New Procedures for Late Forms 1120-F and Late-Filing Waivers: The Evolution of IRS Standards and Open Issues for Foreign Corporations

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I. Introduction

Foreign corporations with limited activities in the United States, especially those with minimal international business experience, sometimes are unaware of their duty to file annual Forms 1120-F (*U.S. Income Tax Return of a Foreign Corporation*). The IRS dislikes unawareness of tax obligations in general, but it has particular contempt for this type of ignorance. In addition to normal penalties for late filing, late payment, and late information returns, foreign corporations running afoul of their Form 1120-F duties face a formidable stick: The IRS disallows business-related deductions and credits to which the foreign corporations normally would have been entitled, such that they are essentially taxed on gross income, instead of net income.

Cognizant of the harshness of the deduction-and-credit disallowance rule, the IRS created an exception. The IRS will ignore tardiness in situations where a foreign corporation can demonstrate that, based on the facts and circumstances, it acted reasonably and in good faith ("Late-Filing Waiver").[1] Inconsistencies have arisen over the years concerning where foreign corporations should submit requests for Late-Filing Waivers, the degree of scrutiny to be applied by the IRS, the number of years that must be addressed, *etc*. The IRS, in an effort to centralize and standardize the process, issued in February 2018 instructions for handling late Forms 1120-F and requests for Late-Filing Waivers.[2]

This article analyzes filing duties of foreign corporations, the original harsh standards for granting Late-Filing Waivers, current criteria utilized by the IRS, details of the new Guidelines, and unresolved questions.

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II. Description of Applicable Law—Code Sec. 882

A. Broad General Filing Duty

A foreign corporation generally must file a Form 1120-F if it (i) was engaged in a U.S. trade or business, regardless of whether it derived any income that was effectively connected with such trade or business ("ECI"), (ii) has income, gains, or losses that are treated as if they were ECI, (iii) was not engaged in a U.S. trade or business, but had other U.S.-source income that was not fully paid through tax withholding, (iv) is making a claim for refund, (v) is claiming the benefit of any deductions or credits, or (vi) needs to file a Form 8833 (*Treaty-Based Return Position*) to disclose to the IRS that it is taking the position that a tax treaty overrules or modifies the normal rules found in the Internal Revenue Code.[3]

B. Disallowance of Deductions and Credits for Tardiness

As indicated above, one of the situations mandating the filing of Form 1120-F is when a foreign corporation wants to claim deductions or credits. Here is more on that key issue.

Code Sec. 882 generally allows foreign corporations that derive ECI to be taxed at the rates applicable to domestic corporations on "taxable income."[4] In determining "taxable income," foreign corporations (i) include only the amount of gross income that is ECI and (ii) then reduce such amount by claiming all allowable deductions and credits.[5] Code Sec. 882(c) and the corresponding regulations allow foreign corporations to claim such tax benefits *only if* they file proper, timely Forms 1120-F with the IRS.[6] Code Sec. 882(c)(2) states the following in this regard:

> A foreign corporation shall receive the benefit of the deductions and credits allowed to it in this subtitle *only* by filing or causing to be filed with the Secretary a true and accurate return, in the manner prescribed in subtitle F, including therein all the information which the Secretary may deem necessary for the calculation of such deductions and credits.

Reg. §1.882-4(a)(2) expands on this requirement, specifically adding that the Forms 1120-F must be "timely" filed:

> A foreign corporation shall receive the benefit of the deductions and credits otherwise allowed to it with respect to the income tax, *only if it timely files or causes to be filed* with the Philadelphia Service Center, in the manner prescribed in subtitle F, a true and accurate return of its taxable income which is effectively connected, or treated as effectively connected, for the taxable year with the conduct of a trade or business in the United States by that corporation.

C. Trust but Verify

The sanction for not filing timely Forms 1120-F is harsh: a complete disallowance of deductions and credits for foreign corporations. The situation can be contentious, even if a foreign corporation meets its filing obligation. The regulations indicate, as one might expect, that a foreign corporation is entitled to the tax benefits claimed on Forms 1120-F only to the extent that they are connected with ECI, properly allocated and apportioned to ECI, and substantiated to the satisfaction of the IRS.[7]

D. Effect of Forcing the IRS to Do the Job

The IRS tends to get upset when it must do what it believes a taxpayer should have done in the first place, like file a tax return or information return. This sentiment applies to foreign corporations. If a foreign corporation has various types of U.S.-source income but fails to file a timely Form 1120-F or "protective" Form 1120-F, then the IRS will prepare a Form 1120-F for the foreign corporation based on available data, which ordinarily is unfavorable to the taxpayer, generally disallow all deductions and credits, assess the resulting liability, and start taking collection actions.[8]

E. Ability to File "Protective" Form 1120-F

Because of the severe consequences for not filing timely Forms 1120-F, and because of the complexities of U.S. international tax law, the regulations expressly allow foreign corporations to file "protective" Forms 1120-F, and many take advantage of this offer.[9]

If a foreign corporation conducts "limited activities" in the United States which it believes do not generate ECI, or if the foreign corporation initially determines that it has no U.S. tax liability under an income tax treaty, then it can file a "protective" Form 1120-F by the normal deadline.[10] This filing serves to preserve the right to claim deductions and credits related to gross income later, if the IRS audits and determines that ECI exists and the foreign corporation's original tax position was incorrect.[11] The foreign corporation is not required to report income, deductions, and credits on a "protective" Form 1120-F; rather, it attaches

a statement indicating to the IRS that it is merely filing on a "protective" basis pursuant to the regulations.[12]

The IRS itself urges taxpayers to file in cases of uncertainty. For instance, the Instructions to Form 1120-F provide the following recommendations to foreign corporations:

> If a foreign corporation conducts limited activities in a tax year that [it] determines does not give rise to [ECI], the foreign corporation *should* follow the instructions for filing a protective return to safeguard its right to receive the benefit of the deductions and credits attributable to that gross income [and] a foreign corporation *should* also file a protective return if it determines initially that it has no U.S. tax liability under the provisions of any applicable income tax treaty (for example, because its income is not attributable to a permanent establishment in the United States).[13]

F. Where and How to File

Generally, foreign corporations can electronically file Forms 1120-F, along with all related schedules and attachments, and certain corporations are required to do so. Foreign corporations not obligated to electronically file can also do it the old-fashioned way, sending an executed hardcopy to the Internal Revenue Service Center in Ogden, Utah.[14]

