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**PROPOSAL FOR CLARIFICATION REGARDING
THE EXTENDED DUE DATE TO FILE FORM 3520
FOR DUAL RESIDENTS TAKING A TREATY POSITION
AS NONRESIDENTS AND FILING FORM 1040NR**

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EXECUTIVE SUMMARY

There is no clear extended due date to file Form 3520 (as defined below) by dual resident taxpayers who take the position as nonresidents under an income tax treaty entered by the United States and, thus, are required to file Form 1040NR (“**Dual Residents**”).

U.S. persons may be required to report certain events with respect to foreign trust and foreign gifts, by filing IRS Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts* (“**Form 3520**”). This reporting obligation may also be applicable to Dual Residents.

The Internal Revenue Code (“**IRC**”) provides that Form 3520 is due “at such time and in such manner as the Secretary shall prescribe”. The IRS has issued administrative guidance, including IRS Notice 97-34 and the Internal Revenue Manual (“**IRM**”), stating that the due date for filing Form 3520 is the same due date than the taxpayer’s income tax return, including extensions.

The extended due date for a U.S. person is October 15. Generally, the extended due date for a nonresident alien, including a Dual Resident, is December 15.

The instructions to Form 3520 (“**Instructions to Form 3520**”) provide that the extended due date for filing Form 3520 is October 15. Notwithstanding, the Instructions to Form 3520 do not expressly address the extended due date for Dual Residents.

The authors have seen confusion among taxpayers and tax return preparers with respect to the extended due date for filing Form 3520 by Dual Residents. The authors suggest that issuing administrative guidance, including but not limited to updating the Instructions to Form 3520, expressly addressing this issue would be in benefit of both taxpayers and the tax authority.

DISCUSSION

I. Due Date to File Form 3520

A. Requirement to File Form 3520

U.S. persons may be required to file Form 3520 (a) with respect to foreign trusts or (b) to report foreign gifts.

A U.S. person is required to file Form 3520 to report any “reportable event” with respect to a foreign trust.⁵ In general, a reportable event includes: (i) the creation of a foreign trust by a U.S. person, irrespective of whether the trust has U.S. beneficiaries; (ii) the transfer of money or property to a foreign trust by a U.S. person; and (iii) the death of a U.S. citizen or resident, if the foreign trust was treated as a grantor trust, in whole or in part with respect to the U.S. decedent, or if the trust was included in the U.S. decedent's gross estate, in whole or in part.

Similarly, a U.S. person that is treated as the owner of any portion of a foreign trust must annually file IRS Form 3520, irrespective of whether any reportable events occurred during the year.⁶

In addition, a U.S. person that receives “foreign gifts” in excess of certain amounts (*e.g.*, \$100,000 from foreign individuals, or \$17,339 from foreign corporations or foreign partnerships), shall disclose such gifts by filing Form 3520.⁷ For that purpose, a “foreign gift” means any amount received from a person other than a U.S. person which the recipient treats as a gift or bequest.⁸

B. Penalties for Failure to File Form 3520

The penalty for failure to file Form 3520 with respect to foreign trusts could be up to 35% of the gross reportable amount.⁹

In the case of reportable foreign gifts, failure to file Form 3520 “within the time prescribed therefore (including extensions)” derives in (a) the tax consequences of the receipt of such gift as determined by the IRS, and (b) a penalty equal to 5% of the amount of such foreign gift for each month for which the failure continues (not to exceed 25%).¹⁰

⁵ See, IRC Section 6048(a)(3)(A).

⁶ See, IRC Section 6048(b)(1).

⁷ See, IRC Section 6039F(a) and Rev. Proc. 2021-45 (§2.47).

⁸ See, IRC Section 6039F(b).

⁹ IRC Section 6677(b). The “gross reportable amount” in this context means, depending on the reportable event: (i) the gross value of the property involved in the event; (ii) the gross value of the portion of the trust’s assets treated as owned by the U.S. person; or (iii) the gross amount of the distributions. See, IRC Section 6677(c).

¹⁰ See, IRC Section 6039F(c).

