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Form 1120-F

U.S. Income Tax Return of a Foreign
Corporation



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Presenters

Large Business & International

Cross Border Activities

Jurisdiction to Tax Practice Network



Form 1120-F Filing Requirements and Waiver Procedure

Topics of Discussion:

- ❖ Program Objectives
- ❖ Background
- ❖ General Filing Requirements
- ❖ Timely Filed Return



Form 1120-F Filing Requirements and Waiver Procedure

Topics of Discussion (cont.):

- ❖ Failure to Timely File Form 1120-F
- ❖ Form 1120-F Waiver Process
- ❖ LB&I Campaigns



Program Objectives

- ❖ Describe filing requirements for a foreign corporation (“FC”) engaged in U.S. Trade or Business (“USTB”)
- ❖ Explain the purpose of filing a protective return
- ❖ Describe the consequence for failing to timely file Form 1120-F per Section 882(c)



Program Objectives (cont.)

- ❖ List the factors considered when requesting a waiver for the filing deadline per Treasury Regulation (“TR”) § 1.882-4
- ❖ Explain the LB&I Waiver Process Procedures
- ❖ Explain the LB&I Compliance Campaigns



Background

Whether or not a FC is required to file Form 1120-F

"U.S. Income Tax Return of a Foreign Corporation"

depends on the source and character of income earned by the FC



Background (cont.)

❖ Sourcing rules -

- IRC 861 - Sources within the U.S.
- IRC 862 - Sources without the U.S.

❖ Character of income -

- IRC 881 - Tax on income of FC not connected with U.S. business
- IRC 882 - Tax on income of FC connected with U.S. business



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Background (cont.)

- ❖ A domestic corporation is one that was created or organized in the United States or under the laws of the United States, any of its states, or the District of Columbia.
- ❖ A FC is one that does not fit the definition of a domestic corporation.



Passive Income

- ❖ FDAP (Fixed and Determinable, Annual or Periodical) income includes Interest (other than OID), dividends, rents, royalties, salaries, wages, premiums, annuities, compensation, and other FDAP gains, profits, and income.



Passive Income (cont.)

- ❖ Tax on FDAP income is withheld at source
 - at a flat rate of 30%
 - at a reduced rate provided in a tax treaty with the United States



Passive Income (cont.)

- ❖ The FC must file Form 1120-F for the tax year if it earns U.S. Source FDAP income and either –
 - the amount of its tax liability was not fully satisfied by withholding at source
 - It makes a claim for the refund of an overpayment of tax (withholding at source in excess of its tax liability) for the tax year.



Active Income

- ❖ The term “trade or business” generally includes activity for the production of income from selling goods or performing services.
- ❖ A U.S. trade or business (“USTB”) includes activities that are conducted on a regular, continuous, and substantial basis in the U.S.



Active Income (cont.)

- ❖ If a FC is engaged in a USTB it is taxed on the income that is effectively connected to its USTB (“ECI”)
- ❖ ECI is taxed at graduated corporate tax rate
- ❖ In general, a FC can only have ECI if it is engaged in a USTB



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General Filing Requirements

- ❖ A FC that IS engaged in a USTB at any time during the taxable year, or is “treated as” so engaged, is required to file Form 1120-F (whether or not it has taxable income) to report the income effectively connected to its USTB



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General Filing Requirements (cont.)

- ❖ Form 1120-F must be filed on a timely basis and in a true and accurate manner in order for a FC to take deductions and credits against its effectively connected income



General Filing Requirements (cont.)

- ❖ If a FC is a qualified resident of a treaty jurisdiction it may only be taxed on its business profits attributable to a permanent establishment (“PE”) in the U.S.
- ❖ The FC must file Form 1120-F to report the income earned from the PE



General Filing Requirements (cont.)