G. Definition of Timeliness—Special Filing Dates

When taxpayers and tax professionals ponder the term "timely," they generally think of submitting the relevant tax or information return by the original deadline or by the extended deadline, after securing the necessary postponement from the IRS.[15] However, the concept of "timely" means different things in different contexts. There are two major categories when it comes to Forms 1120-F, which the IRS sometimes refers to as "special filing dates."[16]

On one hand, if the foreign corporation filed a Form 1120-F for the previous year, or if the current year is the first year for which the foreign corporation is required to file a Form 1120-F, then the Form 1120-F for the current year must be filed within 18 months of the normal deadline for the current year in order to be considered "timely."[17] The normal deadline depends on the degree of contact that a particular foreign corporation has with the United States. Foreign corporations with an office or place of business in the United States must file Forms 1120-F by the 15th day of the fourth month after the close of the relevant year.[18] The deadline for 2017 for a calendar-year foreign corporation with a U.S. office, for instance, would be April 15, 2018. That normal deadline would shift by two months to June 15, 2018, in situations involving foreign corporations lacking a U.S. office or place of business.[19]

On the other hand, if the foreign corporation was obligated to file a Form 1120-F for the previous year but failed to do so, then the Form 1120-F for the current year must be filed within 18 months of the normal deadline for the current year or before the IRS mails the foreign corporation a notice indicating that its Form 1120-F is missing, whichever is earlier.[20]

Some tax professionals questioned the validity of the "special filing dates" when the IRS first proposed them back in 1989. The IRS rejected the criticisms and maintained them on grounds that Code Sec. 882(c)(2) "clearly provides" for the denial of deductions and credits in the case of late filings and the rules are "justified because of different administrative and compliance concerns with regard to … foreign corporations."[21]

III. IRS Waiver of "Timely" Filing Requirement

The IRS can grant a Late-Filing Waiver, thereby allowing a delinquent foreign corporation to still claim deductions and credits, under certain circumstances.

A. Previous Rules and Standards

Currently, the IRS can grant a Late-Filing Waiver if a foreign corporation establishes that, based on the facts and circumstances, it acted reasonably and in good faith in not filing a timely Form 1120-F.[22] The original regulations featured significantly less sympathy for foreign corporations that neglected their Form 1120-F duties. Indeed, the regulations from 1990 stated that the IRS would show clemency only "in rare and unusual circumstances" and the foreign corporation could demonstrate that it had "good cause."[23] The following three IRS pronouncements addressing the 1990 regulations dispel any uncertainty about just how harsh the IRS intended to be.

1. Program Manager Technical Assistance 2007-00158

Program Manager Technical Assistance ("PMTA") 2007-00158 relates to a request for a Late-Filing Waiver by certain nonresident aliens ("NRAs") because of their investment in a real estate partnership that generated net operating losses for several years. Despite the fact that

the partnership dutifully filed Forms 1065 with the IRS and issued Schedules K-1 to the partners, certain NRA partners did not file Forms 1040NR during the loss years, presumably thinking that it was not necessary given that they had no U.S. tax liability. When the partnership started generating income, the NRAs discovered the problem and sought a Late-Filing Waiver from the IRS, such that they could utilize the net operating losses from earlier years (when they did not file Forms 1040NR) to reduce their U.S. tax liability in the current year (when they did file Forms 1040NR). Although PMTA 2007-00158 involves NRAs and Forms 1040NR, not foreign corporations and Forms 1120-F, it is relevant because the legal standards are the same in both contexts.[24]

The IRS began its analysis in PMTA 2007-00158 by explaining that, while showing "reasonable cause" might suffice to mitigate normal delinquency penalties under Code Sec. 6651, taxpayers must do considerably more to obtain a Late-Filing Waiver:

> Certain penalties in the Internal Revenue Code include "reasonable cause" exceptions. It is our view that the precedent that has developed with respect to these exceptions is relevant to the "good cause" [language in the 1990 regulations]. However, because the "good cause" waiver is not required by the statutes and is permitted by the regulations in only "rare and unusual circumstances," a higher standard is appropriate for the [Late-Filing Waiver] than is required for the penalty exceptions. That is, taxpayers seeking [Late-Filing Waivers] *should be required to make an extraordinary showing of reasonable or good cause* for not having filed a return within the period required by the regulations.

After describing a number of cases in which the courts denied abatement of delinquency penalties under Code Sec. 6651 and/or established a very high bar for achieving such relief, the IRS described the few instances in which a Late-Filing Waiver should apply:

> Clearly, courts have found reasonable cause for a failure to file in only a limited number of situations and have resisted expanding the circumstances in which taxpayers have been excused from a penalty. *The circumstances under which taxpayers are granted [Late-Filing Waivers] should be even more limited and available in only rare and unusual circumstances*. These sections were intended to offer *strong incentives* to nonresident aliens and foreign corporations to file U.S. income tax returns and, consequently, to reduce the opportunity for tax evasion. Furthermore, [the regulations] in allowing taxpayers to file protective income tax returns in certain circumstances provides an easy method by which nonresident aliens can avoid the operation of Section 874(a).
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> For example, if a nonresident alien argues that he should be granted a [Late-Filing Waiver] on the grounds that he was advised by counsel that he had no U.S. tax liability and no requirement to file a return, the individual should be required to submit evidence that the counsel was competent to make such legal determinations; a sworn statement from his attorney that such advice had been given and the basis on which the attorney had reached his erroneous conclusions; and that the taxpayer had sought and received the same erroneous advice from a second competent source. If the attorney's incorrect advice in this regard was in any respect conditional or suspect, good cause for not filing a return did not exist, unless the taxpayer confirmed the advice with a second person experienced in federal taxes. In this regard, a prudent taxpayer who receives conditional, or tentative, advice that he has no gross income effectively connected to a U.S. trade or business, or that there is no income tax liability as the result of a tax treaty, may reasonably be expected to file a protective return …
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> Similarly, if a taxpayer argues that a medical condition prevented him from timely filing a tax return, he should be required to submit sworn statements from competent medical personnel that a medical disability prevented the taxpayer from filing his own return and from engaging a return preparer to complete and file a return on taxpayer's behalf.
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> If a taxpayer alleges that he does not have access to necessary records, he should be required to submit evidence that information needed to prepare his return was unavailable from other sources and statements from the persons who have the records that they refused to allow taxpayer access to the records and for what reasons. As in other situations, a taxpayer who determines that he has no gross income effectively connected with a U.S. trade or business can avoid the operation of section 874(a) by filing a protective return …
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> In sum, in cases in which a [Late-Filing Waiver] is requested … the taxpayer *should be required to establish that it failed to file a timely return for a reason that exceeds the normal reasonable cause standard* for avoiding a failure to file penalty.

