September 11 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens (i.e., noncitizens or foreign nationals) who apparently entered the United States legally on temporary visas. Fears that lax enforcement of immigration laws regulating the admission of foreign nationals into the United States may continue to make the United States vulnerable to further terrorist attacks have led many to call for revisions in the visa policy and possibly changes in who administers immigration law.

Foreign nationals not already legally residing in the United States who wish to come to the United States generally must obtain a visa to be admitted.[1] Under current law, two departments — the Department of State (DOS) and the Department of Justice (DOJ) — each play key roles in administering the law and policies on the admission of aliens.[2] DOS's Bureau of Consular Affairs (Consular Affairs) is the agency currently responsible for issuing visas, and DOJ's Immigration and Naturalization Service (INS) plays a key role in approving immigrant petitions and in inspecting all people who enter the United States.

This report addresses the current policy on immigration visa issuances and options for reassigning this function to the proposed Department of Homeland Security (DHS).[3] It opens with an overview of visa issuances, with sections on procedures for aliens coming to live in the United States permanently and on procedures for aliens admitted for temporary stays.[4] An analysis of the grounds for excluding aliens follows. The report summarizes the debate on transferring visa

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[1]Authorities to except or to waive visa requirements are specified in law, such as the broad parole authority of the Attorney General under §212(d)(5) of INA and the specific authority of the Visa Waiver Program in §217 of INA.

[2]Other departments, notably the Department of Labor (DOL), and the Department of Agriculture (USDA), play roles in the approval process depending on the category or type of visa sought, and the Department of Health and Human Services (DHHS) sets policy on the health-related grounds for inadmissibility discussed below.

[3] For a fuller account of INS restructuring proposals and the possible transfer to homeland security, see CRS Report RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107th Congress*, by Lisa M. Seghetti; and CRS Congressional Distribution Memorandum, *Analysis of President's Plan to Include the Immigration and Naturalization Service in the Proposed Department of Homeland Security*, by Lisa M. Seghetti and Ruth Ellen Wasem.

[4]For a broader discussion, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem.

issuance policy functions to homeland security and concludes with a discussion of the legislative proposals to reassign the visa issuance activities and to revise visa issuance policies.

Overview on Visa Issuances

There are two broad classes of aliens that are issued visas: immigrants and nonimmigrants. Humanitarian admissions, such as asylees, refugees, parolees and other aliens granted relief from deportation by the Attorney General, are handled separately under the Immigration and Nationality Act (INA). Those aliens granted asylum or refugee status ultimately are eligible to become legal permanent residents (LPRs).[5] Illegal aliens or unauthorized aliens include those noncitizens who either entered the United States surreptitiously, i.e., entered without INS inspection, or who violated the terms of their visas.

The documentary requirements for visas are stated in §222 of the INA, with some discretion for further specifications or exceptions by regulation. Generally, the application requirements are more extensive for aliens who wish to permanently live in the United States than those coming for visits. The amount of paperwork required and the length of adjudication process to obtain a visa to come to the United States is analogous to that of the Internal Revenue Service's (IRS) tax forms and review procedures. Just as persons with uncomplicated earnings and expenses may file an IRS "short form" while those whose financial circumstances are more complex may file a series of IRS forms, so too an alien whose situation is straightforward and whose reason for seeking a visa is easily documented generally has fewer forms and procedural hurdles than an alien whose circumstances are more complex. There are over 70 INS forms as well as DOS forms that pertain to the visa issuance process.[6]

The system of processing, adjudication, and issuances of visas is largely a fee-based, rather than a government service funded by direct appropriations. For example, the filing fee that a U.S. citizen would pay INS to process an immigrant petition for a relative is $130 and for an alien worker is $135. The immigrant petition fees collected by INS are deposited in the examinations fee account along with fees filed with other INS petitions (e.g., naturalization, employment authorization).[7] In FY2001, INS deposited more than $1 billion in the examinations fee account. Consular Affairs also collects fees for visas services. The Consular Affairs immigrant visa application processing fee is $335, and the nonimmigrant processing fee is $65.[8] DOS has authority to use up to $316.7 million of these

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[5]For background and further discussion of humanitarian cases, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno and Katherine Bush; and CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

[6]INS forms are available at: [http://www.ins.usdoj.gov/graphics/formsfee/forms/index.htm].