Permanent Establishment (“PE”)

- ❖ A PE is defined, in part, as a fixed place of business through which the business of the enterprise is wholly or partially carried out
- ❖ The nature and amount of activities that rise to the level of a PE are more narrowly focused than those that would give rise to a USTB



General Filing Requirements (cont.)

Protective Form 1120-F

- ❖ A FC may conduct limited activities in the U.S. which it determines:
 - do not give rise to gross income which is effectively connected with the conduct of a USTB (ECI), or



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General Filing Requirements (cont.)

Protective Form 1120-F

- has no U.S. tax liability under the provisions of an applicable income tax treaty
 - for example - it claims that its presence in the US does not rise to the level of a PE and, therefore, there are no business profits subject to US tax



General Filing Requirements (cont.)

Protective Form 1120-F

- ❖ A FC with limited activities can file a protective Form 1120-F reporting no income and no expenses. This allows the foreign corporation to -
 - start the statute of limitations running, and
 - ensure that it will be entitled to claim deductions and credits if it is later determined that the foreign corporation IS engaged in a USTB



General Filing Requirements (cont.)

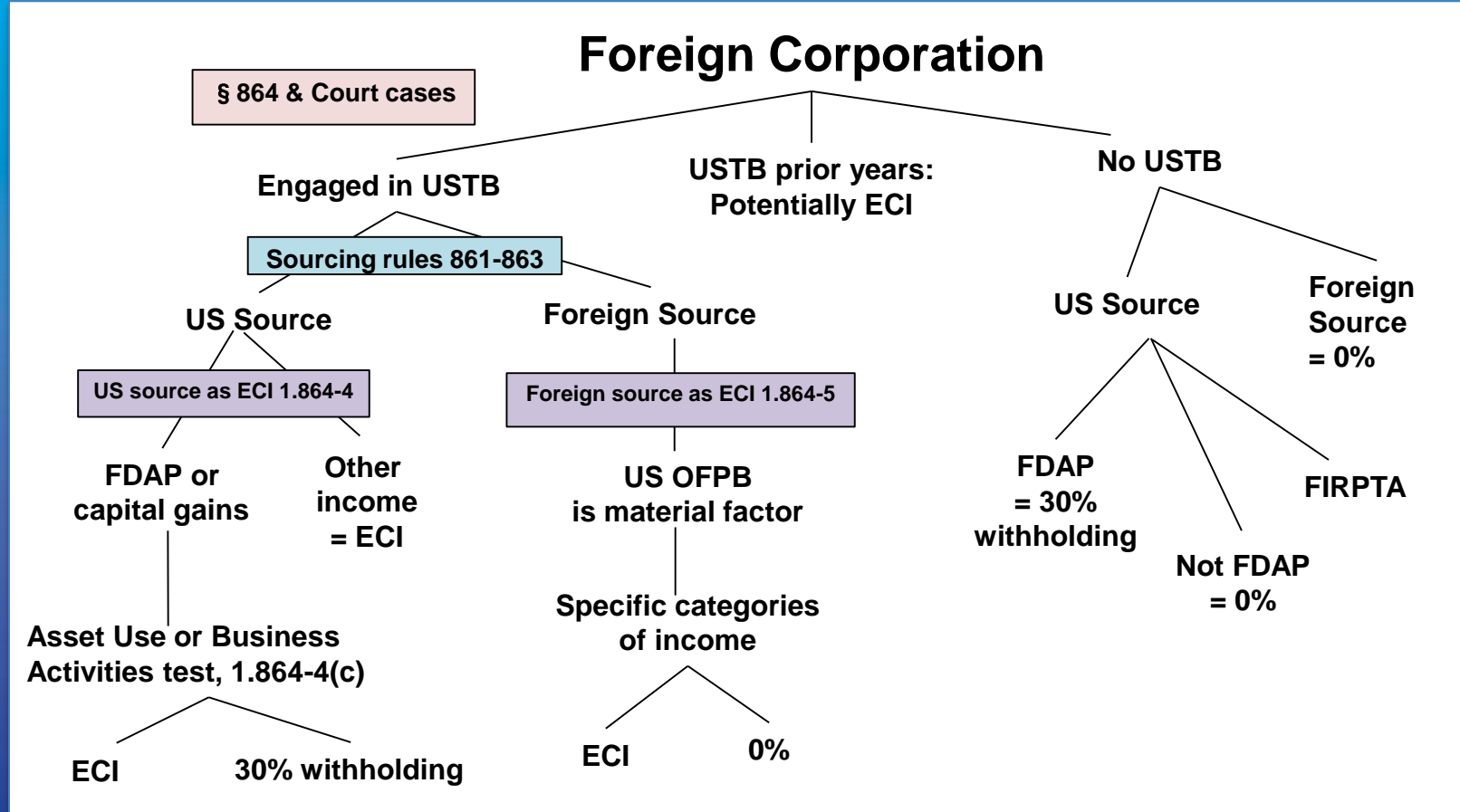
The Form 1120-F Return must

- Be true and accurate
- Be “timely” filed
- Include Form 8833 (treaty-based position)

The next slide illustrates the filing/withholding requirements



USTB/ECI Flowchart





General Filing Requirements (cont.)

Section 6072 - Time for filing income tax returns

- ❖ A FC that maintains an office or place of business in the United States must file by the 15th day of the 4th month after the end of its tax year
 - Exception: A corporation whose tax year ends on June 30 must file by the 15th day of the 3rd month after the end of its tax year (September 15)



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General Filing Requirements (cont.)

Section 6072 - Time for filing income tax returns

- ❖ A foreign corporation that does not maintain an office or place of business in the United States must file by the 15th day of the 6th month after the end of its tax year