2. IRS Technical Advice 200027005

The IRS explained in Technical Advice 200027005 that the "good cause" threshold in the 1990 regulations involves a higher standard of proof than mere "reasonable cause," but acknowledged that the precedent developed in the context of delinquency penalties under Code Sec. 6651 is relevant to the determination. After highlighting multiple cases in which the "reasonable cause" exception was narrowly construed, the IRS concludes the following about "good cause" and the Late-Filing Waiver:

> It is clear that the courts have found "reasonable cause" for a failure to file in only a limited number of situations. The threshold for a [Late-Filing Waiver] differs from the exemption from penalty under Section 6651(a)(1) in that the waiver is not mandated by the Code and requires a showing of "good cause" rather than reasonable cause. Thus, a foreign corporation seeking a [Late-Filing Waiver] should be required to make an extraordinary showing of "reasonable cause" for failure to file a return within the [Special Filing Dates].

Having completed its commentary on "good cause," the IRS then moved to the second important phrase in the 1990 regulations, "rare and unusual circumstances." It indicated that (i) a Late-Filing Waiver should not be granted unless there is "good cause" for not filing timely Forms 1120-F and "rare and unusual circumstances" exist, (ii) an "infrequent and uncommon occurrence" must have triggered the violation, and (iii) the standards should not be "freely granted" or "broadly interpreted" as to defeat the legislative intent of disallowing deductions and credits in the absence of a timely Form 1120-F. Technical Advice 200027005 then provides three examples to clarify what, exactly, the IRS was thinking.

> **Example 1.** Foreign corporation argues that a [Late-Filing Waiver] should be granted … on the grounds that it was advised by counsel that it was not engaged in a U.S. trade or business, had no U.S. tax liability and no requirement to file a return. In order to establish good cause under rare and unusual circumstances, a foreign corporation will be required to submit evidence of the following: (1) that its counsel was competent to make such legal determination; (2) that the taxpayer provided counsel with true and accurate information regarding all of its activities relating to the United States on which to base each such legal determinations; (3) a sworn statement from its attorney that such advice had been given and the basis on which the attorney reached his erroneous conclusions; (4) that the taxpayer, in fact, relied on the advice; and (5) that said reliance was the cause of the failure to timely file the return …
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> **Example 2.** Same as Example 1, except that counsel advised the foreign corporation only with respect to whether the foreign corporation had a U.S. tax liability and filing requirement, and there was no evidence that the question of whether the foreign corporation was engaged in a trade or business in the United States was ever evaluated in its own right. In such a situation, the corporation has not satisfied the requirements set forth in Example 1 and, thus, has not established good cause for a waiver under rare and unusual circumstances.
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> **Example 3.** Foreign corporation filed Form 8833 … but did not attach it to a Form 1120-F. Foreign corporation argues that the filing of Form 8833 should qualify as a protective return … and if not, that a [Late-Filing Waiver] is appropriate. In order to meet the requirements of a protective return … a Form 1120-F must be filed. Thus, the mere filing of Form 8833 without attaching Form 1120-F will not qualify as a protective return … A [Late-Filing Waiver] is also not appropriate under the circumstances set forth. Pursuant to the Treasury Regulations, a waiver will be granted only in rare and unusual circumstances, if good cause for the foreign corporation's failure to file is established. A foreign corporation cannot establish good cause for failure to file a return if it fails to attach a Form 1120-F to an accurately and timely filed Form 8833. [The applicable regulations] and the instructions to Form 8833 clearly indicate that [Form 8833] must be filed as an attachment to Form 1120-F, even if the foreign corporation would not otherwise be required to file a [Form 1120-F]. Thus, it is not possible for a foreign corporation to establish good cause for failure to file Form 1120-F under such circumstances.

3. PMTA 2007-00131

This IRS pronouncement is interesting because it represents advice to the Assistant Commissioner (International) in connection with his presentation at the Annual International Tax Conference in Miami, Florida. The issue was whether the IRS should provide an "amnesty period" during which foreign corporations and NRAs with ECI could file late Forms 1120-F and late Forms 1040NR, respectively, without being subject to the deduction-and-credit

disallowance rules. The recommendation in PMTA 2007-00131 was not to allow any type of amnesty because (i) the 1990 regulations provide "adequate notice" to taxpayers of the filing duties, and the IRS is unaware of any statements it issued "that could have created any ambiguity in the meaning, application, or effective dates of these regulations," (ii) providing amnesty would reward foreign corporations and NRAs that/who "played the audit lottery," (iii) the 1990 regulations provide IRS personnel with "adequate discretion" to grant a Late-Filing Waiver, and (iv) using amnesty as a compliance tool would set an undesirable precedent.

B. Current Rules and Standards

The IRS's attitude toward the Late-Filing Waiver shifted dramatically over the years. Evidence of such change is found in the current regulations, issued in 2002, which acknowledge the shortcomings of the earlier standards:

> When these regulations were promulgated in 1990, Treasury and the IRS intended that the [Late-Filing Waiver] standard balance the legislative intent to establish strong compliance measures with respect to required income tax return filing by foreign taxpayers with a means to grant relief from the filing deadlines in appropriate cases. In practice, the IRS has found that the standard [in the 1990 regulations] is too restrictive and does not achieve this balance.[25]

The current regulations begin by explaining that the IRS will not grant a Late-Filing Waiver if the foreign corporation "knew" it had a duty to file Form 1120-F but "chose not to do so."[26] Moreover, the regulations clarify that a condition to getting a Late-Filing Waiver is cooperation by the foreign corporation in the process of determining its income tax liability for the relevant years.[27] Finally, a foreign corporation is ineligible for a Late-Filing Waiver if it has a "permanent establishment" in the United States, as this term is used in treaties.[28]

With those preliminaries out of the way, the current regulations provide that the IRS will permit a Late-Filing Waiver if the foreign corporation can demonstrate that, in light of the relevant facts and circumstances, it acted "reasonably and in good faith" in failing to file a timely Form 1120-F or "protective" Form 1120-F.[29] This IRS must consider the following list of factors in deciding whether a foreign corporation meets the current standard for relief:

- Whether the foreign corporation voluntarily identifies itself to the IRS as having failed to file a Form 1120-F before the IRS discovers the issue;
- Whether the foreign corporation did not become aware of its ability to file a "protective" Form 1120-F by the normal deadline;
- Whether the foreign corporation has previously filed a Form 1120-F;
- Whether the foreign corporation failed to file a Form 1120-F because, after exercising reasonable diligence (taking into account its relevant experience and level of sophistication), the foreign corporation was unaware of the necessity;
- Whether the foreign corporation failed to file a Form 1120-F because of intervening events beyond its control; and
- Whether other mitigating or exacerbating factors exist.[30]

