

An Introduction to the Taxation of Passive Foreign Investment Companies (PFICs)

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Agenda

- I. PFIC Introduction
 - Historical Purpose
 - PFIC definition
 - PFIC asset and income tests

- II. Taxation of PFICs
 - Excess distribution regime
 - QEF regime
 - Mark-to-market regime

- III. Form 8621
 - Who must file and when?
 - Making the elections
 - Late elections
 - Excess Distribution Regime Example
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- IV. New Jersey and New York Treatment

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I. PFIC INTRODUCTION

Historical Purpose of PFICs

- The PFIC regime was enacted via the Tax Reform Act of 1968 to prevent the deferral of income through the use of foreign corporations.
- PFICs commonly include:
 - Investments funds (e.g., hedge funds and private equity funds)
 - Foreign mutual funds (including publicly traded mutual funds)

PFIC Definition

- Requirements:
 - 1) A foreign entity
 - 2) Which is treated as a corporation for US federal income tax purposes
 - 3) Meets the Income Test **or** Asset Test

NOTE: There is no minimum U.S. person percentage ownership for a foreign corporation to be a PFIC.

PFIC Income Test

- Income Test
 - 75% or more of the foreign corporation's gross income is passive income
- Passive income – generally includes:
 - dividends
 - interest and annuities
 - rents and royalties (but not from an active trade or business)
 - gains over losses from sales or exchanges of certain properties, including:
 - Property that gives rise to dividends, interest, royalties, rents or annuities
 - An interest in a partnership, trust or REMIC
 - Property that does not produce income
 - gains over losses from commodities transactions
 - foreign currency gains over foreign currency losses
 - income from notional principal contracts (e.g., interest rate swaps, equity swaps)
 - income from a partnership if the corporation owns less than 25% of the partnership
 - If 25% or more is owned, look-through rules apply

NOTE: Passive income does not include dividends, interest, rents, and royalties from a related person that is not properly allocable to passive income of such related person

PFIC Asset Test

- Asset Test
 - At least 50% of the average percentage of assets held by foreign corporation during the taxable year are assets that:
 - Produce passive income
 - Held for the production of passive income
- 2020 final regulations provide the following guidance with respect to the PFIC asset test:
 - As a general rule, the asset test applies based on value (publicly traded corporations) and based on adjusted basis for CFCs. Other foreign corporations may elect value or adjusted basis method.
 - “averaging” is applied on a quarterly basis, but a shareholder may elect to use shorter periods, such as a monthly or weekly basis, and
 - an asset need not actually produce passive income currently to be a passive asset, which includes assets held for the production of passive income
- Passive assets typically include:
 - Cash
 - Stock and securities
 - Derivative instruments e.g., swaps, options

PFIC Exceptions and Look-through Rules

- There are three sets of look-through rules to consider when testing for PFIC Status (as applicable):
 - Subsidiary look-through rules
 - Related person look-through rules
 - Special domestic corporation look-through rules
- Exceptions to PFIC status - to consider when the Income or Asset Test is met:
 - Start-up exception (available for 1st year with gross income)
 - Change of business exception

Polling Question #1

II. TAXATION OF PFICS

Taxation of PFICs

- For Taxpayers who own an interest in a PFIC (directly or indirectly), one of the 3 regimes may apply:
 - Excess distribution regime (default regime)
 - Qualified electing funds (QEFs)
 - PFIC with mark-to-market election

Excess Distribution Regime

- Default regime if no election made
- Distributions:
 - Recognized in year made
 - Must determine if distribution is “excess distribution”
 - If the distribution received in current year > 125% of average distributions received in three prior years – it is an excess distribution
- All dividends treated as ordinary dividends (not qualified dividends subject to the long-term capital gain rate)
- All gains taxed at ordinary rates
- The excess distribution is allocated to the entire holding period of PFIC shares on per share per day basis
 - The holding period for purposes of the allocation does not include the period in which the US person was not a US person.
 - The excess distribution allocated to earlier years is taxed at the highest marginal rate in effect for each year and interest is charged on deemed deferred income per year as if the tax was due in those prior years.
- Foreign income taxes imposed on the distribution may be claimed as foreign tax credits.
 - Taxes are also allocated ratably to each holding period day.

QEF Regime

- Flow through concept for US tax purposes
- US shareholder recognizes annually share of:
 - Ordinary income
 - Long term capital gains
- Election should be made in the first year of ownership of PFIC to achieve best results and avoid complexities
 - Takes away the punitive tax and interest regime under the excess distribution regime (default regime).
- Election made on Form 8621
- This election is usually NOT made for foreign mutual funds due to the inability to get financial information on US tax basis
- Common with foreign private equity funds (treated as corporations) who have significant US investors
- Gain upon sale of QEF PFIC treated as capital gain
- Foreign tax credits for indirect taxes (taxes paid by the foreign corporation on its earnings) are only available for corporate taxpayers who own at least 10% of the PFIC.

QEF Regime

- PFIC must provide to shareholders “PFIC Annual Statement” which shows their pro-rata share of earnings and net capital gain or sufficient information to allow the shareholders to compute these amounts
- Must be prepared under US tax rules
- Distributions are reported on PFIC Annual Statement but not double-counted as income (Sec. 1293(d)) similar to a U.S. Partnership regime

Mark-to-Market Regime

- Most common method for foreign mutual funds
- Takes away the punitive tax and interest regime under the excess distribution regime (default regime).
- Can be advantageous if the shareholder is ineligible to make a QEF election (such as if the PFIC is unable or unwilling to provide the information necessary to satisfy the reporting requirements), and the shareholder seeks to avoid the “default” excess distribution regime.
- The PFIC stock must be “marketable”:
 - regularly traded on a qualified US or foreign securities exchange
 - Regularly traded = traded on at least 15 days during each quarter of the year.
 - Comparable to a regulated investment company offered for sale as the issuer and redeemable at its net asset value, OR
 - An option on marketable PFIC stock

Mark-to-Market Regime

- Increase in value is recognized each year as ordinary income.
 - Increase in value = FMV at end of the year – adjusted basis
- Distributions are taxed as ordinary income
- Basis in the PFIC stock is increased for MTM income (reduces the gain on disposition)
- Gain on the disposition is treated as ordinary income
- Decreases in value allowed but limited to “unreversed inclusions”
 - Unreversed Inclusions = prior income (less losses) recognized under MTM rules
 - Decreases in excess of Unreversed Inclusions are not recognized until disposition
- Basis in PFIC stock is decreased by MTM Loss allowed.
- Loss, in excess of Unreversed Inclusions, treated as a capital loss

Polling Question #2

III. FORM 8621

Who must file and when?

- Each US Person who is a direct or *indirect* shareholder of PFIC
 - Indirect shareholder:
 - A 50%-or-more shareholder of a CFC that is not a PFIC and that directly or indirectly owns stock
 - A 50%-or-more shareholder of a domestic corporation that owns a section 1291 fund
 - 2nd tier PFIC
 - PFICs held through pass-through entities
 - A S corporation is considered a pass-through entity

Who must file and when?

