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Copies as indicated at the end of the letter

March 22, 2020

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

Dear Lara:

Thank you for taking the time on Thursday to discuss the impact of the coronavirus pandemic on U.S. tax residence rules.[1] As promised, this letter sets out our understanding of the issues and proposes some solutions for consideration and others to whom the letter is copied. We are at everyone's disposal to discuss any of these matters.

[1] In this letter, we will for consistency refer to the "pandemic" or the "coronavirus pandemic" as the situation comprising the worldwide spread of the novel coronavirus and the illness it can cause, COVID-19.

This letter is being submitted on behalf of the Los Angeles International Tax Club, a group of lawyers and certified public accountants all of whom practice in the area of international taxation. I am the principal author of this letter; however, it has been reviewed by the following individuals, who have provided valuable suggestions and revisions and who will subscribe to this letter in the coming days. In the interests of time, the individuals are participating in their personal capacities and have not sought permission to speak on behalf of firms or any professional organizations with which they are affiliated – I have appended a list showing their current firms and contact information.

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1. Summary

This letter requests Treasury and the Internal Revenue Service to issue guidance in relation to the definition of a resident alien in section 7701(b)[2] to allow alien individuals to exclude days of presence during the period a natural disaster or a Presidentially declared national emergency and to expand the medical condition exception to deal with people affected by the coronavirus pandemic. The guidance would also clarify that the exception can apply to persons who are prevented from leaving because of the pandemic and can also apply to a person other than the person who suffers from the medical condition, such as a caregiver or dependent.

[2] All unprefixed statutory references are to sections of the Internal Revenue Code of 1986, as amended the "Code"). All unprefixed references to regulations are to regulations issued by the U.S. Department of the Treasury.

We believe that Treasury has sufficient authority to issue such guidance but to the extent Treasury considers it requires additional authority, we consider that Congress should provide such authority and direct Treasury to use it.

2. Background

2.1 Section 7701(b) Definition of Resident Alien

(a) Principal Tests. First, we note that section 7701(b) was enacted in 1984, its implementing regulations were adopted in 1992, and neither the Code nor the regulations have been significantly amended since promulgation in response to changes in the world economy, U.S. immigration law and practice, and U.S. tax laws. In general, this paper does not concern itself with broader issues relating to the definition of resident. Rather, it is focused primarily on the situation of aliens whose classification as "resident" or "nonresident" may be impacted by the coronavirus pandemic and its effects.

Section 7701(b) provides that an individual will be treated as a resident alien with respect to any calendar year if (and only if) such individual meets one of two tests.[3]

The first test, typically referred to as the lawful permanent resident test or more informally as the "green card" test, causes an individual who has been admitted as a lawful permanent resident in accordance with the immigration laws to be a U.S. resident for federal tax purposes.[4] This letter does not propose any changes to the application of that test and we say no more about it.

The second of the two tests is the substantial presence test, sometimes referred to informally as the "day-counting test".[5] This is the test with which this paper is concerned. The substantial presence test is relevant only to alien individuals who are not lawful permanent residents.[6]

(b) The Substantial Presence Test. An alien individual is a resident under this test for a calendar year if the individual is present in the United States on at least 31 days during the calendar year and the sum of (1) the number of days of presence in the calendar year, (2) one-third of the number of days of presence in the preceding calendar year, and (3) one-sixth of the number of days of presence in the second preceding calendar year (the "formula") totals 183 or more. Nevertheless, an alien who has not been present in the current calendar year for at least 183 days is not treated as meeting the test if it is established that the individual has a tax home,

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[3] Section 7701(b) applies for all purposes of the Code except Subtitle B (estate and gift taxes). The definition of residence is also relevant for purposes of determining whether an individual is a U.S. person for purposes of Bank Secrecy Act (FBAR) reporting.

[4] Section 7701(b)(1)(A)(i) and section 7701(b)(6).

[5] Section 7701(a)(1)(A)(ii) and section 7701(b)(3).

