

**IRS Form 8854–Initial and Annual Expatriation Information Statement:
Renouncing U.S. Citizenship, Expatriation Tax, and IRS Relief Procedure**

The United States (“U.S.”) taxes the worldwide income of its citizens and resident aliens (including undocumented workers).¹ Specifically,

1. U.S. citizens and permanent residents (a/k/a. green-card holders) (sometimes U.S. Persons) are subject to U.S. taxation on their worldwide income even if they live in a foreign country.
2. U.S. citizens and permanent residents pay U.S. estate tax on their worldwide assets.
3. U.S. citizens and permanent residents living outside the U.S. are subject to annual filing and international information reporting (“IIR”) requirements.²

For non-US residents, the cost of complying with these requirements is not insubstantial. These taxpayers believe that the increased information sharing resulting from the Foreign Account Tax Compliance Act (“FATCA”) will allow the IRS to impose draconian civil and criminal penalties against taxpayers that ignore the reporting requirements.³

With increasing frequency, U.S. Persons living outside the U.S. want to discuss the tax costs and tax and non-tax consequences of expatriation under IRC §§ 877 and 877A. This article reviews these costs and an IRS procedure for certain expatriates of modest means.

1. Renouncing U.S. Citizenship and Long-Term Resident Status

In most cases, the process for renouncing U.S. Citizenship is easy. In general, 8 U.S.C. § 1481 governs the renunciation of U.S. citizenship. Subsection (a) provides that:

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily...

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense...⁴

Thus, a taxpayer may appear before the U.S. Embassy or U.S. Consulate Office in a foreign country to renounce U.S. citizenship or residency by signing an oath of renunciation.⁵

Once the renunciation request has been reviewed and approved, a *Certificate of Loss of Nationality* (“COLN”) is issued.⁶

The taxpayer then files IRS Form 8854, *Expatriation Information Statement*, with the IRS, attaching it to the income tax return for the tax year that includes one’s expatriation date.⁷

The procedure to surrender a green card status is straightforward. A green card holder completes and mails USCIS Form I-407, *Abandonment of Lawful Permanent Resident Status*. For tax, I.R.C. §6851(d) provides no alien, subject to exceptions by regulations, “shall depart from the United States unless he first procures from the Secretary a certificate that he has complied with all the obligations imposed upon him by the income tax laws.” The certificate required by I.R.C. §6851(d) is sometimes called the “sailing permit.” A sailing permit can be obtained by filing one of two forms with the IRS. The IRS Form 1040-C, *U.S. Departing Alien Income Tax Return*, is used by aliens leaving the U.S. to report income received and expected to be received during the tax year. The IRS Form 2063, *U.S. Departing Alien Income Tax Statement*, is filed by departing aliens with no taxable income. Green card holders with no definite plans to return to the U.S. must also file IRS Form 8854, *Expatriation Information Statement*.

Although renunciation is easy, the number of U.S. citizens that have renounced their citizenship remains small. They include celebrities, billionaires, and politicians. For example, Tina Turner, renounced her U.S. citizenship in 2013 and became a citizen of Switzerland.⁸ Eduardo Saverin, the billionaire co-creator of Facebook, gave up his U.S. citizenship and became a Singaporean citizen.⁹ For these taxpayers, benefits of renouncing U.S. citizenship or permanent residency include the (a) elimination of U.S. tax and filing obligations, (b) the reduction or elimination of U.S. estate tax and gift tax, and (c) the elimination of double taxation..¹⁰

For most expatriates, renouncing U.S. citizenship comes with negative consequences, including loss of the protection as a U.S. citizen, the loss of U.S. consular services, losing the right to vote, and losing access to U.S. job market.¹¹

More importantly, for expatriates with ties to the U.S., the primary purpose behind renunciation cannot be tax avoidance. Tax professionals report that wealthy renouncing expatriates are being audited by the IRS based on its belief that the renunciation was motivated by tax avoidance. Also, under the U.S. Immigration and Nationality Act and 1996 Reed Amendment, a former citizen can be denied re-entry to the United States if it is determined by the U.S. Attorney General that the former citizen renounced their U.S. citizenship to avoid paying U.S. tax.¹² Simply, “an individual who is found to have renounced for U.S. tax avoidance purposes will be denied access into the United States and will be considered ‘inadmissible’ for immigration purposes.”¹³

Finally, renunciation of citizenship or returning green card alone does not end the U.S. taxation, and individuals who relinquished their citizenship or long-term residency may be subject to the expatriation tax under IRC §§877 and 877A.