- Exception - Excess Distribution Regime only (no QEF or MTM election) (Treas. Reg. §1.1298-1(c)(2)).
 - Direct owners: if value of PFIC stock is \$25,000 or less (\$50,000 or less for MFJ) on the last day of the shareholder's tax year and there is no reportable transaction
 - Indirect owners: if value of PFIC stock is \$5,000 or less on the last day of the shareholder's tax year and there is no reportable transaction.
 - **NOTE: the value of the PFIC stock does not exempt the shareholder from the excess distribution regime. If the value is less than the threshold amount but there is a sale or distribution of PFIC stock during the year, the excess distribution regime is applicable, and Form 8621 is required.**
- Additional exceptions apply if the shareholder is a tax-exempt entity or if PFIC shares are held through certain foreign pension funds (Treas. Reg. § 1.1298-1(c)(4)).

Form 8621 – Basic Information

Form **8621**
 (Rev. December 2018)
 Department of the Treasury
 Internal Revenue Service

Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund

► Go to www.irs.gov/Form8621 for instructions and the latest information.

OMB No. 1545-1002

Attachment
 Sequence No. **69**

Name of shareholder		Identifying number (see instructions)	
Number, street, and room or suite no. If a P.O. box, see instructions.		Shareholder tax year: calendar year 20 <input type="text"/> or other tax year beginning <input type="text"/> , 20 <input type="text"/> and ending <input type="text"/> , 20 <input type="text"/> .	
City or town, state, and ZIP code or country			
Check type of shareholder filing the return: <input type="checkbox"/> Individual <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> S Corporation <input type="checkbox"/> Nongrantor Trust <input type="checkbox"/> Estate			
Check if any Excepted Specified Foreign Financial Assets are reported on this form. See instructions <input type="checkbox"/>			
Qualifying Insurance Corporation Election—I, a shareholder of stock of a foreign corporation, elect to treat such stock as the stock of a Qualifying Insurance Corporation under the alternative facts and circumstances test within the meaning of section 1297(f)(2). See instructions <input type="checkbox"/>			
Name of foreign corporation, passive foreign investment company (PFIC), or qualified electing fund (QEF)		Employer identification number (if any)	
Address (Enter number, street, city or town, and country.)		Reference ID number (see instructions)	
		Tax year of foreign corporation, PFIC, or QEF: calendar year 20 <input type="text"/> or other tax year beginning <input type="text"/> , 20 <input type="text"/> and ending <input type="text"/> , 20 <input type="text"/> .	

Form 8621 – Part I

Part I Summary of Annual Information (see instructions)

Provide the following information with respect to all shares of the PFIC held by the shareholder:

- 1 Description of each class of shares held by the shareholder: _____
 Check if shares jointly owned with spouse.

 - 2 Date shares acquired during the tax year, if applicable: _____

 - 3 Number of shares held at the end of the tax year: _____

 - 4 Value of shares held at the end of the tax year (check the appropriate box, if applicable):
(a) \$0–50,000 (b) \$50,001–100,000 (c) \$100,001–150,000 (d) \$150,001–200,000
(e) If more than \$200,000, list value: _____

 - 5 Type of PFIC and amount of any excess distribution or gain treated as an excess distribution under section 1291, inclusion under section 1293, and inclusion or deduction under section 1296 (check all boxes that apply):
(a) Section 1291 \$ _____
(b) Section 1293 (Qualified Electing Fund) \$ _____
(c) Section 1296 (Mark to Market) \$ _____
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Form 8621 – Part II

- QEF Election – make the election in Part II Box A.
- MTM Election – make the election in Part II Box C

Part II Elections (see instructions)

- A** **Election To Treat the PFIC as a QEF.** I, a shareholder of a PFIC, elect to treat the PFIC as a QEF. *Complete lines 6a through 7c of Part III.*
- B** **Election To Extend Time For Payment of Tax.** I, a shareholder of a QEF, elect to extend the time for payment of tax on the undistributed earnings and profits of the QEF until this election is terminated. *Complete lines 8a through 9c of Part III to calculate the tax that may be deferred.*
- Note:** If any portion of line 6a or line 7a of Part III is includable under section 951, you may **not** make this election. Also, see sections 1294(c) and 1294(f) and the related regulations for events that terminate this election.
- C** **Election To Mark-to-Market PFIC Stock.** I, a shareholder of a PFIC, elect to mark-to-market the PFIC stock that is marketable within the meaning of section 1296(e). *Complete Part IV.*
- D** **Deemed Sale Election.** I, a shareholder on the first day of a PFIC's first tax year as a QEF, elect to recognize gain on the deemed sale of my interest in the PFIC. *Enter gain or loss on line 15f of Part V.*
- E** **Deemed Dividend Election.** I, a shareholder on the first day of a PFIC's first tax year as a QEF that is a controlled foreign corporation (CFC), elect to treat an amount equal to my share of the post-1986 earnings and profits of the CFC as an excess distribution. *Enter this amount on line 15e of Part V. If the excess distribution is greater than zero, also complete line 16 of Part V.*
- F** **Election To Recognize Gain on Deemed Sale of PFIC.** I, a shareholder of a former PFIC or a PFIC to which section 1297(d) applies, elect to treat as an excess distribution the gain recognized on the deemed sale of my interest in the PFIC on the last day of its last tax year as a PFIC under section 1297(a). *Enter gain on line 15f of Part V.*
- G** **Deemed Dividend Election With Respect to a Section 1297(e) PFIC.** I, a shareholder of a section 1297(e) PFIC, within the meaning of Regulations section 1.1297-3(a), elect to make a deemed dividend election with respect to the Section 1297(e) PFIC. My holding period in the stock of the Section 1297(e) PFIC includes the CFC qualification date, as defined in Regulations section 1.1297-3(d). *Enter the excess distribution on line 15e, Part V. If the excess distribution is greater than zero, also complete line 16, Part V.*
- H** **Deemed Dividend Election With Respect to a Former PFIC.** I, a shareholder of a former PFIC, within the meaning of Regulations section 1.1298-3(a), elect to make a deemed dividend election with respect to the former PFIC. My holding period in the stock of the former PFIC includes the termination date, as defined in Regulations section 1.1298-3(d). *Enter the excess distribution on line 15e, Part V. If the excess distribution is greater than zero, also complete line 16, Part V.*

For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see separate instructions.

Cat. No. 64174H

Form **8621** (Rev. 12-2018)

Note: Election is made once. The subsequent year forms 8621 will show which type of PFIC regime(s) apply with respect to the PFIC in Part I line 5.

Late elections

- Cannot normally make a late QEF or MTM election
- A QEF or MTM election may be made with a current tax return.
 - MTM election - MTM gain in the first year of election treated as an Excess Distribution
 - QEF election - Once the stock is subject to the excess distribution regime, it remains subject to the excess distribution regime (even if it no longer meets the PFIC definition) unless a purging QEF election is made.
- Purging QEF Elections - When a QEF election is made in a year after the acquisition of the PFIC interest, any gain which has accrued in the PFIC may be “purged” to avoid the application of the excess distribution regime with respect to the pre-election years.
- A purging QEF election is either:
 - Deemed sale election – gain from the deemed sale of PFIC stock is treated as an excess distribution.
 - Made in Form 8621 Part II Box D
 - Gain or loss reported in Part V
 - Deemed dividend election – allowed only for PFICs which are also CFCs.
 - Made in Form 8621 Part II Box E
 - Deemed distribution reported in Part V

Form 8621 – Part III

Part III **Income From a Qualified Electing Fund (QEF).** All QEF shareholders complete lines 6a through 7c. If you are making Election B, also complete lines 8a through 9c. See instructions.

