IRS Introduces Relief Procedures for Former U.S. Citizens: Path to Avoid the Exit Tax, Income Taxes, and Penalties Despite Past Non-Compliance

*By Hale E. Sheppard**

I. Introduction

The IRS has implemented numerous voluntary disclosure programs over the past decade for taxpayers with international tax non-compliance. Opinions vary, of course, but many taxpayers and practitioners considered the penalties imposed under such programs fairly harsh. The IRS has softened its stance considerably with the introduction of its newest program in September 2019, called Relief Procedures for Certain Former Citizens ("RPCFC"). It is designed to benefit a taxpayers who were formerly U.S. citizens, have already expatriated, had little to no U.S. income tax liability in the years preceding expatriation, were not filing U.S. tax or information returns with the IRS before expatriating, did not pay the "exit tax" under Code Sec. 877A, and would not have been subject to the exit tax were it not for their non-willful violations.

This article explains the general tax and information-reporting duties for U.S. taxpayers with international connections, the application of the exit tax, the details about the new RPCFC, and interesting issues triggered by the RPCFC that are likely unknown to many taxpayers.

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II. Critical Background Information

One must first understand basic international tax and information-reporting duties, as well as the long list of downsides for shirking such duties, in order to appreciate the significance of this article. These are summarized below.

A. Tax and Disclosure Duties

U.S. citizens and residents have several tax-related obligations, whether they live in the United States or abroad. Examples of such obligations are set forth below:

- They must report on their Form 1040 (*U.S. Individual Income Tax Return*) all income that they earn, receive, or are deemed to receive, regardless of the country from which such income derives.
- If they hold an interest in a foreign financial account, they generally must (i) check the "yes" box in Part III (Foreign Accounts and Trusts) of Schedule B (Interest and Ordinary Dividends) to Form 1040 to disclose the existence of the foreign account, (ii) identify the foreign country in which the account is located, also on Schedule B to Form 1040, (iii) declare on Form 1040 all passive income generated by the account, such as interest, dividends, and capital gains, and (iv) e-file a FinCEN Form 114 (*Report of Foreign Bank and Financial Accounts*) ("FBAR").
- They also might be required to enclose with their Form 1040 a Form 8938 (*Statement of Specified Foreign Financial Assets*), which is the broadest international information return.[1]
- In situations where taxpayers hold an interest in a foreign entity, they often must file the appropriate international information returns, such as Form 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*), Form 8865 (*Return of U.S. Persons with Respect to Certain Foreign Partnerships*), Form 8858 (*Information Return of U.S. Persons with Respect to Foreign Disregarded Entities and Foreign Branches*), Forms 8621 (*Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*), Forms 3520 (*Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*), and Forms 3520-A (*Annual Information Return of Foreign Trust With a U.S. Owner*).

B. Multiple Sanctions for Violations

Many articles focus on the severity of penalties for international non-compliance. That level of detail is unnecessary here. Suffice it to recap below some of the most common economic punishments imposed by the IRS.

First, taxpayers omitting income from foreign activities and assets often face large U.S. tax liabilities, as well as significant penalties related directly to the tax underpayments. Examples include negligence penalties equal to 20% of the tax debt to the IRS, penalties rising to 40% of the tax debt in situations involving undisclosed foreign financial assets, and penalties reaching 75% of the tax debt if the IRS can prove civil fraud.[2] Taxpayers are also stuck with large interest charges, on both the tax liabilities and penalties.[3]

Second, taxpayers are often overwhelmed by large sanctions for unfiled FBARs. Congress was concerned about widespread FBAR non-compliance for many years; therefore, it enacted stringent penalty provisions in 2004 as part of the American Jobs Creation Act ("Jobs Act").[4] Under the law in existence *before* the Jobs Act, the IRS could only assert penalties where it could demonstrate that taxpayers "willfully" violated the FBAR rules.[5] If the IRS managed to satisfy that high standard, it could impose a relatively small penalty, ranging from just $25,000 to $100,000, regardless of the size of the hidden accounts.[6] Thanks to the Jobs Act, the IRS may now assert a penalty on any person who fails to file a required FBAR, period.[7] In the case of non-willful violations, the maximum penalty is $10,000 per violation.[8] The Jobs Act calls for higher penalties where willfulness exists. Specifically, when a taxpayer willfully fails to file an FBAR, the IRS may assert a penalty equal to $100,000 or 50% of the balance in the undisclosed account at the time of the violation, whichever amount is larger.[9] Given the multi-million dollar balances in many unreported accounts, and given that the IRS can assert a penalty worth 50% of the account for every single year that the violation occurred, FBAR penalties can be enormous.

Third, if a taxpayer fails to file Form 8938 in a timely manner, then the IRS generally will assert a penalty of $10,000 per violation.[10] The penalty increases to a maximum of $50,000 if the taxpayer does not rectify the problem quickly after contact from the IRS.[11]

Fourth, additional penalties apply when foreign trusts are involved. Form 3520 must be filed in various circumstances. For instance, a "responsible party" generally must file a Form 3520 within 90 days of certain "reportable events," such as the creation of a foreign trust by a U.S. person, the transfer of money or other property (directly or indirectly or constructively) to a foreign trust by a U.S. person, and the death of a U.S. person, if the decedent was treated as the "owner" of any portion of the trust under the grantor trust rules, or if any portion was included in the gross estate of the decedent.[12] A U.S. person also must file a Form 3520 if he receives during a year (directly or indirectly or constructively) any distribution from a foreign trust.[13] The penalty for not filing a Form 3520 is $10,000 or 35% of the so-called "gross reportable amount," whichever is larger.[14] A Form 3520-A normally must be filed if, at any time during the relevant year, a U.S. person is treated as the "owner" of any portion of the foreign trust under the grantor trust rules.[15]

The normal penalty for Form 3520-A violations is the higher of $10,000 or 5% of the "gross reportable amount."[16]

Fifth, holding an interest in a foreign corporation triggers more complications and potential penalties. Four categories of U.S. persons who are officers, directors, and/or shareholders of certain foreign corporations ordinarily must file a Form 5471 with the IRS.[17] If a person neglects to do so, then the IRS may assert a penalty of $10,000 per violation, per year.[18] This standard penalty increases at a rate of $10,000 per month, to a maximum of $50,000, if the problem persists after notification by the IRS.[19]

The penalties described above can be significant, even when considered separately. They can become untenable, though, when the IRS decides to "stack" the penalties, asserting multiple penalties in connection with the same unreported foreign assets or activities. As recently as March 2019, a District Court held the "stacking" of certain penalties by the IRS was prohibited neither by law nor by the constitution.[20]

C. Endless Assessment Periods

It is important to note that failure to timely file nearly all international information returns (except the FBAR) not only triggers the penalties described above, but also gives the IRS an unlimited period of time to audit the Form 1040 to which the information returns should have been attached, and then assess additional taxes, penalties, and interest charges. A relatively obscure procedural provision, Code Sec. 6501(c)(8)(A), contains a powerful tool for the IRS. It generally states that, where a taxpayer does not properly file a long list of international information returns, the assessment-period remains open "with respect to any tax return, event, or period" to which the information returns relate, until three years after the taxpayer ultimately files the information returns.[21] Consequently, if a taxpayer never files, say, a Form 8938 to reveal his interest in foreign financial assets, then the assessment-period never begins to run against the IRS. This obligates taxpayers with undisclosed foreign assets to act, because keeping a low profile and allowing the clock to run out is no longer a realistic option.

