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United States – PFIC Regs Released: Reporting Required on 2013 Tax Returns

by KPMG LLP's Washington National Tax practice, Washington, D.C. (KPMG LLP in the United States is a KPMG International member firm)

On December 30, 2013, the U.S. Internal Revenue Service (IRS) released temporary, final and proposed regulations in relation to passive foreign investment companies (PFICs).¹ The new regulations confirm that U.S. citizens and residents who own shares in PFICs will be required to provide annual reporting on Form 8621 for all PFICs starting with their 2013 income tax returns (subject to certain exceptions noted below). However, the regulations eliminate the requirement that taxpayers report PFIC holdings for 2011 and 2012 with their 2013 income tax returns.

KPMG Note

The requirement to file Form 8621 represents a further development of the U.S. tax rules compelling disclosure of assets held outside the United States by U.S. citizens and residents. This additional requirement is likely to add to the complexity of preparing tax returns for affected individuals.

Background

The HIRE Act of 2010 added section 1298(f) to the U.S. Internal Revenue Code (I.R.C.). This provision requires *all* U.S. persons who are shareholders of a PFIC to report their ownership of the PFIC on Form 8621 even when there is no other requirement to file Form 8621, such as receipt of an excess distribution or making the qualified electing fund (QEF) or mark-to-market (MTM) elections. Section 1298(f) was effective as of March 18, 2010. In Notice 2010-34, the IRS suspended the filing requirement for 2010 and in Notice 2011-55 the IRS further suspended this filing requirement until regulations and a revised Form 8621 were issued to reflect the reporting requirements of section 1298(f).

For prior coverage of Notice 2011-55 and related issues, see KPMG's [*Flash International Executive Alert 2011-102*](#) (June 22, 2011).

The December 2013 Regulations

On December 30, 2013, the IRS released temporary, final and proposed regulations under section 1298(f). These regulations were published in the Federal Register on December 31, 2013, and are therefore effective as of that date.

The regulations provide that all PFIC shareholders must file Form 8621 with their 2013 income tax returns and for all subsequent years. However, the reporting requirement for 2011 and 2012 PFIC holdings, which was previously suspended, now does not apply.

Thus, no retroactive reporting for years prior to 2013 is required.

In addition, the regulations provide certain exceptions to the reporting requirement under I.R.C. section 1298(f). These are discussed below.

De Minimis Exception

The regulations provide a *de minimis* exception to the Form 8621 filing requirement under I.R.C. section 1298(f) for certain PFIC shareholders. This exception applies if:

- No QEF or mark-to-market MTM election has been made in relation to the PFIC;
- The shareholder is not subject to tax under I.R.C. section 1291 with respect to any excess distributions from the PFIC, or gains treated as excess distributions during the tax year; and
- Either (a) the aggregate value of all PFIC stock owned by the shareholder at the end of the shareholder's tax year does not exceed \$25,000 or (b) the PFIC stock is owned through another PFIC and the value of the shareholder's proportionate share of the upper-tier PFIC's interest in the lower-tier PFIC does not exceed \$5,000. The \$25,000 threshold is increased to \$50,000 for taxpayers who file a joint return.

Exception for Foreign Pension Funds

The filing requirement under I.R.C. section 1298(f) does not apply to a U.S. person who is treated as the owner of any portion of a foreign grantor trust that is a foreign pension fund operated principally to provide pension or retirement benefits if, pursuant to an income tax treaty, income earned by the pension fund is taxed as income of the U.S. person only when and to the extent it is paid to or for the benefit of that person.

KPMG Note

Only relatively few income tax treaties to which the United States is a party provide this relief. These include the treaties with Belgium, Canada, Germany, Malta, the Netherlands, South Africa, and the United Kingdom.

Beneficiaries of Foreign Estates and Non-grantor Trusts

A U.S. person who is considered to own an interest in a PFIC because he is a beneficiary of a foreign estate or non-grantor trust that owns stock in a PFIC, either directly or indirectly, and has not made a QEF or MTM election with respect to that PFIC, is not required to file Form 8621 under section 1298(f). This exception only applies if the beneficiary is not treated as having received an excess distribution from the PFIC or as recognizing gain that is treated as an excess distribution with respect to the PFIC.

Indirectly Held PFICs: Duplicative Reporting

A U.S. person who is required to include an amount in income only under the QEF or MTM rules with respect to PFIC stock held through another U.S. person is generally not required to file Form 8621 with respect to the PFIC stock if another shareholder through which the U.S. person holds the PFIC stock timely files a Form 8621 under section 1298(f) with respect to the PFIC.

Coordination with Section 6038D

I.R.C. section 6038D requires the annual reporting of certain specified foreign financial assets on Form 8938. Reporting of a PFIC on Form 8938 is not required if the PFIC is reported on a timely filed Form 8621. This coordination rule, designed to prevent duplicative reporting, will continue to apply under the newly issued regulations.

Footnote:

1 T.D. 9650, REG-140974-11, published in the Federal Register December 31, 2013.

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Consider Watching This! Video on the New Individual Taxpayer Identification Number (ITIN) Program Requirements: One Year In

The Internal Revenue Service (IRS) announced some significant changes in the ITIN application procedures in November 2012. The IRS issues ITINs to individuals who are required to have a U.S. taxpayer identification number for tax return or treaty claim purposes, but who do not have, and are not eligible to obtain, a Social Security Number from the Social Security Administration.

One year later, we have experienced how arduous the process for obtaining an ITIN can be – especially for those people from countries that do not certify documents or that need to get ITINs for their dependent children. We have also learnt that the ITIN Unit will accept documents that were certified up to a year prior to processing the ITIN application and there are still some outstanding issues around the five-year life of the ITIN.

KPMG's International Executive Services practice invites you to watch this short video that discusses the significant changes in the ITIN application procedures announced by the Internal Revenue Service in November 2012 (which are effective on or after January 1, 2013), and what lessons have been learnt in the year since the changes were introduced.

www.kpmginstitutes.com/taxwatch/insights/2013/new-itin-requirements.aspx

The information contained in this newsletter was submitted by the KPMG International member firm in the United States. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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