[7]§286(m) of INA.

[8]DOS lists its fees at: [http://travel.state.gov/2002feechart.html].

processing fees in FY2002 and has requested authority to use $642.7 million in FY2003.[9]

Immigrant Visas

Aliens who wish to come to live permanently in the United States must meet a set of criteria specified in the INA. They must qualify as:

- a spouse or minor child of a U.S. citizen;
- a parent, adult child or sibling of an adult U.S. citizen;
- a spouse or minor child of a legal permanent resident;
- an employee that a U.S. employer has gotten approval from the Department of Labor to hire;
- a person of extraordinary or exceptional ability in specified areas;
- a refugee or asylee determined to be fleeing persecution;
- winner of a visa in the diversity lottery; or
- qualify under other specialized provisions of law.

The largest number of immigrants is admitted because of family relationship to U.S. citizens. Of the 849,807 people who became LPRs in FY2000, 54.0% were relatives of U.S. citizens. Comparable numbers of immigrants were family of other LPRs (14.7%) and employment-based immigrants (12.6%). The remainder were refugees and asylees (7.8%) immigrants entering through the diversity lottery program (6.0%), and other miscellaneous categories (5.0%).

Petitions for immigrant, i.e. LPR, status, are first filed with INS by the sponsoring relative or employer in the United States. If the prospective immigrant is already residing in the United States, the INS handles the entire process, which is called "adjustment of status." If the prospective LPR does not have legal residence in the United States, the petition is forwarded to Consular Affairs in their home country after INS has reviewed it. The Consular Affairs officer (when the alien is coming from abroad) and INS adjudicator (when the alien is adjusting status in the United States) must be satisfied that the alien is entitled to the immigrant status. As **Figure 1** depicts, many LPRs are adjusting status from within the United States rather than receiving visas issued abroad by Consular Affairs. The spikes in FY1990 and FY1991 are due to the legalization programs of the Immigration Reform and Control Act of 1986.

A personal interview is required for all prospective LPRs.[10] The burden of proof is on the applicant to establish eligibility for the type of visa for which the application is made. Consular Affairs officers (when the alien is coming from abroad) and INS adjudicators (when the alien is adjusting status in the United States) must confirm that the alien is not ineligible for a visa under the so-called "grounds

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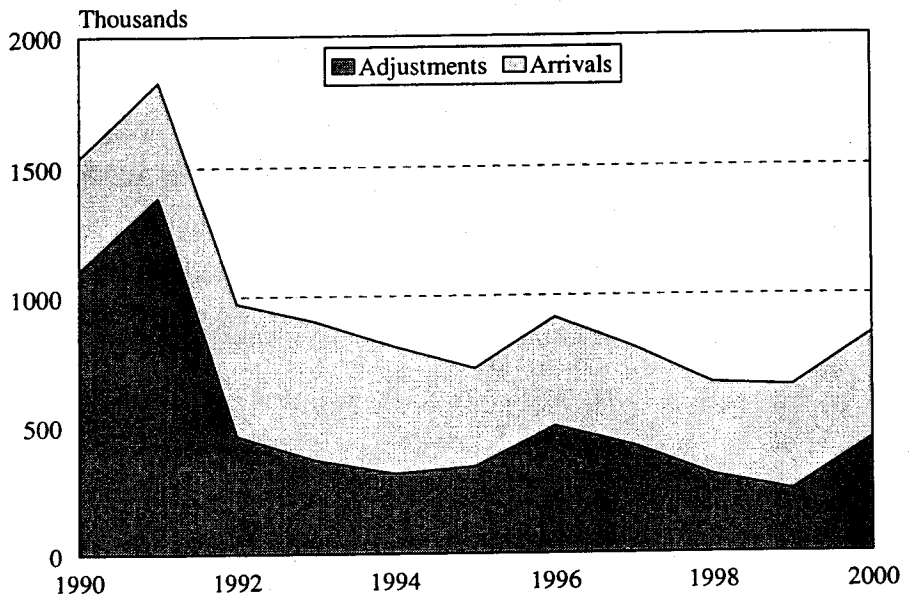
[9]§231 of P.L. 106-113, the Foreign Relations Authorization Act of 2001. CRS Report for Congress RL31370, *State Department and Related Agencies: FY2003 Appropriations*, by Susan Epstein.

