



COMMISSIONER
LARGE BUSINESS AND
INTERNATIONAL DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

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MEMORANDUM FOR LARGE BUSINESS AND INTERNATIONAL EMPLOYEES

FROM: Douglas W. O'Donnell/s/Douglas W. O'Donnell
Commissioner, Large Business and International Division

SUBJECT: LB&I Guidelines for Handling Delinquent Forms 1120-F and
Requests for Waiver Pursuant to Treas. Reg. § 1.882-4(a)(3)(ii)

This memorandum issues guidance on handling delinquent Forms 1120-F and waiver requests pursuant to Treas. Reg. § 1.882-4(a)(3)(ii) until IRM 4.61 is revised.

Purpose: This guidance has been established to ensure that examiners are analyzing waiver requests in a fair, consistent and timely manner under these regulations.

Background/Source(s) of Authority: A foreign corporation is required to file Form 1120-F if it is engaged in a U.S. trade or business. In general, if the foreign corporation fails to file Form 1120-F before the earlier of the date of notification by the IRS that a return is due or 18 months after the due date under IRC § 6072, it is not entitled to deductions and credits under IRC § 882(c)(2) and the regulations thereunder, and will instead be subject to tax at graduated rates under section 11 on its gross income. Treas. Reg. § 1.882-4(a)(3)(ii) permits the Commissioner to waive the filing deadline, and thus allow the foreign corporation to claim deductions and credits, if the foreign corporation can establish, based on the facts and circumstances, that it acted reasonably and in good faith in failing to timely file a return.

Procedural Change: The procedure is outlined in the attached guidance.

Effect on Other Documents: This guidance will be added to IRM 4.61, International Program Audit Guidelines, by a date not to exceed two years from the date of this memo.

Effective Date: 02-01-2018

Contact: Richard Blumenthal, Richard.Blumenthal@irs.gov

Attachments:

- A) Form 1120-F Waiver Summary Analysis
- B) Form 1120-F Waiver Procedure Guidelines
- C) Form 1120-F Waiver Flow Chart

Distribution:

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Attachment A

Form 1120-F Waiver Summary Analysis

Taxpayer Name: _____
EIN: _____
Years: _____

Waiver Summary Analysis

NOTE: When submitting the Waiver Summary Analysis as part of the Waiver Request Package, please include, if applicable, the 886-As, and the taxpayer's protest and the Service's rebuttal. If there is not a protest and a rebuttal, please submit the correspondence which gives rise to the Waiver Request and supports the Waiver Summary Analysis. Please provide detailed responses in the boxes below.

Conclusion: Waiver of filing deadlines under Treas. Reg. § 1.882-4(a)(3)(ii) is
(Highlight one) grant/denied as summarized below.

Did the corporation cooperate in the process of determining its income tax liability for the taxable year for which the return was not filed?

Additionally, consider the following factors in determining whether the foreign corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return:

(A) Whether the corporation voluntarily identifies itself to the Internal Revenue Service as having failed to file a U.S. income tax return before the Internal Revenue Service discovers the failure to file.

(B) Whether the corporation did not become aware of its ability to file a protective return (as described in paragraph (a)(3)(vi) of this section) by the deadline for filing a protective return.

(C) Whether the corporation had not previously filed a U.S. income tax return.

Taxpayer Name: _____
EIN: _____
Years: _____

(D) Whether the corporation failed to file a U.S. income tax return because, after exercising reasonable diligence (taking into account its relevant experience and level of sophistication), the corporation was unaware of the necessity for filing the return.

(E) Whether the corporation failed to file a U.S. income tax return because of intervening events beyond its control.

(F) Whether other mitigating or exacerbating factors existed.

Attachment B

Form 1120-F Waiver Procedure Guidelines

Large Business & International (LB&I) Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg. § 1.882-4(a)(3)(ii).