[6] In addition, there are three provisions available under which an individual can affirmatively elect to be treated as a resident. In general, we do not address these provisions in this paper. For reference, the provisions are sections 6013(g), 6013(h) and 7701(b)(4).

as defined in section 911(d)(3), in a foreign country and has a closer connection to such country than to the United States.[7] This exception is not, however, available if the individual had an application for adjustment of status pending or if the individual took other steps to apply for status as a lawful permanent resident.[8]

In effect, there are four categories of aliens:

Days in Current Calendar Year	**Status**	**Exceptions**
30 days or less	Nonresident	Statutory elections to be treated as resident (see footnote 6) but not section 7701(b)(4)
Between 31 and 182 days and less than 183 days under the formula	Nonresident	Statutory elections to be treated as resident (see footnote 6)
Less than 183 days but 183 days or more under the formula	Resident	Foreign tax home/closer connection Tax treaty provision (typically Article 4)
183 or more	Resident	Tax treaty provision only

2.2 Days Not Treated as Days of Presence and the Medical Condition Exception.

The Code provides that certain individuals will not be treated as being in the United States on any day that (a) the individual is an "exempt individual",[9] (b) the individual is in transit between two foreign countries,[10] (c) the individual is a regular commuter residing in Canada or Mexico who commutes between to and from employment in the United States,[11] or (d) the individual meets the medical condition exception described in more detail below.[12]

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7 Section 7701(b)(3)(B).
8 Section 7701(b)(3)(C)(b)(3)(D)(i).
9 Under Section 7701(b)(5), an exempt individual is an individual who falls into certain temporary statuses applicable to foreign-government individuals, teachers, trainees, and students as well as professional athletes temporarily present to compete in a charitable sporting event (informally known as the "PGA exception"). We are generally not concerned with this rule.
10 Section 7701(b)(7)(C).
11 Section 7701(b)(7)(B).
12 Section 7701(b)(3)(D)(ii).

The exempt individual rules and the medical condition exception are the exceptions most relevant to this paper. For ease of reference, we set out in full the statutory language of the requirement for an individual to meet the medical condition exception:

> "(ii) [S]uch individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States."[13]

Treasury regulations expand on this requirement.[14] For ease of reference, we also set out the relevant provision in full in Appendix B, as well as the relevant portions of the Explanation of Provisions in Treasury Decision 8411 which promulgated the regulations.

3. The Effects of the Pandemic

3.1 Practical Inability to Leave the United States

Numerous aliens were in the United States when reports of the coronavirus first appeared; many others came to the United States before it became clear that drastic measures would be implemented to restrict or completely prohibit travel, particularly across national borders. It seems unnecessary to recount these events, which unfolded at breakneck pace beginning in January 2020 and in a manner that most people have found confusing and disconcerting. President Trump announced the first actual travel ban (for visitors from China) on January 31, 2020 and even required some Americans to be quarantined. Many other countries began announcing travel bans, border closings and automatic quarantines in February 2020. The U.S. ban on travel from continental Europe was made effective on March 13; from the United Kingdom on March 17. Finding authoritative official information about restrictions can be daunting and the details in any case can shift from one day to the next; it is also well-known that officials on the ground in many countries (including the United States) are not always precisely following government rules and this also is a significant deterrent to travelers.

The pandemic has arisen in the early part of the year. It is reasonable to assume that many aliens who did not expect their stay in the United States to be extended are now unable to leave the United States for a variety of reasons connected to the pandemic. These reasons may include:

- Having tested positive for the coronavirus or being diagnosed with COVID-19, conditions which in some cases may have arisen before the alien entered the United States.

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13 *Ibid.*

14 Reg. section 301.7701(b)-3(c).

- Being quarantined because of having been exposed to other individuals carrying or suspected of carrying the coronavirus.

- Being unable as a legal or practical matter to return to the country in which they usually reside or to which they had planned to travel from the United States, due to factors connected to the pandemic, such as travel bans, travel restrictions, or unavailability of means of travel (such as canceled airline routes or refusal by airlines, bus lines and shipping lines to carry certain passengers or categories of passengers).