Extensions: A foreign corporation may file Form 7004 to request a 6-month extension of time to file - it **MUST** be filed prior to the Section 6072 due date



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General Filing Requirements (cont.)

Section 882(c)(2) provides that if a foreign corporation fails to “timely” file a true and accurate Form 1120-F, its deductions and credits may be disallowed. If so, it would be taxed on its gross income.



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General Filing Requirements (cont.)

- ❖ TR § 1.882-4(a)(3) provides the deadline for filing a "timely" return solely for purposes of section 882(c)(2).
 - It provides that the return must be filed within 18 months of the due date (see Slides 24 & 25) set forth in Section 6072 and the regulations thereunder



Timely Filed Return TR § 1.882-4(a)(3)

End of Tax Year	6072(a) Due Date (office in U.S.)	6072(c) Due Date (NO office in U.S.)	1.882-4 date	
			U.S. office	No U.S. office
Calendar Year (e.g. 12/31/2017)	04/15/2018	06/15/2018	10/15/2019	12/15/2019
Fiscal Year (NOT June 30) (e.g. 03/31/2017)	7/15/2017	9/15/2017	1/15/2019	03/15/2019
Fiscal Year ending June 30 ONLY (e.g. 06/30/2017)	9/15/2017	12/15/2017	3/15/2019	06/15/2019



Failure to Timely File Form 1120-F

- ❖ TR § 1.882-4(a)(3)(ii) permits the Commissioner to waive the extended (18 month) filing deadline (discussed in Slide 27) which would allow the foreign corporation the benefits of deductions and credits on an untimely filed Form 1120-F
- ❖ The regulation provides that the foreign corporation must establish, based on the facts and circumstances, that it acted reasonably and in good faith in failing to timely file

Failure to Timely File Form 1120-F (cont.)

- ❖ TR § 1.882-4(a)(3)(ii) cites 6 factors that the Service will consider when making a determination on waiving the filing deadline for Form 1120-F (See Slides 33 through 38)





Overview of the Waiver Process

Summary of waiver procedures process

- ❖ Delinquent returns are required to be filed with the Ogden Campus (per Form 1120-F instructions)
 - Returns will not be accepted by the field per the February 1, 2018 interim guidance from Douglas O'Donnell, LB&I Commissioner
 - Excludes returns & related returns under exam
<https://www.irs.gov/pub/foia/ig/spder/lbi-04-0218-007.pdf>



Overview of the Waiver Process

Summary of waiver procedures process (cont.)