6a	Enter your pro rata share of the ordinary earnings of the QEF	6a		
b	Enter the portion of line 6a that is included in income under section 951 or that may be excluded under section 1293(g)	6b		
c	Subtract line 6b from line 6a. Enter this amount on your tax return as ordinary income		6c	
7a	Enter your pro rata share of the total net capital gain of the QEF	7a		
b	Enter the portion of line 7a that is included in income under section 951 or that may be excluded under section 1293(g)	7b		
c	Subtract line 7b from line 7a. This amount is a net long-term capital gain. Enter this amount in Part II of the Schedule D used for your income tax return. See instructions		7c	
Complete lines 8 and 9 only if you are making a section 1294 election (Election B) for the current tax year.				
8a	Add lines 6c and 7c		8a	
b	Enter the total amount of cash and the fair market value of other property distributed or deemed distributed to you during the tax year of the QEF. See instructions	8b		
c	Enter the portion of line 8a not already included in line 8b that is attributable to shares in the QEF that you disposed of, pledged, or otherwise transferred during the tax year	8c		
d	Add lines 8b and 8c		8d	
e	Subtract line 8d from line 8a, and enter the difference (if zero or less, enter amount in brackets)		8e	
Important: If line 8e is greater than zero, and no portion of line 6a or 7a is includible in income under section 951, you may make Election B with respect to the amount on line 8e.				
9a	Enter the total tax for the tax year. See instructions	9a		
b	Enter the total tax for the tax year determined without regard to the amount entered on line 8e	9b		
c	Subtract line 9b from line 9a. This is the deferred tax, the time for payment of which is extended by making Election B. See instructions		9c	

Form 8621 – Part IV

Part IV Gain or (Loss) From Mark-to-Market Election (see instructions)	
10a Enter the fair market value of your PFIC stock at the end of the tax year	10a
b Enter your adjusted basis in the stock at the end of the tax year	10b
c Subtract line 10b from line 10a. If a gain, do not complete lines 11 and 12. Include this amount as ordinary income on your tax return. If a loss, go to line 11	10c
11 Enter any unreversed inclusions (as defined in section 1296(d))	11
12 Enter the loss from line 10c, but only to the extent of unreversed inclusions on line 11. Include this amount as an ordinary loss on your tax return	12
13 If you sold or otherwise disposed of any section 1296 stock (see instructions) during the tax year:	
a Enter the fair market value of the stock on the date of sale or disposition	13a
b Enter the adjusted basis of the stock on the date of sale or disposition	13b
c Subtract line 13b from line 13a. If a gain, do not complete line 14. Include this amount as ordinary income on your tax return. If a loss, go to line 14	13c
14a Enter any unreversed inclusions (as defined in section 1296(d))	14a
b Enter the loss from line 13c, but only to the extent of unreversed inclusions on line 14a. Include this amount as an ordinary loss on your tax return. If the loss on line 13c exceeds unreversed inclusions on line 14a, complete line 14c	14b
c Enter the amount by which the loss on line 13c exceeds unreversed inclusions on line 14a. Include this amount on your tax return according to the rules generally applicable for losses provided elsewhere in the Code and regulations	14c

Note: See instructions in case of multiple sales or dispositions.

Form 8621 – Part V

Part V **Distributions From and Dispositions of Stock of a Section 1291 Fund** (see instructions)
 Complete a **separate Part V** for each excess distribution and disposition. See instructions.

<p>15a Enter your total distributions from the section 1291 fund during the current tax year with respect to the applicable stock. If the holding period of the stock began in the current tax year, see instructions</p>	<p>15a</p>	
<p>b Enter the total distributions (reduced by the portions of such distributions that were excess distributions but not included in income under section 1291(a)(1)(B)) made by the fund with respect to the applicable stock for each of the 3 years preceding the current tax year (or if shorter, the portion of the shareholder's holding period before the current tax year)</p>	<p>15b</p>	
<p>c Divide line 15b by 3.0. (See instructions if the number of preceding tax years is less than 3.)</p>	<p>15c</p>	
<p>d Multiply line 15c by 125% (1.25)</p>	<p>15d</p>	
<p>e Subtract line 15d from line 15a. This amount, if more than zero, is the excess distribution with respect to the applicable stock. If there is an excess distribution, complete line 16. If zero or less and you did not dispose of stock during the tax year, do not complete the rest of Part V. See instructions if you received more than one distribution during the current tax year. Also, see instructions for rules for reporting a nonexcess distribution on your income tax return</p>	<p>15e</p>	
<p>f Enter gain or loss from the disposition of stock of a section 1291 fund or former section 1291 fund. If a gain, complete line 16. If a loss, show it in brackets and do not complete line 16</p>	<p>15f</p>	
<p>16a If there is a positive amount on line 15e or 15f (or both), attach a statement for each excess distribution and disposition. Show your holding period for each share of stock or block of shares held. Allocate the excess distribution or gain to each day in your holding period. Add all amounts that are allocated to days in each tax year.</p>		
<p>b Enter the total of the amounts determined in line 16a that are allocable to the current tax year and tax years before the foreign corporation became a PFIC (pre-PFIC years). Enter these amounts on your income tax return as other income</p>	<p>16b</p>	
<p>c Enter the aggregate increases in tax (before credits) for each tax year in your holding period (other than the current tax year and pre-PFIC years). See instructions</p>	<p>16c</p>	
<p>d Foreign tax credit (see instructions)</p>	<p>16d</p>	
<p>e Subtract line 16d from line 16c. Enter this amount on your income tax return as "additional tax." See instructions</p>	<p>16e</p>	
<p>f Determine interest on each net increase in tax determined on line 16e using the rates and methods of section 6621. Enter the aggregate amount of interest here. See instructions</p>	<p>16f</p>	

Form 8938

Form **8938**
(Rev. November 2021)
Department of the Treasury
Internal Revenue Service

Statement of Specified Foreign Financial Assets

▶ Go to www.irs.gov/Form8938 for instructions and the latest information.

▶ Attach to your tax return.

OMB No. 1545-2195

Attachment
Sequence No. **938**

For calendar year 20____ or tax year beginning _____, 20____, and ending _____, 20____

If you have attached additional statements, check here

Number of additional statements _____

1 Name(s) shown on return _____

2 Taxpayer identification number (TIN) _____

3 Type of filer

a Specified individual

b Partnership

c Corporation

d Trust

4 If you checked box 3a, skip this line 4. If you checked box 3b or 3c, enter the name and TIN of the specified individual who closely holds the partnership or corporation. If you checked box 3d, enter the name and TIN of the specified person who is a current beneficiary of the trust. (See instructions for definitions and what to do if you have more than one specified individual or specified person to list.)

a Name _____

b TIN _____

Part IV Excepted Specified Foreign Financial Assets (see instructions)

If you reported specified foreign financial assets on one or more of the following forms, enter the number of such forms filed. You do not need to include these assets on Form 8938 for the tax year.

15 Number of Forms 3520 _____

16 Number of Forms 3520-A _____

17 Number of Forms 5471 _____

18 Number of Forms 8621 _____

19 Number of Forms 8865 _____

For Paperwork Reduction Act Notice, see the separate instructions.