2. Filing the IRS Form 8854

Today’s expatriation tax has its genesis in the 2008, the Heroes Earnings Assistance Relief Tax (“HEART”) Act.¹⁴ Specifically, Section 301 of the HEART Act added sections “877A and 2801 to the Internal Revenue Code (“Code”), amended sections 6039G and 7701(a), amended sections 877(e) and 7701(b), and repealed section 7701(n) regarding individuals who on or after June 17, 2008, relinquish U.S. citizenship or cease to be lawful permanent residents of the United States.”¹⁵ The taxes resulting from the application of these rules is computed on IRS Form 8854, *Expatriation Information Statement*.

Who is a Covered Expatriate?

Many U.S. citizens or residents seeking to renounce their status are subject to the expatriation tax under the HEART Act. The tax will apply if:

- (1) the average annual net income tax of an individual for the period of five taxable years ending before the date of the loss of United States citizenship is greater than \$124,000 (adjusted for inflation under 877A(a)(3)(B))¹⁶;
- (2) the net worth of the individual as of such date is \$2,000,000 or more;

OR

- (3) such individual fails to certify under penalty of perjury that he has met the requirements of U.S. tax law for the five preceding taxable years or fails to submit such evidence of such compliance as the Secretary may require.¹⁷ (emphasis added)

An expatriate who meets one of the above conditions is considered a ‘Covered Expatriate’ and becomes subject to the expatriation tax under IRC §§877 and 877A.

The exceptions in determining whether an expatriate qualifies as a Covered Expatriate are in IRC §877A(g)(1)(B) which provides that an individual shall not be treated as meeting the condition (1) or (2) above if:

- (i) the individual became at birth a citizen of the United States and a citizen of another country and, as of the expatriation date, *continues to be a citizen of, and is taxed as a resident of, such other country, and has been a resident of the United States for not more than 10 taxable years* during the 15-taxable year period ending with the taxable year during which the expatriation date occurs,
- (ii) the individual’s *relinquishment of United States citizenship occurs before such individual attains age 18½*, and the individual has been a resident of the United States for not more than 10 taxable years before the date of relinquishment.¹⁸ (emphasis added)

What is the Expatriation Date – IRS Form 8854-line 4?

The expatriation date is “the date an individual relinquishes United States citizenship, or in the case of a long-term resident of the United States, the date on which the individual ceases to be a lawful permanent resident of the United States.”¹⁹

A U.S. citizen will be treated as relinquishing his or her U.S. citizenship on the earliest of four dates:

- (1) “the date the individual renounces his or her U.S. nationality before a diplomatic or consular officer of the U.S. . .
- (2) the date the individual furnishes to the U.S. Department of State a signed statement of voluntary relinquishment of U.S. nationality. . .
- (3) the date the U.S. Department of State issues to the individual a certificate of loss of nationality; or
- (4) the date a U.S. court cancels a naturalized citizen’s certificate of naturalization.”²⁰

A long-term resident ceases to be a lawful permanent resident if he or she:

- (1) 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,
- (2) does not waive the benefits of such treaty applicable to residents of the foreign country, and
- (3) notifies the Secretary of the commencement of such treatment.²¹

How Does a Taxpayer Calculate the Expatriation Tax - IRS Form 8854-parts III & IV

The expatriation tax applies to all net unrealized gains on the individual's worldwide assets on a mark-to-market basis – that is, all property (subject to a few exceptions) of a Covered Expatriate is deemed sold for its fair market value on the day before the expatriation date, and any gains from such deemed sales are subject to income tax.²²

Any net gains can be reduced by the exclusion amount under IRC § 877A (a)(3), which is to be adjusted for inflation, although such exclusion amount is allocated pro rata among all of the assets included in the exit tax base.²³

Losses from deemed sales are taken into account for the taxable year of the deemed sale, except that the wash sale rules under IRC §1091 do not apply.²⁴

To apply the mark-to-market rules, “a Covered Expatriate is considered to own any interest in property that would be taxable as part of his or her gross estate for Federal estate tax purposes . . .”²⁵ A Covered Expatriate also is deemed to own his or her beneficial interest(s) in each trust that would not constitute part of his or her gross estate.²⁶ The mark-to-market tax rules does not apply to deferred compensation items, certain tax-deferred accounts, and interest in any non-grantor trust of which the covered expatriate was a beneficiary on the day before the expatriation date.²⁷