[10]22 CFR §42.62.

for inadmissibility" of the INA, which include criminal, terrorist, and public health grounds for exclusion discussed below.[11]

Figure 1. Immigrants Arriving or Adjusting Status, FY1990-FY2000



Source: CRS presentation of published INS data.

Nonimmigrant Visas

Aliens seeking to come to the United States temporarily rather than to live permanently are known as nonimmigrants.[12] These aliens are admitted to the United States for a temporary period of time and an expressed reason. There are 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas are issued currently. Most of these nonimmigrant visa categories are defined in §101(a)(15) of the INA. These visa categories are commonly referred to by the letter and numeral that denotes their subsection in §101(a)(15), e.g., B-2 tourists, E-2 treaty investors, F-1 foreign students, H-1B temporary professional workers, J-1 cultural exchange participants, or S-4 terrorist informants.

The burden of proof is on the applicant to establish eligibility for nonimmigrant status and the type of nonimmigrant visa for which the application is made. Nonimmigrants must demonstrate that they are coming for a limited period and for a specific purpose. The Consular Affairs officer, at the time of application for a visa,

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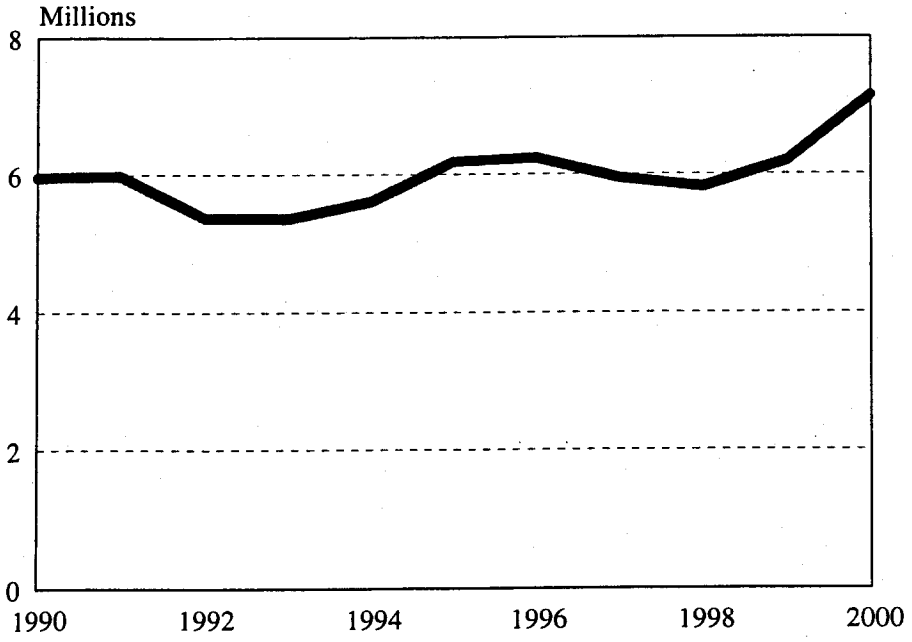
[11]For more information, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William J. Krouse and Raphael Perl.

[12]For a full discussion and analysis of nonimmigrant visas, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

as well as the INS inspectors, at the time of application for admission, must be satisfied that the alien is entitled to a nonimmigrant status.[13] The law exempts only the H-1 workers, L intracompany transfers, and V family members from the requirement that they prove that they are not coming to live permanently.[14] INS plays a role determining eligibility for certain nonimmigrant visas, notably H workers and L intracompany transfers. Also, if a nonimmigrant in the United States wishes to change from one nonimmigrant category to another, such as from a tourist visa to a student visa, the alien files a change of status application with the INS. If the alien leaves the United States while the change of status is pending, the alien is presumed to have relinquished the application.

