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Office of the Comptroller
Bureau of Consular Affairs
U.S. Department of State
(CA/C), SA-17, 8th Floor
Washington, DC 20522-1707

RE: Schedule of Consular Fees for Citizenship-Related Services

Dear Sir or Madam:

Pursuant to notice published in the Federal Register on August 28, 2014, this comment letter of opposition is submitted to the U.S. Department of State on behalf of the Alliance for the Defence of Canadian Sovereignty/L'Alliance pour la défense de la souveraineté canadienne (the "Alliance"). The Alliance was established under the Canada Not-for-profit Corporations Act to defend Canadian sovereignty and protect all persons in Canada from the attempts of other countries to impose "extra-territorial" legislation in Canada. Canadians represented by the Alliance include citizens and residents who are deemed by the United States also to be U.S. citizens under the laws and regulations discussed herein ("Dual Citizens").

The above-referenced Interim Final Rule ("Interim Rule") would amend the Schedule of Fees for Consular Services rendered in connection with the processing of various visa and other citizenship-related services including requests for renunciation of U.S. citizenship. A review of the fee changes, which in some cases represent a reduction in user costs, reflects variances within a 7-45 percent range from the prior fees which were last changed in 2010. The one notable exception, however, is that the Documentation for Renunciation of Citizenship fee is increased from $450 to $2,350 which represents a five-fold increase.

Renunciation of U.S. citizenship is an option of growing importance to Dual Citizens, particularly for those individuals often referred to as "Accidental Americans," namely, persons born in the U.S. (and therefore U.S. citizens) but who departed at a young age to live permanently in Canada. Dual Citizens wishing to free themselves of U.S. citizenship also include Canadian citizens and residents who were born in Canada to one or both parents who held United States citizenship. Many Accidental Americans and those born in Canada to U.S.

parents dispute the right of the United States to impose U.S. citizenship on them without their express consent.

In addition to the Interim Rule's questionable predicate as to the scope of U.S. citizenship, the fivefold increase in the processing fee for renunciation of citizenship is not just disproportionate, but now constitutes a significant burden to the exercise of a right of citizenship. This individual right was explicitly recognized by Congress in the Expatriation Act of 1868 which provides in the following terms:

> "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness … Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." 15 Stat. 223; R.S. § 1999; 8 U.S.C.A. 1481 notes.

The historical iteration of the right to expatriate is also expressly included in the specific statutory authority to surrender U.S. nationality by "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." 8 U.S.C. 1481(a)(5); also Supreme Court recognition in *Afroyim v. Rusk*, 387 U.S. 253 (1967).

Under the terms of the Federal Register notice, the new fees became effective on September 6, 2014. This was essentially coincident upon publication which, as noted, occurred on August 28, 2014. For this reason, our client also interposes objections to the Interim Rule on procedural grounds, namely the lack of proper notice and an opportunity to comment as required under the Administrative Procedure Act ("APA"). 5 U.S.C. § 553. This statute provides that administrative agencies are required to provide "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

The September 6, 2014 effective date of this fivefold increase in the renunciation fee has obviously deprived our client and all other adversely affected parties of their rights under the APA to provide prior input to the rulemaking process. An exception to the prior notice and opportunity for public comment requirement pertains only "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). The Interim Rule invokes this exception on the stated ground that "the fees in this rule fund consular services that are critical to national security." 79 Fed. Reg. 51251 (August 28, 2014).

Clearly the fees specified in the Interim Rule "fund consular services," but it is an exaggeration with no rational basis to claim that the announced increase in the fee schedule is "critical to national security." The annual budget of the U.S. State Department is approximately $50 billion dollars, with Diplomatic and Consular Programs amounting to over $8 billion of aggregate expenditures. The Interim Rule projects the annual increase in the processing fee for Renunciation of Citizenship to be $4.5 million. Id. at 51252. This differential, while very

meaningful to affected individuals, is less than one percent of the State Department budget for Diplomatic and Consular Programs and less than one-tenth of one percent of the aggregated State Department budget.

In this connection, it is important to note that the last increase in consular fees followed standard APA procedure in the form of a Proposed Rule which was open for prior public comment. 75 Fed. Fed. Reg. 6321 (Feb. 9, 2010). Inasmuch as the State Department is now contending that an increase in consular fees no longer necessitates the notice and comment opportunity in accordance with the standard APA process, then it must provide a meaningful explanation for a reversal from past practice since "[r]easoned decision making … necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent." *Dillmon v NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009). See also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) that "An agency may not … depart from a prior policy sub silentio."

Another major differentiation between the Interim Rule and its 2010 predecessor is the magnitude of the change. According to the 2010 documentation, there was no charge whatsoever for documentation services in connection with the renunciation of U.S. citizenship – a position fully consistent with the aforementioned legislative proscription that there should be no restrictions or impairments on the expatriation rights of U.S. citizens. For these reasons, it is our client's view that the pre-2010 policy concerning consular services is the proper treatment.

Even if the $450 charge per individual request was arguably within the bounds of a reasonable limitation, which we dispute, a five-fold increase is disproportionate both as to the 2010 action as well as all other 2014 fee increases and discriminatory in that it widens the gap between those who can and cannot afford to pay.

Finally, it must be observed that these fee changes are occurring in the context of the rapidly rising number of U.S. governmental initiatives aimed at U.S. citizens exercising the equally inherent right to live abroad. Falling foremost in this category would, of course, be the extraterritorial impact of the Foreign Account Tax Compliance Act ("FATCA") (Pub. Law No. 111-146), requiring Canadian banks, in order to avoid a 30 percent withholding tax, to register with the IRS and agree to report to the IRS information about their accounts with any U.S. ownership indicia. FATCA is in accretion to the Foreign Investors Tax Act (FITA) (Pub. Law No. 89-809), as amended (Pub. Law Nos. 104-191; 110-245), imposing an extensive reporting and specific expatriation or "exit tax" upon the relinquishment of U.S. citizenship (Internal Revenue Code Sections 877, 877A, 2107, 2501 et al.). This category further includes the provisions of the Bank Secrecy Act (BSA) (Public Law 91–508) subjecting the bank accounts of Americans abroad to file a Foreign Bank and Financial Accounts Report ("FBAR") (Form TD–F 90–22.1). FBAR is a complex and costly annual reporting requirement with no comparable obligation applicable to financial accounts maintained domestically by U.S. residents.

The accumulation of these and other related actions, including the Interim Rule under discussion herein, are fast approaching the limits of reasonable delineation between the general

power to raise revenue at the federal level and the point at which the action becomes so arbitrary as to amount to a confiscation of property.

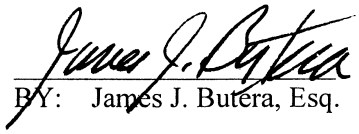
Summarizing our client's objections to the Interim Rule:

1. The $2,350 fee is in and of itself an impermissible burden on the right of citizenship renunciation;

2. The process of imposing the fee through a truncated procedural process violated the rights of our client's members as prescribed under the APA.

For the foregoing reasons, the appropriate governmental action at this point is to suspend the price increases specified in the Interim Rule until there has been a proper opportunity for adversely affected parties and their representative membership organizations to participate in the process before final decisions are announced.

Respectfully Submitted,



BY: James J. Butera, Esq.