Re: **OMB control number 1545-1002 / Form 8821 and Form 8821-A**

November 19, 2024

About SEAT:

SEAT is a Paris based organization which provides education and advocacy on behalf of "U.S. Persons" living outside the United States who are tax residents of other countries. A partial list of our contributions and advocacy is available on our site at https://www.SEATNow.org. Generally, SEAT advocates for ending the U.S. citizenship-based tax regime by "severing citizenship from tax residency" and replacing it with the international standard of taxation based on residence and source where citizenship is irrelevant.

Why SEAT Was Created:

Although the exact number is unknown, there are millions of U.S. citizens living outside the United States. U.S. citizens abroad generally fall into one of the following two groups:

- **Financial Center of Gravity in The United States:** Some (short term "expats" and "retirees abroad") have accumulated U.S. based retirement savings and investments living under the U.S. tax system and retirement incentives found therein; and
- **Financial Center of Gravity Outside the United States:** Some (those who moved from the United States at a young age) live permanently outside the United States and therefore have their pensions and retirement/financial planning under the tax rules of their country of residence. This is significant because the U.S. Internal Revenue Code imposes punitive taxation and reporting on non-U.S. income streams and assets.

The latter group, because of their non-US assets and income streams are more negatively impacted by the U.S. citizenship (extraterritorial) tax regime. The Internal Revenue Code generally treats non-U.S. assets and many non-U.S. income streams with suspicion. This results in U.S. citizens living outside the United States being subjected to a different and more punitive tax system than U.S. citizens living inside the United States (https://www.taxconnections.com/taxblog/the-united-states-imposes-a-separate-and-more-punitive-tax-system-on-us-dual-citizens-who-live-in-their-country-of-second-citizenship/). The problem is exacerbated because (other than the right to vote granted to some but not all U.S. citizens abroad) U.S. citizens abroad have no political representation

inside the United States. To borrow from the language of Justice Stone in Carolene Products: U.S. citizens abroad are a "discrete and insular minority".

Re: **"OMB control number 1545-1002"**

"SUMMARY:

The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning return by a shareholder of a passive foreign investment company or qualified electing fund and return by a shareholder making certain late elections to end treatment as a passive foreign investment company."

Please note that SEAT's comment is directed ONLY to the IRS request concerning:

"Comments concerning return by a shareholder of a passive foreign investment company or qualified electing fund"

Outline:

Part A - The Governing Statute, Regulations, Directions To Form 8621 and Form 8621

Part B - The Purpose of The PFIC Rules

Part C - How the PFIC Rules Impact Americans Abroad

Part D – A Regulatory Fix for Americans Abroad and PFIC: How Treasury Can Allow Long Term Americans Abroad to Invest For Their Retirements Using Non-US Mutual Funds And Pensions

Part E – The IRS Instructions for Form 8621

Part F - Improvements to Form 8621

Part A - The Governing Statute, Regulations, Directions To Form 8621 and Form 8621

The Statute

The annual information reporting requirement (reflected in Form 8621) comes from IRC § 1298(f), which came into being on March 18, 2010 with the enactment of the HIRE Act (the annual requirement to file Form 8621 was suspended until tax year 2013, however — see Regs. § 1.1298-1T(c)(3)).

The law itself is quite vague and gives the IRS broad power. The law states:

> **(f) REPORTING REQUIREMENT**
>
> **Except as otherwise provided by the Secretary**, each United States person who is a shareholder of a passive foreign investment company shall file an annual report containing such information as the Secretary may require.
>
> **(g) REGULATIONS**
>
> The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this part.

https://www.law.cornell.edu/uscode/text/26/1298

(Note that the statute specifically gives Treasury the authority to provide exemptions for taxpayers generally and to provide for thresholds for various kinds of individuals. At present Treasury has exercised this authority to exempt individuals with holdings of less than $25,000 USD (in the aggregate from reporting on Form 8621 unless there has been a sale of all or part of the fund.)

The Regulation

A taxpayer may be excepted from filing Form 8621 as per the Treasury Regulations. The Regulations include ...

