

INTERNATIONAL TAX CHECKLIST

2013 INDIVIDUAL PASSIVE FOREIGN INVESTMENT COMPANY (PFIC)

Purpose of this checklist: Assist the tax return preparer in identifying issues concerning a passive foreign investment company (PFIC) in regard to 2013 tax returns.

NOTES:

All references are to the Internal Revenue Code (IRC) of 1986, as amended, and the regulations thereunder, unless otherwise indicated.

Section 1298(f) is now effective for 2013 and future years. Under section 1298(f), both the direct and indirect ownership of a PFIC is required to be disclosed on Federal Form 8621, Information Return by a Shareholder of a PFIC or Qualified Electing Fund, unless an exception is met. Under section 6501(c)(8), the failure to comply with the Form 8621 PFIC disclosure requirement will cause the suspension of the statute of limitations for the entire tax return.

Prior to any PFIC election, the start-up and change of business exceptions of section 1298(b) should be considered.

If a partner has more than a 50% interest in a partnership, the partner must include, on the partners' FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), any of the partnership's PFIC assets.

Client Name and Number: _____

Prepared by: _____ Date: _____ Reviewed by: _____ Date: _____

	YES OR <u>DONE</u>	N/A	COMMENTS OR <u>EXPLANATION</u>
1) Does the taxpayer have an investment in a domestic partnership? ¹	_____	_____	_____
.1) If yes, has the domestic partnership provided information regarding whether or not it has invested in foreign corporations that could be PFICs?	_____	_____	_____
i) If yes, and all of the following requirements are met for a specific PFIC, no Form 8621 is required to be filed for that PFIC under Treas. Reg. § 1.1298-1T(b)(2)(ii):			
• The domestic partnership has made either a section 1295 qualified electing fund (QEF) election or a section 1296 mark-to-market (MTM) election for the PFIC investee company on Form 8621; and			
• The domestic partnership has complied with section 1298(f) by filing Form 8621 for the current year and has notified the partner; and			
• The partnership has reported to the partner the partner's share of the PFIC income.	_____	_____	_____

¹ For 2013, assets held by a domestic partnership are not reportable on a partner's Form 8938, Statement of Foreign Financial Assets.

	<u>YES OR DONE</u>	<u>N/A</u>	<u>COMMENTS OR EXPLANATION</u>
ii) If yes, and the partnership has not made a QEF or MTM election for an investee company that is a PFIC, and all of the following requirements are met for that PFIC under the de minimis exception of Treas. Reg. § 1.1298-1T(c)(2)(i), no Form 8621 is required to be filed for that PFIC: <ul style="list-style-type: none"> • The aggregate fair market value of all separate PFICs owned is not greater than \$25,000 at year-end (or \$50,000 for married filing jointly); and • The PFIC generated no section 1291 excess distribution income. 	_____	_____	_____
<p><i>NOTE: See Treas. Reg. § 1.1298-1T(c)(2)(ii) for specific rules in determining PFIC values for the \$25,000/\$50,000 thresholds. PFICs owned through a domestic partnership are not counted toward the de minimis threshold under Treas. Reg. § 1.1298-1T(c)(2)(ii)(A).</i></p>			
iii) If yes, and no QEF or MTM election has been made, and there are section 1291 distributions from or sales of the PFIC, Form 8621 must be filed by the partner to report the PFIC distributions/sales.	_____	_____	_____
a) No QEF election can be made for these PFICs by the partner/unit holder. The partner may wish to advise the partnership to consider a combined QEF and deemed sale election.	_____	_____	_____
b) Complete Form 8621, Part V, lines 15a – 16f.	_____	_____	_____
iv) If yes, and the shares of the PFIC investment are marketable, and the partnership has failed to make a section 1296 MTM election, the partner may wish to advise the partnership to consider a section 1296 MTM election.	_____	_____	_____
.2) If the partnership has not provided information regarding possible PFIC investments, request such information directly from the partnership.	_____	_____	_____
.3) If a partner has at least a 10% indirect ownership in a foreign company that the partnership has invested in, the partner may have a filing requirement for Form 5471, <i>Information Return of U.S. Persons With Respect to Certain Foreign Corporations</i> . The failure to file Form 5471 may result in civil penalties. In addition, if a Form 5471 is required to be filed but is not, under section 6501(c)(8), the statute of limitations on the entire return will be suspended.	_____	_____	_____