The current regulations contain the following six examples regarding the Late-Filing Waiver. They have been slightly altered to enhance readability, to the extent that this is possible with dense, acronym-laden, fact-intensive examples.[31]

Example 1—Foreign Corporation Voluntarily Discloses

Facts: In Year 1, foreign corporation ("FC") became a limited partner with a passive investment in a U.S. limited partnership that was engaged in a U.S. trade or business. During Year 1 through Year 4, FC incurred losses with respect to its U.S. partnership interest. FC's foreign tax director incorrectly concluded that because it was a limited partner and had only losses from its partnership interest, FC was not required to file a Form 1120-F. FC's management was aware neither of FC's obligation to file a Form 1120-F for those years, nor of its ability to file a "protective" Form 1120-F for those years. FC had never filed a Form 1120-F before. In Year 5, FC began realizing a profit rather than a loss with respect to its partnership interest and, for this reason, engaged a U.S. tax advisor to handle its responsibility to file U.S. returns. In preparing FC's Form 1120-F for Year 5, FC's U.S. tax advisor discovered that Forms 1120-F were not filed for Year 1 through Year 4. Therefore, with respect to those years for which applicable filing deadlines were not met, FC would be barred from claiming any deductions that otherwise would have given rise to net operating losses on returns for those years, and that would have been available as loss carryforwards in subsequent years. At FC's direction, its U.S. tax advisor promptly contacted the appropriate examining personnel and cooperated with the IRS in determining FC's income tax liability, for example, by preparing and filing the appropriate Forms 1120-F for Year 1 through Year 4 and by making FC's books and records available to an IRS examiner.

Conclusion: FC has *met* the standard for a Late-Filing Waiver.

Example 2—Foreign Corporation Refuses to Cooperate

Facts: Same facts as in Example 1, except that while FC's U.S. tax advisor contacted the appropriate IRS examining personnel and filed Forms 1120-F for Year 1 through Year 4, FC refused all requests by the IRS to provide supporting information (for example, books and records) with respect to such Forms 1120-F.

Conclusion: Because FC did not cooperate in determining its U.S. tax liability for the taxable years for which a Form 1120-F was not timely filed, FC is not granted a Late-Filing Waiver.

Example 3—Foreign Corporation Does Not File a "Protective" Return

Facts: Same facts as in Example 1, except that in Year 1 through Year 4, FC's foreign tax director also consulted a U.S. tax advisor, who advised FC's foreign tax director that it was uncertain whether Forms 1120-F were necessary for those years and that FC could protect its right subsequently to claim the loss carryforwards by filing "protective" Forms 1120-F. FC did not file Forms 1120-F or "protective" Forms 1120-F for those years. FC did not present evidence that intervening events beyond FC's control prevented it from filing Forms 1120-F, and there were no other mitigating factors.

Conclusion: FC has *not met* the standard for a Late-Filing Waiver.

Example 4—Foreign Corporation with ECI

Facts: In Year 1, FC, a technology company, opened an office in the United States to market and sell a software program that FC had developed outside the United States. FC had minimal business or tax experience internationally, and no such experience in the United States. Through FC's direct efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. FC, however, did not file Forms 1120-F for Year 1 or Year 2. FC's management was aware neither of FC's obligation to file Forms 1120-F for those years, nor of its ability to file a "protective" Form 1120-F for those years. FC had never filed a Form 1120-F before. In January of Year 4, FC engaged U.S. counsel in connection with licensing software to an unrelated U.S. company. U.S. counsel reviewed FC's U.S. activities and advised FC that it should have filed Forms 1120-F for Year 1 and Year 2. FC immediately engaged a U.S. tax advisor who, at FC's direction, promptly contacted the appropriate examining personnel and cooperated with the IRS in determining FC's income tax liability, for example, by preparing and filing the appropriate Forms 1120-F for Year 1 and Year 2 and by making FC's books and records available to an IRS examiner.

Conclusion: FC has *met* the standard for a Late-Filing Waiver.

Example 5—IRS Discovers the Non-Compliance

Facts: In Year 1, FC, a technology company, opened an office in the United States to market and sell a software program that FC had developed outside the United States. Through FC's direct efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. FC had extensive experience conducting similar business activities in other countries, including making the appropriate tax filings. However, FC's management was aware neither of FC's obligation to file a Form 1120-F for those years, nor of its ability to file a "protective" Form 1120-F for those years. FC had never filed a Form 1120-F before. Despite FC's extensive experience conducting similar business activities in other countries, it made no effort to seek advice in connection with its U.S. tax obligations. FC failed to file either Forms 1120-F or "protective" Forms 1120-F for Year 1 and Year 2. In January of Year 4, an IRS examiner asked FC for an explanation of FC's failure to file Forms 1120-F. FC immediately engaged a U.S. tax advisor and cooperated with the IRS in determining FC's income tax liability, for example, by preparing and filing Forms 1120-F for Year 1 and Year 2 and by making FC's books and records available to the examiner. FC did not present evidence that intervening events beyond its control prevented it from filing a Form 1120-F, and there were no other mitigating factors.

Conclusion: FC has *not met* the standard for a Late-Filing Waiver.

Example 6—Foreign Corporation with Prior Filing History

Facts: FC began a U.S. trade or business in Year 1. FC's tax advisor filed the Forms 1120-F for Year 1 through Year 6, reporting income effectively connected with FC's U.S. trade or business. In Year 7, FC replaced its tax advisor with a tax advisor unfamiliar with U.S. tax law. FC did not file a Form 1120-F for any year from Year 7 through Year 10, although it had effectively connected income for those years. FC's management was aware of FC's ability to file a

"protective" Form 1120-F for those years. In Year 11, an IRS examiner contacted FC and asked its chief financial officer for an explanation of FC's failure to file Forms 1120-F after Year 6. FC immediately engaged a U.S. tax advisor and cooperated with the IRS in determining FC's income tax liability, for example, by preparing and filing Forms 1120-F for Year 7 through Year 10 and by making FC's books and records available to the examiner. FC did not present evidence that intervening events beyond its control prevented it from filing Forms 1120-F, and there were no other mitigating factors.

Conclusion: FC has *not met* the standard for a Late-Filing Waiver.

The IRS has introduced a long series of voluntary disclosure programs starting in 2009 designed to encourage domestic taxpayers to pro-actively rectify their past international tax non-compliance.