III. Overview of Expatriation and Code Sec. 877A

A. Relevant History

In 1966, Congress enacted the U.S. expatriation tax rules to discourage U.S. citizens from moving abroad and surrendering their citizenship in order to avoid paying U.S. taxes.[22] Code Sec. 877 originally imposed taxes on certain U.S. individuals who surrendered their U.S. citizenship within the prior 10 years with a tax-avoidance purpose.

Later, in 1966, Congress expanded Code Sec. 877 to also cover long-term residents ("LTRs") who terminated their residency, and imposed information-reporting requirements.[23] The IRS provided guidance about the rules of Code Sec. 877 in Notice 97-19.[24]

Congress again revised Code Sec. 877 in 2004 based on various recommendations from the Joint Committee on Taxation.[25]

Finally, in 2008, Congress made its final revision thus far by replacing Code Sec. 877 with a new provision, Code Sec. 877A.[26] The IRS has not yet issued regulations concerning Code Sec. 877A, and the main guidance is found in Notice 2009-85.[27] Code Sec. 877A is described in more detail below.

B. Code Sec. 877A Generally

Code Sec. 877A generally imposes a mark-to-market tax regime on certain taxpayers who decide to "expatriate." These taxpayers generally must pretend to sell all their property at fair market value the day before their "expatriation date" and pay the corresponding U.S. income taxes on any gains.[28] This so-called "exit tax" applies only to "covered expatriates."[29]

C. Expatriate

The term "expatriate" means either a U.S. citizen who relinquishes his citizenship, or a LTR who ceases to be a "lawful permanent resident" of the United States.[30]

A U.S. citizen is treated as relinquishing his U.S. citizenship on the earliest of the following dates: (i) The individual renounces his U.S. nationality before a diplomatic or consular office[31]; (ii) The individual furnishes to the Department of State a signed statement of voluntary relinquishment of U.S. nationality[32]; (iii) The Department of State issues to the individual a certificate of loss of U.S. nationality[33]; or (iv) A U.S. court cancels a naturalized citizen's certificate of naturalization.[34]

D. Expatriation Date

The "expatriation date" for a U.S. citizen is the date he relinquishes U.S. citizenship under one of the four methods described above.[35]

E. Covered Expatriate

For purposes of Code Sec. 877A, the term "covered expatriate" means an "expatriate" who either has an average annual U.S. income tax liability for the past five years of a particular amount ("Tax Liability Test"), *or* who has a net worth exceeding a certain threshold ("Net Worth Test"), *or* who cannot certify to the IRS that he has been in full U.S. tax compliance for the past five years ("Certification Test").[36] If the "expatriate" fails even one of the preceding three tests, then he will be considered a "covered expatriate."

F. Requirement to File Form 8854

U.S. citizens who relinquish their U.S. citizenship, and who are subject to the Code Sec. 877A rules (even if they are exempt from the exit tax), must file a Form 8854 either (i) as soon as possible after expatriation, or (ii) by the due date for the first Form 1040NR (*U.S. Nonresident Alien Income Tax Return*).[37]

The need to file Form 8854 is explained in various sources. For instance, any individual to whom Code Sec. 877A applies for any taxable year shall provide a statement (*i.e.*, Form 8854) for such year, which includes the basic information described in the statute, plus "such other information as the [IRS] may prescribe."[38]

The IRS has not issued regulations yet, so taxpayers must look to Notice 2009-85.[39] It explains that a "covered expatriate" is an expatriate who fails the Tax Liability Test, the Net Worth Test, *or* the Certification Test. It expands on the third aspect, as follows:

> A taxpayer is a covered expatriate if he "fails to certify, under penalties of perjury, compliance with all U.S. federal tax obligations for the five taxable years preceding the taxable year that includes the expatriation date, including, but not limited to, obligations to file income tax, employment tax, gift tax, and information returns, if applicable, and obligations to pay all relevant tax liabilities, interest, and penalties (the "certification test"). *This certification must be made on Form 8854 and must be filed by the due date of the taxpayer's federal income tax return for the taxable year that includes the day before the expatriation date*.[40]

Notice 2009-85 contains additional language confirming the need for taxpayers to file Form 8854 to demonstrate requisite U.S. tax compliance during the relevant period. Below are a few of the many instances:

> Certification of compliance with tax obligations for preceding five years. *All U.S. citizens who relinquish their U.S. citizenship … must file Form 8854* in order to certify, under penalties of perjury, that they have been in compliance with all federal tax laws during the five years preceding the year of expatriation. Individuals who fail to make such certification will be treated as covered expatriates within the meaning of Section 877A(g), whether or not they also meet the tax liability test or the net worth test.[41]

> Example 22. A relinquishes his citizenship on December 1, 2009. Under Section 877A(a)(1), A is deemed to have sold all of A's property on November 30, 2009, the day before the expatriation date. *A must certify on a Form 8854 filed with Form 1040NR for the 2009 taxable year that A has complied with all of A's federal tax obligations for 2004 through 2008*. For the portion of the taxable year that includes the day before the expatriation date, A must attach a Form 1040 (or other schedule, as provided in Treas. Reg. § 1.6012-1(b)(2)(ii)(b)) to his Form 1040NR. If A does not file Form 8854, A will be treated as a covered expatriate, even if A does not meet the tax liability test or the net worth test."[42]

Like Notice 2009-85, Form 8854 itself clarifies that filing is mandatory for U.S. citizens desiring to leave the United States behind. Form 8854 poses the following question: "Do you certify under penalties of perjury that you have complied with all of your tax obligations for the 5 preceding tax years (see instructions)?"[43] Taxpayers uncertain about the question can turn to the corresponding instructions from the IRS, which state the following:

> Check the 'Yes' box if you have complied with your tax obligations for the 5 tax years ending before the date on which you expatriated, including, but not limited to, your obligations to file income tax, employment tax, gift tax, and information returns, if applicable, and your obligations to pay all relevant tax liabilities, interest, and penalties. You will be subject to tax under Section 877A if you have not complied with these obligations, regardless of whether your average annual income tax liability or net worth exceeds the applicable threshold amounts.[44]

IV. New IRS Relief Program for Certain Former U.S. Citizens

The IRS announced a new initiative in September 2019, called the RPCFC, whose goal is to allow some taxpayers to avoid classification as "covered expatriates" and exposure to the expatriation tax under Code Sec. 877A.[45] More specifically, the RPCFC is designed to benefit a narrow group of taxpayers who (i) were U.S. citizens, (ii) have already expatriated, (iii) had no U.S. income tax liability or a minimal amount of U.S. income tax liability in the years preceding expatriation, (iv) were effectively "off the grid" in terms of U.S. tax compliance in that they never filed Forms 1040 or international information returns, (v) would not have been subjected to the exit tax as a result of the Tax Liability Test or Net Worth Test, (vi) but who were liable for the exit tax because they failed the Certification Test (*i.e.*, they did not have full U.S. tax compliance in the five years preceding expatriation), yet did not pay such tax. The types of taxpayers at who the RPCFC is aimed are described further below.