The calculations on IRS Form 8854-Section IV regarding deferred compensation of a Covered Expatriate, are based on IRC 877A(c)(1) which provides that the mark-to-market rules otherwise available under IRC 877A does not apply. Instead, IRC 877A(d) provides an alternative tax regime. In the case of an “eligible deferred compensation item,”²⁸ the payor must deduct and withhold from any taxable payments to a Covered Expatriate regarding such items a tax equal to 30 percent of the amount of those taxable payments.²⁹ In the case of other deferred compensation items, “an amount equal to the present value of the Covered Expatriate’s accrued benefit shall be treated as having been received by such individual on the day before the expatriation date as a distribution under the plan.”³⁰

Also, a Covered Expatriate may elect to defer payment of tax attributable to property deemed sold. (See IRS Form 8854-Section C). IRC § 877A(b) provides:

“a covered expatriate may make an irrevocable election (“deferral election”) with respect to any property deemed sold by reason of section 877A(a) to defer the payment of the additional tax attributable to any such property (“deferral assets”). The deferral election is made on an asset-by-asset basis. In order to make the election with respect to any asset, the covered expatriate must provide adequate security (defined below) and must irrevocably waive any right under any U.S. treaty that would preclude assessment or collection of any tax imposed by reason of section 877A.”

Gifts and Bequests – IRC §2801

Gifts or bequests from a Covered Expatriate on or after June 17, 2008, are subject to a transfer tax under IRC §2801, which was added to the Code as part of the HEART Act and implemented by the proposed regulation the IRS issued on September 9, 2015.³¹

IRC §2801 imposes tax on any U.S. citizens or residents who receive a covered gift or bequest. The covered gift or bequest means “(A) any property acquired by gift directly or indirectly from an individual who, at the time of such acquisition, is a covered expatriate, and (B) any property acquired directly or indirectly by reason of the death of an individual who, immediately before such death, was a covered expatriate.”³² While U.S. gift or estates tax typically is imposed on the transferor or the estate, IRC §2801 imposes tax on the recipient of the gift or bequest. The tax imposed under IRC §2801 is equal to the product of the highest rate of estate tax (prescribed in IRC §2001(c)) and the value of such gift or bequest,³³ but it is subject to the annual gift tax exclusion specified in IRC §2503(b).

3. IRS’ New Relief Procedure Gives an Option to Certain Former Citizens

Wikipedia defines the term “Accidental Americans” as follows:

An accidental American is a citizen of a country other than the United States who may also be considered a U.S. citizen or eligible for U.S. citizenship under U.S. nationality law but is not aware of having such status, or has only become aware of it recently during adulthood. Accidental Americans' U.S. citizenship arises due to their parents' ties to the United States rather than their own choices: they may be born in their own country but to one U.S. citizen parent who emigrated from the United States, or they may be born in the U.S. to parents residing in the country temporarily for work or study and then return to their own country in their early childhood, with few if any memories of the United States. The term may also sometimes be applied to people who definitely are not U.S. citizens but have some other sort of connection with the country, for example green card holders who moved back to their country of origin and let their green cards expire without

formally cancelling their U.S. immigration status, or non-U.S. citizens married to Americans abroad.

A simple Google search reveals hundreds of articles about filing and compliance difficulties faced the “Accidental Americans.”

On September 6, 2019, the IRS introduced a relief procedure to address many of the complaints raised by non-compliant expatriates of modest means. This relief procedure relieves the obligations of the expatriation tax and any back taxes, including penalties and interest, owed while they were U.S. citizens.³⁴ It also enables certain U.S. citizens to avoid the status of Covered Expatriate under IRC §877(a)(2).³⁵

The procedure is limited to Accidental Americans. Specifically, the procedure is open to Accidental Americans:

- (1) who have **relinquished or plan to relinquish their U.S. citizenship** after March 18, 2010;
- (2) who have **no filing history as a U.S. citizen or resident** (if an expatriate filed Form 1040NR nonresident alien income tax return under good faith belief that he/she was not a U.S. citizen, the procedure may still be allowed);
- (3) who have **a net worth less than \$2,000,000** at the time of expatriation and at the time of making their submission under the relief procedures;
- (4) **who have an aggregate total tax liability of \$25,000 or less for the five tax years preceding expatriation** and in the year of expatriation (after application of all applicable deductions, exclusions, exemptions and credits, including foreign tax credits, but excluding the application of IRC § 877A and excluding any penalties and interest); AND
- (5) whose failure to file required tax returns (including income tax returns, applicable gift tax returns, information returns (including Form 8938, Statement of Foreign Financial Assets), and Report of Foreign Bank and Financial Accounts (FinCEN Form 114, formerly Form TD F 90-22.1)) and to pay taxes and penalties for the years at issue was **due to non-willful conduct**.³⁶ (Emphasis added).