Introduction

These LB&I Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg. § 1.882-4(a)(3)(ii) (“Guidelines”) have been established to ensure that delinquent Forms 1120-F and requests for waiver pursuant to Treas. Reg. § 1.882-4(a)(3)(ii) are handled by LB&I¹ in a consistent manner. As described in detail below, all foreign corporations must file their income tax returns² at the location designated in the instructions to Form 1120-F (U.S. Income Tax Return of a Foreign Corporation), whether or not the return is timely filed for purposes of Treas. Reg. § 1.882-4(a)(3). No one involved in a compliance function should accept as filed a delinquent Form 1120-F from a taxpayer,³ or discuss in advance of filing a return whether a waiver will be granted. Once a return is filed, and LB&I has selected the return for examination, these guidelines for handling waivers will apply.

The Deputy Commissioner, LB&I, has been delegated the authority to grant or deny waivers under Treas. Reg. § 1.882-4(a)(3)(ii) pursuant to LB&I DO 1-23-12. Without prejudice to prior determinations, the Deputy Commissioner has delegated this authority to the Directors of Field Operations (DFO), Cross Border Activities (CBA). Accordingly, the procedures below set forth the manner in which waiver requests will be elevated to the DFO for a final determination.

The Guidelines (1) summarize the relevant law; (2) set forth the scenarios to which the Guidelines apply; (3) provide general instruction as to the steps to be taken under each scenario; and (4) detail the process of formulating the recommendation (and the CBA DFO’s determination) on a taxpayer request for waiver pursuant to Treas. Reg. § 1.882-4(a)(3)(ii).

¹ LB&I refers to all personnel in the IRS Large Business & International Division. Revenue agents and their direct managers are referred to as the “Exam Team.”

² Unless otherwise noted, any reference to a Form 1120-F in these Guidelines includes a protective Form 1120-F as described in Treas. Reg. § 1.882-4(a)(3)(vi).

³ An exception may be appropriate in the case where a related party is currently under examination (See Internal Revenue Manual Sections 4.12.1.16 and 4.12.1.17), where the taxpayer is under exam for a year other than the delinquent return year, or where the taxpayer is under exam for a return type other than the delinquent 1120-F. If the return is secured, it should be filed with the appropriate Submissions Processing Center for Business Master File returns under existing procedures set forth in Internal Revenue Manual 4.12.1.17(4).

I. Summary of the Relevant Law.

A. Section 882(c)(2).

Under section 882(c)(2), a foreign corporation that is engaged in a trade or business within the United States is only allowed deductions and credits that are connected with income that is effectively connected with the conduct of a trade or business (“ECI”). Those deductions and credits are further conditioned on the foreign corporation filing a true and accurate return in the manner required by subtitle F, including all the information necessary for the calculation of such deductions and credits. These conditions do not apply to credits provided by section 33 for tax withheld at source or to deductions for charitable contributions allowed under section 170, whether or not connected to ECI.

B. General filing deadlines for foreign corporations.

Section 6072 provides the due dates for foreign corporations required to file an income tax return (Form 1120-F). The due date depends on whether the foreign corporation has an office or place of business in the United States. If it does have such an office or place of business, the return is due at the same time as a return of a domestic corporation. Note that those due dates changed for tax years beginning on or after January 1, 2016. If it does not have such an office or place of business, the return is due on or before the 15th day of the 6th month after the close of its taxable or fiscal year.

Under Treas. Reg. § 1.6012-2(g) (1) a foreign corporation is required to file a tax return if it is engaged in a U.S. trade or business, even if it has no ECI or its income is exempt from tax under a tax treaty. However, if the foreign corporation has no gross income for the taxable year, it is not required to complete the return schedules, but must attach a statement indicating the nature of any exclusions claimed and the amount of the exclusions, to the extent such amounts are readily determinable.

Form 1120-F returns should be filed in accordance with the Form 1120-F filing instructions. Currently, Form 1120-F returns are filed with the Internal Revenue Service Center in Ogden, UT. Taxpayers may also be able to file Form 1120-F returns electronically. Prior to 2006, Form 1120-F returns were filed with the Internal Revenue Service Center in Philadelphia, PA.