A. General Information

Setting the stage, the IRS indicates that it recognizes that "[s]ome U.S. citizens, born in the United States to foreign parents, or born outside the United States to U.S. citizen parents, may be unaware of their status as U.S. citizens or the consequences of such status."[46] It later explains that in order to comply with existing law and avoid significant tax liabilities, citizens who renounce or otherwise relinquish their U.S. citizenship must comply with U.S. federal tax obligations for the year of expatriation, as well as the previous five years.[47] This requires having and using a Social Security Number ("SSN"). The IRS goes on to explain that, in order to meet the Certification Test and thus avoid being classified as a "covered expatriate," taxpayers must file a Form 8854 with their Form 1040 for the year of expatriation and certify full U.S. compliance for the past five years.[48]

The IRS indicates that the RPCFC is an alternative means for satisfying the Certification Test for U.S. citizens who expatriated after March 18, 2010. If the individuals submit the mandatory documents and meet the eligibility requirements for the RPCFC, then they will not be considered "covered expatriates" under Code Sec. 877A and thus will not be subject to the exit tax, will not be required to pay back income taxes, and will not be penalized for unfiled international information returns.[49]

The IRS clarifies that the RPCFC is only available to taxpayers whose failure to file Forms 1040, international information returns, and FBARs, as well as their failure to pay all relevant taxes, was due to "non-willful conduct."[50]

B. Initial Guidance Issued by the IRS

The IRS has grown accustomed to issuing guidance about voluntary disclosure programs through Frequently Asked Questions ("FAQs"), published solely on its website. The case is no different with the RPCFC. Certain information gleaned from the FAQs is described below:

- The IRS has not yet determined a termination date for the RPCFC.[51]
- Taxpayers must "strictly meet" all the following criteria to be eligible: (i) They relinquished their U.S. citizenship after March 18, 2010; (ii) They have no filing history with the IRS as a U.S. citizen or resident; (iii) They did not fail the Tax Liability Test during the five years before expatriating; (iv) They had a net worth of less than $2 million, both at the time of expatriating and at the time of making a submission under the RPCFC, without taking into account any exceptions; (v) They have an aggregate tax liability of $25,000 or less for the five years before expatriating and the year of expatriating, calculated after applying all deductions, exclusions, exemptions, and credits, omitting any potential exit tax, and omitting any penalties and interest; (vi) They complete and file all necessary U.S. tax returns and information returns for the relevant six years; and (vii) They did not willfully violate any U.S. tax-related duties.[52]
- The fact that taxpayers previously filed a Form 1040-NR (*U.S. Nonresident Alien Income Tax Return*) with a good faith belief that they were not U.S. citizens does not mean that they have a "filing history" with the IRS and does not disqualify them from the RPCFC.[53]
- If taxpayers do not meet all the eligibility criteria described above but attempt to file under the RPCFC anyway, the IRS will process the returns using normal procedures, and the taxpayers will be liable for all relevant taxes, penalties, and interest.[54]
- The RPCFC is only open to individuals, not estates, trusts, corporations, partnerships, or other entities.[55]
- Taxpayers must submit the following documents under the RPCFC: (i) Certification of Loss of Nationality of the United States or a copy of a court

order canceling the Certificate of Naturalization, dated after March 18, 2010; (ii) Copy of a valid passport, or birth certificate and government-issued identification; (iii) For the year of expatriation, dual-status return, including Form 1040NR with all required information returns, Form 8854, Form 1040, and all required information returns; and (iv) For the five years preceding expatriation, Forms 1040 with all required information returns, with "Relief for Certain Former Citizens" stamped in red ink at the top of the first pages.[56]

- Taxpayers are not required to enclose a check with their RPCFC submissions because the IRS waives all income tax liabilities and potential penalties.[57]
- Taxpayers do not take into account any U.S. taxes previously paid via automatic withholding when determining whether they satisfy the $25,000 total tax liability eligibility criteria.[58]
- Taxpayers make their RPCFC submissions to Internal Revenue Service, 3651 South I-H 35, Mail Stop 4301 AUSC, Attn: Relief for Certain Former Citizens Austin, TX 78741.[59]
- Taxpayers cannot seek pre-clearance, prior approval, or a placeholder to participate in the RPCFC.[60]
- Taxpayers lacking an SSN can still participate in the RPCFC; they should just leave blank the boxes on returns that require an SSN.[61]
- Submissions under the RPCFC are not automatically audited by the IRS, but they might be audited through normal channels or they might be subject to "verification procedures" to ensure their accuracy and completeness.[62]
- Filing FBARs is not an eligibility criteria for the RPCFC, but, if taxpayers file FBARs before or simultaneously with their RPCFC submission, then the IRS will not assert FBAR penalties.[63]
- The IRS will review the RPCFC submissions to ensure that they meet the eligibility criteria and then send taxpayers a letter confirming that their submissions are complete.[64]

C. Examples Provided by the IRS

The IRS provided nine examples of how the RPCFC functions. These items, which have been slightly modified to improve readability, are set forth below[65]:

- *Hypothetical 1*. John was born in the United States while his non-U.S. parents were attending university for post-graduate studies. Shortly after John was born, the family returned to Country E. John is a citizen of Country E and lives and works in Country E. John renounced his citizenship on October 1, 2019, and received a Certificate of Loss of Nationality. John has never filed a U.S. income tax return and never applied for or received an SSN. He wants to use the RPCFC to come into compliance with his U.S. tax obligations. He must report his worldwide income on Form 1040 for 2019 and the preceding five tax years (and may claim all available deductions and credits, including foreign tax credits, to the extent permitted) to determine the total tax. In each year, John had various sources of income, including small amounts of income from foreign mutual funds that are passive foreign investment companies. For tax years 2014 through 2019, John submits the following tax returns required under these procedures: (i) 2019 Form 1040NR (with Form 1040 attached as an information return reporting worldwide income through October 1, 2019), with a total tax of $1,000, and (ii) Forms 1040 for 2014 through 2018, each of which shows a total tax of $4,800 on line 63. John uses his best efforts in computing his total tax for each year. John computed the income from his foreign mutual funds and reported them as ordinary income on the "other income" line of his Forms 1040. He should have also used Form 8621 (*Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*) to make additional computations, but he failed to include that form with his return. John adds the "total tax" amounts for all his six tax returns submitted under the procedures; the amount is $25,000. John's total tax liabilities are within the limit for these procedures. John is eligible to use the RPCFC.
- *Hypothetical 2*. Assume all the facts in Hypothetical 1, except John's aggregate total tax liability for tax years 2014 through 2019 is slightly over $25,000. John is not eligible to use the RPCFC because his aggregate total tax liability for tax years 2014 through 2019 exceeds the threshold for these procedures. If he makes a submission under these procedures, the IRS will process the returns using normal processing procedures. John will be liable for all taxes, penalties, and interest associated with his submissions. Under general IRS procedures, John may request relief for penalties under the First-Time-Abate Policy for tax year 2014, and request abatement of penalties based on reasonable cause for the remaining liabilities. If he qualifies, John may file an Offer-in-Compromise.
- *Hypothetical 3*. Jane was born in the United States. Her parents, citizens of another country, were in the

United States on a temporary work assignment with a multinational company when she was born. While on that temporary work assignment, Jane's parents purchased a house in the United States. Jane and her family returned to their country shortly after she was born. Although they left the United States, Jane's parents kept the house in the United States and rented it to tenants. Jane lives and works outside the United States. When her parents died, Jane inherited the rental house (with a fair market value of $300,000). Jane wants to renounce her citizenship and use the RPCFC to come into compliance with her tax obligations. Jane has never filed a U.S. income tax return and never applied for or received an SSN. Jane must report her worldwide income on her U.S. income tax returns, including any income from the U.S. rental home. Jane renounces her citizenship on December 31, 2019. Then, Jane submits the tax returns required under the RPCFC for tax years 2014 through 2019 (including a Form 8854). Assuming the aggregate total tax amount for tax years 2014 through 2019 is less than $25,000 and Jane's net worth is below $2 million, Jane may use the RPCFC.