- ❖ Delinquent returns will be analyzed by field examiners as part of LB&I campaign strategy
- ❖ Field examiners review and analyze the FC's waiver request and make recommendations to grant or deny the waiver request based generally on the 6 factors in the regulations

<https://www.irs.gov/pub/foia/ig/spder/lbi-04-0218-007.pdf>



Overview of Waiver Process (cont.)

TR § 1.882-4 factors to determine if waiver will be granted:

1. Whether the corporation voluntarily identifies itself to the IRS as having failed to file a U.S. income tax return before the IRS discovers the failure to file;



Overview of Waiver Process (cont.)

TR § 1.882-4 factors to determine if waiver will be granted:

2. Whether the corporation did not become aware of its ability to file a protective return (as described in TR § 1.882-4 (a)(3)(vi)) by the deadline for filing a protective return;



Overview of Waiver Process (cont.)

TR § 1.882-4 factors to determine if waiver will be granted:

3. Whether the corporation had not previously filed a U.S. income tax return;



Overview of Waiver Process (cont.)

TR § 1.882-4 factors to determine if waiver will be granted:

4. 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;



Overview of Waiver Process (cont.)

TR § 1.882-4 factors to determine if waiver will be granted:

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



Overview of Waiver Process (cont.)

TR § 1.882-4 factors to determine if waiver will be granted:

6. Whether other mitigating or exacerbating factors existed.



Overview of Waiver Process (cont.)

Summary of waiver procedures process

- ❖ Waiver Determination - The totality of the six factors (outlined in the previous slides) are considered in making a decision that the corporation acted reasonably and in good faith and no one factor is determinative.



Overview of Waiver Process (cont.)

Summary of waiver procedures process (cont.)

- If exam recommends granting waiver – forward to the appropriate Cross Border Activities Director of Field Operations (DFO).
 - If the DFO does not agree with exam's recommendation, the case shall be forwarded to the Waiver Committee for guidance



Overview of Waiver Process (cont.)

Summary of waiver procedures process (cont.)

- If exam recommends denial of waiver – forward to Waiver Committee
 - The Waiver Committee will forward their recommendation to the DFO
 - The DFO makes a final determination whether to grant or deny waiver.



