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Immigration and Tax Issues for Nonresident Aliens Subject to Unexpected Travel Restrictions

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The recent pandemic has caused changes to our lives in multiple ways, including shelter-in-place orders and travel restrictions between various countries. These short-term restrictions, however, may have a significant impact on nonresident aliens who were not originally planning on staying in the United States for an extended period of time before the pandemic spread. The more immediate concern may be from an immigration point of view if the nonresident alien's visa is about to expire soon and that individual becomes out of status. A larger, and more long-term, concern may be the prospect of the nonresident alien unintentionally becoming a U.S. tax resident because he or she ends up spending too many days in the United States during 2020.

A central aspect of many nonresident aliens' tax planning with respect to U.S. taxes involves being on certain types of visas (such as student or teacher visas) or strictly limiting their time in the United States so as not to become a tax resident under the "substantial presence test" (which is discussed in detail here). For nonresident aliens unexpectedly trapped in the United States, these tax-planning strategies may no longer be viable, with potentially severe consequences. The nonresident alien may become subject to U.S. income tax on his or her worldwide income and will be subject to extensive information reporting requirements regarding his or her foreign financial accounts and other foreign assets.

Consider, for example, the following common fact patterns we have encountered with clients in the last week. One client came to the United States for his annual visit with his U.S.-resident family and had definite departure plans scheduled because he always strictly limits his time in the United States to no more than 121 days per year. But his home country has inbound travel restrictions that prevent him from traveling for at least two more weeks and, therefore, he likely could exceed 121 days this

year. Another client came to the United States to have prescheduled back surgery to alleviate chronic spinal stenosis and follow-up rehabilitation. Yet another client was in the United States for an extended vacation when the pandemic started. Both do not wish to stay here, but because each resides in a country that currently is a "hot zone," neither wishes to go back until the worst is over in their respective countries. Theoretically, each client could travel to a third country without current travel restrictions in order to exit before their U.S. visa expires and to avoid U.S. days of presence, but that would be immensely inconvenient to be in a strange country where they may not know anyone, and where the pandemic may eventually reach anyway.

First, we consider the immigration status implications for these clients.

The primary immigration-related concern for nonimmigrants is the maintenance of lawful status. Let's consider the cases of B1/B2 visitors (tourists) and F-1 students. Most visitors who enter the United States with a B1/B2 visa are granted a six-month period of admission. When faced with changed circumstances or an emergency, they can usually request an extension of stay, or even a change of status to another visa category.

However, nationals of certain countries may be admitted to the United States under the Visa Waiver Program (VWP) for a three-month period without a visa. These travelers must first register with the Electronic System for Travel Authorization. The Visa Waiver Program exempts nationals of 39 countries with low overstay rates from the visa application process.

The price for this convenience is severely limited flexibility. In addition to a shorter period of admission, VWP visitors are generally barred from extending their three-month period of admission or changing to another status. VWP visitors may only extend their lawful status under the "satisfactory departure" regulatory provision, which states:

> If an emergency prevents an alien admitted under this part from departing from the United States within his or her period of authorized stay, the district director having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant a period of satisfactory departure not to exceed 30 days. If departure is accomplished during that period, the alien is to be regarded as having satisfactorily accomplished the visit without overstaying the allotted time.

The U.S. Department of Homeland Security has issued guidelines for satisfactory departure requests related to coronavirus health concerns and travel restrictions. Requests may be submitted to the U.S. Customs and Border Protection Office of Deferred Inspections. Required documentation includes an original and a copy of passport; a copy of I-94 admission record; an original and a copy of a round-trip ticket used for entry to the United States; and a letter from an airline or other evidence

showing why the person can't depart the United States (e.g., flight canceled, country not accepting travel from the United States).

Procedures for satisfactory departure requests are changing rapidly in response to COVID-19 concerns and office closures. For example, the Miami CBP Deferred Inspection Office, which has closed to the public, is now accepting requests by telephone without supporting documentation. CBP offices in other cities have implemented different procedures. CBP district offices can be expected to continue revising procedures in response to the crisis.