	<u>YES OR DONE</u>	<u>N/A</u>	<u>COMMENTS OR EXPLANATION</u>
.4) In each year that a partner makes a capital contribution to the domestic partnership, determine if any subsequent investments in foreign corporations by the partnership will trigger a filing requirement for Form 926, <i>Return by a U.S. Transferor of Property to a Foreign Corporation</i> , by the partner. The failure to file Form 926 when required may result in civil penalties. In addition, if a Form 926 is required but is not filed, under section 6501(c)(8), the statute of limitations on the entire tax return will be suspended.	_____	_____	_____
2) Does the taxpayer have an investment in a foreign partnership? ²	_____	_____	_____
.1) If yes, has the foreign partnership provided information regarding whether or not it has invested in foreign corporations that could be PFICs?	_____	_____	_____
i) If yes, first apply the de minimis test of 1) .1) ii) above. If the current year is the first year of the PFIC investment, strongly consider making a QEF election in order to avoid the excess distribution rules of section 1291, even if the provisions of the de minimis test would otherwise be met.	_____	_____	_____
a) Has the foreign partnership provided the 1) PFIC Annual Intermediary Statement, and 2) the allocable ordinary income, net capital gain and distributions from the PFIC to the investor, if any? Both are required to make a QEF election.	_____	_____	_____
.a) Has a separate Form 8621 been prepared for each PFIC investment, for which a QEF election has been made?	_____	_____	_____
.b) Has the QEF election been made on a timely filed (including extensions) tax return?	_____	_____	_____
b) If the foreign partnership has not provided PFIC information for the QEF election as outlined in 2) .1) i) a) above, consider requesting such information from the foreign partnership.	_____	_____	_____
ii) If the foreign partnership has one or more PFIC investments which existed before the current year, and no QEF election was made in the initial year of investment, consider making an “un-pedigreed” QEF election on the current year Form 8621 under one of the following two scenarios:	_____	_____	_____
a) If making an un-pedigreed QEF election, consider accompanying the QEF election with a “deemed sale” election in order to purge the “PFIC taint” on Form 8621; or,	_____	_____	_____

² Interests in a foreign partnership need to be reported on Form 8938, *Statement of Foreign Financial Assets*, unless the interest in the foreign partnership meets the definition of held “in the conduct of trade or business” for purposes of *Treas. Reg. § 1.6038D-3T(b)(4)* or is subject to a mark-to-market election that has been made under section 475(a). For 2013, assets held by the foreign partnership are not reportable on a partner's Form 8938.

	<u>YES OR DONE</u>	<u>N/A</u>	<u>COMMENTS OR EXPLANATION</u>
<ul style="list-style-type: none"> b) If making an unpedigreed QEF election, consider accompanying the QEF election with a “deemed dividend” election in order to purge the “PFIC taint” on Form 8621. Note that this election is only available if the PFIC is a controlled foreign corporation (CFC) or a CFC that was previously a PFIC. 	_____	_____	_____
<ul style="list-style-type: none"> c) Note that a QEF election for an unpedigreed PFIC is generally <i>not</i> recommended unless accompanied by one of the two above elections. 	_____	_____	_____
<ul style="list-style-type: none"> iii) If the foreign partnership has made an investment in a PFIC that has marketable shares, consider making an MTM election in order to avoid the excess distribution regime. Prepare Form 8621 and check box C in Part II. 	_____	_____	_____
.2) If the foreign partnership has not provided information regarding possible PFIC investments, request such information directly from the partnership.	_____	_____	_____
.3) If a partner has at least a 10% indirect ownership in a foreign company that the partnership has invested in, the partner may have a Form 5471 filing requirement. Note that if a Form 5471 is required to be filed but is not, under section 6501(c)(8) the statute of limitations on the entire tax return is suspended.	_____	_____	_____
.4) If a partner 1) owns 10% or more of the foreign partnership or 2) contributes more than \$100,000 to a foreign partnership, review Form 8865, <i>Return of U.S. Persons With Respect to Certain Foreign Partnerships</i> , filing requirements and file if required in order to avoid civil penalties and to prevent the statute of limitations on the entire return from being suspended under section 6501(c)(8).	_____	_____	_____
.5) In each year a partner makes a capital contribution to the foreign partnership, determine if any subsequent investments in foreign corporations by the partnership will trigger a Form 926 filing requirement by the partner. If a Form 926 is required but is not filed, the statute of limitations on the entire tax return is suspended under section 6501(c)(8).	_____	_____	_____
3) Does the taxpayer have a direct investment in a foreign corporation which could be a PFIC?	_____	_____	_____
<ul style="list-style-type: none"> .1) If yes, obtain information from the foreign corporation regarding its PFIC status and first apply the de minimis test of 1) .1) ii) above. If the de minimis test is exceeded, go through steps 2) .1) – .3) above. Strongly consider making a QEF election where appropriate even if the de minimis test would otherwise be met. 	_____	_____	_____