Cat. No. 37753A

Form **8938** (Rev. 11-2021)

Excess Distribution Regime Example

Sales of PFIC Stock

SECTION 1291 SALES

Purchase Date	Sale Date	Units in Block	Units Sold	Units Left	Basis	Sale Price	Gain / Loss	Line 15f
11/28/18	01/20/20	277.081000	277.081000	0.000000	2,830.00	3,007.00	177.00	177
12/28/18	01/20/20	273.038000	242.027000	31.011000	2,535.00	2,626.00	91.00	91
12/28/18	03/04/20	31.011000	31.011000	0.000000	325.00	300.00	-25.00	-25
01/28/19	03/04/20	280.828000	280.828000	0.000000	2,813.00	2,719.00	-94.00	-94
05/28/19	03/04/20	261.114000	261.114000	0.000000	2,874.00	2,528.00	-346.00	-346
10/29/19	03/04/20	264.176000	264.176000	0.000000	2,822.00	2,558.00	-264.00	-264
01/28/20	03/04/20	261.158000	261.158000	0.000000	2,808.00	2,528.00	-280.00	-280

Excess Distribution Regime Example

Gain Allocation

SECTION 1291 GAIN ALLOCATION

** Excess Distribution Allocated to Current Tax Year or Pre-PFIC periods

Line 15f	Holding Start	Holding End	Days	Excess Per Day	Line 16b	Line 16c	Line 16d	Line 16e	Line 16f
177.00	11/28/18	01/20/20	418	0.42344498	8.47	62.36	0.00	62.36	2.46

	Tax Year	Days	Allocated Excess	Increase in Tax	Foreign Tax Credit	Additional Tax	Interest
	2018	33	13.97	5.17	0.00	5.17	0.47
	2019	365	154.56	57.19	0.00	57.19	1.99
**	2020	20	8.47				

Line 15f	Holding Start	Holding End	Days	Excess Per Day	Line 16b	Line 16c	Line 16d	Line 16e	Line 16f
91.00	12/28/18	01/20/20	388	0.23453608	4.69	31.93	0.00	31.93	1.13

	Tax Year	Days	Allocated Excess	Increase in Tax	Foreign Tax Credit	Additional Tax	Interest
	2018	3	0.70	0.26	0.00	0.26	0.02
	2019	365	85.61	31.67	0.00	31.67	1.10
**	2020	20	4.69				

Excess Distribution Regime Example

Form 8621 – Part I

Part I Summary of Annual Information (see instructions)

Provide the following information with respect to all shares of the PFIC held by the shareholder:

- 1 Description of each class of shares held by the shareholder: common shares
 Check if shares jointly owned with spouse.

 - 2 Date shares acquired during the tax year, if applicable: 01/28/20

 - 3 Number of shares held at the end of the tax year: 0

 - 4 Value of shares held at the end of the tax year (check the appropriate box, if applicable):
(a) \$0–50,000 (b) \$50,001–100,000 (c) \$100,001–150,000 (d) \$150,001–200,000
(e) If more than \$200,000, list value: _____

 - 5 Type of PFIC and amount of any excess distribution or gain treated as an excess distribution under section 1291, inclusion under section 1293, and inclusion or deduction under section 1296 (check all boxes that apply):
(a) Section 1291 \$ 268
(b) Section 1293 (Qualified Electing Fund) \$ _____
(c) Section 1296 (Mark to Market) \$ _____
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Excess Distribution Regime Example

Form 8621 – Part V (GAIN)

Part V **Distributions From and Dispositions of Stock of a Section 1291 Fund** (see instructions)
 Complete a *separate* Part V for each excess distribution and disposition. See instructions.

15a	Enter your total distributions from the section 1291 fund during the current tax year with respect to the applicable stock. If the holding period of the stock began in the current tax year, see instructions	15a	0. *
b	Enter the total distributions (reduced by the portions of such distributions that were excess distributions but not included in income under section 1291(a)(1)(B)) made by the fund with respect to the applicable stock for each of the 3 years preceding the current tax year (or if shorter, the portion of the shareholder's holding period before the current tax year)	15b	
c	Divide line 15b by 3.0. (See instructions if the number of preceding tax years is less than 3.)	15c	
d	Multiply line 15c by 125% (1.25)	15d	
e	Subtract line 15d from line 15a. This amount, if more than zero, is the excess distribution with respect to the applicable stock. If there is an excess distribution, complete line 16. If zero or less and you did not dispose of stock during the tax year, do not complete the rest of Part V. See instructions if you received more than one distribution during the current tax year. Also, see instructions for rules for reporting a nonexcess distribution on your income tax return	15e	0.
f	Enter gain or loss from the disposition of stock of a section 1291 fund or former section 1291 fund. If a gain, complete line 16. If a loss, show it in brackets and do not complete line 16	15f	268.
16a	If there is a positive amount on line 15e or 15f (or both), attach a statement for each excess distribution and disposition. Show your holding period for each share of stock or block of shares held. Allocate the excess distribution or gain to each day in your holding period. Add all amounts that are allocated to days in each tax year.		
b	Enter the total of the amounts determined in line 16a that are allocable to the current tax year and tax years before the foreign corporation became a PFIC (pre-PFIC years). Enter these amounts on your income tax return as other income	16b	13.
c	Enter the aggregate increases in tax (before credits) for each tax year in your holding period (other than the current tax year and pre-PFIC years). See instructions	16c	94.
d	Foreign tax credit (see instructions)	16d	0.
e	Subtract line 16d from line 16c. Enter this amount on your income tax return as "additional tax." See instructions	16e	94.
f	Determine interest on each net increase in tax determined on line 16e using the rates and methods of section 6621. Enter the aggregate amount of interest here. See instructions	16f	4.

**For practical reasons, amounts are combined (a separate Part V for stock with different holding periods).*

** SEE CALCULATION STATEMENT (REF. ID [REDACTED]) FOR LINES 15b TO 15d CALCULATION DETAILS

Excess Distribution Regime Example

Form 8621 – Part V (LOSS)

Part V **Distributions From and Dispositions of Stock of a Section 1291 Fund** (see instructions)
 Complete a *separate Part V* for each excess distribution and disposition. See instructions.

15a	Enter your total distributions from the section 1291 fund during the current tax year with respect to the applicable stock. If the holding period of the stock began in the current tax year, see instructions	15a	
b	Enter the total distributions (reduced by the portions of such distributions that were excess distributions but not included in income under section 1291(a)(1)(B)) made by the fund with respect to the applicable stock for each of the 3 years preceding the current tax year (or if shorter, the portion of the shareholder's holding period before the current tax year)	15b	
c	Divide line 15b by 3.0. (See instructions if the number of preceding tax years is less than 3.)	15c	
d	Multiply line 15c by 125% (1.25)	15d	
e	Subtract line 15d from line 15a. This amount, if more than zero, is the excess distribution with respect to the applicable stock. If there is an excess distribution, complete line 16. If zero or less and you did not dispose of stock during the tax year, do not complete the rest of Part V. See instructions if you received more than one distribution during the current tax year. Also, see instructions for rules for reporting a nonexcess distribution on your income tax return	15e	
f	Enter gain or loss from the disposition of stock of a section 1291 fund or former section 1291 fund. If a gain, complete line 16. If a loss, show it in brackets and do not complete line 16	15f	(1,009.)
16a	If there is a positive amount on line 15e or 15f (or both), attach a statement for each excess distribution and disposition. Show your holding period for each share of stock or block of shares held. Allocate the excess distribution or gain to each day in your holding period. Add all amounts that are allocated to days in each tax year.		
b	Enter the total of the amounts determined in line 16a that are allocable to the current tax year and tax years before the foreign corporation became a PFIC (pre-PFIC years). Enter these amounts on your income tax return as other income	16b	
c	Enter the aggregate increases in tax (before credits) for each tax year in your holding period (other than the current tax year and pre-PFIC years). See instructions	16c	
d	Foreign tax credit (see instructions)	16d	
e	Subtract line 16d from line 16c. Enter this amount on your income tax return as "additional tax." See instructions	16e	
f	Determine interest on each net increase in tax determined on line 16e using the rates and methods of section 6621. Enter the aggregate amount of interest here. See instructions	16f	

