American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

May 20, 2013

Mr. Daniel Werfel
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: Request for an exemption from filing Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund, for certain PFIC shareholders under Internal Revenue Code section 1298(f)

Dear Messrs. Werfel, Wilkins, and Mazur:

The American Institute of Certified Public Accountants (AICPA) is writing to request an exemption for certain shareholders from the new section 1298(f) Passive Foreign Investment Company (PFIC) reporting requirement on Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.[1] This letter was developed by the PFIC Task Force of the International Taxation Technical Resource Panel, and approved by the Tax Executive Committee.

The AICPA is the world's largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

[1] All references to Form 8621 in this letter refer to the form revised as of December 2012.

Background

Internal Revenue Code section (IRC) 1298(f)[2] was added by section 521 of the Hiring Incentives to Restore Employment (HIRE) Act of 2010 which was enacted on March 18, 2010. Section 1298(f) requires the annual reporting of information by shareholders of PFICs, as determined by the Secretary of the Treasury (the Secretary). Section 1298(f) was effective on March 18, 2010. Congress specifically granted the Secretary the authority to promulgate exceptions to the new reporting requirement.[3]

On April 6, 2010, the Internal Revenue Service (IRS) issued Notice 2010-34, to delay the new PFIC reporting requirement for tax years beginning before March 18, 2010. Subsequently, the IRS issued Notice 2011-55 which further suspended the annual section 1298(f) reporting requirement for tax years beginning after March 18, 2010, for PFIC shareholders not otherwise required to file Form 8621. The instructions to Form 8621[4] state that "[t]he suspension of the section 1298(f) reporting requirement will remain in effect pending the release of a subsequent revision of Form 8621, modified to reflect the requirements of section 1298(f), as set forth in guidance to be included in future regulations."

Section 6501(c)(8) was also added by the HIRE Act and provides that, absent reasonable cause by the shareholder of the PFIC for failure to report the information required under section 1298(f), it will hold the statute of limitations on the shareholder's tax return open for three years after the omission is corrected.

The IRS has included in the December 2012 Form 8621, a draft of the new information proposed to be provided on Form 8621 ("New Part I") by PFIC shareholders who prior to the enactment of section 1298(f) were not required to file a Form 8621. That information includes the number and value of the PFIC shares, the date acquired and a description of the class of shares. PFIC shareholders are not required to complete New Part I until underlying regulations are published.

Exception from Filing Form 8621 for Certain PFIC Shareholders under Section 1298(f)

The AICPA believes that Treasury should exercise its authority to promulgate exceptions to the filing requirement set forth under section 1298(f) because certain shareholders of a PFIC are unable to obtain information about whether amounts are invested in a PFIC and, in some cases, are unable to obtain the new information proposed to be provided under New Part I. Therefore, we are recommending that an exemption be granted for PFIC shareholders who satisfy the following conditions:

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[2] All section references in this letter are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.
[3] Section 1298(f).
[4] All references to instructions to Form 8621 in this letter refer to the instructions issued in December 2012.

1. Direct ownership:

    a. The PFIC shareholder directly owns less than 2 percent of a PFIC;

    b. The PFIC shareholder did not receive notification from the PFIC regarding the PFIC's status as a PFIC; AND

    c. The shareholder does not otherwise have actual knowledge or a reason to know that the investment is a PFIC.

2. Indirect ownership:

    a. The PFIC shareholder directly owns less than 10 percent of the entity which directly or indirectly owns the PFIC;

    b. The PFIC shareholder did not receive notification regarding the PFIC's status as a PFIC from:

        i. the entity directly owned by the PFIC shareholder,

        ii. any intervening entity, or

        iii. the PFIC; AND

    c. The PFIC shareholder does not otherwise have actual knowledge or a reason to know that the investment is a PFIC.

Many taxpayers are indirect owners of PFICs. These taxpayers commonly invest, directly or indirectly, in partnerships that hold investments classified as PFICs. They may own a very small percentage of the partnership and have no control over the management, investment decisions, or level of disclosure provided to the investors by the management of the partnership. Many of these taxpayers were already invested in partnerships holding PFIC investments prior to the enactment of section 1298(f). These taxpayers may have no knowledge of the law change, particularly if the partnership in which the taxpayer has invested has not informed the taxpayer of both the existence of a PFIC investment and the new annual reporting requirements. In certain cases, the partnership may not be able to obtain enough information about its investments to determine if the investment is a PFIC.

Our members often find that partnerships which own PFICs are foreign partnerships whose U.S. investors constitute a small percentage of the overall ownership. As such, the foreign partnership may decide that it does not wish to incur the cost (which can be substantial) to determine whether or not any of its portfolio investee companies are PFICs. In these cases, investors cannot compel the foreign partnerships to obtain and

provide the information and therefore, have little or no ability to obtain the requisite information they need to prepare annual Form 8621 filings.