As discussed below, an individual might not be personally subject to any of the foregoing, but these issues might affect dependents, such as minor children, spouses, elderly parents or persons for whom the individuals are caregivers.

3.2 Effect on Application of the Substantial Presence Test

In all these cases, and others, the inability of aliens to leave the United States may, absent relief, cause them to become resident aliens under the substantial presence test.

As an extreme example, an individual present for 306 days in each of 2018 and 2019 but who previously expected to spend no more than 30 days in the United States in 2020 could already have satisfied the test if present for 31 days or more.[15] Many aliens are aware of the arithmetical rule that if they never spend more than 121 days in the United States, they cannot satisfy the substantial presence test. An individual who carefully made sure he or she spent no more than 121 days in the United States in 2018 and 2019 could become a resident if that individual spent 123 days in the United States in 2020.[16]

The aliens in these examples might be able to show that they meet the foreign tax home closer connection exception or a tax treaty exemption (provided that the United States has an income tax treaty with a country in which they are resident for tax purposes under that country's laws). There are circumstances in which an individual might not be able to show that their personal and economic connections are in a single country other than the United States. Even assuming that an alien satisfied these conditions, he or she would be required to file a tax return which would not otherwise have been required.

3.3 Other Collateral Effects. We have not yet considered in detail other potential collateral effects of the pandemic on the tax position of aliens. At some point, we hope that Treasury, the

[15] 31 + 306/3 + 306/6 = 184 days.
[16] 123 + 121/3 + 121/6 = 183 ½ days

IRS and Congress will give some thought to these effects. The following list of issues is not exhaustive and is meant to be illustrative only:

- One indirect effect of the inability of an alien individual to leave the United States for an extended period of time is that the individual might be required to engage in business activities in the United States, in which the alien would not have engaged had he or she been able to leave to return to their usual place of residence or work.

  For example, while in the United States, the alien may be required to engage in activities that would cause him to be treated as engaged in a trade or business within the United States, e.g., by rendering services to his or her employer or principal using remote working technology and may be required to do so to satisfy customers or the employer. These services could constitute the conduct of a trade or business within the United States and the related compensation could be effectively connected to such trade or business, requiring the filing of a tax return and possibly the payment of tax.[17] Consideration could be given to providing that an individual shall not be engaged in the conduct of a trade or business within the United States by virtue of rendering services to the individual's employer or principal during a time when the individual is unable due to the pandemic to leave the United States and return to the country where individual's tax home or habitual abode is situated. Consideration could also be given to waiving the limitation, found in treaties for the application of the dependent or independent services article, on presence in the United States during a twelve-month period.[18]

  This issue affects not only the individual employee or service provider but also the employer or principal.

- An alien individual's performance of services might also cause his or her employer or principal to be considered to be engaged in a trade or business within the United States. Even if these activities did not produce income effectively connected to such a trade or business, at the very least the employer or principal might be required to file a U.S. federal income tax return.

- Under section 877A, an alien individual becomes a long-term resident potentially subject to the mark-to-market rules and other expatriation-related rules set out in sections 877A and 2801 if he or she was a lawful permanent resident in eight of the 15

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[17] Section 864(b)(1). The threshold is raised in the case of residents of tax treaty countries so as to require that the foreign employer have a U.S. permanent establishment. While we think it unlikely in most cases that the activities of an employee compelled to stay in the United States due to the pandemic could by themselves cause the employer to have a U.S. permanent establishment, the employer might already have a permanent establishment.

[18] Typically, this is 183 days but the numbers vary. See "Compensation for Personal Services Performed in United States Exempt from U.S. Income Tax Under Income Tax Treaties" available at www.irs.gov/pub/irs-utl/Tax_Treaty_Table_2.pdf (viewed March 21, 2020).

years ending in the year that he or she ceases to be lawful permanent resident. The suspension of U.S. consular services, and the delays that will follow resumption of such services, could prevent an individual desiring to give up his or her status as a lawful permanent resident in time to avoid such status.[19] The question arises whether it would be appropriate to treat an individual as a covered expatriate in such circumstances.