**For practical reasons, amounts are combined (a separate Part V for stock with different holding periods).*

2022 Proposed Regulations

Key Changes

1. Domestic Partnerships (and S Corporations) –

- **No elections** - Currently, domestic partnerships are generally permitted to make a QEF election or an MTM election with respect to PFIC owned by the partnership directly or indirectly.
 - When the partnership makes a QEF election, it includes its proportionate share of ordinary earnings and net capital gains of the PFIC and its U.S. partners are then required to include their distributive share of QEF inclusions in income.
 - Similarly, when the partnership makes an MTM election, it includes the excess amount of the fair market value of PFIC stock at the end of the taxable year over the adjusted tax basis in the PFIC stock as taxable and its U.S. partners are then required to include their distributive share in income.
- Under the proposed PFIC regulations, domestic partnerships won't be allowed to make the QEF or MTM election or any purging elections. U.S. partners would be required to make these elections.
- Preexisting QEF and MTM elections would continue to be valid or partners in domestic partnerships which made a QEF/MTM election as if they were effectively made by each partner.
- **No Form 8621** – Under the proposed regulations, domestic partnerships (and S Corporations) would not be required to file Form 8621. Instead, domestic partnerships (and S Corporations) would have certain reporting responsibilities as part of Schedules K-2 and K-3.

2022 Proposed Regulations

Key Changes

2. CFC- PFIC Overlap Rule

- A “US Shareholder” (broadly, a 10% owner) owning shares of a foreign corporation that is both a CFC and a PFIC is generally not subject to the PFIC rules under the CFC/PFIC overlap rule in IRC Section 1297(d). The proposed regulations would confirm this treatment by subjecting partners (or shareholders) to the PFIC regime if (1) their domestic partnership (or S corporation) owns a CFC that is also a PFIC; and (ii) they are *not* (indirect) US Shareholders of that CFC.

Polling Question #3

IV. NEW JERSEY AND NEW YORK TREATMENT

PFICs –

New Jersey Treatment

- New Jersey is a selective conformity state which means it adopts only certain IRC provisions, certain provisions as of a specific date, and/or makes certain material changes to key IRC provisions.
- Generally, follows federal method of reporting: QEF, MTM or Excess Distribution
- No election to extend payment of tax on undistributed QEF earnings

PFICs –

New Jersey Treatment

- Treatment of federal MTM loss to extent of Unreversed Inclusions?
- Treatment of gain on disposition as ordinary income for NJ purposes?
- Presumably, no interest charge or tax imposed at the highest rate on Excess Distribution for NJ purposes
- Limited guidance: *State Tax News*, Winter 2000

PFICs –

New York Treatment

- New York is a rolling conformity state which means NY generally adopts the provisions of the IRC as enacted.
- Generally, follows the federal method of reporting: QEF, MTM or Excess Distribution

V. NON-COMPLIANCE SOLUTIONS

What Happens If You Don't File Form 8621?

No Form 8621 Penalties

- Unlike other international information returns, there is NO penalty for not filing Form 8621.
- But, generally, it is to the advantage of a U.S. taxpayer to file Form 8621 and to make an election to pay taxes on the current income of the PFIC to avoid punitive taxes on future distributions.

But Watch for Other Penalties...

Form 8938 Penalties

- While there is no Form 8621 penalty, most filers fail to simultaneously file Form 8938 to report the investment. The failure to report the PFIC interest on Form 8938 gives rise to a \$10,000 penalty for failure to file, per incidence penalty.
- This penalty applies with respect to the Form 8938, but is tied to the failure to file the Form 8621. The maximum penalty is up to \$50,000 penalty for failing to comply with the Form 8938 reporting requirements after IRS notification.
- If Form 8621 is filed, then in Form 8938, you must simply complete only Part IV and indicate that Form 8621 was filed.

But Watch for Other Penalties...

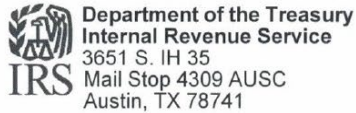
FinCen 114 (FBAR) Penalties

- Also, while there is no Form 8621 penalty, most filers fail to file an FBAR to report the investment. The failure to report an FBAR gives rise to a \$10,000 non-willful penalty for failure to file, per incidence penalty.
- *Accuracy-related penalties:* Generally, where there is an underpayment of tax that is due to negligence or disregard of rules and regulations, a penalty may be imposed in an amount equal to 20% of the tax underpayment. The penalty is increased to 40% of the tax underpayment for an undisclosed foreign financial asset understatement.

Statute of Limitation

- If form 8621 is not filed, the statute of limitation of the entire tax return may remain open indefinitely (sec. 6501(c)(8)).
- That means your entire return remains subject to audit until three years after you file the required Form 8621. See IRC Section 6501(c)(8).

IRS Letter 6291 Soft Letter Warning Notice



Date:

[REDACTED]

Taxpayer ID number (last 4 digits):

[REDACTED]

Tax years:

201912

Hotline telephone number:

[REDACTED]

[REDACTED]

Dear [REDACTED]

Why we're contacting you

Our records for the tax years above show you may not have properly reported the foreign financial assets on Form 8938, Statement of Specified Foreign Financial Assets, you held with [REDACTED]

What you need to know

These foreign financial assets exceed the reporting threshold under Internal Revenue Code (IRC) Section 6038D, which was adopted as part of the Foreign Account Tax Compliance Act (FATCA). You may need to file, or correct a previously filed, Form 8938 to report information on your foreign financial assets because you are a specified person with an interest in reportable foreign financial assets.

Generally, U.S. taxpayers must report income from all sources worldwide, including income from foreign entities and foreign financial assets. In addition to Form 8938, you may also need to file one or more of the following returns or reports:

- Complete and accurate federal income tax returns or amended tax returns showing the amount and type of taxable income from foreign entities and foreign financial assets
- Complete and accurate FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBARs)
- Applicable international information returns, such as:
 - Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;
 - Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner;
 - Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations;
 - Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships;
 - Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation;
 - Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund; and
 - Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs).

You don't have to fully report the details of any specified foreign financial asset on Form 8938 if the specified foreign financial asset was reported on a timely filed Form 3520, 3520-A, 5471, 8621, or 8865. However, you must report on Form 8938 the filing of these forms (including the number of each form filed) on which the asset is reported. See Form 8938, Part IV, Excepted Specified Foreign Financial Assets.

We may assess additional tax and penalties on unreported income as well as information return penalties for failure to timely file complete and correct international information returns.

What you need to do

Please review your information relevant to Form 8938 and the above returns, forms, and reports to ensure all required United States filings are current, complete, and correct. You should take all necessary actions to remedy any non-compliance with your reporting of foreign income, foreign entities, and foreign financial assets.