Many investment advisors are not aware of the PFIC disclosure requirements and do not inform their clients of these reporting requirements when they invest their clients' funds in entities that invest in PFICs. In these cases, taxpayers have no way of knowing they have an indirect interest in a PFIC or a PFIC filing requirement.

In the indirect ownership situation, the tax preparer community may not always provide a failsafe. A tax preparer must exercise reasonable due diligence in the preparation of tax returns in accordance with Circular 230, AICPA guidelines and state licensing requirements. Even when fully complying with all regulatory guidelines, it is possible that the tax preparer of either Forms 1065, U.S. Partnership Return of Income[5] or Forms 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships[6] does not have adequate information to ascertain whether their clients hold investments in partnerships which are invested in PFICs. This is particularly true if there are multiple tiers of funds pooling resources so that the ultimate investment portfolios are several layers beneath the entity with the obligation to inform their U.S. investors of indirect PFIC ownership and concomitant filing requirements. In these situations where the tax preparer has no knowledge of a PFIC investment held by a client partnership, the indirect PFIC investor is not in a position to obtain information to determine whether there is a requirement to file Form 8621.

Our members also find that the only information that a taxpayer in one of the partnership examples above may receive is an annual Schedule K-1 (Form 1065), Partner's Share of Income, Deductions, Credits, etc.[7] (or in the case of a foreign partnership that does not do business in the U.S., a "pro-forma" K-1). A comprehensive Schedule K-1 package will contain, in its footnotes or accompanying documents, information regarding the PFIC investments made by the partnership and the corresponding ownership percentages of each partner. However, if the K-1 contains no information regarding PFIC investments that the partnership has made, the investor has no way of knowing of the existence of the PFIC in order to disclose it on Form 8621, let alone when the shares were acquired, the number and value of the shares, and the class of shares. Even if in the indirect ownership context it could determine PFIC status, it would be impossible for these shareholders to determine the new information required as proposed on Part 1 of Form 8621.

As noted above, Congress granted the Secretary specific regulatory authority under section 1298(f) to provide exceptions to the new section 1298(f) reporting requirement. We believe that the Secretary should exercise its authority as described above. We also note that precedent already exists in the Code in the international informational reporting area where ownership of less than 10 percent does not trigger a reporting requirement.

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[5] All references to Form 1065 in this letter refer to the 2012 form.
[6] All references to Form 8865 in this letter refer to the 2012 form.
[7] All references to Form K-1 in this letter refer to the 2012 form.

There is also precedent in the Treasury Regulations (Treas. Reg.) for favorable treatment of direct PFIC owners with less than 2 percent ownership. Under Treas. Reg. § 1.1295-3(e)(2)(i), a less than 2 percent direct PFIC owner (a "qualified shareholder") is exempted from the reasonable belief requirement of Treas. Reg. § 1.1295-3(b)(1) in order to make a retroactive Qualified Electing Fund (QEF) election under section 1295.

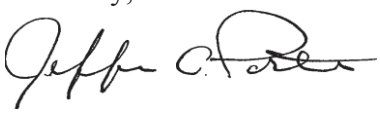
Conclusion

We request that the Treasury Department and the IRS issue specific guidance establishing exceptions from the new annual reporting requirement under section 1298(f) in situations where less than 10 percent indirect PFIC owners have no actual knowledge or a reason to believe that they are indirect owners of a PFIC and where less than 2 percent direct PFIC owners have no actual knowledge or a reason to know of the PFIC status of their investment.

We also recommend that an anti-abuse rule be drafted to prevent the exception from being used by PFIC shareholders who attempt to intentionally avoid their PFIC filing requirements by avoiding obtaining information regarding the PFIC status of their investments.

We appreciate your consideration of our recommendations, and we welcome further discussion. If you have any questions, please contact Andrew Mattson, Chair, AICPA PFIC Task Force, at (408) 369-2566 or andy.mattson@mossadams.com; or Christine Ballard, Chair, AICPA International Taxation Technical Resource Panel, at (415) 956-1500 or christine.ballard@mossadams.com; or Kristin Esposito, AICPA Technical Manager, at (202) 434-9241 or kesposito@aicpa.org.

Sincerely,



Jeffrey A. Porter, CPA
Chair, Tax Executive Committee

cc: Ms. Danielle Rolfes, International Tax Counsel, Department of the Treasury
Mr. Steven Musher, Associate Chief Counsel (International)
Mr. Jeffrey Mitchell, IRS Branch Chief (International)