IV. New IRS Guidelines About Late-Filing Waiver

In February 2018, the IRS released guidelines for handling late Forms 1120-F and requests for Late-Filing Waivers, which eventually will be incorporated into the Internal Revenue Manual ("Guidelines").[32] The official purpose for the Guidelines is "to ensure that examiners are analyzing [Late-Filing Waiver] requests in a fair, consistent, and timely manner under the regulations."

A. Centralized Filing

Perhaps the most significant revelations by the Guidelines are that (i) Revenue Agents and others working on the compliance side of the IRS generally will not entertain late Forms 1120-F filed directly with them, and (ii) late Forms 1120-F will effectively be subjected to some form of an audit. The Guidelines provide the following mandate on this topic:

> No one involved in a compliance function should accept as filed a delinquent Form 1120-F from a taxpayer, or discuss in advance of filing a return whether a [Late-Filing Waiver] will be granted. Once a return is filed, and LB&I has selected the return for examination, these Guidelines for handling [Late-Filing Waivers] will apply.[33]

The Guidelines divide situations into two main categories.

B. Scenario 1

Scenario 1 contemplates a foreign corporation that is not currently under audit, which voluntarily and pro-actively approaches LB & I about its unfiled Forms 1120-F for prior years. Here, the Guidelines tell LB & I personnel to instruct the foreign corporation to file late Forms 1120-F in the regular manner, pursuant to the Instructions to Form 1120-F, despite their tardiness. The Guidelines go on to emphasize that all matters are to be centralized, stating that "LB&I should *not* accept a delinquent Form 1120-F from the taxpayer or accept from, or discuss with, the taxpayer a request for [a Late-Filing Waiver]."

C. Scenario 2

Scenario 2 arises when LB & I gets assigned to audit a foreign corporation with respect to a late Form 1120-F. The actions of LB & I depend on whether the foreign corporation has already filed a request for a Late-Filing Waiver. If this has occurred, then the Exam Team (which is comprised of the Revenue Agent and his or her direct Manager) should develop the facts relevant to the request for a Late-Filing Waiver, reach a recommendation to grant or deny such request, and then follow the recommendation-processing rules described below.[34]

Conversely, if the foreign corporation has not previously filed a request for a Late-Filing Waiver, then the Exam Team is supposed to notify the foreign corporation in writing of its ability to do so. However, warn the Guidelines, the Exam Team "should not advise, instruct, or otherwise signal the taxpayer to take any particular action." In other words, no wink, wink, nudge, nudge allowed. The Guidelines include a sample "Waiver Procedure Information Letter" that the Exam Team can use to meet its notification requirement. If the foreign corporation decides to submit a request for a Late-Filing Waiver immediately after reading the "Waiver Procedure Information Letter," which seems logical and probable, then the Exam Team should develop the facts, decide whether to grant or deny such request, and then follow the recommendation-processing rules described below.

In instances where the foreign corporation does not take the hint after reading the "Waiver Procedure Information

Letter" and thus does not file a request for a Late-Filing Waiver right away, the Guidelines instruct the Exam Team to continue the audit and disallow the deductions and credits in accordance with Code Sec. 882(c)(2). If the foreign corporation changes its mind after seeing the U.S. tax liability without the benefit of deductions or credits, it can file a request for a Late-Filing Waiver at that time, and the Exam Team will be charged with developing the facts, reaching a recommendation to grant or deny such request, and then following the recommendation-processing rules described below.

In addition to addressing the request for a Late-Filing Waiver, the Exam Team will be auditing the Forms 1120-F, of course. The Guidelines clarify that, whether timely or late, Forms 1120-F with unsupported items will not be upheld: "Regardless of the determination on a [Late-Filing Waiver] request, the Exam Team may, as appropriate, propose to disallow specific deductions and credits in any amount to the extent that they are determined not to be allowable under the law or have not been properly substantiated."

D. Recommendation-Processing Rules

The Guidelines indicate that a request for a Late-Filing Waiver will be handled in the following manner.

As explained above, an Exam Team will review and analyze the request and make an initial recommendation on whether to grant or deny it. Then, the Exam Team will prepare a "Waiver Request Package" and send it to the appropriate Territory Manager. The "Waiver Request Package" will contain, to the extent applicable, (i) the Late-Filing Waiver application, including exhibits, (ii) a completed "Waiver Summary Analysis," which is a two-page document created by the IRS to facilitate the inputting of information by the Exam Team about each of the six relevant factors that the IRS must consider pursuant to Reg. §1.882-4(a)(3), (iii) copies of any Information Document Requests ("IDRs") issued to the foreign corporation and its responses to such IDRs, (iv) Form 886-A (*Explanation of Items*), (v) Protest Letter filed by the foreign corporation, (vi) any Rebuttal by the IRS to the Protest Letter, and (vii) recommendation by the Exam Team about acceptance or denial of the request for a Late-Filing Waiver.

Next, the Territory Manager and Exam Team will have a call to review the "Waiver Request Package" and discuss the recommendation. This might result in the Exam Team needing to obtain additional data from the foreign corporation. This data-gathering and dialogue continue until the Exam Team and the Territory Manager come to a recommendation and send it to the Director of Field Operations ("DFO") for Cross Border Activities ("CBA").

There are some variations depending on whether the Territory Manager and Exam team suggest granting or denying the Late-Filing Waiver, but the ultimate review and decision-making authority resides with a specialized "Waiver Committee" and the DFO for CBA. The Exam Team is responsible for delivering the news to the foreign corporation about the Late-Filing Waiver, good or bad.

V. Interesting Issues

The Guidelines are interesting for a number of reasons, some obvious, some not. Below is a discussion of various noteworthy issues.

A. No Substantive Changes

As indicated above, foreign corporations seeking a Late-Filing Waiver under the 1990 regulations had the sizable burden of demonstrating to the IRS that the failure to file timely Forms 1120-F was due to "good cause" and there were "rare and unusual circumstances." The standard changed with the issuance of the regulations in 2002. Since that time, foreign corporations have only needed to prove that they acted "reasonably and in good faith," which analysis is based on six criteria described in the regulations.[35]

The Guidelines establish a new internal IRS procedure for processing, examining, and analyzing late Forms 1120-F and requests for Late-Filing Waivers, but they do not change the standards by which the IRS arrives at its conclusions. The IRS will continue to consider the same six criteria that have been in existence since 2002. This is apparent from the fact the Guidelines contemplate the Exam Team providing a "Waiver Request Package" to the Territory Manager, which will contain, among other things, a completed "Waiver Summary Analysis." This, as explained above, consists of a two-page document created by the IRS to allow the Exam Team to insert into boxes information about each of the six criteria for ease of review.