C. Special filing deadlines for foreign corporations under section 882(c)(2).

Treas. Reg. § 1.882-4(a)(3)(i) prevents a foreign corporation from receiving the benefit of deductions and credits otherwise allowable (with the exceptions for deductions and credits noted in the statute) if it fails to meet the following special filing dates, as applicable, set forth in the regulations:

1. If a return was filed for the immediately preceding taxable year, or if the current taxable year is the first taxable year of the foreign corporation for which a return is required to be filed, the required return for the current taxable year must be filed within 18 months of the due date as set forth in section 6072 and the regulations under that section.
2. If no return for the taxable year immediately preceding the current taxable year has been filed, the required return for the current taxable year (other than the first taxable year of the foreign corporation for which a return is required to be filed) must have been filed no later than the earlier of the date which is 18 months after the due date, as per section 6072, for filing the return for the current taxable year or the date the IRS mails a notice to the foreign corporation advising the corporation that the current year tax return has not been filed and that no deductions or credits (other than those excepted by statute) may be claimed by the taxpayer.

D. Protective returns for purposes of section 882(c)(2).

Under Treas. Reg. § 1.882-4(a)(3)(vi), a foreign corporation that conducts limited activities in the United States that it determines do not give rise to ECI may nonetheless file a return for the taxable year on a timely basis under Treas. Reg. § 1.882-4(a)(3)(i) to protect its right to receive the benefit of deductions and credits if it is later determined, after the return is filed, that the determination is incorrect. The return does not need to report any gross income as ECI or any deductions or credits but should include a statement that the return is being filed to protect the foreign corporation's right to deductions and credits. A foreign corporation may follow the same procedure if it determines initially that it has no U.S. tax liability under the provisions of an applicable income tax treaty. If it is claiming it does not have a permanent establishment in the United States, it must also generally disclose that position on Form 8833. Failure to attach a Form 8833 to a Form 1120-F results in a penalty annually of \$10,000. See section 6712.

E. Waiver of the special filing deadlines.

Under Treas. Reg. § 1.882-4(a)(3)(ii), the filing deadlines set forth in Treas. Reg. § 1.882-4(a)(3)(i) may be waived if the foreign corporation establishes to the satisfaction of the Commissioner or his or her delegate that the corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return (including a protective return (as described in Treas. Reg. § 1.882-4(a)(3)(vi)). For this purpose, a foreign corporation shall not be considered to have acted reasonably and in good faith if it knew that it was required to file the return and chose not to do so. The regulations provide 6 factors to be considered in this analysis (see Treas. Reg. § 1.882-4(a)(3)(ii)(A)-(F) for a list of these factors).

II. Scenarios to which the Guidelines Apply.

The Guidelines apply to the following two scenarios:

Scenario 1. A taxpayer not currently under exam approaches LB&I directly and informs LB&I that for a particular tax year it has not filed a Form 1120-F for which the relevant timely filing deadline under Treas. Reg. § 1.882-4(a)(3)(i) has past, and that it now seeks to file a delinquent Form 1120-F. In some instances, a taxpayer representative may approach LB&I on a no-name basis on behalf of a taxpayer. The taxpayer or representative may seek to submit a delinquent return to LB&I or discuss the likelihood of a waiver being granted from the filing deadlines for the delinquent Form 1120-F.

Scenario 2. LB&I has been assigned the examination of a filed Form 1120-F for a particular tax year and determines that the filing of the Form 1120-F failed to meet the relevant timely filing deadline under Treas. Reg. § 1.882-4(a)(3)(i).

III. General Instruction to LB&I Under Each Scenario.

A. Scenario 1.

In Scenario 1, LB&I should inform the taxpayer (or its representative, as applicable) that the Form 1120-F, even though delinquent under Treas. Reg. § 1.882-4(a)(3)(i), must be filed in accordance with the filing instructions for the Form 1120-F. Also in Scenario 1, LB&I should not accept a delinquent Form 1120-F from the taxpayer or accept from, or discuss with, the taxpayer a request for waiver pursuant to Treas. Reg. § 1.882-4(a)(3)(ii).

B. Scenario 2.

In Scenario 2, the steps that LB&I should take depend on whether the taxpayer has submitted a request for waiver pursuant to Treas. Reg. § 1.882-4(a)(3)(ii).