- Under section 911, what impact will the pandemic have on the ability of U.S. citizen or resident individuals to meet the requirements of the definition of a "qualified individual", as a condition of excluding certain foreign earned income in computing their U.S. tax liability?

- Conversely, under certain treaties a U.S. citizen cannot benefit from application of the treaty by our treaty partner unless they meet a test akin to the substantial presence test.[20]

4. What Should the Government Do?

4.1 In General

We believe that an alien individual who in normal circumstances would not have become or continued to be resident under the substantial presence test, because he or she would have left before spending enough days to satisfy the test, should not become a resident as a result of the individual being unable to leave due to unforeseeable circumstances such as the coronavirus pandemic.

It should be possible for the government to craft a regulatory solution to the problem. We describe the outlines of such a solution below and we also discuss whether the government has the authority to solve the problem. Although we consider that there is sufficient authority to solve the problem in most cases, we would urge Congress to grant Treasury the explicit authority to do so and to deal with any outlier cases.[21]

4.2 Proposed Solutions – Regulatory

(a) Expand the Categories of Exempt Individuals. The simplest approach would be to expand the category of exempt individuals for purposes of section 7701(b)(3)(D)(i) to include

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[19] U.S. Department of State, "Suspension of Routine Visa Services", https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html (viewed March 21, 2020), announcing cancelation of all routine immigrant and nonimmigrant visa appointments as of March 20, 2020.

[20] E.g., United Kingdom-United States income tax treaty (signed July 24, 2001; in force March 31, 2003), article 4(2).

[21] While not discussed in this letter, we would also encourage the government to address indirect consequences of an individual's inability, including wage and other withholding issues that may arise to the individual's employer or principal and the possibility that the individual may cause its employer or principal to be found to maintain a permanent establishment within the United States for treaty purposes.

any individual present in the United States during a period designated by the Secretary of the Treasury as a "natural disaster" or, alternatively, during the period in which a Presidential declaration of a national emergency is in effect (or for such number of days as Treasury may specify, for example up to 120 days, and subject to such reasonable or necessary conditions and requirements as Treasury may specify). In effect, there would be a presumption that such individual was unable to leave due to the period of the natural disaster or national emergency and days of presence during this period would not be counted.[22] The advantage of this approach is that it is simple and administrable.

(b) Expand and Clarify the Medical Condition Exception. If the simple approach proposed in the preceding paragraph were thought to be overbroad, a narrower approach would be to provide that an individual may claim the benefit of the medical condition exception for any day when the individual was "unable to leave the United States" "as a result of the prevalence of the coronavirus and COVID-19 in the United States and/or in the country of the taxpayer's tax home or habitual abode" due to "measures taken by the United States government or any State or any foreign government to combat the spread of the coronavirus and COVID-19" and/or "limitations on the ability to return to the country of the taxpayer's tax home or habitual abode".

Each of the expressions in quotation marks could be defined. We would in general hope that the definitions would be flexible and capable of applying to the multiple varieties of situations that have arisen in the context of the pandemic or future pandemics.[23] We think that longer term improvements to the medical condition exception should be undertaken but there is an immediate need relating to the virus.

Having said this, we think it should be made clear that in this particular instance, the government accepts that an alien individual need not personally be infected with the virus or suffering from the disease. Rather, the government should acknowledge that prevalence of the coronavirus and the disease constitute a medical condition that affects everyone in a particular country until it has been contained. Treasury and the IRS could provide for the issuance of announcements concerning this subject with respect to the United States, any State or any foreign country or geographic region.

"Limitations or restrictions on the ability to return" could include the unavailability of travel on a reasonably affordable basis by common carrier, including but not limited to the result of carrier restrictions for any person or category of persons to which the alien belongs.

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[22] The presumption could be limited so that it would not apply if the individual was resident both in 2019 and in the year next following the year in which the IRS found that the pandemic was no longer prevalent or the national emergency was no longer continuing.