At first blush, limiting the aggregate total tax liability to \$25,000 or less for six years appears to exclude many Accidental Americans. However, the \$25,000 limitation is computed after application of all deductions, exclusions, exemptions and credits, including foreign tax credits. The National Taxpayer Advocate has observed that, after applying exclusions and the

foreign tax credit and tax, most non-resident US Citizens have no tax liability.³⁷ Thus, the threshold is high enough to cover most of the “Accidental Americans.”

Participating in this program is relatively easy. A taxpayer renounces his/her citizenship using the Department of State procedure described above. He or she then files with the IRS the following documents, writing in red “*Relief for Certain Former Citizens*” across the top of each return:

- (1) Certificate of Loss of Nationality (COLN) of the U.S., Form DS-4083, or copy of court order canceling a naturalized citizen’s certificate of naturalization (described in IRC § 877A(g)(4)(D));
- (2) Identification: Copy of (a) valid passport OR (b) birth certificate and government issued identification;
- (3) For the tax year of the expatriation: “Dual-status” return including Form 1040NR with all required information returns; Form 8854; Form 1040 attached as an information return reporting worldwide income up to date of expatriation; and all other required information returns, including but not limited to Form 8938;
- (4) For five tax years preceding the tax year of expatriation: Forms 1040 with all required information returns.³⁸

The following points relating to this procedure are worthy of special mention:

- (1) This procedure does not apply to long-term residents;
- (2) Unlike other streamlined procedures, ***this procedure does not require an applicant to have a Social Security Number.*** An applicant simply can leave the boxes blank where an SSN is requested.
- (3) The IRS will acknowledge the receipt of the submission after reviewing the submission package. This is noteworthy because the IRS rarely acknowledges receipt or approval of other streamlined process;
- (4) ***Returns submitted under this procedure will not be automatically subject to IRS audit,*** although they may be selected for audit under the regular audit selection process; and
- (5) If an applicant who is not eligible for this procedure makes a submission, the IRS will process such submission using normal return processing procedure, and the applicant will be liable for all taxes, penalties, and interest. This calls for a special caution in utilizing

this procedure as an expatriate's attempt to be tax-complaint may cause a dire situation.³⁹
(emphasis added)

4. Conclusion

U.S. citizens overseas report that FATCA – and the requirement for foreign financial institutions to report information to the U.S. regarding U.S. citizens' accounts – is resulting in U.S. citizens being turned away by financial institutions. FATCA and the U.S. reporting, filing and tax obligations have caused U.S. Citizens abroad to consider renouncing their citizenship. Most claim to consider renouncing because of the money. Others renounce because they believe the U.S. tax compliance and disclosure laws are expensive, inconvenient, and unfair.

Abandoning citizenship and/or giving up a green card has serious consequences: the taxpayer gives up the benefits granted to U.S. citizens, including the right to vote in U.S. elections, government protection and help while traveling overseas, citizenship for children born abroad, access to federal jobs, and unrestricted travel into and out of the United States. For some taxpayers, the expatriation tax exceeds the tax savings that result from renunciation.

Taxpayers considering giving up their U.S. Citizenship or their green card should carefully consider the tax and non-tax consequences of this irrevocable choice.

¹ Under IRC §7701, resident aliens include U.S. permanent residents (a.k.a. green-card holders) and those who pass the substantial present test under IRC §7701(b)(3) (including undocumented workers).

² The forms U.S. taxpayer must file include:

Report of International Transportation of Currency or Monetary Instruments–*FinCEN Form 105*;
Report of Foreign Bank and Financial Accounts (FBAR)–*FinCEN Form 114*; Form 1116– *Foreign Tax Credit (Individual, Estate, or Trust)*; Form 2555 / 2555 EZ–*Foreign Earned Income / Exclusion*; Form 3520/ *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*; Form 3520A -*Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*; Form 5471- *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*; Form 5472–*Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*; Form 8621– *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*; Form 8938- *Statement of Specified Foreign Financial Assets*.

³ In addition to the tax penalty, the IRS may request the Secretary of State to deny, revoke, or limit the renewal of the passport of an individual with serious tax debt under IRC §7345, which can cause serious travel delays for U.S. citizens or residents living abroad.

⁴ 8 U.S.C. § 1481(a).