1. Taxpayer has submitted a request for waiver.

The Exam Team should develop the facts relevant to the request for waiver in accordance with Treas. Reg. § 1.882-4(a)(3)(ii), reach a recommendation to grant or deny the request and then follow the process set forth in Section IV below.

2. Taxpayer has not submitted a request for waiver.

The Exam Team should make the taxpayer aware in writing of the option to request a waiver under Treas. Reg. § 1.882-4(a)(3)(ii). The Exam Team should not advise, instruct or otherwise signal the taxpayer to take any particular action. Sample

language, in the form of a letter, that may be used as a guide to implement this step is attached to these Guidelines.

If the taxpayer submits a request for waiver, the Exam Team should develop the request in accordance with Treas. Reg. § 1.882-4(a)(3)(ii), reach a recommendation to grant or deny the request and then follow the process set forth in Section IV below.

If the taxpayer does not submit a request for waiver, after being informed of the option, the Exam Team will continue the examination of the filed return. See Section I.A. *Summary of the Relevant Law* for further guidance on the deductions and credits that may be disallowed under section 882(c)(2). If the taxpayer submits a request for waiver in response to a proposed disallowance under section 882(c)(2), the Exam Team should develop the facts relevant to the request in accordance with Treas. Reg. § 1.882-4(a)(3)(ii), reach a recommendation to grant or deny the request and then follow the process set forth in Section IV below.

Note: Regardless of the determination on a request for waiver, the Exam Team may, as appropriate, propose to disallow specific deductions and credits in any amount to the extent that they are determined to be not allowable under the law or have not been properly substantiated.

IV. Processing the Exam Team's Recommendation On a Request for Waiver.

A request for waiver will be granted or denied through the following process. The authority to grant or deny a waiver request has been delegated to the LB&I Deputy Commissioner and the CBA DFOs. See Memorandum from Deputy Commissioner (LB&I) to Field Operations, CBA, signed December 28, 2016.

The Exam Team will review and analyze the taxpayer's waiver request and make a recommendation on whether to grant or deny the waiver request based on all the facts and circumstances, including those provided by the taxpayer in its request. The Exam Team will prepare the "Waiver Request Package" and forward the recommendation for acceptance or denial to the Territory Manager along with a Waiver Request Package. The Waiver Request Package includes the Administrative File including, but not limited to A) the Waiver Summary Analysis⁴; B) the taxpayer's request for waiver and any supplements thereto; C) any IDRs or other requests for information related to the request for waiver issued by Exam to the taxpayer or third-parties; D) the responses to any such IDRs and requests for information; and E) a Form 886-A, Protest and Rebuttal, if any.

⁴ See attached sample Waiver Summary Analysis Template.

The Territory Manager will schedule a call with the Exam Team to review the information and discuss the recommendation. If necessary, this may result in the Exam Team collecting additional information from the taxpayer. This process will continue until the Exam Team and the Territory Manager come to a recommendation to send forth to its CBA DFO Area Staff Assistant.⁵ The processing of the Exam Team's recommendation on a request for a waiver differs depending on whether the Exam Team, with the concurrence of the Territory Manager, recommends that the waiver request be granted or denied.

A. The Exam Team recommends that a request for waiver be granted.

If the Exam Team, with the concurrence of its Territory Manager, recommends that a request for a waiver be granted, the Territory Manager will forward the Waiver Request Package to the CBA DFO Area Staff Assistant. Once the CBA DFO Area Staff Assistant confirms that the Waiver Request Package is complete, the CBA DFO Area Staff Assistant will forward the Waiver Request Package to the CBA DFO for his or her determination to grant or deny the request for waiver.

If the CBA DFO agrees with the Exam Team's recommendation and determines that the waiver should be granted, the CBA Area Staff Assistant will communicate the determination to the Exam Territory Manager and Exam Team Manager, as well as to the Waiver Committee (discussed below). The Exam Team will subsequently notify the taxpayer in writing of the determination.

If the CBA DFO does not agree at this point with the Exam Team's recommendation to grant the waiver, the CBA DFO has the option to request additional information, and consult with the Waiver Committee in order to reach a final decision. Ultimately, the CBA DFO Staff Assistant will communicate the CBA DFO's final determination to the Exam Territory Manager and Exam Team Manager, as well as the Waiver Committee. The Exam Team will subsequently notify the taxpayer in writing of the determination.