Satisfactory departure requests are adjudicated on a case-by-case basis. Satisfactory departure is not likely to be granted if the person has already overstayed his or her period of admission or is able to arrange for other forms of travel. The coronavirus pandemic by itself might not be considered a sufficient reason for an extension of stay in the absence of a serious medical issue or emergency.

International students in F-1 visa status must also maintain lawful nonimmigrant status. Failure to maintain valid F-1 status in the Student and Exchange Visitor Information System (SEVIS) could trigger the day count under the substantial presence test discussed below. U.S. Citizenship and Immigration Services has indicated that students can maintain status despite program changes, including expanded online learning, provided the school notifies SEVIS of these changes within 10 days. Modifications and adaptations affecting the approved program of study, course load, or class attendance may be allowed in some cases but must be properly recorded in SEVIS. For example, schools may request reduced course load designation in SEVIS for F-1 students who wish to remain enrolled but are unable to continue their studies due to illness.

Next, we consider the tax issues raised by the client situations outlined above. All of them are at risk of becoming U.S. tax residents and subjecting their worldwide income to U.S. taxation and their non-U.S. assets to extensive information reporting requirements if they spend too much time in the United States. Our vacationing client comes from a country that has a tax treaty with the United States, so she can rely on the treaty's residency tiebreaker provision to treat her as a nonresident for income tax calculation purposes, but not for the information reporting requirements. The regular visitor client and the back surgery client, however, do not come from a treaty country. Accordingly, they must each find an alternative exception to escape U.S. tax residency. For the regular visitor client, if he can limit his stay in the United States to 183 days during 2020, he can file for the closer connection exception. For the back surgery patient, since his condition did not arise while he was in the United States, and it will not prevent him from leaving the United States following the rehabilitation period, he is not eligible for the medical treatment exception to the substantial presence test. Therefore, he too must limit his days in the United States during 2020 to fewer than 183 days in order to be eligible to file for the closer connection exception. Even if each of these clients ultimately were successful in avoiding U.S. tax residency, both would be subject to the information reporting requirements applicable to their respective non-U.S. assets and accounts.

Many professional groups (such as the American Bar Association Tax Section, the Florida Bar Tax Section, the American Institute of Certified Public Accountants, etc.) have submitted comments to the IRS highlighting these issues and suggesting various regulatory actions the IRS could take to ameliorate the potential problem of unexpected U.S. tax residency due to pandemic-related travel restrictions. Some of the suggestions include:

- Excluding days of presence in the United States caused by pandemic-related travel restrictions for a specified period of time, which could be later extended if the pandemic continues longer than expected. This would also eliminate the information reporting requirements that could be applicable to nonresident aliens.
- Expanding the definition of the medical exception to the substantial presence test to include this specific pandemic, even if the nonresident alien does not contract COVID-19, so that all days of presence during a specified period of time can be excluded.
- Expand the scope of the closer connection exception by allowing the nonresident alien to exceed 183 days of presence during 2020 if caused by pandemic-related travel restrictions.
- For the medical exception, closer connection, and treaty tiebreaker provisions, permit a one-year exception to the information reporting requirements for nonresident aliens who inadvertently become U.S. tax residents.
- Temporarily exempt U.S. source capital gains for any nonresident alien who inadvertently spends more than 183 days in the United States during 2020.

The IRS has already issued a number of taxpayer-friendly notices and filing guidance in response to the current pandemic, such as extending the return filing and tax payment deadlines for most forms and taxpayers until July 15 and allowing for the submission of electronic signatures on certain filings. Let's hope the IRS also uses its regulatory authority soon to address and minimize the U.S. tax and information return obligations that could be imposed on nonresident aliens who find themselves unable to leave the United States until after the global pandemic has ended.

If you are a nonresident alien facing this situation, we urge you to contact your U.S. immigration and tax advisers for advice on how to manage your immigration and tax residency statuses in order to mitigate this potential unexpected exposure to U.S. taxation.

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