B. Did Somebody Say Amnesty?

It seems that most everybody has forgotten that this is not a new issue. As discussed earlier in this article, the IRS stated approximately two decades ago in PMTA 2007-00131 that it was inappropriate to offer any type of amnesty to foreign corporations with unfiled Forms 1120-F and NRAs with unfiled Forms 1040-NR. The IRS had a change of heart in 2003, though, when it announced a "compliance initiative" in Notice 2003-38.

Taxpayers had to do the following in order to participate in the "compliance initiative" and receive a Late-Filing

Waiver: (i) file true and accurate Forms 1120-F or Forms 1040-NR, and not "protective" returns, with the appropriate Internal Revenue Service Center by September 15, 2003, (ii) write or stamp "Return Filed Under Notice 2003-28" in red ink at the top of each return, (iii) pay all corresponding U.S. income tax liabilities, (iv) pay statutory interest "and penalties as determined by the IRS," (v) cooperate with the IRS in determining and satisfying the liability "for income tax, interest, and penalties" for the applicable years, and (vi) provide copies of all Forms 2848 (*Power of Attorney*) in effect.

The IRS specifically stated that the "compliance initiative" in Notice 2003-38 was not available to foreign corporations that had filed Forms 1120-F and was not available to NRAs who had filed Forms 1040-NR for any previous year. Moreover, the IRS explained that the "compliance initiative" was not an option in situations where the IRS had contacted a taxpayer about the failure to file Forms 1120-F or Forms 1040-NR, or had actually started, or notified the taxpayer that it intended to start, an examination or investigation.

Notice 2003-38 makes it clear that, although the IRS was willing to allow foreign corporations and NRAs to avoid the deduction-and-credit disallowance, it fully intended to take its pound of flesh. This came in the form of back taxes, penalties, and interest. Notice 2003-28 stated the following in this regard:

> With respect to U.S. federal income tax returns filed pursuant to this compliance initiative, the IRS will also waive the fraudulent failure to file penalty under Section 6651(f), *but not the failure to file penalty under Section 6651(a)(1). The IRS will impose other applicable penalties, as appropriate, with respect to U.S. federal income tax returns filed pursuant to this compliance initiative*.

Notice 2003-38 concluded by explaining that participation in the "compliance initiative" was not mandatory; taxpayers could instead seek a Late-Filing Waiver under the 2002 regulations, provided that they were able to demonstrate to the IRS that they acted "reasonably and in good faith" and met the six criteria set forth in the regulations.

The Guidelines, issued in February 2018, are *not* a rehash of the "compliance initiative" from 2003. Indeed, they do not offer any guarantee that a foreign corporation will be granted a Late-Filing Waiver, latitude on the applicable standard, limitation on the number of past years for which Forms 1120-F must be filed, *etc*. The Guidelines solely provide a set of rules for foreign corporations and IRS personnel to follow in the case of Form 1120-F violations. Consequently, to the extent that the IRS denies a request for a Late-Filing Waiver and thus proposes a large U.S. tax liability (which is logical given that the IRS would be taxing *gross* income that is effectively connected with a U.S. trade or business, plus penalties and interest), one would expect to see tax litigation initiated by foreign corporations. They would be alleging that they meet the standard for receiving a Late-Filing Waiver because there was "reasonable cause" and they acted in "good faith" (based on the six criteria found in the regulations), that the IRS abused its administrative discretion in denying the Late-Filing Waiver, and more.

C. Penalties Anyone?

The Late-Filing Waiver allows a foreign corporation to escape the harsh treatment contemplated by Code Sec. 882(c)(2); that is, paying U.S. taxes on gross income effectively connected with a U.S. trade or business, without the benefit of many deductions and credits. This is beneficial to a foreign corporation, no doubt, but it is far from *carte blanche*. Foreign corporations that file late Forms 1120-F often are subject to other penalties, some of which are described below.

1. Delinquency Penalties

Under Code Sec. 6651(a), the IRS generally may assert so-called delinquency penalties if a taxpayer fails to file certain returns and/or fails to pay certain taxes by the deadline (including extensions). The IRS may not assert penalties, however, if the taxpayer shows that the violation was due to "reasonable cause" and not due to "willful neglect."[36] Interestingly, the Instructions to Form 1120-F acknowledge that the IRS might impose delinquency penalties and direct foreign corporations to present defenses only when the IRS inquiries or audits begin: "Caution! If you believe that reasonable cause exists [for filing a Form 1120-F late], do not attach an explanation when you file Form 1120-F. Instead, if the corporation receives a penalty notice after the return is filed, send the IRS an explanation at that time and the IRS will determine if the [foreign] corporation meets reasonable cause criteria."[37]

2. Failure to Disclose Applicability of Treaty

Certain U.S. persons generally are required to file a Form 8833 to notify the IRS that they are taking a position that a provision in a treaty to which the United States is a party overrules or modifies a provision of the Internal Revenue Code during the relevant year ("Treaty-Based Return

Position").[38] Taxpayers must file a separate Form 8833 for each Treaty-Based Return Position taken, unless the reporting requirement is specifically waived. For instance, U.S. persons are not required to file Forms 8833 reporting Treaty-Based Return Positions that reduce the amount of U.S. income tax on foreign income earned from dependent personal services, pensions, annuities, social security, and other public pensions.[39]

If a U.S. person is required to file a Form 8833 and fails to do so, then the IRS generally may assert a penalty of $1,000 for each failure to disclose a Treaty-Based Return Position. This sanction increases to $10,000 per violation in the case of a C corporation.[40] This penalty will not be asserted, however, where there is "reasonable cause" for the violation and the taxpayer acted in good faith.[41]

3. Foreign Corporations Operating in the United States

Form 5472 (*Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*) generally must be filed to disclose certain "reportable transactions" between a "reporting corporation" and "related parties," as these terms are specifically defined for purposes of Code Sec. 6038A and the regulations thereunder. There are two main categories of "reporting corporations," one of which is a foreign corporation that operates a U.S. trade or business at any time during the year at issue.[42]

A reporting corporation normally must file a separate annual Form 5472 with respect to each related party with which it had any reportable transaction during the taxable year, and the Form 5472 must be filed even though it may not affect the amount of U.S. tax due.[43] The reporting corporation must file Form 5472 with its annual income tax return by the due date of that return.[44]

A reporting corporation that fails to file a timely and substantially complete Form 5472 is subject to a penalty of $10,000.[45] However, if the reporting corporation acted in "good faith" and there is "reasonable cause" for not filing a Form 5472, then the IRS will waive the $10,000 penalty.[46]