Personal interviews are generally required for foreign nationals seeking nonimmigrant visas. Interviews, however, may be waived in certain cases, most notably B visitor visas.[15] This waiver formed the basis for the controversial and allegedly fraud-prone "Visa Express" in Saudi Arabia (now suspended) where travel agents pre-screened visa applicants and submitted petitions on behalf of the aliens.

Figure 2. Nonimmigrant Visas Issued, FY1990-FY2000



Source: CRS presentation of DOS Bureau of Consular Affairs data.

[13] 22 CFR §41.11(a).

[14] §214(b) of INA.

[15] 22 CFR §41.102.

In FY2000, DOS issued 7,141,636 nonimmigrant visas. As **Figure 2** illustrates, the annual number has grown over the past few years after dipping slightly in the early 1990s. This growth is largely attributable to the issuances of border crossing cards to residents of Canada and Mexico and the issuances of temporary worker visas. Combined, visitors for tourism and business comprised the largest group of nonimmigrants in FY2000, about 5.7 million. Visitors on B visas comprised 58.7% of the 7.1 million, while visitors with border crossing cards who are from neighboring countries made up the next largest group (21.3%). Other notable categories were students (8.4%) and workers (4.9%). Depending on the visa category and the country the alien is coming from, the nonimmigrant visa may be valid for several years and may permit multiple entries. As a result, INS reports over 30 million nonimmigrant entries in FY2001.[16]

Most visitors, however, enter the United States without nonimmigrant visas through the Visa Waiver Program (VWP). This provision of INA allows the Attorney General to waive the visa documentary requirements for aliens coming as visitors from 28 countries, e.g. Australia, France, Germany, Italy, Japan, New Zealand, Switzerland, and the United Kingdom. The INS reports that 17 million nonimmigrants entered the United States through VWP in FY2001.[17] Since aliens entering through VWP do not get visas, INS inspectors at the port of entry must perform background checks and make a determination of whether the VWP alien is eligible to enter the United States.

Grounds for Exclusion

All aliens must undergo reviews performed by DOS consular officers abroad and INS inspectors upon entry to the U.S. These reviews are intended to ensure that they are not ineligible for visas or admission under the grounds for inadmissibility spelled out in INA.[18] These criteria are:

- health-related grounds;
- criminal history;
- security and terrorist concerns;
- public charge (e.g., indigence);
- seeking to work without proper labor certification;
- illegal entrants and immigration law violations;
- ineligible for citizenship; and,
- aliens previously removed.

Consular officers are required to check the background of all aliens in the "lookout" databases. Some other provisions may be waived or are not applicable in the case of nonimmigrants, refugees (e.g., public charge), and other aliens. All family-based

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[16]For additional analysis, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[17]For further discussion of VWP, see CRS Report RS21205, *Immigration: Visa Waiver Program*, by Alison Siskin.

[18]§212(a) of INA.

immigrants and employment-based immigrants who are sponsored by a relative must have binding affidavits of support signed by U.S. sponsors in order to show that they will not become public charges.

As **Table 1** presents, DOS excluded 33,605 applicants for immigrant visas and 21,119 applicants for nonimmigrant visas in FY2000 based upon inadmissibility. Almost half (48.5%) of the immigrant petitioners who were rejected on listed exclusionary grounds were rejected because the DOS determined that the aliens were inadmissible as likely public charges. On these grounds, about two-thirds of all rejected nonimmigrant applicants were inadmissible because of immigration law violations, most notably misrepresentation. Another 13.4% were inadmissible because of prior unlawful presence in the United States.

While the grounds of inadmissibility are an important basis for denying foreign nationals admission to the United States, it should be noted that most aliens who are rejected by DOS — over 2.5 million — are rejected because they are not eligible for the visa they are seeking. Comparable data from INS on aliens deemed ineligible for immigrant status or inadmissible as a nonimmigrant are not available. As a result, the DOS data presented in **Table 1** understate the number and distribution of aliens denied admission to the United States.