B. The Exam Team recommends that a request for waiver be denied.

If the Exam Team, with the concurrence of its Territory Manager, recommends that a request for waiver be denied, the Territory Manager will forward the Waiver Request Package to the CBA DFO Area Staff Assistant who will, upon confirming that the Waiver Request Package is complete, forward the Waiver Request Package to a committee to be formed, and referred to as the Waiver Committee, for its consideration (with a copy to the CBA DFO).

The Waiver Committee will ensure that, regardless of the type of business conducted, all recommendations for denial of waivers will be evaluated by an independent committee and handled consistently. The Waiver Committee will consist of

⁵ There are two DFOs in CBA—one for the East and one for the West, so it is important that Exam directs the case recommendation to the appropriate CBA DFO Area Staff Assistant.

the CBA Practice Area Program Manager, CBA Territory Manager, CBA Team Manager and a member of the Treaty Assistance and Interpretation Team (if the foreign corporation is a resident of a treaty jurisdiction). The Territory Manager and Team Manager will be designated by the DFO and will not be the same Territory or Team Manager that reviewed the Waiver Request Package.

The CBA DFO Area Staff Assistant will schedule a conference call with the Waiver Committee, the Exam Team and the Exam Territory Manager to discuss the case. Next, the Team Manager on the Waiver Committee will forward the waiver recommendation, or recommendations (if the Waiver Committee and Exam still disagree) and the Waiver Request Package, to the CBA DFO Area Staff Assistant, who will in turn submit the recommendation(s) to the CBA DFO. The CBA DFO may request additional information or clarification from the Waiver Committee and/or Exam prior to making his or her determination. The CBA DFO Area Staff Assistant will communicate the CBA DFO's final determination to the Exam Territory Manager, the Exam Team Manager and the Waiver Committee. The Exam Team will subsequently notify the taxpayer in writing of the determination.

Wording to Use with “Waiver Procedure Information Letter

(Paste this language into the Information Letter to Taxpayer.)

[IRS contact]
[IRS contact telephone number]

[Date]

[Taxpayer]
[Street Address]
[Postal Code]

Internal Revenue Code section 882(c)(2) and Treas. Reg. § 1.882-4(a)(2) provide that a foreign corporation is allowed deductions properly allocated and apportioned to effectively connected income and credits attributable to that income only if it timely files a true and accurate return of its taxable income which is effectively connected, or treated as effectively connected, with the conduct of a United States trade or business for the taxable year (Exceptions apply for the deductions allowed under section 170 and credits provided by sections 33, 34 and 852(b)(3)(D)(ii)). The return, on Form 1120-F, must be filed in accordance with the Form 1120-F filing instructions. The current filing instructions provide that the Form 1120-F return must be filed with the Internal Revenue Service Center in Ogden, UT.

Treas. Reg. § 1.882-4(a)(3)(i) sets forth the specific filing deadlines for filing a true and accurate return of a foreign corporation for purposes of determining allowance of the deductions and credits described above. Treas. Reg. § 1.882-4(a)(3)(ii) provides that the filing deadlines may be waived if the foreign corporation establishes to the satisfaction of the Commissioner or his or her delegate that the corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return (including a protective return). For this purpose, a foreign corporation shall not be considered to have acted reasonably and in good faith if it knew that it was required to file the return and chose not to do so. Please note that under these regulations “a foreign corporation shall not be granted a waiver unless it cooperates in the process of determining its income tax liability for the taxable year for which the return was not filed.”

The Service has determined that you have not timely filed under Treas. Reg. § 1.882-4(a)(3)(i) your Form(s) 1120-F for the taxable year(s) ending [insert taxable year(s) ending]. If you choose to make a request for waiver of the filing deadlines, please note that Treas. Reg. § 1.882-4(a)(3)(ii) sets forth a list of particular factors that the Service will consider in making its determination.