We offer the following options for taxpayers with foreign financial assets to address previous failures to comply with U.S. tax and information return obligations:

• **Request to Participate in the Voluntary Disclosure Practice**

If you have concerns that your non-compliance is criminal, you may contact IRS Criminal Investigation to submit a request to participate in the voluntary disclosure practice. See Internal Revenue Manual (IRM) 9.5.11.9. The voluntary disclosure practice provides taxpayers a way to comply and potentially avoid criminal prosecution. You can find information on how to participate in the voluntary disclosure practice at www.irs.gov/vdp.

• **Use Streamlined Filing Compliance Procedures**

We offer Streamlined Filing Compliance Procedures to eligible taxpayers who can certify that their failure to fully report foreign income and assets, and to pay all associated tax due, was not willful. You can find information on streamlined filing compliance at www.irs.gov/streamlined. This option is available only to individual taxpayers and estates of deceased individual taxpayers.

• **File delinquent or amended returns**

If you're not eligible for the Voluntary Disclosure Practice or the Streamlined Filing Compliance Procedures or neither is the right option for you, you can correct past mistakes by filing past due or amended tax returns. Please see the following links for more information.

If you failed to file one or more income tax returns, file the delinquent returns as soon as possible. For more information, see www.irs.gov/filing.

If you made a mistake on your income tax return, you can file an amended return. For information on amending individual income tax returns, visit www.irs.gov/f1040x. For information on amending corporation income tax returns, visit www.irs.gov/f1120x. For information on amending partnership returns, visit www.irs.gov/f1065x.

Where you can get more information

Find tax forms or publications by visiting our website at www.irs.gov/forms or calling 800-TAX-FORM (800-829-3676). Find information about the reporting of foreign income, foreign entities, and foreign financial assets at www.irs.gov or www.FinCEN.gov.

You don't need to respond to this letter

If you have questions, you can call our voice message hotline number shown at the top of this letter and leave a message. We'll respond to all messages within three business days.

Sincerely,

Bryan Stiernagle

Bryan Stiernagle

LB&I Program Manager

IRS Letter 6185 Soft Letter Warning Notice



Department of the Treasury
Internal Revenue Service
Large Business & International
3651 South IH 35
Mail Stop 4308 AUSC
Austin, TX 78741

Date:

Taxpayer ID number (last 4 digits):

Hotline telephone number:

Response due by:

Dear [REDACTED]

Why we're writing to you

We received information that you held an interest in **one or more** foreign financial accounts, foreign entities, or foreign financial assets. Generally, U.S. taxpayers must report foreign financial assets and accounts. We show you may not have met your U.S. tax and reporting requirements for these foreign financial investments.

We offer options for taxpayers with foreign financial assets to address previous failures to comply with U.S. tax and information return requirements.

What you need to do

Respond to this letter by **the response due date above** using one of the options outlined below. If you don't respond by the date shown above, we may initiate an examination and may assess applicable penalties.

Option 1 - Streamlined Filing Compliance Procedures

We offer the Streamlined Filing Compliance Procedures to taxpayers certifying that their failure to report foreign financial assets and to pay all tax due in respect of those assets, did not result from willful conduct on their part. You can find information on this option at www.irs.gov/streamlined.

If you meet the criteria to use the Streamlined Filing Compliance Procedures, **send your submission to the address on the webpage referenced above** and **not** the address listed on pages 1 or 2 of this letter.

You must write "RESPONSE TO LETTER 6185" in red across the top of your submission form (use either Form 14653, Certification by U.S. Person Residing Outside of the United States, or Form 14654, Certification by U.S. Person Residing in the United States).

Option 2 - Voluntary Disclosure Practice

The Voluntary Disclosure Practice provides taxpayers concerned that their conduct is willful or fraudulent, and that may rise to the level of tax and tax-related crimes, with a means to come into compliance with the law and avoid potential criminal prosecution. A voluntary disclosure will not automatically guarantee immunity from prosecution. A voluntary disclosure will be considered along with all other facts and circumstances in determining whether criminal prosecution will be recommended. Taxpayers who did not commit any tax or tax related crimes, and do not need the voluntary disclosure practice to seek protection from potential criminal prosecution, should select another option outlined in this letter.

You can find information on how to make a voluntary disclosure at www.irs.gov/vdp.

Option 3 - File delinquent or amended returns

Taxpayers who did not commit any tax or tax-related crimes and do not need the voluntary disclosure practice to seek protection from potential criminal prosecution, or who fall outside the Streamlined Filing Compliance Procedures, can correct past mistakes by filing an amended or past due tax return. Please see the following links for additional information.

If you make a mistake on your income tax return, you can file an amended return. For more information see www.irs.gov/file/1040x.

If you failed to file one or more income tax returns, file the delinquent returns as soon as possible. For more information see www.irs.gov/filing.

You may send all your required tax returns or amended tax returns, information returns, and related filings to the following address:

Austin Offshore Initiative Unit
Mail Stop 4309AUSC
3651 S IH-35
Austin, TX 78741

FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), must be filed electronically with FinCEN. You can find more information at www.FinCEN.gov.

Returns sent under this option are subject to all applicable penalties unless you show that your noncompliance was due to reasonable cause and not willful neglect. If you want to present reasonable cause for past noncompliance, include a statement with your submissions explaining all the facts and circumstances. For general information on establishing reasonable cause, please see www.irs.gov/reasonablecause.

Returns sent under this option aren't subject to IRS audit automatically. However, we may select them for audit under the existing audit selection processes applicable to any U.S. tax return. They may also be subject to verification procedures in that we may check the accuracy and completeness of submissions against information received from banks, financial advisors, and other sources.

Option 4 - Explain why you think you're compliant

If you believe you fully complied with all U.S. tax and information reporting requirements for your foreign financial accounts and assets, provide:

- A statement of facts explaining your position and the actions you took to become compliant with U.S. reporting requirements.
- A complete history of previously unreported foreign income, foreign entities, and foreign financial accounts.
- Copies of any relevant or previously filed documents that confirm your compliance.
- Your contact information, including the complete address where you reside, the address where you receive mail, and your telephone number.

Streamlined Filing Compliance Procedures

- Only Taxpayers that can certify under penalties of perjury that their conduct was non-willful may use the Streamlined Filing Compliance Procedures.
- The Streamlined Filing Compliance Procedures has helped over 10,000 taxpayers come into compliance.
- The Streamlined Filing Compliance Procedures are available to both non-resident and resident U.S. taxpayers who can demonstrate that their conduct was non-willful.
- **Caution:** these programs could be closed at any time.



Streamlined Filing Compliance Procedures

Individuals

Businesses and Self-Employed

Charities and Nonprofits

International Taxpayers

Individuals - International

Businesses - International

Governmental Liaisons

Federal State Local Governments

Indian Tribal Governments

Tax Exempt Bonds

Purpose of the streamlined procedures

The streamlined filing compliance procedures ("streamlined procedures") describe below are available to taxpayers certifying that their failure to report foreign financial assets and pay all tax due in respect of those assets did not result from willful conduct on their part. The streamlined procedures are designed to provide to taxpayers in such situations with

- a streamlined procedure for filing amended or delinquent returns, and
- terms for resolving their tax and penalty procedure for filing amended or delinquent returns, and
- terms for resolving their tax and penalty obligations.