[23] It would be relatively simple to define a pandemic as a pandemic declared by the World Health Organization and determined by Treasury to be present in the United States and causing widespread government restrictions or practical limitations on international travel.

More broadly, we request that it be clarified that, as a general matter, the medical condition exception extends to the dependents and caregivers of an individual subject to a medical condition.

(c) Modify Application of the Foreign Tax Home/Closer Connection Test. Consideration also could be given to modifying the foreign tax home/close connection test.

First, the 182-day limitation on use of the test could be eliminated in 2020 and in any subsequent year in which the pandemic (or a future pandemic) occurred or during the pendency of a Treasury-designated period of a natural disaster or the pendency of a Presidential declaration of a national emergency.

Second, the requirement of section 7701(b)(3)(C)(ii) that the alien not have taken steps to apply for status as a lawful permanent resident could be waived.[24]

4.3 Treasury Authority

In addition to its general authority under the Code to prescribe "needful rules and regulations",[25] Treasury has authority to prescribe such regulations as may be necessary or appropriate to carry out the purposes of section 7701(b).[26] We consider that Treasury could use this authority to construe that medical condition exception more broadly than has historically been the case, or simply to exclude from days of presence in the United States those days in 2020 designated by the Secretary of the Treasury as a period of a natural disaster or in any event after a Presidential declaration of a national emergency.

The Explanation of Provisions in T.D. 8411 refers to Congressional intent that the exception apply in very few cases. The Explanation of Provisions is however not wholly accurate in this regard. The House Report cited in the Explanation of Provisions does not refer to an intent to apply the exception in very few cases. Rather, it says that the "The Committee [on Ways and Means] *anticipates* that few individuals will be physically unable to leave the United States." It is reasonable to assume that the Committee did not anticipate an event such as the coronavirus pandemic or its multifarious effects, including quarantines, travel restrictions, lockdowns, and the virtual shutdown of the airline industry, and intended (or at least would not have opposed) the use of Treasury's regulatory authority in extraordinary situations.

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[24] We would not however recommend waiving the requirement of section 7701(b)(3)(C)(i) that the alien not have a pending application for adjustment of status. Such applications are normally made when the alien is already present in the United States and it is usually a requirement that the alien remain in the United States during the pendency of the application, unless permission to leave is obtained through a process known as Advance Parole. See https://www.uscis.gov/greencard/adjustment-of-status (viewed March 19, 2020).

[25] Section 7805(a).

[26] Section 7701(b)(11).

We note also that the statute does not explicitly state that the medical condition must be one from which the individual in question is suffering. It could be read to apply to an individual unable to leave because of a medical condition affecting someone else. Most obviously, such an individual might be a dependent or a caregiver. For example, assume an alien cannot leave because his or her child or elderly parent or spouse is suffering from a medical condition. We have carefully read through the regulations and the Explanation of Provisions and nowhere does it explicitly state that it is the individual whose residence is to be determined must be the person suffering from the medical condition; even if that was what the drafters had in mind, it is perfectly possible to read all of the relevant materials without finding a statement that only the person suffering from the medical condition could take advantage of the exception. If the government feels it must abide by the statute, legislative history, the regulations and the Explanation of Provisions, it is not precluded by the literal language of any of these from expanding the application to persons affected by someone else's illness.

If Treasury does not consider it can construe the medical condition exception as broadly as we propose, a legislative remedy would be needed. As noted below, we would recommend that the legislative remedy focus on a grant of regulatory authority to Treasury, rather than the enactment of detailed rules, but with a clear direction to exercise such authority.

Alternatively, Treasury may be able to find external authority in the Stafford Act[27] or other law that applies in the case of emergencies. In the short time available, we have not been able to research this possibility.

4.4 Legislative Relief

We would welcome legislative action in this area. We request that any provision be self-executing so that relief not be dependent on the issuance of regulations

The simplest approach would be a specific direction to Treasury, by regulation or other guidance, to allow an alien individual to exclude days of presence during a period of a natural disaster designated by Treasury or in any event during a Presidentially declared period of national emergency. If necessary, this could be formulated as a presumption that the alien individual was prevented from leaving the United States because of a medical, environmental or other condition or circumstance that has been certified by the Secretary of the Treasury as meeting the criteria for "natural disaster" relief, and also to make clear that the medical or other such condition or circumstance can relate to one or more individuals other than the alien. Congress could indicate that its intent is for such grant to be construed broadly.