⁵ Renunciation of U.S. Nationality Abroad, U.S. Department of State, available at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Renunciation-US-Nationality-Abroad.html>; see e.g., Renunciation of U.S. Citizenship, available at <https://nl.usembassy.gov/u-s-citizen-services/citizenship-services/renunciation-u-s-citizenship/>.

⁶ *Id.*

⁷ 2019 Instruction for Form 8854, available at <https://www.irs.gov/pub/irs-dft/i8854--dft.pdf>.

⁸ Andrew Henderson, *The 5 Most Famous People to Renounce US Citizenship*, Nomad Capitalist, <https://nomadcapitalist.com/2013/12/08/top-5-famous-people-renounce-us-citizenship/>.

⁹ *Id.*; Some people severely criticized that Eduardo's renunciation was for tax avoidance. Brian Solomon, *Eduardo Saverin Renounces U.S. Citizenship Ahead Of Mega Facebook IPO*, Forbes, May 11, 2012, <https://www.forbes.com/sites/briansolomon/2012/05/11/eduardo-saverin-renounces-u-s-citizenship-ahead-of-mega-facebook-ipo/#4a398f271ff6>.

¹⁰ Alexander Marino, *Renouncing Your U.S. Citizenship: Is Divorcing Uncle Sam Right For You?*, MONDAQ (24 Mar. 2014) (available at <http://www.mondaq.com/canada/x/227982/Income+Tax/Renouncing+Your+US+Citizenship+Is+Divorcing+Uncle+Sam+Right+For+You>).

¹¹ *Id.*

¹² 8 U.S.C. § 1182(a)(10)(E).

¹³ Alexander Marino, *Renouncing Your U.S. Citizenship: Is Divorcing Uncle Sam Right For You?* MONDAQ (24 Mar. 2014) (available at <http://www.mondaq.com/canada/x/227982/Income+Tax/Renouncing+Your+US+Citizenship+Is+Divorcing+Uncle+Sam+Right+For+You>).

¹⁴ Annie A. Huang, *The Price of Leaving: Renouncing U.S. Citizenship Comes with Costly Consequences*, K&L GATES LEGAL INSIGHT (Aug. 27, 2013) (hereinafter "Huang")

¹⁵ Notice 2009-85, 2009-45 I.R.B. 598 (this notice is entitled "Guidance for Expatriates Under Section 877A")

¹⁶ For expatriation on or after June 17, 2008, the amount is \$139,000 for 2008, \$145,000 for 2009, \$145,000 for 2010, \$147,000 for 2011, \$151,000 for 2012, \$155,000 for 2013, \$157,000 for 2014, \$160,000 for 2015, \$161,000 for 2016, \$162,000 for 2017, \$165,000 for 2018, and \$168,000 for 2019. 2019 Instruction for Form 8854, available at <https://www.irs.gov/pub/irs-dft/i8854--dft.pdf>.

¹⁷ IRC §877(a)(2).

¹⁸ IRC §877A(g)(1)(B).

¹⁹ IRC §877A(g)(3).

²⁰ IRC §877A(g)(4).

²¹ IRC s7701(b)(6).

²² IRC §877A(a); *see also*, Notice 2009-85.

²³ Notice 2009-85, § 3(b).

²⁴ *Id.*

²⁵ Notice 2009-85, § 3(a).

²⁶ *Id.*

²⁷ IRC §877A(c).

²⁸ Eligible deferred compensation item means any deferred compensation item with respect to which: (i) the payor is either a U.S. person or a non-U.S. person who elects to be treated as a U.S. person and (ii) the covered expatriate notifies the payor of his or her status as a covered expatriate and irrevocably waives any right to claim any withholding reduction under any treaty with the United States. IRC §877A(d)(3).

²⁹ IRC §877A(d)(1)(A).

³⁰ IRC §877A(d)(2)(A)(i). *See however*, IRC 877A(d)(2)(A)(ii) "with respect to any deferred compensation item referred to in paragraph (4)(D), the rights of the covered expatriate to such item shall be treated as becoming transferable and not subject to a substantial risk of forfeiture on the day before the expatriation date."

³¹ Guidance Under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests Form Covered Expatriates, REG-112997-10.

³² IRC §2801(e)(1).

³³ IRC §2801(a).

³⁴ *Id.*

³⁵ Relief Procedures for Certain Former Citizens, available at <https://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens>.

³⁶ *Id.* Non-willful conduct means "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."

³⁷ Challenges Persist for International Taxpayers as the IRS Moves Slowly to Address Their Needs available at <https://taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Most-Serious-Problems-International-Taxpayer-Issues.pdf>

³⁸ *Id.*

³⁹ *Id.*