

Damage Mitigation: The IRS Helps Alleviate Effect of COVID-19 on U.S. and Foreign Residency

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Earlier this month, Caplin & Drysdale [warned](#) foreign individuals present in the United States of the potential unintended U.S. tax consequence of quarantines and travel restrictions put in place due to COVID-19. Additionally, taxpayers who intended to qualify for the foreign earned income and housing exclusions, but who felt forced to leave their foreign country of residence, might have inadvertently lost the ability to claim those exclusions.

The IRS has now issued guidance to help mitigate the inadvertent consequences arising from COVID-19 for foreign persons present in the United States and U.S. persons intending to claim the foreign earned income and/or housing exclusions. The guidance excludes up to 60 days from the substantial presence test, and provides a waiver of the time requirements necessary to qualify for the foreign earned income and/or housing exclusions.

Exclusion from the Substantial Presence Test

Under Revenue Procedure 2020-20, an eligible individual may exclude a single period of up to 60 days from the substantial presence test under the medical condition exception. The 60-day exclusion period must begin after February 1, 2020 but before April 1, 2020, and the eligible individual must be present in the United States on each of the days he or she seeks to exclude. The 60-day period will also apply in determining whether an individual (whether or not an eligible individual, as defined below) qualifies for benefits under a U.S. income tax treaty with respect to income from employment or the performance of other dependent personal services in the United States.

An eligible individual is any individual who was not a U.S. resident at the close of 2019, does not become a green card holder in 2020, and does not become resident in 2020 (after accounting for the excluded period). Individuals are presumed to have been unable to leave the United States during the excluded period.

The Revenue Procedure excludes individuals who have taken steps to become a lawful permanent resident (i.e., apply for a green card) from benefiting from this 60-day relief, but it does not specify a time frame during which one must have taken such steps. Thus, a person who has *ever* applied for permanent residence, but later abandoned his or her effort, should consult with counsel if they are considering using this safe harbor.

To claim this relief, individuals who have a requirement to file Form 1040-NR, *U.S. Nonresident Alien Income Tax Return*, for 2020, irrespective of the substantial presence test, must attach a Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, to their timely-filed (with extensions) Form 1040-NR, and indicate on the Form 8843 that they are filing it for the "COVID-19 MEDICAL CONDITION TRAVEL EXCEPTION." Individuals who are not independently required to file a Form 1040-NR need not file one to qualify for the exclusion period. However, they are instructed to retain all relevant records to demonstrate they have relied on the Revenue Procedure, and the IRS reserves its right to later request the filing of Form 8843. Finally, claiming a 60-day exclusion under the safe harbor does not prevent an individual from claiming the otherwise-available medical condition exception or other exceptions from residency.

Foreign Earned Income and Housing Costs Exclusions

An individual residing abroad may elect to exclude from gross income a specified amount of foreign earned income and/or housing costs if he or she meets the strict residency requirements that govern the availability of these exclusions. However, an individual who would typically meet these residency requirements, but must leave the foreign country due to war, civil unrest, or similar adverse conditions that preclude the normal conduct of business may still qualify for the exclusions if it is so determined by the Secretary of the Treasury, after consultation with the Secretary of State.

Revenue Procedure 2020-27 announces that the Secretary of the Treasury, after consultation with the Secretary of State, has determined that COVID-19 has created an adverse condition that precluded the normal conduct of business:

- in the People’s Republic of China, except for Hong Kong and Macau, as of December 1, 2019, and
- globally, as of February 1, 2020.

This disruption will end on July 15, 2020, unless the IRS announces an additional extension.

Thus, an individual who left the country where he or she intended to establish foreign residency to shelter in the United States (or anywhere else in the world) during the specified period will be treated as remaining in such country if the individual “establishes a reasonable expectation” that he or she would have established residency but for the global health emergency caused by the pandemic. Only individuals who established bona fide residency or physical presence in their chosen foreign country on or prior to the beginning of the identified period above are eligible for the relief.

Attorneys in Caplin & Drysdale’s [Private Client](#) and [Tax Controversy](#) groups have decades of experience helping individuals navigate the complex rules governing U.S. residency matters. Our attorneys will continue to monitor federal and state policies intended to help taxpayers during the COVID-19 crisis.

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