	<u>YES OR DONE</u>	<u>N/A</u>	<u>COMMENTS OR EXPLANATION</u>
.2) In the year of initial investment, report the investment as follows:	_____	_____	_____
i) If the taxpayer acquires > 50%, the investment is a CFC. Complete Form 5471, Form 8938, <i>Statement of Specified Foreign Financial Assets</i> , Part IV ³ and report the CFC’s financial accounts on Form 114. ⁴	_____	_____	_____
ii) If the taxpayer acquires < or = 50% and the taxpayer acquires at least 10% and the investment <u>is</u> a PFIC, then complete Form 5471 (Category 3 filer), Form 8621, and Form 8938 Part IV. ⁵	_____	_____	_____
iii) If the taxpayer acquires < 50% but at least 10% and the investment <u>is not</u> a PFIC, then complete Form 5471 (Category 3 filer) and Form 8938 Part IV. ⁶	_____	_____	_____
iv) If the taxpayer acquires < 10% and the investment <u>is</u> a PFIC, then complete Form 8621 and Form 8938 Part IV. ⁷	_____	_____	_____
v) If the taxpayer acquires < 10% and the investment <u>is not</u> a PFIC, then complete Form 8938 part II. ⁸ This situation requires an annual review.	_____	_____	_____
.3) Whether or not the foreign corporation is a PFIC, in each year where a capital contribution is made, review Form 926 filing requirements and file it if required, in order to avoid civil penalties and to prevent the statute of limitations on the entire return from being suspended under section 6501(c)(8).	_____	_____	_____
4) Is the taxpayer a controlling shareholder of a foreign corporation that is not a PFIC but that, in turn, owns a PFIC itself? If yes, then the controlling shareholder must file Form 8621 to disclose the PFIC owned by the foreign corporation provided the controlling shareholder does not meet the \$25,000/\$50,000 de minimis exception of Treas. Reg. § 1.1298-1T(c)(2)(i) or the \$5,000 small value exception for the indirectly held PFIC of Treas. Reg. § 1.1298-1T(c)(2)(i)(A)(2).	_____	_____	_____
5) Does the taxpayer have an interest in a foreign defined contribution pension, foreign retirement account, foreign whole life product or foreign annuity? If yes, these accounts should be reviewed for PFIC holdings.	_____	_____	_____
6) If the taxpayer has a foreign retirement or pension plan in a country with which the U.S. has a tax treaty, does the treaty provide for a deferral of taxation until income is paid from the retirement or pension plan? If yes, then disclosure of any PFIC inside of these plans is not required. Note that the treaty article should contain the language “...income earned by the pension fund may be taxed as the income of the owner of the trust only when and to the extent the income is paid to, or for the benefit of, the owner” [Treas. Reg. § 1.1298-1T(b)(3)(ii)].	_____	_____	_____

³ File Form 8938 or FinCEN Form 114, Report of Foreign Bank and Financial Accounts (“FBAR”) if the value of the investment, when combined with other reportable assets, is in excess of the filing thresholds for these forms.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

	YES OR <u>DONE</u>	<u>N/A</u>	COMMENTS OR <u>EXPLANATION</u>
7) Is the taxpayer an owner of any portion of a foreign or domestic grantor trust? If yes, then the owner must disclose any PFIC owned by the trust on Form 8621.	_____	_____	_____
8) Is the taxpayer a beneficiary of a foreign estate or a foreign non-grantor trust? If yes, and the beneficiary has also made either a QEF or MTM election with respect to a PFIC held by the foreign estate or non-grantor trust, then such PFICs must be disclosed on Form 8621.	_____	_____	_____