Waiver Process Implementation

Waiver Documents

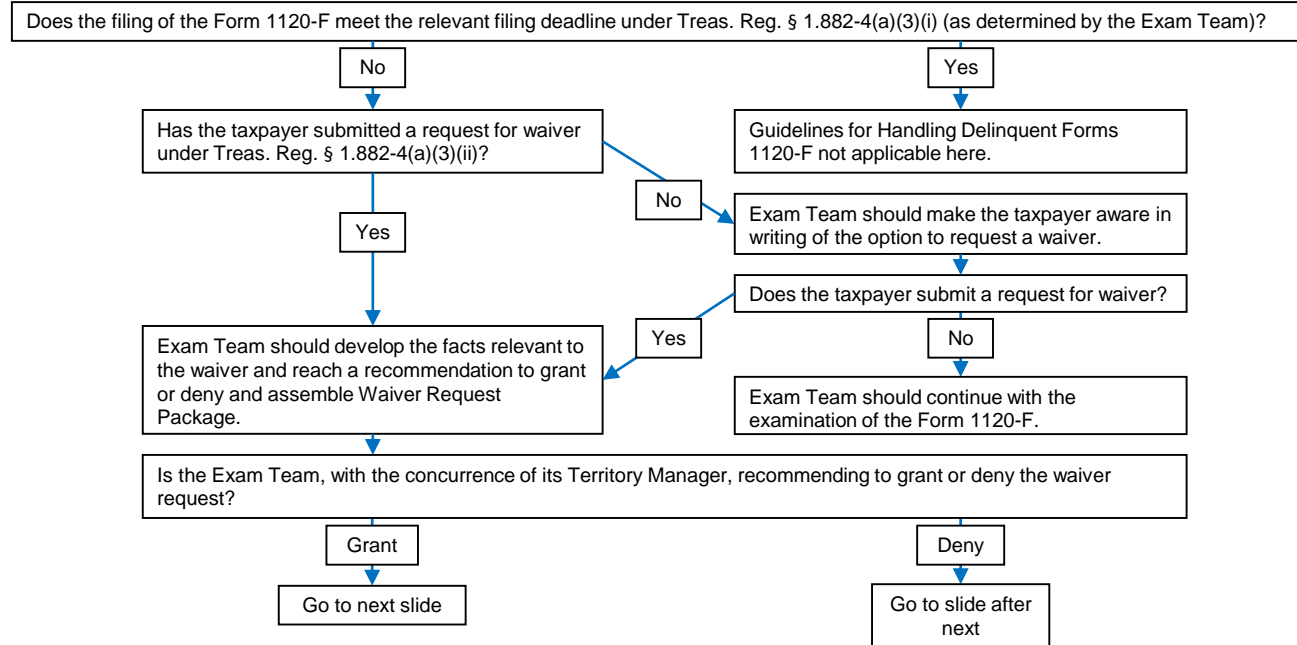
1. Delegation Order
2. Form 1120-F Waiver Procedure Memo – Interim Guidance
3. Form 1120-F Waiver Procedure Guidelines
4. Waiver Summary Analysis
5. Flow Chart of Procedures



Waiver Process Implementation (cont.)