(c) ***Exceptions***—(1) *Exception if shareholder is a tax-exempt entity.* A shareholder that is an organization exempt under section 501(a) to the extent that it is described in section 501(c), 501(d), or 401(a), a state college or university described in section 511(a)(2)(B), a plan described in section 403(b) or 457(b), an individual retirement plan or annuity as defined in section 7701(a)(37), or a qualified tuition program described in section 529, a qualified ABLE program described in 529A, or a Coverdell education savings account described in section 530 is not required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to a PFIC unless the income derived with respect to the PFIC stock would be taxable to the organization under subchapter F of Subtitle A of the Code.

(2) ***Exception if aggregate value of shareholder's PFIC stock is $25,000 or less, or value of shareholder's indirect PFIC stock is $5,000 or less***—(i) *General rule.* A shareholder is not required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to a section 1291 fund (as defined in § 1.1291-1(b)(2)(v)) for a shareholder's taxable year if—

(A) On the last day of the shareholder's taxable year:

(1) The value of all PFIC stock owned directly or indirectly under section 1298(a) and § 1.1291-1(b)(8) by the shareholder is $25,000 or less; or

(2) The section 1291 fund stock is indirectly owned by the shareholder under section 1298(a)(2)(B) and § 1.1291-1(b)(8)(ii)(B), and the value of the section 1291 fund stock indirectly owned by the shareholder is $5,000 or less;

(B) The shareholder is not treated as receiving an excess distribution (within the meaning of section 1291(b)) with respect to the section 1291 fund during the taxable year or as recognizing gain treated as an excess distribution under section

1291(a)(2) as the result of a disposition of the section 1291 fund during the taxable year; and

(C) An election under section 1295 has not been made to treat the section 1291 fund as a qualified electing fund with respect to the shareholder.

(ii) ***Determination of the $25,000 threshold in the case of indirect ownership.*** For purposes of determining the value of stock held by a shareholder for purposes of paragraph (c)(2)(i)(A)(*1*) of this section, the shareholder must take into account the value of all PFIC stock owned directly or indirectly under section 1298(a) and § 1.1291-1(b)(8), except for PFIC stock that is—

(A) Owned through another United States person that itself is a shareholder of the PFIC (including a domestic partnership or S corporation treated as a shareholder of a PFIC for purposes of information reporting requirements applicable to a shareholder);

(B) Owned through a PFIC under section 1298(a)(2)(B) and § 1.1291-1(b)(8)(ii)(B); or

(C) Marked to market for the shareholder's taxable year under any provision of chapter 1 of the Internal Revenue Code other than section 1296, provided the rules of § 1.1296-1(i)(2) and (3) do not apply to the shareholder with respect to the PFIC stock pursuant to § 1.1291-1(c)(4)(ii) for the shareholder's taxable year.

(iii) ***Application of the $25,000 exception to shareholders who file a joint return.*** In the case of a joint return, the exception described in paragraph (c)(2)(i)(A)(*1*) of this section shall apply if the value of all PFIC stock owned directly or indirectly (as determined under section 1298(a), § 1.1291-1(b)(8), and paragraph (c)(2)(ii) of this section) by both spouses is $50,000 or less, and all of the other applicable requirements of paragraph (c)(2) of this section are met.

(iv) ***Reliance on periodic account statements.*** A shareholder may rely upon periodic account statements provided at least annually to determine the value of a PFIC unless the shareholder has actual knowledge or reason to know based on readily accessible information that the statements do not reflect a reasonable estimate of the PFIC's value.

(3) ***Exception for PFIC stock marked to market under a provision other than section 1296.*** A shareholder is not required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to a PFIC for any taxable year in which the PFIC is marked to market under any provision of chapter 1 of the Internal Revenue Code other than section 1296, provided the rules of § 1.1296-1(i)(2) and (3) do not apply to the shareholder with respect to the PFIC pursuant to § 1.1291-1(c)(4)(ii) for the taxable year.