The reporting corporation must make an affirmative showing of all the relevant facts in a written statement made under penalties of perjury to demonstrate that good faith and reasonable cause exist.[47] The IRS makes its determination on a case-by-case basis, taking into account all the pertinent facts and circumstances.[48] The regulations provide the following guidance in this regard: (i) An honest misunderstanding of fact or law by the reporting corporation may indicate reasonable cause and good faith in light of the experience and knowledge of the reporting corporation; (ii) Isolated computational or transcriptional errors are consistent with reasonable cause and good faith; (iii) Reliance by the reporting corporation on an erroneous information return, erroneous professional advice, or other erroneous data constitutes reasonable cause and good faith only if such reliance was reasonable under all the circumstances; (iv) A reporting corporation may have grounds for penalty abatement if it has a reasonable belief (*i.e.*, it does not know or have reason to know) that it is not owned by foreign persons; and (v) Reasonable cause may exist in situations where a foreign owner is considered a "related party" solely under the broad principles of the transfer-pricing rules in Code Sec. 482, and the reporting corporation had a reasonable belief that its relationship with the foreign owner did not meet these broad principles.[49]

4. Silence Is Ominous

The standard for achieving a Late-Filing Waiver is "reasonable cause" and "good faith." This is identical or very similar to the thresholds for obtaining abatement of delinquency penalties, Form 8833 penalties, and Form 5472 penalties. Therefore, logic dictates that, if the IRS were to grant a Late-Filing Waiver after reviewing the six criteria set forth in the regulations (*i.e.*, Reg. §1.882-4(a)(3)(ii)), then the IRS should also eliminate the potential penalties on the following grounds. First, thanks to the Late-Filing Waiver, the Form 1120-F is not considered delinquent, such that any tax payments triggered by the Form 1120-F and any international information returns enclosed with Form 1120-F should not be deemed late either. Second, if the IRS has concluded that a foreign corporation has acted reasonably and in good faith with respect to Form 1120-F, then it should reach the same conclusion with respect to all related payment and filing issues.

The preceding paragraph has some appeal, but it has problems, too. These include the fact that the Guidelines do not mention, cross-reference, or evoke penalties; there is ominous silence on this critical issue. Moreover, history shows that, just because the IRS will allow Late-Filing Waivers in certain circumstances, this does not mean that it intends to let taxpayers off the hook entirely. Case in point, when the IRS introduced the "compliance initiative" many years ago in Notice 2003-38, it specifically stated that it would still charge participating taxpayers back taxes, delinquency penalties under Code Sec. 6651, and "other applicable penalties, as appropriate." One might guess that penalties for missing Forms 5472 and/or Forms 8833 might be "appropriate" from the IRS's perspective.

D. Impact of Automatically Assessable Penalties

Assuming that the IRS intends to assert penalties despite granting a Late-Filing Waiver under the Guidelines, unexpected procedural issues might arise. This stems from the fact that the IRS has been *automatically* imposing Form 5472 penalties since 2013. The IRS, after achieving considerable economic success by automatically sanctioning other types of international information returns, decided to implement the so-called "systematic assessment" mechanism for Forms 5472 in 2013. Since that time, if a Form 1120 or Form 1120-F is filed after the deadline and Forms 5472 are enclosed, then the IRS will assess a $10,000 per-violation penalty and start the collection process, regardless of whether the taxpayer includes with the late Forms 5472 a statement of reasonable cause.[50]

Two reports issued by the U.S. Treasury Inspector General for Tax Administration ("TIGTA") explain how the IRS arrived at this assess-penalties-now-possibly-consider-excuses-later situation. The initial TIGTA report was released in 2006.[51] It recognized that Forms 5472, along with Forms 5471 (for controlled foreign corporations), play a fundamental role in promoting international tax compliance. Indeed, according to TIGTA, their importance is reflected "in the severity of the penalties" for filing violations.[52] TIGTA observed that (i) the IRS should have asserted $79.2 million more in penalties in 2002 alone, (ii) the under-penalization resulted in part from the inability of Revenue Agents to spot the issue, and (iii) the IRS was "missing opportunities to promote better compliance with the filing requirements for Forms 5471 and 5472 by not assessing the late-filing penalties more often."[53] TIGTA made two main recommendations to the IRS. First, it should convene a study group to determine whether to "automate" the penalty-assessment process for Form 5471 and Form 5472. Second, the IRS should commence a "pilot program" for automatic assessment of penalties.[54] The IRS implemented both suggestions.

TIGTA released its follow-up report in 2013.[55] It confirmed that, based on the degree of success from the automation of Form 5471 penalties starting in 2009, the IRS decided to expand the program to Forms 5472 in 2013. In addition to immediately imposing penalties for all Forms 5472 enclosed with late Forms 1120 or Forms 1120-F, TIGTA suggested that the IRS decrease the number of abatements that it grants after the fact by applying stricter standards.[56]

The Guidelines are clear in that Revenue Agents should not accept late Forms 1120-F, all foreign corporations should be directed to file late Forms 1120-F (possibly enclosing late Forms 5472) at the normal Internal Revenue Service Center, and all late Forms 1120-F and requests for Late-Filing Waivers will be analyzed initially by the Exam Team. What is not clear from the Guidelines, though, is how or whether an Exam Team, which is devoted to *pre-assessment* issues, will address *post-assessment* issues, such as the automatic Form 5472 penalties triggered by filing the late Forms 1120-F with the Internal Revenue Service Center. Will the IRS input some type of collection "freeze" while the late Form 1120-F matters are analyzed through a multi-layer (and likely slow) process involving the Exam Team, Territory Manager, Waiver Committee, and DFO of CBA? Will the IRS obligate the foreign corporation to either pay penalties or request a Collection Due Process hearing to avoid liens and levies by the IRS? Will the IRS consider penalty-abatement requests as part of the process established in the Guidelines?

VI. Conclusion

The IRS has introduced a long series of voluntary disclosure programs starting in 2009 designed to encourage *domestic* taxpayers to pro-actively rectify their past international tax non-compliance. These include, but are not limited to, the Offshore Voluntary Disclosure Program and the Streamline Domestic Offshore Procedure. Each features a limited look-back period, penalty reduction, and other enticements. *Foreign* corporations with unfiled Forms 1120-F were surely hoping for similar opportunities, but the Guidelines are not an amnesty program. They are simply procedures for standardizing the treatment by the IRS of late Forms 1120-F and requests for Late-Filing Waivers. The Guidelines trigger unanswered questions, such as the impact on several penalties, the specific facts that will satisfy the reasonable-cause-and-good-faith standard in this context, the routes for disputing an unfavorable decision by the IRS on a request for a Late-Filing Waiver, and more. This uncertainty makes it critical that foreign corporations retain qualified international tax counsel before approaching the IRS to resolve late Form 1120-F problems.