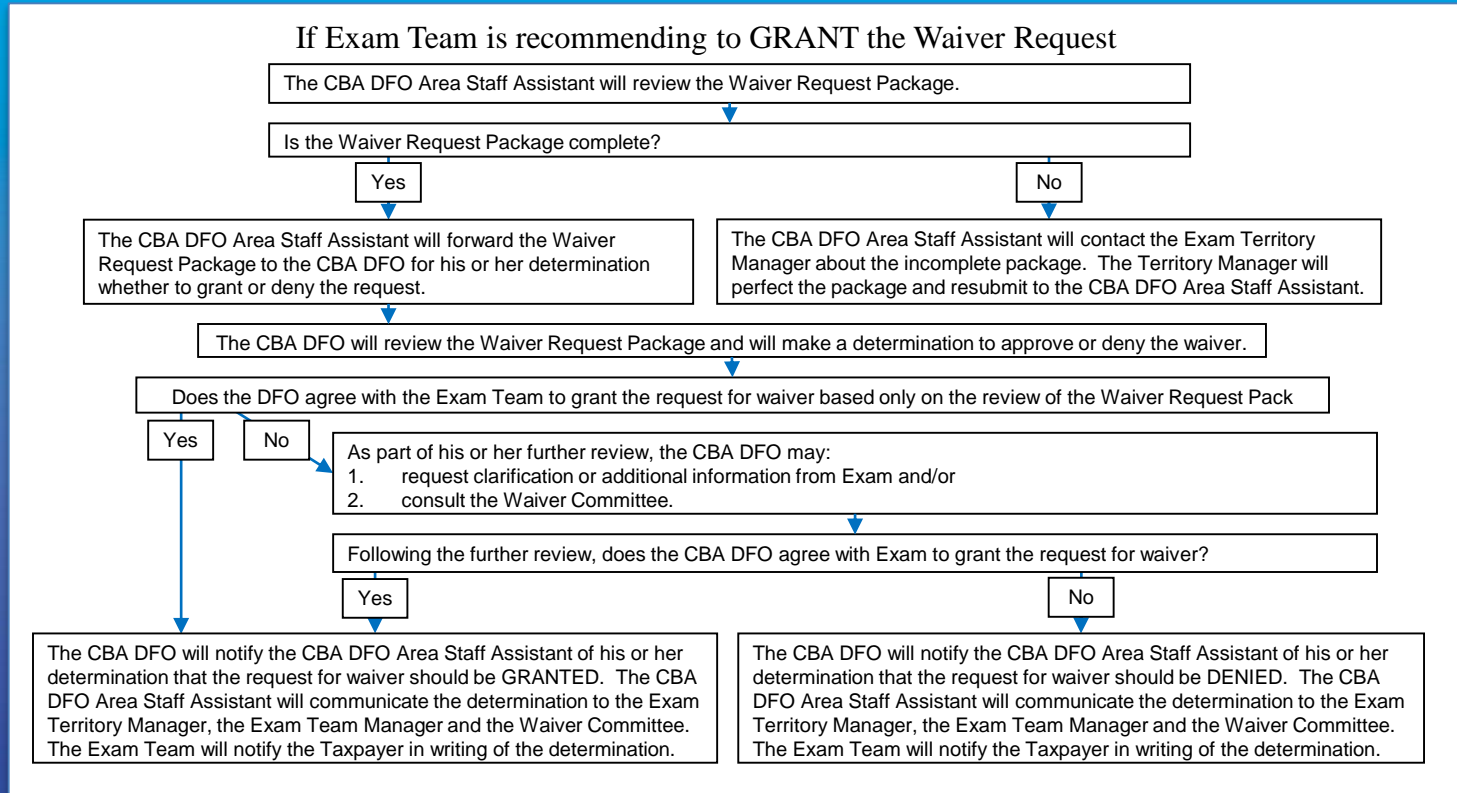
Flowchart of the Waiver Process

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



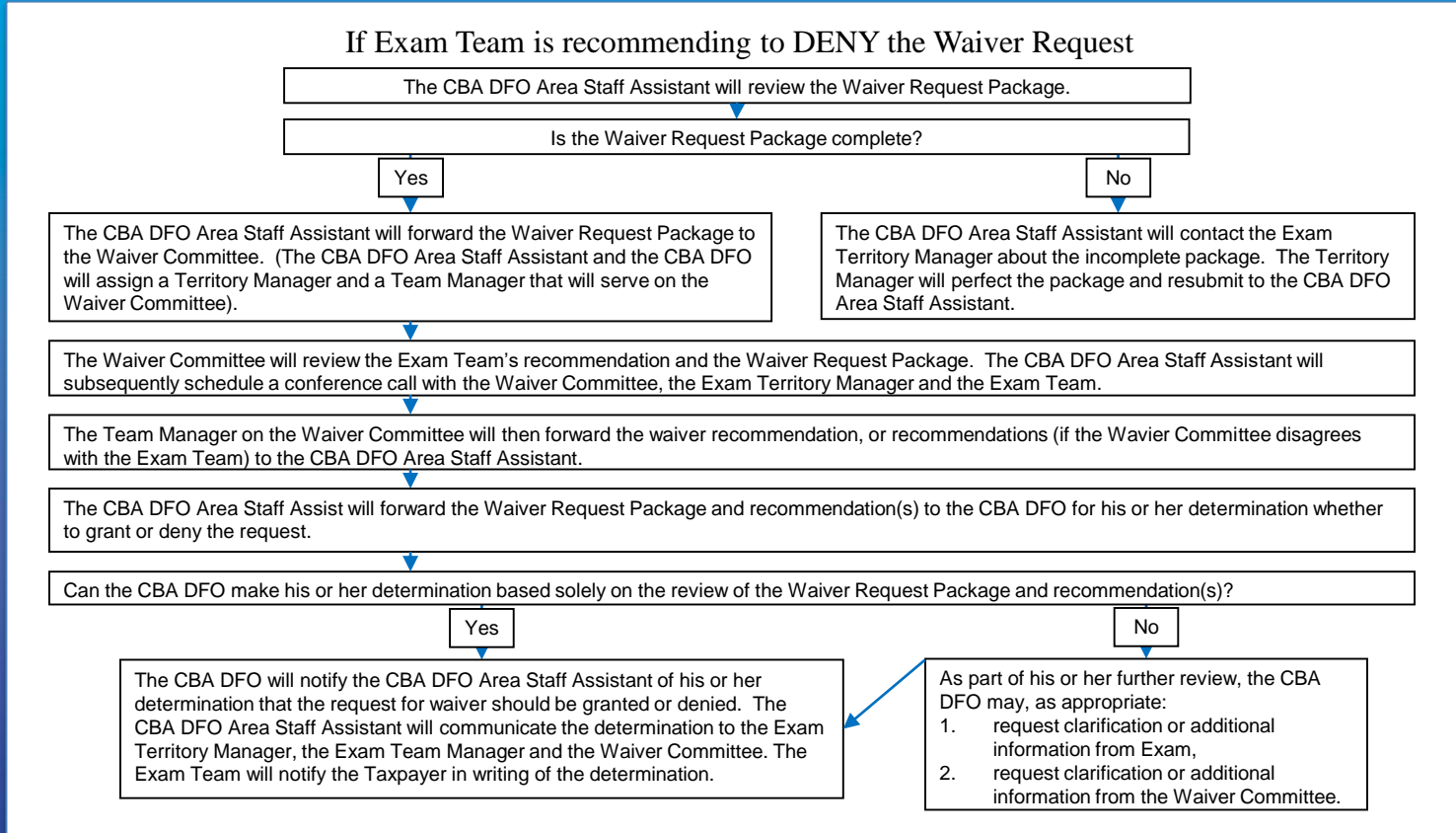


Waiver Process Implementation (cont.)





Waiver Process Implementation (cont.)





LB&I Campaigns

Campaigns

On January 31, 2017, the Internal Revenue Service announced the initial rollout of the Large Business and International (LB&I) compliance campaigns in its efforts to move towards issue-based examinations.

- 1120-F Delinquent Returns Campaign
- Form 1120-F Non-Filer Campaign

<https://www.irs.gov/businesses/full-list-of-lb-large-business-and-international-campaigns>



Exhibit: Form 1120-F (pg. 1 items)

Form 1120-F Department of the Treasury Internal Revenue Service	U.S. Income Tax Return of a Foreign Corporation		OMB No. 1545-0123
	For calendar year 2018, or tax year beginning _____, 2018, and ending _____, 20____		2018
▶ Go to www.irs.gov/Form1120F for instructions and the latest information.			
Type or Print	Name	Employer identification number	
	Number, street, and room or suite no. (see instructions)	Check box(es) if: <input type="checkbox"/> Initial return	
	City or town, state or province, country, and ZIP or foreign postal code	<input type="checkbox"/> Name or address change <input type="checkbox"/> Final return	
		<input type="checkbox"/> First post-merger return <input type="checkbox"/> Amended return	
		<input type="checkbox"/> Schedule M-3 attached <input checked="" type="checkbox"/> Protective return	

1	Tax from Section I, line 11, page 3	1				
2	Tax from Section II, Schedule J, line 9, page 5	2				
3	Tax from Section III (add lines 6 and 10 on page 6)	3				
4	Total tax. Add lines 1 through 3				4	
5a	2017 overpayment credited to 2018	5a				
b	2018 estimated tax payments	5b				



Exhibit: Form 1120-F (pg. 3 Sec. I)

SECTION I – Income From U.S. Sources Not Effectively Connected With the Conduct of a Trade or Business in the United States – Do not report items properly withheld and reported on Form 1042-S. See instructions.