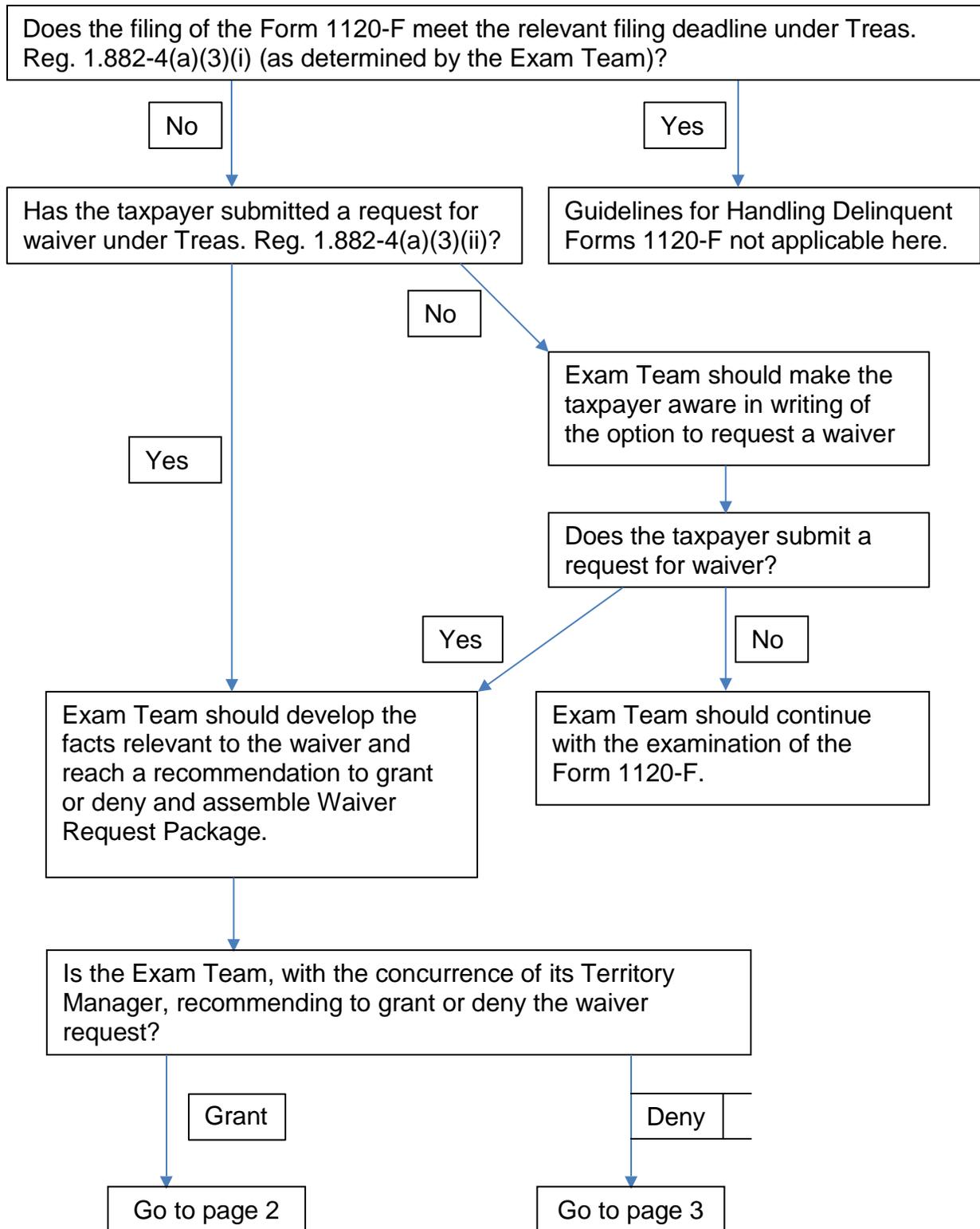
Please contact the IRS personnel listed above if you have any questions about this letter.