(4) ***Exception for PFIC stock held through certain foreign pension funds.*** A shareholder who is a member or beneficiary of, or participant in, a plan, trust, scheme, or other arrangement that is treated as a foreign pension fund (or equivalent) under an income tax treaty to which the United States is a party and that owns, directly or indirectly, an interest in a PFIC is not required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to the PFIC interest if, pursuant to the applicable income tax treaty, the income earned by the foreign pension fund may be taxed as the income of the shareholder only when and to the extent the income is paid to, or for the benefit of, the shareholder.

(5) ***Exception for certain shareholders who are dual resident taxpayers***—(i) *General rule.* Subject to the provisions of paragraphs (c)(5)(ii) and (iii) of this section, a shareholder is not required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to a PFIC for a taxable year, or the portion of a taxable year, in which the shareholder is a dual resident taxpayer (within the meaning of § 301.7701(b)-7(a)(1) of this chapter) who is treated as a nonresident alien of the United States for purposes of computing his or her United States income tax liability pursuant to § 301.7701(b)-7 of this chapter.

(ii) ***Dual resident taxpayer filing as a nonresident alien at end of taxable year.*** If a shareholder to whom this paragraph (c)(5) applies computes his or her U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of § 301.7701(b)-7(b) and (c) of this chapter and, in particular, such individual timely files with the Internal Revenue Service Form 1040NR, "U.S. Nonresident Alien Income Tax Return," or Form 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents," as

applicable, and attaches thereto a properly completed Form 8833, "Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)," and the schedule required by § 1.6012-1(b)(2)(ii)(*b*) (if applicable), such shareholder will not be required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to the taxable year, or the portion of the taxable year, covered by Form 1040NR (or Form 1040NR-EZ).

(iii) ***Dual resident taxpayer filing as resident alien at end of taxable year.*** If a shareholder to whom this paragraph (c)(5) applies computes his or her U.S. income tax liability as a resident alien on the last day of the taxable year and complies with the filing requirements of § 1.6012-1(b)(2)(ii)(*a*) and, in particular such shareholder timely files with the Internal Revenue Service Form 1040, "U.S. Individual Income Tax Return," or Form 1040EZ, "Income Tax Return for Single and Joint Filers With No Dependents," as applicable, and attaches a properly completed Form 8833 to the schedule required by § 1.6012-1(b)(2)(ii)(*a*), such shareholder will not be required under section 1298(f) and these regulations to file Form 8621 (or successor form) with respect to the portion of the taxable year reflected on the schedule to such Form 1040 or Form 1040EZ required by § 1.6012-1(b)(2)(ii)(*a*).

https://www.law.cornell.edu/cfr/text/26/1.1298-1

The Directions /Instructions To Form 8621

https://www.irs.gov/pub/irs-pdf/i8621.pdf

Form 8621

https://www.irs.gov/pub/irs-pdf/f8621.pdf

Part B - The Purpose of the PFIC Rules

PFICs were introduced as part of the 1986 tax reform. In order to understand the intent of the PFIC rules it is useful to read the general explanation of the tax reform act. The explanation starts at page 1021 of the document or page 1037 of the pdf. It is worth the read ...

https://web.archive.org/web/20120507115421/https://www.jct.gov/jcs-10-87.pdf/

Generally it is clear that the purpose of the PFIC rules was to discourage and impose penalties when U.S. persons (regardless of level of ownership) became shareholders in "Foreign" corporations whose assets and activities suggested an investment purpose. A perusal of the JCT document suggests that a message to shareholders of PFICS that:

If you don't pay the United States tax on income BEFORE you actually receive a distribution (as per Internal Revenue Code Sections 1295 (QEF) and 1296 (Mark to Market rules); then

You will pay an extra punitive tax on (pretend) deferral when you actually receive an excess distribution. (Note that an "excess distribution" includes ANY disposition of the shares in the "Passive Foreign Investment Corporation".

Bottom line:

The purpose of the PFIC rules is to punish investments in Foreign Corporations which are NOT covered by the Subpart F rules!