Table 1. Aliens DOS Excluded in FY2000 by Grounds of Inadmissibility

Grounds for exclusion	Aliens excluded by State Department			
	Immigrant		Nonimmigrant	
Health	1,288	3.8%	151	0.7%
Criminal	507	1.5%	3,207	15.2%
Terrorism & security	9	—	181	0.9%
Public charge	16,285	48.5%	763	3.6%
Labor certification	7,849	23.4%	2	—
Immigration violations	2,878	8.6%	13,969	66.1%
Ineligible for citizenship	3	—	3	—
Previously removed or illegal presence	4,781	14.2%	2,837	13.4%
Miscellaneous	5	—	6	—
Total inadmissible	33,605	100%	21,119	100%
Ineligible for visa applied for due to other reasons	40,241	—	2,489,327	—

Source: CRS analysis of DOS Bureau of Consular Affairs data.

Issues and Legislation

Reassigning Visa Issuance Functions

With the expected creation of a department of homeland security imminent, considerable debate has surfaced about whether or not any or all visa issuance functions should be located in the new agency. Varied viewpoints are discussed below.

As announced on June 6, 2002, the Administration's proposal for a homeland security department would include INS among the agencies transferred to a new homeland security department. The stated goal of the Administration's proposal is to consolidate into a single federal department many of the homeland security functions performed by units within various federal agencies and departments. The Administration would place all functions of INS under the border and transportation security division of the proposed department. The narrative of the June 6, 2002 plan did not go into details, however, it appeared that under the plan Consular Affairs in the Department of State would retain its visa issuance responsibilities.

Option: Locating all Functions in DHS. Voices in support of moving Consular Affairs's visa issuance responsibilities to the proposed DHS assert that consular officers emphasize the promotion of tourism, commerce, and cultural exchange and are lax in screening foreign nationals who want to come the United States. Media reports of the "Visa Express" that DOS established in Saudi Arabia to allow travel agents to pre-screen nonimmigrants raised considerable concern, especially reports that several of the September 11 terrorists allegedly entered through "Visa Express." Critics argued that visa issuance was the real "front line" of homeland security against terrorists and that the responsibility for this function should be in a department that did not have competing priorities of diplomatic relations and reciprocity with foreign governments.

Some argue that keeping the INS adjudications and Consular Affairs visa issuances in different departments would perpetuate the types of mistakes and oversights that stem from inadequate coordination and competing chains of command. Most importantly, they emphasize the need for immigration adjudications and visa issuances — as well as immigration law enforcement and inspections activities — to be under one central authority that has border security as its primary mission.

Option: Locating Functions in Different Agencies. Proponents of retaining visa issuances in Consular Affairs assert that only consular officers in the field would have the country-specific knowledge to make decisions about whether an alien was admissible and that staffing 250 diplomatic and consular posts around the world would stretch the proposed homeland security department beyond its capacity. They also point out that under current law, consular decisions are not appealable and warned that transferring this adjudication to homeland security might make it subject to judicial appeals or other due process considerations. They maintain that the problems Consular Affairs evidenced in visa issuances have already

been addressed by strengthening provisions in the USA PATRIOT Act (P.L. 107-56) and the Enhanced Border Security and Visa Reform Act (P.L. 107-173).

Those who support retaining immigrant adjudications and services in DOJ and visa issuances in DOS point to the specializations that each department brings to the functions. They assert that the "dual check" system in which both INS and Consular Affairs make their own determinations on whether an alien ultimately enters the United States provides greater security. Proponents of the current structures argue that failures in intelligence gathering and analysis, not lax enforcement of immigration law, were the principal factors that enabled terrorists to obtain visas. Others opposing the transfer of INS adjudications and Consular Affairs visa issuances to DHS maintain that DHS would be less likely to balance the more generous elements of immigration law (e.g., the reunification of families, the admission of immigrants with needed skills, the protection of refugees, opportunities for cultural exchange, the facilitation of trade, commerce, and diplomacy) with the more restrictive elements of the law (e.g., protection of public health and welfare, national security, public safety, and labor markets).