- *Hypothetical 4*. Assume all the facts in Hypothetical 3, except the value of the U.S. rental home is $3 million, and Jane's total net worth exceeds $2 million. Jane does not qualify for the RPCFC because her net worth exceeds $2 million. The exceptions to "covered expatriate" status, as provided in Code Sec. 877(c)(2), are not applicable to the RPCFC.
- *Hypothetical 5*. Assume all the facts in Hypothetical 3, except in tax year 2012 Jane filed a Form 1040NR reporting rental income and related expenses for the U.S. rental home. She had no other U.S. sourced income. Jane's 2012 filing was based on the good faith assumption that she was not a U.S. citizen. Jane may use the RPCFC.
- *Hypothetical 6*. Jane is a dual citizen of the United States and Country T, and she is a resident of Country T. The United States has a tax treaty with Country T. Jane has a net worth under $2 million and has an average income tax liability for the past five years under the threshold of Code Sec. 877(a)(2)(A). Jane's only income over the past five years has been $200,000 of wage income that she earned from performing services in Country T for a Country T employer. For the last five years Jane has been filing tax returns in Country T as a Country T resident reporting all her wage income. Jane was subject to an income tax rate of 35% in Country T in each year. Assume the U.S. income tax rate for 2014 through 2019 is 25%. Assume further that Jane does not qualify to make an election under Code Sec. 911. Jane is planning to relinquish her U.S. citizenship in 2019 by taking an oath of renunciation. After relinquishing citizenship, she wants to use the RPCFC to come into compliance with her U.S. tax obligations. Jane has never filed a U.S. income tax return and never applied for or received an SSN. Jane renounces her U.S. citizenship on December 31, 2019. Then, Jane submits the tax returns required under the RPCFC for 2014 through 2019 (including a Form 8854). Jane must report her worldwide income on her U.S. income tax returns, including the $200,000 of wage income. She submits the returns without an SSN. Assume that Country T would have the primary right to tax Jane's wage income, and the United States would have a secondary right to tax the income based on her citizenship, after providing a credit for the income tax paid to Country T. Because Jane's Country T tax liability is higher than her U.S. tax liability, and because Jane is not limited in the amount of the Country T tax she may claim as a credit, Jane would not owe any additional U.S. tax. Thus, Jane would have an aggregate U.S. tax liability for 2014 through 2019 under $25,000. Jane is eligible to use the RPCFC.
- *Hypothetical 7*. Assume the same facts as in Hypothetical 6, except that Jane paid income taxes in Country T at a tax rate of 20%. Assume the U.S. income tax rate for 2014 through 2019 is 25%. As in Hypothetical 6, under the U.S.-Country T tax treaty, Country T would have the primary right to tax Jane's wage income, and the United States would have a secondary right to tax the income based on her citizenship, after providing a credit for the income tax paid to Country T. Because Jane's Country T tax liability is lower than Jane's U.S. tax liability, and even though Jane is not limited in the amount of the Country T tax she may claim as a credit, Jane still owes additional residual tax to the United States. Jane paid the equivalent of $40,000 of tax in Country T in each year. After applying the U.S. foreign tax credit, Jane still owes $10,000 of additional tax in the United States in each year. Considering six years from 2014 through 2019, Jane owes an aggregate of $60,000 of tax to the United States, which would be greater than $25,000. Jane is not eligible to use the RPCFC.
- *Hypothetical 8*. Assume the same facts in Hypothetical 6, except there is no applicable treaty,

Jane may be eligible to make an election under Code Sec. 911, and Jane was subject to a 25% income tax rate in Country T. Assume the U.S. income tax rate for 2014 through 2019 is 25%. Because Jane is a U.S. citizen residing in a foreign country and working in that foreign country, Jane may be entitled to claim the foreign earned income exclusion under Code Sec. 911, which would reduce Jane's U.S. taxable income. Although Jane can claim a foreign tax credit, assume Jane chooses to first use the foreign earned income exclusion. If Jane meets the requirements under Code Sec. 911, Jane can claim the foreign earned income exclusion on Form 2555 (*Foreign Earned Income*) or Form 2555-EZ (*Foreign Earned Income Exclusion*) and exclude a portion of her earned income in each year. To the extent that the foreign earned income exclusion does not cover all the income earned, Jane can claim a foreign tax credit with respect to the excess foreign source income. Due to the foreign earned income exclusion and foreign tax credits, Jane would not owe any U.S. tax. Thus, Jane would have an aggregate U.S. income tax liability for 2014 through 2019 under the $25,000 aggregate income tax threshold. Jane is eligible to use the RPCFC.

- *Hypothetical 9*. Assume the same facts in Hypothetical 8, except Jane was subject to a 17% income tax rate in Country T. Assume the U.S. income tax rate for 2014 through 2019 is 25%. Provided that Jane meets the requirements under Code Sec. 911, Jane can claim the foreign earned income exclusion on Form 2555 or Form 2555-EZ and exclude a portion of her earned income in each relevant year. To the extent that the foreign earned income exclusion does not cover all the income earned, Jane can claim a foreign tax credit with respect to the excess foreign source income. Because the amount of Country T tax that Jane can credit is less than her U.S. tax liability, Jane would owe U.S. income tax in each year. For example, for 2014, $100,800 of the $200,000 of income is not excluded under Code Sec. 911 multiplied by a 25% U.S. tax rate equals $25,200 of U.S. tax. The amount of Country T tax allocated to the non-excluded amount is $17,136. $25,200 of U.S. tax minus foreign tax credits of $17,136 provides a difference of $8,064 of U.S. tax owed in 2014. Thus, Jane would have an aggregate U.S. income tax liability for 2014 through 2019 of $46,944, which is greater than $25,000. Jane is not eligible to use the RPCFC.

The IRS indicated that it plans to host a webinar "in the near future" providing additional information and "practical tips" for making submissions under the RPCFC.[66]

V. Interesting Issues

The RPCFC, like all disclosure programs, triggers numerous comments, comparisons, issues, *etc*. A few of the more interesting ones are examined below.

A. Individuals Who Do Not Need the RPCFC

In introducing the RPCFC, the IRS seems to indicate that it is designed for individuals, who were born in the United States to foreign parents or were born abroad to U.S. citizens, and, because of these circumstances, they either were unaware of their U.S. citizenship and/or the tax responsibilities that come with such status.[67] However, the IRS does not mention two other categories of taxpayers, who are already not classified as "covered expatriates" for similar reasons. Current law dictates that an individual shall *not* be treated as a "covered expatriate," and thus shall *not* be subject to exit tax, if that individual *either*:

- Became at birth both a U.S. citizen and a citizen of another country and, as of the date of expatriation, continues to be a citizen of, and is taxed as a resident of, such other country, and has not been a U.S. resident pursuant to the "substantial presence" test for more than 10 taxable years during the 15-taxable-year period ending with the taxable year during which expatriation occurs,[68] *or*
- The individual's relinquishment of U.S. citizenship occurs before such individual attains age 18½ and the individual has not been a U.S. resident for more than 10 taxable years before the date of relinquishment.[69]

According to relevant congressional reports, the two exceptions set forth above were created in order to relieve from the exit tax individuals whose principal purpose for expatriating was not tax avoidance and who were previously unaware of their status as U.S. citizens.[70] Those falling into these categories are often referred to as "accidental Americans."

