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Final Regulations Provide Guidance on PFIC Ownership

The IRS has published final regulations (T.D. 9806, <https://www.gpo.gov/fdsys/pkg/FR-2016-12-28/pdf/2016-30712.pdf>) that provide guidance on determining ownership of a passive foreign investment company (PFIC) and on certain annual reporting requirements for shareholders of PFICs to file Form 8621, “Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.” The final regulations adopt the 2013 proposed regulations with the changes described below, including implementing the rules described in Notice 2014-28 (which announced that the regulations under Section 1291 would provide that a U.S. person that owns stock of a PFIC through a tax-exempt organization or account is not treated as a shareholder of the PFIC with respect to the stock) and Notice 2014-51 (which announced that the regulations under Section 1298 would provide guidance concerning U.S. persons that own stock in a PFIC that is marked to market under a provision other than Section 1296), and remove the corresponding 2013 temporary regulations (section references are to the Internal Revenue Code of 1986, as amended).

The final regulations modify the definition of shareholder as announced in Notice 2014-28. Under new Treasury Regulations Section 1.1291-1(e)(2), a U.S. person is not treated as a shareholder of a PFIC to the extent the person owns PFIC stock through a tax-exempt organization or account described in Treasury Regulations Section 1.1298-1(c)(1). The final regulations provide that, solely for purposes of determining whether a person owns 50 percent or more in value of the stock of a foreign corporation that is not a PFIC, a person that directly or indirectly owns 50 percent or more in value of the stock of a domestic corporation is considered to own a proportionate amount (by value) of any stock owned directly or indirectly by the domestic corporation.

The final regulations, in accordance with Notice 2014-51, add Treasury Regulations Section 1.1298-1(c)(3), which provides that U.S. persons that own PFIC stock that is marked to market under a non-Section 1296 marked-to-market provision are not subject to Section 1298(f) reporting unless they are subject to Section 1291 under the coordination rule in Treasury Regulations Section 1.1291-1(c)(4)(ii). The final regulations provide a final rule that exempts a domestic partnership from Section 1298(f) reporting with respect to an interest in a PFIC for a taxable year when none of its direct or indirect partners are required to file Form 8621 (or successor form) with respect to the PFIC interest under Section 1298(f) and these regulations because the partners are not subject to the PFIC rules.

The Treasury Department and the IRS have concluded that compliance with and enforcement of the PFIC regime would not be adversely impacted by allowing a reporting exception for transitory ownership of Section 1291 funds when there is no taxation under Section 1291 with respect to the short period of ownership. Thus, the final regulations provide an exception for Section 1298(f) reporting for certain shareholders with respect to PFICs that were owned for a short period of time during which no PFIC taxation was imposed on the shareholders. Specifically, a shareholder



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is not required to file a Form 8621 under Section 1298(f) with respect to stock of a Section 1291 fund that it acquired either during its taxable year or the immediately preceding year if the shareholder (i) does not own any stock of the Section 1291 fund for more than 30 days during the period beginning 29 days before the first day of the shareholder's taxable year and ending 29 days after the close of the shareholder's taxable year and (ii) did not receive an excess distribution (including gain treated as an excess distribution) with respect to the Section 1291 fund.

The final regulations clarify how a United States person files a Form 8621 (or successor form) when the United States person is not otherwise required to file a U.S. income tax return (or information return, if applicable). Section 1.1298-1(d) of the final regulations states that a U.S. person that is not otherwise required to file a U.S. income tax return must file the Form 8621 (or successor form) in accordance with the instructions for the form. The Treasury Department and the IRS refused to adopt a recommendation to permit a protective filing because, as explained in the preamble, the reasonable cause exception under Section 6501(c)(8) (B) provides appropriate relief for a failure to file Form 8621. When a taxpayer can establish reasonable cause for a failure to file Form 8621, the assessment period is suspended only with respect to items related to the PFIC that were required to be reported on the Form 8621.

The regulations became effective on Dec. 28, 2016, but contain several applicability dates.

IRS Explains When Tax Matters Partner May Sign Consent Form

In emailed advice (<https://www.irs.gov/pub/irs-wd/201652019.pdf>), the IRS explained that an individual who is the tax matters partner TMP for earlier tax years may sign the Form 921-P, "Consent Fixing Period of Limitation on Assessment of Income and Profits Tax," for those years, but if the individual is not the TMP for the earlier years, then the TMP for the earlier years will need to sign Forms 921-P unless the partnership provides written authorization for the individual to sign a consent for those years.

Overstated Basis Not Related to Sold Asset Is Omission of Income

In emailed advice (<https://www.irs.gov/pub/irs-wd/201652022.pdf>), the IRS stated that Section 6501(e) (1) provides that an understatement of gross income by reason of an overstatement of unrecovered cost or other basis is an omission from gross income even if the overstatement of basis is not in regard to a "sold asset."

IRS Extends Time for Disclosing Microcaptive Transactions

After the release of Notice 2016-66 (see our prior coverage at <http://www.stradley.com/insights/publications/2016/tax-insights-2016/tax-insights-november-9-2016>), the Treasury Department and the IRS received several requests for an extension of time for participants and material advisers filing disclosure statements. [Notice 2017-8; 2017-3 IRB 1](#) modifies Section 3.03 of Notice 2016-66 to provide an extension of time for the filing of those disclosure statements. The time for providing disclosure of a transaction described in Section 2.01 of Notice 2016-66 set forth in Treasury Regulations Section 1.6011-4(e), with respect to participants in the transaction of interest, and Treasury Regulations Section 301.6111-3(e), with respect to material advisers, is extended until May 1, 2017.

Argentina, U.S. Sign TIEA

The Argentine finance minister, Alfonso Prat-Gay, and the U.S. ambassador to Argentina, Noah Mamet, signed a tax information exchange agreement in Buenos Aires on Dec. 23, 2016. The agreement, which is designed to combat tax evasion and promote fiscal transparency, provides a legal framework for the reciprocal automatic exchange of financial information that is necessary to comply with FATCA.