[27] Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 100-707.

If Congress feels it needs to amend section 7701(b), then we would recommend that the regulatory solutions proposed above be incorporated into the Code. For example, we would suggest that the following clause (iii) be added to section 7701(b)(3)(D):

> (iii) such individual was unable to leave the United States and return to a country in which the individual's tax home was located or where the individual had his habitual abode at a time when a widespread infectious disease was prevalent in either such country. [If possible, Congress could extend the proposed language to cover a broader range of situations involving medical, environmental or natural disasters.] In determining whether an individual is described in the preceding sentence, account shall be taken of legal restrictions in the United States and such country, the reasonable availability and affordability of transportation, and the state of health of the individual and any "connected person", meaning a dependent or a person for whom the individual has significant caregiving responsibilities.

We would also request a clarification that an alien individual may claim the benefit of the medical condition exception based on the health of any connected person.

We would request that Treasury be given authority to waive the conditions to the foreign tax home/closer connection test as described above or to apply the test based on excluding days of presence in the manner described above.

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As noted at the beginning of this letter, the author and contributors are at your disposal if you would like to discuss any of these matters or to elaborate further on our suggested alternatives.

Sincerely,

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Appendix A: Details Concerning the Individuals Who Commented on the Letter

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Appendix B: Medical Condition Exception – Regulations and Legislative History

1. Treas. Reg. Section 301.7701(b)-3(c)

(c) Medical condition -

(1) In general. An individual will not be considered present on any day that the individual intends to leave and is unable to leave the United States because of a medical condition or medical problem that arose while the individual was present in the United States. A day of presence will not be excluded if the individual, who was initially prevented from leaving, is subsequently able to leave the United States and then remains in the United States beyond a reasonable period for making arrangements to leave the United States. A day will also not be excluded if the medical condition arose during a prior stay in the United States (whether or not days of presence during the prior stay were excluded) and the alien returns to the United States for treatment of the medical condition or medical problem that arose during the prior stay.

(2) Intent to leave the United States. For purposes of paragraph (c)(1) of this section, whether an individual intends to leave the United States on a particular day will be determined based on all the facts and circumstances. Thus, if at the time an individual's medical condition or medical problem arose, the individual was present in the United States for a definite purpose which by its nature could be accomplished within the United States during a period of time that would not cause the individual to be a resident under the substantial presence test, the individual may be able to establish that he or she intended to leave the United States. However, if the individual's purpose is of such a nature that an extended period of time would be required for its accomplishment (sufficient to cause the individual to be a resident under the substantial presence test), the individual would not be able to establish the requisite intent to leave the United States. If the individual is present in the United States for no particular purpose or a purpose by its nature that does not require a specific period of time to accomplish, the determination of whether the individual has the requisite intent to leave the United States will depend on all the surrounding facts and circumstances. In the case of an individual adjudicated mentally incompetent, proof of intent to leave the United States may be determined by analyzing the incompetent's pattern of behavior prior to the adjudication of incompetence. Generally, an individual will be presumed to have intended to leave during a period of illness if the individual leaves the United States within a reasonable period of time (time to make arrangements to leave) after becoming physically able to leave.

(3) Pre-existing medical condition. A medical condition or problem will not be considered to arise while the individual is present in the United States, if the condition or problem existed prior to the individual's arrival in the United States, and the individual was aware of the condition or problem, regardless of whether the individual required treatment for the condition or problem when the individual entered the United States.