B. The RPCFC Does Not Cover LTRs

It is interesting to compare how the IRS treats differently U.S. citizens, who have already expatriated, and U.S. residents who now want to expatriate.

1. Obtaining and Losing U.S. Resident Status

An individual is considered a "U.S. person" for U.S. tax purposes if he is either a U.S. citizen or a U.S. resident. This characterization is critical because, once an individual becomes a U.S. person, he is subject to all U.S. tax obligations, which include filing annual Forms 1040, paying taxes, and filing a potentially long list of international information returns.

Determining whether an individual is a U.S. citizen is relatively straightforward, but confirming status as a U.S. resident can be tricky. Broadly speaking, an individual can become a U.S. resident in one of four main ways: (i) He can obtain a Green Card from the relevant U.S. immigration agency; (ii) He can maintain a "substantial presence" in the United States; (iii) He can make a first-year election to be treated as a U.S. resident; or (iv) He can elect to file joint Forms 1040 with a spouse who is already a U.S. person. We focus here on the first category, *i.e.*, the Green Card holder.

An alien individual is treated as a U.S. resident for tax purposes if he is a "lawful permanent resident" (*i.e.*, a Green Card holder) at any time during the relevant calendar year. In terms of duration, an individual will be considered a "lawful permanent resident" as long as he has been granted a Green Card by the U.S. immigration authorities and "such status has not been revoked (and has not been administratively or judicially determined to have been abandoned)."[71] The regulations echo this sentiment, stating that U.S. resident status continues "unless it is rescinded, or administratively or judicially determined to have been abandoned."[72] In 2008, Congress introduced a third manner of losing U.S. resident status for tax purposes, when it inserted the following language:

> An individual shall cease to be treated as a lawful permanent resident of the United States if such individual commences to be treated as a resident of a foreign country under the provisions of a tax treaty between the United States and the foreign country, does not waive the benefits of such treaty applicable to residents of the foreign country, and notifies the Secretary of the commencement of such treatment.[73]

In summary, once an alien individual becomes a U.S. resident by obtaining a Green Card, he maintains this status, for U.S. tax purposes, until one of three things occurs: (i) revocation/rescission of the Green Card, (ii) abandonment of the Green Card, coupled with an administrative or judicial ruling confirming such abandonment, or (iii) demonstrating that an individual should be considered a resident of a foreign country under a tax treaty and filing the necessary forms with the IRS to claim such status, including Form 1040-NR, Form 8833 (*Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*), and Form 8854, if necessary.[74]

2. Changes Occur When U.S. Residents Remain Too Long

Depending on how long they retain their Green Cards, some individuals become long-term residents ("LTRs") for tax purposes, which, of course, has consequences. The term LTR means the following:

> [A]ny individual (other than a citizen of the United States) who is a lawful permanent resident of the United States [*i.e.*, a Green Card Holder] in at least 8 taxable years during the period of 15 taxable years ending with the taxable year during which [Green Card status is terminated] ….[75]

The legislative history provides additional clarity regarding what LTR means in the context of the exit tax. It states the following in this regard:

> The present-law expatriation tax provisions apply only to certain U.S. citizens who lose their citizenship. The House bill extends these expatriation tax provisions to apply also to [LTRs] of the United States whose U.S. residency is terminated. For this purpose, [an LTR] is any individual who was a lawful permanent resident of the United States for at least 8 out of the 15 taxable years ending with the year in which such termination occurs ….[76]

Likewise, the Instructions to Form 8854 contain guidance confirming that the exit tax only applies to U.S. citizens and LTRs[77]:

> Expatriation tax provisions apply to U.S. citizens who have relinquished their citizenship and [LTRs] who have ended their residency (expatriated).
>
> You are considered to have expatriated on the date you relinquished your citizenship (in the case of a former citizen) or terminated your [LTR] status (in the case of a former U.S. resident).
>
> You are an LTR if you were a lawful permanent resident of the United States [*i.e.*, a Green Card Holder] in at least 8 of the last 15 tax years ending with the year your status as an LTR ends. In

determining if you meet the 8-year requirement, do not count any year that you were treated as a resident of a foreign country under a tax treaty and did not waive treaty benefits applicable to residents of the country.

3. Many LTRs Are Unaware of the Issues

As explained above, formal steps must be taken to relinquish U.S. residency status gained through a Green Card. Allowing a Green Card to expire does not suffice, and remaining outside the United States permanently or for long periods of time is inadequate. As the IRS pointed about in a recent Chief Counsel Advisory, "merely leaving the United States with no intention to return is not sufficient."[78]

Green Card holders often are oblivious to this reality, and many obtaining LTR status are ignorant to the fact that they are subject to the exit tax and must file a Form 8854. Practitioners specializing in the overlap between tax and immigration law explain the situation artfully:

> Unfortunately, most LPRs [*i.e.*, lawful permanent residents] who leave the United States have no idea or notice of their ongoing obligation to pay tax to the United States on their worldwide income unless or until they attempt to satisfy IRS standards for termination of LPR status. Paradoxically, this could include a scenario under which an LPR remains obligated to pay U.S. taxes, even though he remains outside the United States too long (thereby not maintaining close enough ties to the United States) to be readmitted as an LPR. IRS Publication 519 cautions, in fact, that unless an LPR possesses proof of termination per the discussion above, the taxpayer remains a U.S. tax resident, even if the U.S. immigration authority would not respect the LPR status as valid because the green card had expired or because of extended absence from the United States. As a result of widespread ignorance about the intersection of U.S. immigration and tax laws, unfortunately, countless foreign nationals who obtained LPR status and later departed the United States for employment, retirement, or personal reasons may have assumed that they terminated U.S. immigrant status automatically but are now at risk of obligation for U.S. taxes (plus penalties and interest) for failure to comply with U.S. tax and disclosure obligations.[79]

4. IRS Treats Uniformed U.S. Citizens and LTRs Differently

The RPCFC is designed to assist a narrow group of former U.S. citizens, unaware of their status or the ramifications thereof, who have already expatriated without fulfilling their tax duties. LTRs, also ignorant of their continuing U.S. residency status and exposure to the exit tax, who desire to expatriate from the United States, have a different process with the IRS. They generally participate in the Streamline Foreign Offshore Procedure ("SFOP").