ENDNOTES

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1 Reg. §1.882-4(a)(3)(ii).

2 Internal Revenue Service, *LB&I Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg.*

§1.882-4(a)(3)(ii), February 1, 2018.

3 2016 Instructions for Form 1120-F (*U.S. Income Tax Return of a Foreign Corporation*), at 2.

4 Code Sec. 882(a).

5 Code Sec. 882(b); Code Sec. 882(c)(1)(A).

6 Code Sec. 882(c)(2); Reg. §1.882-4(a)(2).

7 Reg. §1.882-4(b)(1) and (2).

8 Reg. §1.882-4(a)(4). This is similar to Code Sec. 6020(b).

9 Reg. §1.882-4(a)(3)(vi).

10 Reg. §1.882-4(a)(3)(vi).

11 Reg. §1.882-4(a)(3)(vi).

12 Reg. §1.882-4(a)(3)(vi).

13 2016 Instructions for Form 1120-F (*U.S. Income Tax Return of a Foreign Corporation*), at 2.

14 2016 Instructions for Form 1120-F (*U.S. Income Tax Return of a Foreign Corporation*), at 3 and 4.

15 The extension is obtained by filing Form 7004 (*Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns*).

16 IRS Memorandum LB & I-04-0218-007, published as Tax Notes Document 2018-8695.

17 Reg. §1.882-4(a)(3)(i). The normal deadlines are found in Code Sec. 6072.

18 Code Sec. 6072(a); Code Sec. 6072(c); Reg. §1.6072-2(b).

19 Code Sec. 6072(a); Code Sec. 6072(c); Reg. §1.6072-2(b).

20 Reg. §1.882-4(a)(3)(i).

21 T.D. 8322, Dec. 11, 1990, Preamble.

22 Reg. §1.882-4(a)(3)(ii).

23 Reg. §1.882-4(a)(3)(ii) as issued in T.D. 8322, Dec. 11, 1990. For an extensive analysis of the regulations from 1990, *see Swallows Holding Ltd.*, 126 TC 96, Dec. 56,417 (2006), *rev'd*, CA-3, 2008-1 USTC ¶50,188, 515 F3d 162.

24 *Compare* Code Sec. 874(a), Code Sec. 882(c), and their respective regulations.

25 T.D. 8981, Jan. 28, 2002, Preamble.

26 Reg. §1.882-4(a)(3)(ii).

27 Reg. §1.882-4(a)(3)(ii).

28 Reg. §1.882-4(a)(3)(v).

29 Reg. §1.882-4(a)(3)(ii).

30 Reg. §1.882-4(a)(3)(ii)(A) through (F).

31 Reg. §1.882-4(a)(3)(iii).

32 Internal Revenue Service, *LB&I Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg. §1.882-4(a)(3)(ii)*, February 1, 2018.

33 Internal Revenue Service, *LB&I Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg. §1.882-4(a)(3)(ii)*, February 1, 2018. The Guidelines indicate that exceptions to this rigid rule might be appropriate where (i) a related-party is currently under audit, (ii) the IRS is auditing a year other than the one for which a late Form 1120-F was filed, or (iii) the IRS is auditing something other than the late Form 1120-F. *See supra* note 3.

34 Internal Revenue Service, *LB&I Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg. §1.882-4(a)(3)(ii)*, February 1, 2018. Section IV—Processing the Exam Team's Recommendation on a Request for Waiver.

35 Reg. §1.882-4(a)(3)(ii).

36 Code Sec. 6651(a); Reg. §301.6651-1(a)(1).

37 2016 Instructions for Form 1120-F (*U.S. Income Tax Return of a Foreign Corporation*), at 9.

38 Code Sec. 6114; Reg. §301.6601-1(a).

39 Reg. §301.6114-1(c)(1)(iv).

40 Code Sec. 6712(a); Reg. §301.6712-1(a).

41 Code Sec. 6712(b); Reg. §301.6712-1(b).

42 Code Sec. 6038C(a); Reg. §1.6038A-1(c)(1). If a foreign corporation is a resident of a foreign country that has a tax treaty with the United States, then it will not be considered a "reporting corporation," unless it has a "permanent establishment" in the United States. *See* Reg. §1.6038A-1(c)(5)(i).

43 Reg. §1.6038A-2(a)(1).

44 Reg. §1.6038A-2(d).

45 Code Sec. 6038A(d)(1); Reg. §1.6038A-4.

46 Code Sec. 6038A(d)(3); Reg. §1.6038A-4(b)(1).

47 Reg. §1.6038A-4(b)(2)(i).

48 Reg. §1.6038A-4(b)(2)(iii).

49 Reg. §1.6038A-4(b)(2)(iii).

50 IRM §21.8.2.20.1 (Oct. 1, 2014).

51 U.S. Treasury Inspector General for Tax Administration. Automating the Penalty-Setting Process for Information Returns Related to Foreign Operations and Transactions Shows Promise, but More Work Is Needed. Report 2006-30-075 (May 2006).

52 U.S. Treasury Inspector General for Tax Administration. Automating the Penalty-Setting Process for Information Returns Related to Foreign Operations and Transactions Shows Promise, but More Work Is Needed. Report 2006-30-075 (May 2006), at 1–2.

53 U.S. Treasury Inspector General for Tax Administration. Automating the Penalty-Setting Process for Information Returns Related to Foreign Operations and Transactions Shows Promise, but More Work Is Needed. Report 2006-30-075 (May 2006), at 2.

54 U.S. Treasury Inspector General for Tax Administration. Automating the Penalty-Setting Process for Information Returns Related to Foreign Operations and Transactions Shows Promise, but More Work Is Needed. Report 2006-30-075 (May 2006), at 7–8.

55 U.S. Treasury Inspector General for Tax Administration. Systematic Penalties on Late-Filed Forms Related to Certain Foreign Corporations Were Properly Assessed, but the Abatement Process Needs Improvement. Report 2013-30-111 (Sept. 25, 2013).

56 U.S. Treasury Inspector General for Tax Administration. Systematic Penalties on Late-Filed Forms Related to Certain Foreign Corporations Were Properly Assessed, but the Abatement Process Needs Improvement. Report 2013-30-111 (Sept. 25, 2013), at 8.