Legislation. Representative Dick Armey, Majority Leader and Chair of Select Committee on Homeland Security, introduced the President's proposal as **H.R. 5005**, the Homeland Security Act of 2002. H.R. 5005 would transfer all of the functions of INS to the newly created department under its Border Security and Transportation Division. As introduced, H.R. 5005 would bifurcate visa issuances so that DHS would set the policies and DOS would retain responsibility for implementation.

During the week of July 8, 2002, the House Committees on Judiciary, International Relations, and Government all approved language on visa issuances that retained DOS's administrative role in issuing visas, but added specific language to address many of the policy and national security concerns raised during their respective hearings. Breaking with the Administration, the House Judiciary Committee approved language that would place much of INS's adjudication and service responsibilities — including its role in approving immigrant petitions — with a new Bureau of Citizenship and Immigration Services headed by an Assistant Attorney General at DOJ.

When the House Select Committee on Homeland Security marked up H.R. 5005 on July 19, 2002, it approved language on immigrant processing and visa issuances consistent with the House Judiciary Committee recommendations. As reported, H.R. 5005 clarifies that the Secretary of DHS would issue regulations regarding visas issuances and would assign staff to consular posts abroad to provide advice and review and to conduct investigations, and that Consular Affairs would continue to issue visas. It would further expand the current exclusion authority of the Secretary of State by permitting the Secretary to exclude an alien when necessary or advisable in the foreign policy or security interests of the U.S., giving the Secretary of State an authority even broader than that in law before the 1990 Immigration Amendments reformed the grounds for exclusion. It also would clarify that decisions of the consular officers are not reviewable.

During the floor debate on H.R. 5005, only one immigration-related amendment was considered, and it would have moved the consular visa function to DHS. The amendment offered by Congressman David Weldon failed, and the House went on to pass H.R. 5005 on July 26, 2002. **Table 2** summarizes what department would be responsible for visa issuance activities under the various bills.[19]

The National Homeland Security and Combating Terrorism Act of 2002 reported by the Senate Governmental Affairs Committee (S. 2452) on June 24, 2002, includes the immigration enforcement functions of INS and the Office of International Affairs but does not transfer any of the other immigration services and visa issuances functions. Representative Mac Thornberry sponsored H.R. 4660, a bill similar to S. 2452 as introduced, that creates a homeland security department but also does not transfer any of the immigration adjudications and visa issuances functions.

Table 2. Visa Issuance Policy Roles and Tasks: Comparison of Major Homeland Security Proposals

Task/role	Current law	S. 2452 (introduced)	S. 2452 (July 29 substitute)	H.R. 5005 (introduced)	H.R. 5005 (passed)
Issuing nonimmigrant visas abroad	State	State	Homeland regulates; State issues	Homeland sets policy; State administers	Homeland regulates; State issues
Changing nonimmigrant visas	Justice	Justice	Homeland	Homeland	Justice
Approving immigrant petitions	Justice	Justice	Homeland	Homeland	Justice
Issuing immigrant visas	State	State	Homeland regulates; State issues	Homeland sets policy; State administers	Homeland regulates; State issues
Adjusting immigrant (LPR) status	Justice	Justice	Homeland	Homeland	Justice

Recently released substitute language for S. 2452 differs somewhat on the issues of immigration adjudications and visa issuances from the Administration's proposal and H.R. 5005 as reported. The Senate substitute would not alter the State Department's consular role in issuing visas, with language comparable to H.R. 5005, and it would give DHS the authority to issue regulations on visa issuances. It would, however, give DHS the permission to delegate authority to issue regulations to DOS. In contrast to the House-passed bill and S. 2452 as introduced, the Senate substitute

[19]For a detailed comparison, see CRS Report RL31513, *Homeland Security: Side by Side Comparison of H.R. 5005 and S. 2453, 107th Congress*, coordinated by Sharon Gressle.

would establish an Under Secretary for Immigration Affairs in DHS who would handle immigration and naturalization functions as well as immigration enforcement and border functions. The Senate Government Reform Committee acted on the substitute for S. 2452 on July 24, 2002.