In order to be eligible for the SFOP, a taxpayer (who is a U.S. citizen or Green Card holder) must meet the following criteria: (i) he was physically outside the United States for at least 330 days in one or more of the past three years; (ii) he did not have an "abode" in the United States during the relevant year; (iii) he either did not file annual Forms 1040 with the IRS or filed annual Forms 1040 that did not properly report all income from everywhere in the world; (iv) he might have also failed to file proper international information returns; (v) the violations were the result of "non-willful" conduct; (vi) neither the IRS nor the U.S. Department of Justice ("DOJ") has initiated a civil examination or criminal investigation of the taxpayer or a related party; (vii) the taxpayer is an individual (or the estate of an individual), because the SFOP is not open to business entities; and (viii) he has an SSN. Under the SFOP, taxpayers are only required to file Forms 1040 or Forms 1040X for the past three years, international information returns for the past three years, and FBARs for the past six years. The taxpayer must pay all tax liabilities and interest charges stemming from Forms 1040 or Forms 1040X, but the IRS does not impose any penalties whatsoever on taxpayers who successfully resolve matters through the SFOP.[80]

The SFOP, in its original form, presented a problem to LTRs who wanted to first get fully compliant with the IRS and then immediately expatriate: It only allowed taxpayers to achieve full U.S. compliance in the past *three* years, such that they still did not meet the requisite five years under the Certification Test. Accordingly, LTRs were obligated to participate in the SFOP, maintain full U.S. tax compliance for two additional years, and then expatriate from the United States, if they wanted a chance to avoid the exit tax.

The IRS later changed its tune, at least internally. It issued guidance to its personnel who were assigned to answer questions from the public about voluntary disclosure programs, which contained the following information:

Question: May expatriating taxpayers submit more than three years of tax returns under the Streamlined Procedures?

Answer: Expatriating taxpayers may submit five years of tax returns under the Streamlined Procedures. Each of the five years must include the appropriate "Streamlined" submission annotation in red ink on the certification form and on the top of the first page of all Forms 1040.[81]

To be clear, data about the option for LTRs participating in the SFOP to unilaterally expand the tax compliance period from three years to five years is not found in the IRS's webpage introducing the SFOP and is not found in the FAQs related to the SFOP. It is only located in internal IRS guidance, not generally accessible to the public. The result is that while former U.S. citizens can immediately and completely rectify past U.S. income tax, information-reporting, and exit tax issues through the RPCFC, it is likely that few LTRs living abroad, equally desirous of shirking their U.S. status and tax-related obligations at once, are aware of their ability to do so through the SFOP, as modified by obscure IRS guidance.

C. Review of the "Willfulness" Issue

As explained above, individuals are prohibited from resolving matters through the RPCFC if their violations were "willful."[82] This is a common standard used by the IRS in recent voluntary disclosure programs, such as the SFOP. Despite its widespread use, a significant amount of uncertainty exists regarding what the evolving concept of willfulness means, to the IRS and to the courts, in different contexts. The IRS provides the following definition with respect to the RPCFC: "Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law."[83]

Several courts have examined what constitutes "willfulness" with respect to FBAR penalties.[84] Notable decisions include *Williams* in 2012,[85] *McBride* in 2012,[86] *Bussell* in 2015,[87] *Bohanec* in 2016,[88] *Bedrosian* in 2017,[89] *Kelley-Hunter* in 2017,[90] *Garrity* in 2018,[91] *Markus* in 2018,[92] *Cohen* in 2018,[93] *Horowitz* in 2019,[94] *Flume* in 2019,[95] *Boyd* in 2019,[96] *Rum* in 2019,[97] and *Ott* in 2019.[98]

Among the many lessons taught by these previous cases are the following:

- The government is only required to prove willfulness by a preponderance of the evidence, not by clear and convincing evidence.
- The government can establish willfulness by showing that a taxpayer either knowingly or recklessly violated the FBAR duty.
- Recklessness might exist where a taxpayer fails to inform his accountant about foreign accounts.
- Recklessness might also exist where a taxpayer is "willfully blind" of his FBAR duties, which can occur when the taxpayer executes but does not read and understand every aspect of a Form 1040, including all Schedules attached to the Form 1040 (like Schedule B containing the foreign-account question) and any separate forms referenced in the Schedules (like the FBAR).
- Not reading the entire Form 1040 before signing it might also constitute "extreme recklessness" by taxpayers, primarily because the foreign-account question on Schedule B is "simple and straightforward and requires no financial or legal training."
- It is "reckless" for taxpayers not to research the educational and professional credentials of the tax professionals on whom they are relying to prepare their U.S. returns.
- The IRS may impose FBAR penalties on a per-unreported-account-per-year basis, and it is not limited to just one penalty per FBAR.
- If the taxpayer makes a damaging admission during a criminal trial, the government will use such statement against him in a later civil FBAR penalty action.
- The taxpayer's motives for not filing an FBAR are irrelevant, because nefarious, specific intent is not necessary to trigger willfulness.
- The government can prove willfulness through circumstantial evidence and inference, including actions by the taxpayer to conceal sources of income or other financial data.
- In determining whether an FBAR violation was willful, courts might consider after-the-fact unprivileged communications between taxpayers and their tax advisors.
- The courts review the question of willfulness on a *de novo* basis, meaning that taxpayers generally cannot offer evidence at trial related to the IRS's administrative process in conducting the audit, determining whether willfulness existed, *etc.*
- Courts might reject as irrelevant, in an evidentiary sense, reports and testimony from experts who attempt to link general public unawareness of FBAR duties to ignorance of the specific taxpayer under attack.

- In assessing FBAR penalties, the IRS can disregard its published guidance in the Internal Revenue Manual, such as the instructions about equitably allocating penalties related to foreign accounts with two or more co-owners.

VI. Conclusion

The RPCFC seems like a very positive development for certain U.S. citizens who failed to rectify their U.S. tax issues before expatriating, thereby exposing themselves to the exit tax. However, as with all voluntary disclosure programs offered by the IRS, taxpayers should remain cautiously optimistic, as the key will be the manner in which the IRS effectuates the RPCFC. Specifically, it is unclear whether the IRS plans to simply process all submissions under the RPCFC, issue letters confirming completeness, and conclude matters swiftly and permanently, or whether the IRS intends to subject a large number submissions to the "verification procedures" and narrowly define the concept of "non-willfulness," as it has in other contexts recently.[99] In other words, while most taxpayers strongly believe that their own U.S. tax non-compliance was non-willful, justifiable, reasonable, *etc.*, the IRS is likely to start asking why an individual, who was a U.S. citizen, who took affirmative steps in dealing with the U.S. government to terminate citizenship, and who probably consulted legal and/or other advisors in taking this life-altering step, never inquired about U.S. tax consequences and never took actions to rectify matters with the IRS at any point before, during or after the expatriation, until the IRS dangled a carrot called the RPCFC. Therefore, taxpayers considering participation in the RPCFC should be careful to hire U.S. tax professionals with significant experience in representing clients before the IRS in voluntary disclosure programs and FBAR disputes, where the concept of willfulness is front and center.

ENDNOTES

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1 For a detailed analysis of common filing requirements, including Form 8938, *see* the following articles by the same author: Hale E. Sheppard, *The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance*, Int'l Tax J., 2012, at 11; Hale E. Sheppard, *Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules After IRS Issues Final Regulations*, Int'l Tax J., 2015, at 25; Hale E. Sheppard, *Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting*, Int'l Tax J., 2016, at 5; Hale E. Sheppard, *Canadian Retirement Plans: What Does Revenue Procedure 2014-55 Mean for U.S. Tax Deferral, Form 8891, Form 8938, and the FBAR?* Int'l Tax J., 2016, at 25; and Hale E. Sheppard, *Unlimited Assessment-Period for Form 8938 Violations: Ruling Shows IRS's Intent to Attack Multiple Tax Returns*, Taxes, 2017, at 31; Hale E. Sheppard, *Extended Assessment Periods and International Tax Enforcement: Rafizadeh v. Commissioner, Unreported Foreign Assets, and Use of FATCA Weapons*, Taxes, 2018, at 35 and 44 J. Int'l Taxation 25 (2018).