As reflected below, the streamlined procedures that were first offered on September 1, 2012 have been expanded and modified to accommodate a broader group of U.S. taxpayers. Major changes to the streamlined procedures include:

- extension of eligibility to U.S. taxpayers residing in the United States
- elimination of the \$1,500 tax threshold, and
- elimination of the risk assessment process associated with the streamlined filing compliance procedure announced in 2012.

Eligibility criteria for the streamlined procedures

The modified streamlined procedures are designed only for individual taxpayers, including estates of individual taxpayers. The streamlined procedures are available to both U.S. individual taxpayers residing outside the United States and U.S. individual taxpayers residing in the United States. Descriptions of the specific eligibility requirements for the streamlined procedures for both non-U.S. residents (the "Streamlined Foreign Offshore Procedures") and U.S. residents ("Streamlined Domestic Offshore Procedures") are set forth below.

Taxpayers must certify that conduct was not willful. Taxpayers using either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures, will be required to certify, in accordance with the specific instructions set forth below, that the failure to report all income, pay all tax and submit all required information returns, including FBARs (FinCEN Form 114, previously Form

Your Offshore Compliance

Options

- [IRS Criminal Investigation Voluntary Disclosure Practice](#)
- [Delinquent FBAR Submission Procedures](#)
- [Delinquent International Information Return Submission Procedures](#)

Instructions for Streamlined Procedures

- [U.S. Taxpayers Residing in the United States](#)
- [U.S. Taxpayers Residing Outside the United States](#)

What is the Purpose of the Streamlined Filing Compliance Procedures?

- The Streamlined Filing Compliance Procedures were designed to provide options to help both U.S. taxpayers residing overseas, **AND** in the U.S., comply with their U.S. tax obligations.
- The two programs are:
 - (1) the Streamlined Domestic Offshore Procedures (“SDOP”) and
 - (2) the Streamlined Foreign Offshore Procedures (“SFOP”)
- Compared to the Former 2012 Streamlined Program, the SDOP and the SFOP include a broader section of non-compliant, but non-willful, U.S. taxpayers.
- For the first time, U.S. resident taxpayers who are out of compliance with reporting their foreign source income or, who have failed to file international information returns such as the FBAR, could now participate.

General Eligibility for the Streamlined Filing Compliance Procedures

- The Streamlined Filing Compliance Procedures are designed only for individual taxpayers, including estates of individual taxpayers. However, it should be noted that an estate might have a difficult time demonstrating the non-willfulness of a deceased individual.
- **To be eligible for the SFOP:** the taxpayer must meet the definition of a “non-resident taxpayer” and filed delinquent or amended income tax returns. All penalties are waived.
- **To be eligible for the SDOP:** the taxpayer must fail to satisfy the “non-residency” criteria and file amended income tax returns. There is a 5% miscellaneous penalty on assets reportable on an FBAR or Form 8938.
- **Taxpayers must certify under penalties of perjury:** that their conduct for the failure to report all income, pay all tax and file all information returns, including FBARs, **was due to non-willful conduct.**

Form **14654**
(September 2017)

Department of the Treasury - Internal Revenue Service

**Certification by U.S. Person Residing in the United States
for Streamlined Domestic Offshore Procedures**

OMB Number
1545-2241

Name(s) of taxpayer(s)		TIN(s) of taxpayer(s)	Telephone number	
Mailing address	City	State	ZIP code	

Note: If this certification is a joint certification, the statements will be considered made on behalf of both spouses, even though the pronoun "I" is used. If spouses submitting a joint certification have different reasons for their failure to report all income, pay all tax, and submit all required information returns, including FBARs, they must state their individual reasons separately in the required statement of facts.

Certification

I am providing amended income tax returns, including all required information returns, for each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed. I previously filed original tax returns for these years. The tax and interest I owe for each year are as follows

Year (list years in order)	Amount of Tax I Owe Shown On Form 1040X	Interest	Total
			\$0.00
			\$0.00
			\$0.00
			\$0.00
Total			

I failed to report income from one or more foreign financial assets during the above period.

I meet all the eligibility requirements for the Streamlined Domestic Offshore procedures.

If I failed to timely file correct and complete FBARs for any of the last 6 years, I have now electronically filed those FBARs.

During each year in either my 3-year covered tax return period or my 6-year covered FBAR period, my foreign financial assets subject to the 5% miscellaneous offshore penalty were as follows

Year

Name, City, and Country of Financial Institution/Description of Asset	Account Number	Year Account Was Opened or Asset Was Acquired	Year-End Balance/ Asset Value (state in US Dollars)
Total			

If you held no assets subject to the 5% miscellaneous offshore penalty during this year enter "N/A" next to "Total" in the above table. Attach a continuation sheet if necessary. If you attach a continuation sheet, it must be signed with taxpayer name(s) and TIN(s) printed.

Year

Name, City, and Country of Financial Institution/Description of Asset	Account Number	Year Account Was Opened or Asset Was Acquired	Year-End Balance/ Asset Value (state in US Dollars)
Total			

If you held no assets subject to the 5% miscellaneous offshore penalty during this year enter "N/A" next to "Total" in the above table. Attach a continuation sheet if necessary. If you attach a continuation sheet, it must be signed with taxpayer name(s) and TIN(s) printed.

Provide specific reasons for your failure to report all income, pay all tax, and submit all required information returns, including FBARs. Include the whole story including favorable and unfavorable facts. Specific reasons, whether favorable or unfavorable to you, should include your personal background, financial background, and anything else you believe is relevant to your failure to report all income, pay all tax, and submit all required information returns, including FBARs. Additionally, explain the source of funds in all of your foreign financial accounts/assets. For example, explain whether you inherited the account/asset, whether you opened it while residing in a foreign country, or whether you had a business reason to open or use it. And explain your contacts with the account/asset including withdrawals, deposits, and investment/management decisions. Provide a complete story about your foreign financial account/asset. If you relied on a professional advisor, provide the name, address, and telephone number of the advisor and a summary of the advice. If married taxpayers submitting a joint certification have different reasons, provide the individual reasons for each spouse separately in the statement of facts. The field below will automatically expand to accommodate your statement of facts.

Under penalties of perjury, I declare that I have examined this certification and all accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.

Signature of Taxpayer <small>Text</small>	Name of Taxpayer	Date
Signature of Taxpayer (if joint certification) <small>Text</small>	Name of Taxpayer (if joint certification)	Date

The Non-Willful Certification Statement for the SDOP (Form 14654) and SFOP (Form 14653)

- Under the FAQs, Taxpayers must include a narrative statement of facts setting forth the specific reasons for a failure to report all income, pay all tax, and submit all required information returns, including FBARs.
- Taxpayers must include the “whole story” including both favorable and unfavorable facts.
- Specific reasons, whether favorable or unfavorable, should include the Taxpayer’s personal background, financial background, and anything else the Taxpayer believes is relevant to his/her failure to report all income, pay all tax, and submit all required information returns, including FBARs.

What is Non-Willful Conduct?

- In order to participate in the SFOP or the SDOP, a Taxpayer must certify under penalty of perjury that his/her conduct was non-willful.
- The IRS has said that “non-willful conduct” for the new Streamlined Programs is “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.”
- The IRS also has said that it will give no further definition of non-willful conduct for purposes of the SFOP or the SDOP (other than that stated above). It has said that the concept of willfulness is well documented in case law and expects practitioners to apply those definitions, as well as relevant portions of the IRS Manual in advising clients on whether their conduct fits within the definition of non-willfulness.