Q. Did Congress foresee the how widely the PFIC rules would be interpreted?

A. As the following 2014 article - "PFICs Gone Wild" by Monica Gianni demonstrates, the answer is clearly NO.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321349

The PFIC rules are (rightly or wrongly) generally understood by the tax compliance industry to include garden variety mutual funds that are foreign to the United States. This is true without regard to whether (as a matter of fact) those funds are used for tax deferral of any kind.

Part C - How The PFIC Rules Impact Americans Abroad

The effect of this has been to make financial and retirement planning for Americans abroad extremely burdensome.

It is respectfully submitted that Treasury has a moral obligation to provide regulatory relief for Americans abroad – allowing them to invest in mutual funds in their country of residence.

This problem is explored by Dr. Karen Alpert in her paper:

"Investing with One Hand Tied Behind Your Back – An Australian Perspective on United States Tax Rules for Non-Resident Citizens"

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097931

Karen Alpert

University of Queensland - Business School; Financial Research Network (FIRN)

Date Written: January 8, 2018

The Abstract to Dr. Alpert's paper includes:

"Australian investment opportunities outside of superannuation are also limited for US taxpayers. Australian managed funds are punitively taxed under the Passive Foreign Investment Company (PFIC) rules. ... Although this paper focuses on Australia and the interplay between US and Australian tax rules, the issues raised are broadly applicable to US citizens residing anywhere outside of the US."

It is important to note that the application of the PFIC rules has been understood by the tax compliance industry (rightly or wrongly) to apply to non-US mutual funds AND the holdings of non-US pension funds (unless U.S. taxation is excluded pursuant to a U.S. tax treaty)!!

Imagine having to plan for retirement when you are disabled from participating in retail level mutual funds and the pension plans created under the laws of your country of residence!

Different tax treaties impose different restrictions on the lives of Americans abroad!

All U.S. residents are subject to the Internal Revenue Code of the United States.

All Americans abroad are subject to the Internal Revenue Code of the United States, the tax code of their country of residence AND a tax treaty between the United States and their country of residence.

Different treaties have different provisions governing investing and. Retirement planning. The U.S./Australia tax treaty (1) allows for the U.S. to impose. Taxes. Forms and penalties on U.S. citizens living in Australia, but (2) provides little or no protection to U.S. citizens to allow them to engage in retirement planning. Other tax treaties (example Canada and the UK) provide greater protections for U.S. citizens residing in those countries.

To be clear, whether an American abroad can effectively plan for retirement largely depends on the specific country where he resides and any U.S. tax treaty that applies to that country!

Part D – A Regulatory Fix for Americans Abroad and PFIC: How Treasury Can Allow Long Term Americans Abroad To Invest For Their Retirements Using Non-US Mutual Funds And Pensions

SEAT proposes four kinds of relief for Americans abroad …

1. Treasury should specifically state that if a U.S. citizen meets the "bona fide residence test" in IRC 911, that investing in any mutual fund that is organized under the laws of the country of residence should be deemed to NOT be PFICs. *(Note that this is consistent with Treasury's treatment of treaty nonresidents as per the Treasury Regulations.)*

2. Treasury should specifically state that if a U.S. citizen meets the "bona fide residence test" in IRC 911, that participating in any pension plan that is organized under the laws of the country of residence should be deemed to NOT be PFICs (without regard to the existence and contents of any tax treaty). *(Note that this is consistent with Treasury's treatment of treaty nonresidents as per the Treasury Regulations.)*

3. Treasury should specifically state that any investments held in a financial product identified in Annex II of FATCA IGAs should be deemed to NOT be subject to the

PFIC reporting regime. (Example Annex II of the US Canada FATCA IGA found here … https://home.treasury.gov/system/files/131/FATCA-Agreement-Canada-2-5-2014.pdf

4. In the event that Treasury does NOT recognize the important public policy objective of exempting U.S. citizens abroad from the PFIC regime (as per suggestions 1 2 and 3 above), SEAT urges Treasury to establish a threshold (indexed to inflation) of 1 million USD before any non-U.S. mutual fund or pension is required to be reported as a PFIC (raising the threshold from the current $25,000 USD).

Note that SEAT's proposals (1 – 4 above) assume that non-U.S. mutual funds and non-U.S. pensions would be reported on Form 8938 as "Foreign Financial Assets".