Report all gross transportation income subject to 4% tax on line 9. Report other column (a) income items only if not properly withheld and reported on Form 1042-S. The rate of tax on these **gross** income items is 30% or such lower rate specified by tax treaty. No deductions are allowed against these types of income. Enter treaty rates where applicable. **If the corporation is claiming a lower treaty rate, also complete item W on page 2.** If multiple treaty rates apply to a type of income (for example, subsidiary and portfolio dividends or dividends received by disregarded entities), attach a statement showing the amounts, tax rates, and withholding for each.

Name of treaty country, if any ▶

	(a) Class of income (see instructions)	(b) Gross amount	(c) Rate of tax (%)	(d) Amount of tax liability	(e) Amount of U.S. income tax paid or withheld at the source
1	Interest				
2a	Dividends (excluding payments received by QDDs in their equity derivatives dealer capacity)				
2b	Dividend equivalents (excluding payments received by QDDs in their equity derivatives dealer capacity)				
3	Rents				
4	Royalties				
5	Annuities				
6	Gains from disposal of timber, coal, or domestic iron ore with a retained economic interest (attach supporting statement)				
7	Gains from sale or exchange of patents, copyrights, etc.				
8	Fiduciary distributions (attach supporting statement)				
9	Gross transportation income (see instructions)		4		
10	Other items of income				

11	Total. Enter here and on line 1, page 1 ▶				
12	Total. Enter here and include on line 5i, page 1 ▶				

13 Is the corporation fiscally transparent under the laws of the foreign jurisdiction with respect to any item of income listed above? Yes No
If "Yes," attach a statement that provides the information requested above with respect to each such item of income.



Exhibit: Form 1120-F (pg. 4 Sec. II)

Form 1120-F (2018)

Page 4

SECTION II—Income Effectively Connected With the Conduct of a Trade or Business in the United States (see instructions)

Important: Fill in all applicable lines and schedules. If you need more space, see Assembling the Return in the instructions.

	1a	Gross receipts or sales		b	Less returns and allowances		c	Bal ▶	1c			
Income	2	Cost of goods sold (attach Form 1125-A)							2			
	3	Gross profit (subtract line 2 from line 1c)							3			
	4	Dividends (Schedule C, line 13)							4			
	5	Interest							5			
	6	Gross rents							6			
	7	Gross royalties							7			
	8	Capital gain net income (attach Schedule D (Form 1120))							8			
	9	Net gain or (loss) from Form 4797, Part II, line 17 (attach Form 4797)							9			
	10	Other income (see instructions—attach statement)							10			
	11	Total income. Add lines 3 through 10							▶	11		
	Deductions (See instructions for limitations on deductions.)	12	Compensation of officers (see instructions—attach Form 1125-E)							12		
13		Salaries and wages (less employment credits)							13			
14		Repairs and maintenance							14			
15		Bad debts (for bad debts over \$500,000, attach a list of debtors and amounts)							15			
16		Rents							16			
17		Taxes and licenses							17			
18		Interest expense from Schedule I, line 25 (see instructions)							18			
19		Charitable contributions							19			
20		Depreciation from Form 4562 not claimed on Form 1125-A or elsewhere on return (attach Form 4562)							20			
21		Depletion							21			
22		Advertising							22			
23		Pension, profit-sharing, etc., plans							23			
24		Employee benefit programs							24			
25		Reserved for future use							25			
26		Deductions allocated and apportioned to ECI from Schedule H, line 20 (see instructions)							26			
27		Other deductions (attach statement)							27			
28		Total deductions. Add lines 12 through 27							▶	28		
29		Taxable income before NOL deduction and special deductions (subtract line 28 from line 11)							▶	29		
Less:		30a	Net operating loss deduction (see instructions)							30a		
	30b	Special deductions (Schedule C, line 14)							30b			
	30c	Add lines 30a and 30b							30c			
31	Taxable income or (loss). Subtract line 30c from line 29								31			



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Questions?