Differences Between the SDOP and the SFOP

- The primary differences between the SFOP and the SDOP are:
 - **Residency vs. non-residency:** in the SFOP, the taxpayer qualifies as a non-resident U.S. taxpayer, whereas in the SDOP, the taxpayer qualifies as a resident U.S. taxpayer;
 - **Penalties:** in the SFOP, all penalties are waived--the taxpayer only needs to pay taxes and interest due over a three-year period. In the SDOP, the taxpayer must pay taxes and interest due over a three-year period AND a 5% miscellaneous penalty on the highest account balances of the taxpayer's offshore assets (using a six-year look back period and the year-end balances); and

The SFOP Procedure

- Once it is determined that a Taxpayer is eligible to participate in the SFOP, the Taxpayer must:
 - File delinquent or amended tax returns, together with all required information returns for each of the most recent three years and pay any tax and interest due;
 - File delinquent or amended FBARs for each of the most recent six years; and
 - File a Certification in which the Taxpayer certifies under penalty of perjury that the failure to file tax returns, report all income, pay all tax, and submit all information returns, including FBARs was due to non-willful conduct.
- There are special rules if the Taxpayer is seeking relief for failure to elect deferral of income from retirement plans.

The SDOP Procedure

- Once it is determined that a Taxpayer is eligible to participate in the SDOP, the Taxpayer must:
 - File amended tax returns, together with all required information returns for each of the most recent three years and pay any tax and interest due;
 - File delinquent FBARs for each of the most recent six years; and
 - File a Certification in which the Taxpayer certifies under penalty of perjury that the failure to file tax returns, report all income, pay all tax, and submit all information returns, including FBARs, was due to non-willful conduct.

There are special rules if the Taxpayer is seeking relief for failure to elect deferral of income from retirement plans.

The SDOP Miscellaneous Penalty

- In addition to paying any tax and interest due, a taxpayer participating in the SDOP must pay a 5% miscellaneous penalty on the highest aggregate balance/value of the Taxpayer's foreign financial assets that are subject to the miscellaneous offshore penalty during the years in the covered FBAR period.
- In this case, year-end account balances and year-end asset values are used in lieu of the highest balances over the course of the year—and the 5% penalty is assessed on the highest year.

IRS Delinquent International Information Return Procedures

- Taxpayers who do not need the protections of a voluntary disclosure (i.e., who are non-willful) or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax, but who:
 - have not filed one or more required international information returns,
 - have reasonable cause for not timely filing the information returns,
 - are not under a civil examination or a criminal investigation by the IRS, and
 - have not already been contacted by the IRS about the delinquent information returns
 - should file the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file.

IRS Delinquent International Information Return Procedures

What are “informational returns”? Examples:

- IRS Form 5471 (Controlled Foreign Corporation)
- IRS Form 3520, 3520-A (Foreign Trusts, Foreign gifts)
- IRS Form 8938 (Foreign Assets)
- IRS Form 8621 (PFICs)

Thresholds:

- no unreported foreign income?
- reasonable cause

Foreign Income: “Taxpayers who have unreported income or unpaid tax are not precluded from filing delinquent international information returns.”



Delinquent International Information Return Submission Procedures

- Individuals
- Businesses and Self-Employed
- Charities and Nonprofits
- International Taxpayers**
 - Individuals - International
 - Businesses - International
- Governmental Liaisons
- Federal State Local Governments
- Indian Tribal Governments
- Tax Exempt Bonds

What do I do if I have a delinquent international information return?

Taxpayers who have identified the need to file delinquent international information returns who are not under a civil examination or a criminal investigation by the IRS and have not already been contacted by the IRS about the delinquent information returns should file the delinquent information returns through normal filing procedures.

Penalties may be assessed in accordance with existing procedures.

- All delinquent international information returns other than Forms 3520 and 3520-A should be attached to an amended return and filed according to the applicable instructions for the amended return.
- All delinquent Forms 3520 and 3520-A should be filed according to the applicable instructions for those forms.
- Taxpayers may attach a reasonable cause statement to each delinquent information return filed for which reasonable cause is being asserted. During processing of the delinquent information return, penalties may be assessed without considering the attached reasonable cause statement. It may be necessary for taxpayers to respond to specific correspondence and submit or resubmit reasonable cause information.

Information returns filed with amended returns will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

Your Offshore Compliance Options

- [IRS Criminal Investigation Voluntary Disclosure Practice](#)
- [Streamlined Filing Compliance Procedures](#)
- [Delinquent FBAR Submission Procedures](#)

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IRS Delinquent FBAR Submission Procedures

Taxpayers who do not need the protections of a voluntary disclosure (i.e., who are non-willful) or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax, but who:

- have not filed a required Report of Foreign Bank and Financial Accounts (FBAR) (FinCEN form 114, previously Form TD F 90-22.1),
 - are not under a civil examination or a criminal investigation by the IRS, and
 - have not already been contacted by the IRS about the delinquent FBARs
- should file the delinquent FBARs according to the FBAR instructions.



Delinquent FBAR Submission Procedures

Individuals

Businesses and Self-Employed

Charities and Nonprofits

International Taxpayers

Individuals - International

Businesses - International

Governmental Liaisons

Federal State Local Governments

Indian Tribal Governments

Tax Exempt Bonds

Taxpayers who do not need to use either the IRS Criminal Investigation Voluntary Disclosure Practice or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax, but who:

- have not filed a required Report of Foreign Bank and Financial Accounts (FBAR) (FinCEN Form 114, previously Form TD F 90-22.1),
- are not under a civil examination or a criminal investigation by the IRS, and
- have not already been contacted by the IRS about the delinquent FBARs

should file the delinquent FBARs according to the FBAR instructions.

Follow these steps to resolve delinquent FBARs

- Review the instructions
- Include a statement explaining why you are filing the FBARs late
- File all FBARs electronically at [FinCEN](#)
- On the cover page of the electronic form, select a reason for filing late
- If you are unable to file electronically, contact FinCEN's Regulatory Help line at 1-800-949-2732 or 1-703-905-3975 (if calling from outside the United States) to determine possible alternatives to electronic filing.

The IRS will not impose a penalty for the failure to file the delinquent FBARs if you properly reported on your U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs, and you have not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted.

FBARs will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

Your Offshore Compliance Options

- [IRS Criminal Investigation Voluntary Disclosure Practice](#)
- [Streamlined Filing Compliance Procedures](#)
- [Delinquent International Information Return Submission Procedures](#)

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Polling Question #4

VI. TAKEAWAYS

Takeaways

- Consider check-the-box elections to prevent the application of the PFIC regime where possible.
- Ideally, consider QEF or MTM election in the first year.
 - In subsequent years, consider purging QEF or MTM election.
- Consider foreign taxes paid by the PFIC and on PFIC distributions when planning for elections.
- Review of foreign investments on an annual basis and the potential need for PFIC testing if unclear
- Discuss investments in Foreign Private Equity and Mutual Funds with clients, PFIC reporting and the need for a cost-benefit analysis.
- Need for pre-immigration planning with non-residents prior to becoming U.S. Taxpayers
- Explore solutions to cure non-compliance and penalty minimization/management
- On March 28, 2022, the Biden Administration proposed to expand access to retroactive QEF elections on amended returns without obtaining a private letter ruling (PLR).

Questions?