PFICs: Direct Cost and Opportunity Cost For Americans Abroad

Direct Cost – Significant compliance costs and significant time

The impediments to investing and retirement planning are clear. The direct costs of completing Form 8621 are very high (the instructions to the form suggest more than 40 hours of time is required) and beyond the budgets of most Americans abroad.

Indirect Cost – The loss of opportunity to engage in retirement and financial planning

As Dr. Alpert's paper demonstrates, the PFIC rules play a significant role in imposing hardships on Americans abroad who are simply attempting to provide financial stability for their families.

The (near) impossibility of compliance

The PFIC regime (in addition effectively disabling Americans abroad from effective financial and retirement planning), ensures that many Americans abroad cannot be compliant with their U.S. tax obligations (assuming those obligations can be understood).

SEAT believes that Treasury has a moral imperative to fix this problem for Americans abroad.

Part E - Form 8621 Follows the IRS Instructions

The PFIC regime is hellishly complex. SEAT understands the difficulty in preparing instructions and a Form that is workable and understandable manner.

Form 8621 is intended to be completed with the instructions as a guide. SEAT respectfully suggests that (at least) the following two areas of the instruction are unclear and should be improved (preferably with more or better examples);

Line 15 (starting on page 12) - Calculating the distributions and whether there is an excess distribution

IRC Section 1291(b)(3)(d) reads as follows:

"(E)

if the distributions are received in a foreign currency, determinations under this subsection shall be made in such currency and the amount of any excess distribution determined in such currency shall be translated into dollars,"

SEAT interprets this to mean that the initial question of whether there is an excess distribution (in the case of a distribution) or (with a disposition) is determined in the currency of the non-U.S. fund.

This is vitally important in determining whether a distribution is an "excess distribution". This point is either NOT incorporated into the instructions are is inadequately incorporated into the instructions. (See instructions to Part V starting on page 12).

Cleary this change is important.

Line 16D (starting on page 13) – How to Calculate Foreign Tax Credits

Line 16d. To figure the foreign tax credit, the shareholder of a section 1291 fund figures the total creditable foreign taxes attributable to the distribution.

This amount includes the withholding taxes paid by the shareholder on the distribution and, in the case of the tax year of a section 1291 fund that begins before 2018, for 10%-or-greater domestic corporate shareholders, any taxes deemed paid under section 902.

These taxes must be creditable under general foreign tax credit principles, and

the shareholder must choose to claim the foreign tax credit for the current tax year.

The excess distribution taxes (the creditable foreign taxes attributable to an excess distribution) are determined by apportioning the total creditable foreign taxes between the part of the distribution that is an excess distribution and the part that is not.

Comment:

The extent and manner to which individuals are entitled to foreign tax credits is very important. SEAT strongly suggests that:

- The rules applying to U.S. domestic corporations be separated from the rules for individuals;
- Better and more examples are provided to explain how the FTC rules are to be applied.

https://www.irs.gov/pub/irs-pdf/i8621.pdf

Part F - Improvements to Form 8621

The PFIC regime is complex. It can be understood (if at all) only by a narrow segment of tax professionals. It is almost impossible to create instructions and a form that can be understood by the taxpayer who is expected to comply. No individual could understand what is required of them. Therefore, SEAT will restrict its suggestions for improving Form 8621 to the major concerns identified in Part E above. These are concerns that could directly result in:

- Determining whether there is an “excess distribution” at all; or
- Determining the correct amount of the excess distribution

These concerns follow directly from the concerns we identified in Part E (above) about the directions.

Part V – Lines 15a to 15f

The form should clarify that WHETHER there is an excess distribution and the AMOUNT of what the excess distribution is should be calculated in the currency of the fund. Once the amount (if any) of the excess distribution has been determined, THEN the excess distribution is to be converted to USD. The conversion is determined using the exchange rate on the date of the excess distribution.

Part V –Line 16d

The reference to the instructions is fine. But the instructions need to do a much better job of explaining (with examples) how the FTC rules apply.