Revising Visa Issuance Policy

Sharing Data and Screening Aliens. Since the September 11 terrorist attacks, considerable concern has been raised because the 19 terrorists were aliens who apparently entered the United States legally on temporary visas. Although the INA bars terrorists, consular officers issuing the visas were not able to bar them because information identifying them as such was not in the databases to which they had access. Many have asserted that the need for all agencies involved in admitting aliens to share intelligence and coordinate activities is essential for U.S. immigration policy to be effective in guarding homeland security. Some argued that the reforms Congress made in the mid-1990s requiring all visa applicants to be checked in the "look out" databases were inadequate because the databases across the relevant agencies were not inter-operable.

Those less enthusiastic about inter-operable databases point to the cost and time required to develop such databases. Instead, they argue the money and resources might be better spent on other tools to strengthen enforcement of immigration laws. They also warn that if intelligence data become too accessible across agencies, national security may actually be breached because sensitive information could fall into the wrong hands.

On a related matter, critics point to the fact that consular officers do not personally interview many aliens to whom they issue nonimmigrant visas. By-passing the personal interview, especially for visitors coming for purportedly short periods of time, was advocated by some as an efficiency of staffing and resources. Others assert that this cost savings comes at too high a price in terms of national security. The critics argue that checking an alien's name in a database is no substitute for a face-to-face interview.

The 107th Congress enacted provisions in the USA PATRIOT Act (P.L. 107-56) that seek to improve the visa issuance process by providing access to relevant electronic information. These provisions authorize the Attorney General to share data from domestic criminal record databases with the Secretary of State for the purpose of adjudicating visa applications. Title III of P.L. 107-173, the Enhanced Border Security and Visa Reform Act, likewise aims to increase access to electronic information in the context of visa issuances, while also requiring additional training for consular officers who issue visas. **H.R. 5013**, introduced on June 26, 2002, would require that consular officers conduct a personal interview of all aliens seeking visas to the United States, not just those who wish to become LPRs.

Defining Terrorism. In response to concerns that the definition of terrorism and the designation of terrorist organizations in the INA that is used to determine the inadmissibility and removal of aliens is too narrow, Congress amended the INA's inadmissibility provisions to broaden somewhat the terrorism grounds for excluding aliens. The INA already barred the admission of any alien who has engaged in or

incited terrorist activity, is reasonably believed to be carrying out a terrorist activity, or is a representative or member of a designated foreign terrorist organization. To this list of inadmissible aliens, the USA PATRIOT Act adds representatives of groups that endorse terrorism, prominent individuals who endorse terrorism, and spouses and children of aliens who are deportable on terrorism grounds on the basis of activities occurring within the previous 5 years.

S. 864, which was reported by the Senate Judiciary Committee on April 25, 2002, would further broaden the security and terrorism grounds of inadmissibility to exclude aliens who have participated in the commission of acts of torture or extrajudicial killings abroad. S. 864 also would make aliens in the United States removable on these same grounds. **H.R. 5013** would expand and recodify the grounds for inadmissibility in the INA as part of its significant revision of immigration policy.

Appendix Table 8.–Data From CLN Database for 2000, 2001, and 2002

Year	Number of individuals who expatriated (CLN issued)	Number of individuals who provided Form 8854 or other financial statement	Number of individuals who provided social security numbers[1]
2000	522	397	323
2001	334	285	205
2002[2]	135	41	97

Source: Internal Revenue Service, CLN database, October 29, 2002.

[1] The number of individuals who submit a social security number at the time of their expatriation is not a subset of the number of individuals who submit a Form 8854 or other financial statement. The IRS reports that of the information received from the Department of State, for some individuals there is no information in addition to the CLN, for other individuals the CLN is accompanied by a Form 8854 or other financial statement and includes a social security number, for other individuals the CLN is accompanied only by a Form 8854 or other financial statement, and for other individuals the CLN is accompanied by only a social security number.

[2] 2002 reflects CLN information received from the Department of State through September 30, 2002.