2 Code Sec. 6662; Code Sec. 6663.

3 Code Sec. 6621.

4 The American Jobs Creation Act, P.L. 108-357 (Oct. 22, 2004).

5 31 USC §5321(a)(5)(A) (as in effect before Oct. 22, 2004).

6 31 USC §5321(a)(5)(B)(ii) (as in effect before Oct. 22, 2004).

7 31 USC §5321(a)(5)(A).

8 31 USC §5321(a)(5)(B)(i). This penalty cannot be asserted if the taxpayer was "non-willful" and there was "reasonable cause" for the violation. *See* 31 USC §5321(a)(5)(B)(ii).

9 31 USC §5321(a)(5)(C)(i).

10 Code Sec. 6038D(d)(1); Reg. §1.6038D-8(a).

11 Code Sec. 6038D(d)(2); Reg. §1.6038D-8(c).

12 Code Sec. 6048(a)(1); Code Sec. 6048(a)(4).

13 Code Sec. 6048(c)(1).

14 Code Sec. 6677(a).

15 Code Sec. 6048(b)(1). The grantor trust rules are located in Code Secs. 671 to 679.

16 Code Sec. 6677(b).

17 Code Sec. 6038; Reg. §1.6038-2; Code Sec. 6046; Reg. §1.6046-1; Code Sec. 6679; Reg. §301.6679-1; Instructions to Form 5471.

18 Code Sec. 6038(b)(1); Reg. §1.6038-2(k)(1)(i); Code Sec. 6046(f); Reg. §1.6046-1(k).

19 Code Sec. 6038(b)(2); Reg. §1.6038-2(k)(1)(ii); Code Sec. 6046(f); Reg. §1.6046-1(k). Similar penalties apply for failure to file Forms 8865 for foreign partnerships and/or Forms 8858 for foreign disregarded entities.

20 Hale E. Sheppard. *What Garrity Teaches About FBARs, Foreign Trusts, "Stacking" of International Penalties, and Simultaneously Fighting the U.S. Government on Multiple Fronts*, J. Tax Practice & Procedure, 2019, at 27.

21 Code Sec. 6501(c)(8)(B) contains a limitation, stating that the assessment period will remain open only with respect to "the item or items" related to the late Form 8938 if the taxpayer can demonstrate that the violation was due to reasonable cause and not due to willful neglect.

22 HR Rep. No. 1450, 89th Cong., 2d Sess. 22–23 (1966); S. Rep. No. 1707, 89th Cong., 2d Sess. 28–29 (1966); *see also W.N. Dillon*, 56 TC 228, Dec. 30,768 (1971) (husband and wife expatriated, in an effort to avoid paying U.S. taxes, after husband became involved in lucrative oil-production scheme but before he was paid from such scheme).

23 Health Insurance Portability and Accountability Act of 1996, §511; HR Rep. No. 496, pt. 1, 104th Cong., 2d Sess. 148 (1996); Joint Committee on Taxation, 104th Cong., 2d Sess., General Explanation of Tax Legislation Enacted in the 104th Congress, at 378–379 (1996); *see also* Code Sec. 6039G.

24 Notice 97-19, 1997 CB 394 (Feb. 24, 1997).

25 American Jobs Creation Act of 2004, §§804(a) through (c), and §Code Sec. 804(e) (June 3, 2004); Joint Committee on Taxation, Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency, at 103–137 (JCS-2-03, Feb. 2003); S. Rep. No. 192, 108th Cong., 1st Sess. 148–149 (2003); HR Rep. No. 548, pt. 1, 108th Cong., 2d Sess. 253–254 (2004); HR Conf. Rep. No. 755, 108th Cong., 2d Sess. 568–580 (2004).

26 P.L. 110-245, 122 Stat. 1624 HR 6081, 110th Cong., 2d Sess.; Heroes Earnings Assistance and Relief Tax Act of 2008, §301 (June 17, 2008).

27 Notice 2009-85, 2009-45 IRB 598 (Oct. 15, 2009).

[28] Code Sec. 877A generally applies to individuals who cease to be U.S. citizens or lawful permanent residents on or after June 17, 2008. *See* Notice 2009-85.

[29] Code Sec. 877A(a)(1).

[30] Code Sec. 877A(g)(2).

[31] 8 USC §1481(a)(5).

[32] 8 USC §1481(a)(1)-(4).

[33] Notice 2009-85, Section 2(A).

[34] Notice 2009-85, Section 2(A).

[35] Code Sec. 877A(g)(2)(B).

[36] Code Sec. 877A(g)(1)(A); Notice 2009-85, Section 2(A); Code Sec. 877(a)(2)(A), (B) and (C).

[37] Code Sec. 6039G(a).

[38] Code Sec. 6039G(b).

[39] Notice 2009-85, 2009-45 IRB 598, Section 1—Overview. It states the following: "Section 877(i) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of Section 877A. The Treasury Department and the Internal Revenue Service (IRS) 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."

[40] Notice 2009-85, 2009-45 IRB 598, Section 2(A)—Individuals Covered—Definitions.

[41] Notice 2009-85, 2009-45 IRB 598, Section 8(C)—Filing and Reporting Requirements—Form 8854.

[42] Notice 2009-85, 2009-45 IRB 598, Section 8(C)—Filing and Reporting Requirements—Form 8854.

[43] Form 8854, Part IV, Section A, Question 6.

[44] 2011 Instructions for Form 8854, at 4.

[45] IRS Newswire Issue Number IR-2019-151 (Sept. 6, 2019).

[46] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[47] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[48] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[49] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[50] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[51] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #1.

[52] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #2.

[53] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #3.

[54] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #8.

[55] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #5.

[56] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #11.

[57] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #12.

[58] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #13.

[59] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #14.

[60] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #15.

[61] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #16.

[62] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #17.

[63] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #18.

[64] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #19.

[65] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #9.

[66] IRS Newswire Issue Number IR 2019-151 (Sept. 6, 2019).

[67] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[68] Code Sec. 877A(g)(1)(B)(i)(I) and (II).

[69] Code Sec. 877A(g)(1)(B)(ii)(I) and (II).

[70] S. Rep. No. 1707, 89th Cong., 2d Sess. 28–29 (1966).

[71] Code Sec. 7701(b)(6).

[72] Reg. §301.7701(b)-1(b)(1).

[73] Code Sec. 7701(b)(6), Flush Language. This was added by the Heroes Earnings Assistance and Relief Tax Act of 2008, P.L. 1110-245, §301(c)(2)(B); U.S. Joint Committee on Taxation, *Technical Explanation of H.R. 6081, the Heroes Earnings Assistance and Relief Tax Act of 2008*, JCX-44-08 (May 20, 2008).

[74] Reg. §301.7701(b)-1(b)(2); Reg. §301.7701(b)-1(b)(3); Code Sec. 7701(b)(6).

[75] Code Sec. 877A(g)(5).

[76] Conference Report, 104th Congress, 2nd Session, Report 104-736, at 324.

[77] *See also* IRS Publication 519 (*U.S. Tax Guide for Aliens*) (2012), at 22.

[78] *IRS Addresses Rules Affecting Green Card Holders, Expats*, 2012 Worldwide Tax Daily 194-28 (Aug. 15, 2014).