[Signature]
[Title]

Attachment C

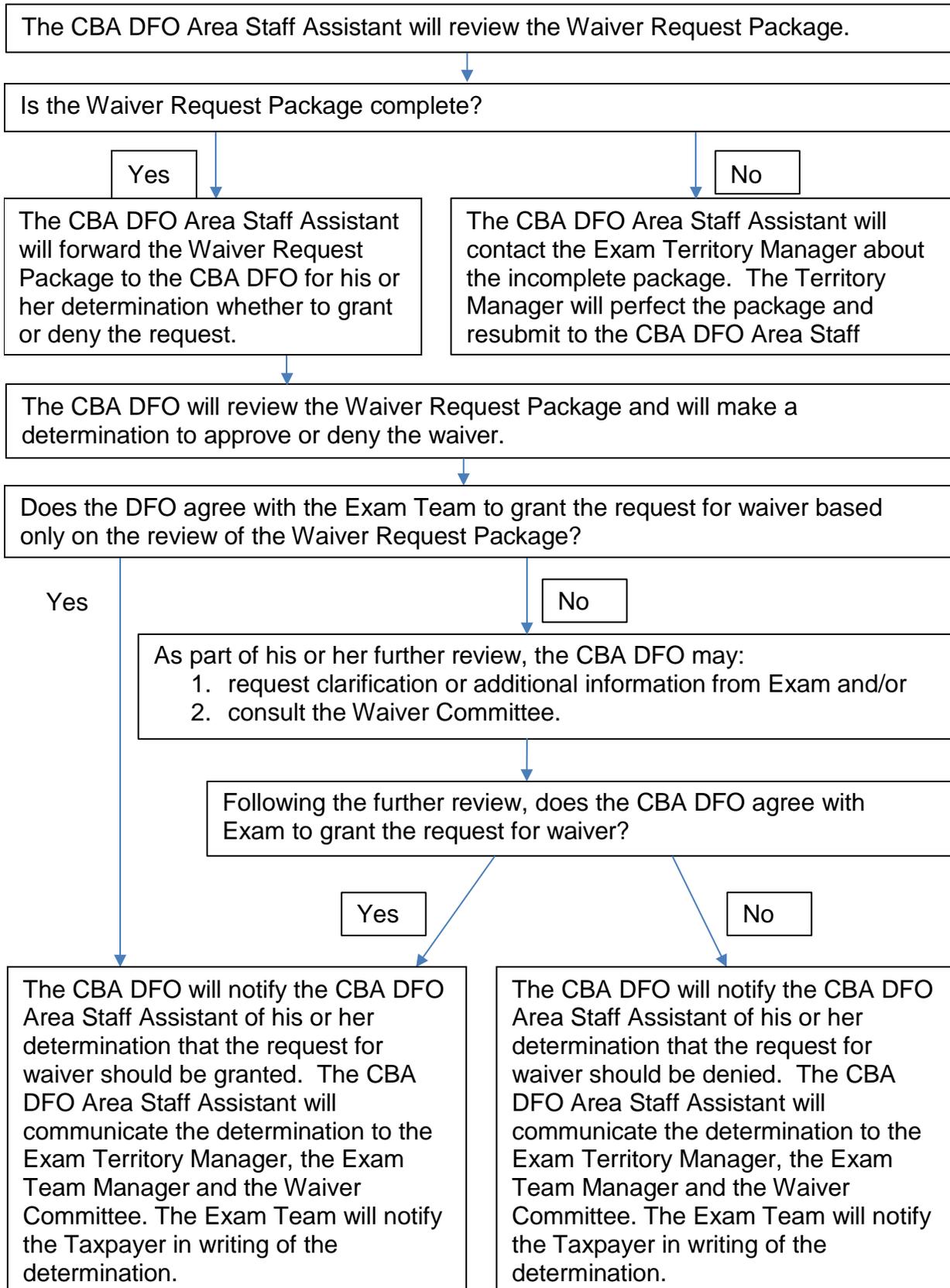
Form 1120-F Waiver Flowchart

Flowchart: The Exam Team has been assigned the examination of a Form 1120-F



Flowchart: The Exam Team has been assigned the examination of a Form 1120-F

If Exam Team is recommending to GRANT the Waiver Request



Flowchart: The Exam Team has been assigned the examination of a Form 1120-F

If Exam Team is recommending to DENY the Waiver Request