(4) Examples. The following examples illustrate the application of this paragraph (c):

Example 1.
B is in a serious automobile accident in the United States on March 25. B intended to leave the United States on March 31 (as evidenced by an airline ticket), but was unable to leave on that date as a result of the injuries suffered in the accident. B recovered from the injuries and was able to leave and did leave the United States on May 31. B's presence in the United States during the period from April 1 through May 31 will not be counted as days of presence in the United States.
Example 2.
The facts are the same as in Example 1, except that B's return flight (as evidenced by an airline ticket) was scheduled for May 31. Because B did not intend to leave the United States until May 31, B may not exclude any days of presence in the United States.

2. Treasury Decision 8411

EXPLANATION OF PROVISIONS

. . .

SECTION 301.7701(b)-3: DAYS OF PRESENCE IN THE UNITED STATES THAT ARE EXCLUDED FOR PURPOSES OF SECTION 7701(b)

. . .

Several commenters proposed that paragraph (c)(1) of section 301.7701(b)-3 be amended so that an individual who is physically unable to leave the United States on a particular day may exclude that day of presence whether or not that individual had intended to leave the United States prior to or on that day. Commenters suggested that the intent test contained in paragraph (c)(1) should be withdrawn because it is contrary to a principal purpose underlying the enactment of section 7701(b), the elimination of "subjective" tests in determining residency. In addition, commenters requested clarification concerning proof of intent, including with respect to individuals who are adjudicated incompetent.

The legislative history of section 7701(b) clearly states that Congress intended that the exclusion of days of presence under the medical exception would apply in very few cases. See H.R. Rep. No. 432, Part 2, 98th Cong., 2d Sess. 1527 (1984). The exception applies to persons who are unable to leave the United States. The exception hinges on the involuntariness of the stay; the individual would leave but is unable to do so because of the medical condition. If the individual did not intend to leave, there is no element of involuntariness; the individual would be in the United States regardless of the medical condition. Eliminating the requirement that the individual's stay be involuntary ("the intent test") would significantly increase the number of individuals who would qualify for this exception and contravene Congressional intent with respect to this particular provision. Thus, even though, in general, Congress intended to eliminate the "subjective" tests that existed under old law, the proper application of the medical exception requires an "intent test" in order to determine whether the individual's stay is

voluntary or involuntary. Furthermore, the legislative history indicates by example that an individual may exclude a day of presence under this section only where the individual had intended to leave the United States prior to the day which the individual is seeking to exclude.

The regulations have been amended, however, to provide guidance concerning how taxpayers may prove intent. In general, intent is proved on the basis of all the objectively determinable facts and circumstances. A factor to be considered in determining intent is whether an individual leaves the United States within a reasonable period of time (time to make arrangements to leave) after becoming physically able to leave. These rules may be applied to persons adjudicated mentally incompetent, for example, by analyzing the incompetent's pattern of behavior prior to the adjudication of incompetence.

Many commenters suggested that the term "preexisting medical condition" of paragraph (c)(3) be amended to include only those medical conditions or problems of which the alien individual was aware and that required treatment before the alien individual entered the United States. Because Congress stated that the exclusion shall not apply to those entering the United States to avail themselves of its medical facilities, the exclusion was not broadened in the manner suggested. See H.R. Rep. No. 432, Part 2, 98th Cong., 2d Sess. 1525 (1984).

3. H.R. Rep. No. 432, (for H.R. 4170) 98th Congress 1st Session (October 21, 1983)

Reasons for Change

. . .

The committee believes that aliens who cannot leave the United States because of a medical condition that arose during their stay here should not automatically be subject to U.S. taxation as residents if here for 183 days. The committee also believes, however, that the Federal Government has contributed to the creation of medical facilities in the United States that are second to none in the world, and that aliens who come to the United States for medical treatment and stay for extended periods of time should be subject to the bill's regular rules.

Explanation of Provision

. . .

An individual who cannot physically leave the United States because of a medical condition that arose during the individual's presence here is eligible for the closer connections/tax home exception to the substantial presence test even if present here for more than 182 days during the year. The Committee anticipates that few individuals will be physically unable to leave the United States. For example, an individual who is in a serious automobile accident shortly before a planned departure date could come within this category. These individuals will have to establish to the satisfaction of the Secretary of the Treasury that they qualify for this special medical exception.