[79] Dodd-Major & Singer, *When Immigration and Tax Converge*, 65 TAX NOTES INTERNATIONAL 917 (Mar. 19, 2012), at 934–935.

[80] Hale E. Sheppard, *Alarming U.S. Tax Rules and Information-Reporting Duties for Foreign Retirement Plans and Accounts: Analyzing Problems and Solutions*, 129 J. TAXATION 14 (2018) (explaining previous and remaining international disclosure programs).

[81] Tax Notes, Document No. 2017-66433, Item G-6 (Aug. 21, 2017).

[82] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*, FAQ #2.

[83] *See www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens*.

[84] For more detailed information about the recent court battles regarding "willful" FBAR penalties, please *see* the following articles by the same author: Hale E. Sheppard, *Flume, Boyd, and Cohen: Three Recent FBAR Cases Yielding Important New Lessons*, INT'L TAX J., 2019, at 35; Hale E. Sheppard, *What Garrity Teaches About FBARs, Foreign Trusts, "Stacking" of International Penalties, and Simultaneously Fighting the U.S. Government on Multiple Fronts*, J. TAX PRACTICE & PROCEDURE, 2019, at 27; Hale E. Sheppard, *United States v. Horowitz: Sixth Case Analyzing Constructive Knowledge as Determinant of FBAR Penalties*, INT'L TAX J., 2019, at 23; Hale E. Sheppard, *Constructive Knowledge and FBAR Penalties: Does Merely Filing a Form 1040 Suffice to Establish "Willfulness?"* INT'L TAX J., 2019, at 35; Hale E. Sheppard, *Appellate Court Jeopardizes First Holding of Non-Willfulness in FBAR Penalty Case: Round Three of the Bedrosian Battle*, *30* J. INT'L TAXATION *37 (2019);* Hale E. Sheppard, *Court Bucks the Trend in Willful FBAR Penalty Cases: Merely Signing Tax Returns Does Not Establish Willfulness*, *TAXES*, 2019, at 23; Hale E. Sheppard, *What Constitutes a "Willful" FBAR Violation? Comprehensive Guidance Based on Eight Important Cases*, 129 J. TAXATION 24 (2018); Hale E. Sheppard, *Court Holds that Pervasive Ignorance Is No Defense to Willful FBAR Penalties: This and Other Lessons from United States v. Garrity*, INT'L TAX J., 2018, at 51; Hale E. Sheppard, *Willful FBAR Penalty Case Shows Importance of Protecting Privileged Communications: What Kelley-Hunter Adds to the Foreign Account Defense Discussion*, INT'L TAX J., *2018, at 15; Hale E. Sheppard, Analysis of the Reasonable Cause Defense in Non-Willful FBAR Penalty Case: Teachings from Jarnagin*, 128 J. TAXATION 6 (2018); Hale E. Sheppard, *First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of Bedrosian for Future Foreign Account Disputes (Part 1)*, 128 J. TAXATION 12 (2018); Hale E. Sheppard, *First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of Bedrosian for Future Foreign Account Disputes (Part 2)*, 128 J. TAXATION 14 (2018); Hale E. Sheppard, *Can Recent "Willful" FBAR Penalty Cases Against Taxpayers Help Tax Firms Fend Off Malpractice Actions?* INT'L TAX J., 2017, at 33; Hale E. Sheppard, *Government Wins Fourth Straight FBAR Penalty Case: Analyzing Bohanec and the Evolution of "Willfulness,"* 126 J. TAXATION

110 (2017); Hale E. Shepard, *Government Wins Second Willful FBAR Penalty Case: Analyzing What McBride Really Means to Taxpayers*, 118 J. TAXATION 187 (2013); Hale E. Sheppard, *Third Time's the Charm: Government Finally Collects "Willful" FBAR Penalty in Williams Case*, 117 J. TAXATION 319 (2012); Hale E. Sheppard, *District Court Rules That Where There's (No) Will, There's a Way to Avoid FBAR Penalties*, 113 J. TAXATION 293 (2010).

[85] *J.B. Williams III*, 131 TC 54, Dec. 57,547 (2008); *Williams*, No. 1:09-cv-437, 2010 WL 347221 (E.D. Va. 9/1/ 2010); *Williams*, CA-4, 2012-2 USTC ¶50,475, 489 FedAppx 655.

[86] *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, Findings of Fact, Conclusions of Law, and Order (Nov. 8, 2012). *See also McBride*, 908 FSupp2d 1186 (D. Utah 2012).

[87] *Bussell*, 117 AFTR 2d 2016-439 (District Court, C.D. California 12/8/2015).

[88] *Bohanec*, 118 AFTR 2d 2016-5537 (District Court, C.D. Cal. 12/8/2016).

[89] *Bedrosian*, 120 AFTR 2d 2017-5671 (D.C. PA 2017).

[90] *Kelley-Hunter*, 120 AFTR 2d 2017-5566 (D.C. Dist. Col), Dec. 12, 2017.

[91] *Garrity*, Case No. 3:15-cv-243 (D.C. Conn.).

[92] *Markus*, D.C. New Jersey, Civil No. 16-2133, Opinion, July 17, 2018.

[93] *Cohen*, 2018 WL 6318837 (C.D. California, Oct. 23, 2018).

[94] *Horowitz*, 123 AFTR 2d 2019-500 (D.C. Maryland 1/18/2019).

[95] *Flume*, 123 AFTR 2d 2019-XXXX (S.D. Texas, June 11, 2019).

[96] *Boyd*, 123 AFTR 2d 2019-1651 (D.C. California, Apr. 23, 2019).

[97] *Rum*, 124 AFTR 2d 2019-XXXX (D.C. Middle District of Florida, 8/2/2019); Andrew Velarde, *FBAR Litigant Fights for Review Beyond Administrative Record*, TAX NOTES, Doc. 2019-22651, June 11, 2019; Amanda Athanasiou, *U.S. Magistrate Backs Government in FBAR Penalty Case*, TAX NOTES, Doc. 2019-29953, August 5, 2019.

[98] *Ott*, 124 AFTR 2d 2019-XXXX (D.C. Eastern District of Michigan, 8/7/2019); Kristen A. Parillo, *Limited Education No Excuse for FBAR Violations, Court Says*, TAX NOTES, Doc. 2019-30515, August 9, 2019.

[99] *See, e.g.,* Andrew Velarde, *IRS Pulls Its FBAR Penalty Punch in OVDI Opt-Out Case*, TAX NOTES, Document No. 2019-35154 (Sept. 16, 2019) (discussing *Cerejo*, a case filed in September 2019 in which taxpayer participated in Offshore Voluntary Compliance Initiative, taxpayer opted-out, and IRS then asserted "willful" FBAR penalties for four years, as well as civil fraud penalties related to the income tax underpayments); Nathan J. Richman, *First Charges Announced for Bad Entry into OVDP Alternative*, TAX ANALYSTS, Document No. 2019-32844 (Aug. 28, 2019) (analyzing *Booker*, a case filed in August 2019 involving a taxpayer who applied for the Streamline Domestic Offshore Program, taxpayer signed a statement under penalties of perjury regarding when he learned about his FBAR duties, taxpayer filed delinquent and/or amended returns, IRS later received information from foreign banks contradicting the taxpayer's statement and returns, and the Department of Justice filed criminal charges against the taxpayer).