C. Due Date for Form 3520

Form 3520 should be filed “at such time and in such manner as the Secretary shall prescribe.”¹¹

More specifically, IRC Section 6039F(a) provides the following:

“(a) In general.--If the value of the aggregate foreign gifts received by a United States person ... during any taxable year exceeds \$10,000, such United States person shall furnish (at such time and in such manner as the Secretary shall prescribe) such information as the Secretary may prescribe regarding each foreign gift received during such year.” (underlined added)

Similarly, IRC Section 6048(d)(3) reads as follows:

“(3) Time and manner of filing information.--Any notice or return required under this section shall be made at such time and in such manner as the Secretary shall prescribe.” (underlined added)

There are no regulations providing for the due date for filing Form 3520.

i. IRS Notice 97-34

IRC Section 6039F was enacted on August 20, 1996. On the same date, IRC Section 6048 was amended to include some of the requirements we have today with respect to foreign trusts.

On June 23, 1997, IRS Notice 97-34 was published providing that the due date to file Form 3520 was the due date (including extensions) of the taxpayer’s income tax return. IRS Notice 97-34 provides the following:

“Section VIII. Transition Rules

A. Filing dates

Generally, to avoid penalties under sections 1494(c), 6039F, or 6677, Form 3520 must be filed as an attachment to the taxpayer's income tax return by the due date (including extensions) of the taxpayer's income tax return. In addition, unless otherwise provided, a copy of Form 3520 must be sent to the Philadelphia Service Center by the same date.” (underlined added)

¹¹ See, IRC Sections 6039F(a) and 6048(d)(3).

ii. Internal Revenue Manual

The Internal Revenue Manual (“IRM”) states that an “extension (Form 4868) to file the U.S. taxpayer's annual tax return is also an extension for the filing of Form 3520.”¹²

More specifically, IRM Section 3.21.19.17 (01-01-2022) reads as follows:

“Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts

...

(5) An extension (Form 4868) to file the U.S. taxpayer's annual tax return is also an extension for the filing of Form 3520.”

iii. Instructions to Form 3520

On the other hand, the Instructions to Form 3520 provide the following:

“When and Where To File

*In general, a U.S. person's Form 3520 is due on the 15th day of the 4th month following the end of such person's tax year for income tax purposes, which, for individuals, is **April 15**. If, however, on the due date of your income tax return, you are a U.S. citizen or resident who qualifies for one of the following conditions, then your Form 3520 is due on the 15th day of the 6th month (**June 15**) following the end of your tax year for income tax purposes. You must include a statement on the Form 3520 showing that you are a U.S. citizen or resident who meets one of these conditions.*

- *You live outside of the United States and Puerto Rico and your place of business or post of duty is outside the United States and Puerto Rico.*
- *You are in the military or naval service on duty outside the United States and Puerto Rico.*

...

Note. *If a U.S. person is granted an extension of time to file an income tax return, the due date for filing Form 3520 is the 15th day*

¹² See, IRM 3.21.19.17 (01-01-2022).

of the 10th month (October 15) following the end of the U.S. person's tax year.” (underlined added)

According to the Instructions to Form 3520, the due date for Form 3520 is:

- a. **General Rule.** The 15th day of the 4th month following the end of the U.S. person's tax year (*i.e.*, April 15).
- b. **U.S. Persons outside of the U.S. and Puerto Rico.** The 15th day of the 6th month following the end of the U.S. person's tax year (*i.e.*, June 15). This includes U.S. persons (i) living, and with place or business or post, outside of the U.S. and Puerto Rico, and (ii) U.S. person in the military or naval service on duty outside the U.S. and Puerto Rico.
- c. **Extended Due Date.** The 15th day of the 10th month (October 15) if the U.S. person is granted an extension to file an income tax return.

The Instructions to Form 3520 only refer to “U.S. persons” and do not expressly address the due date for filing Form 3520 for a Dual Resident that, as explained below, could be extended until December 15.

iv. Surface Transportation and Veterans Health Care Choice Improvement Act of 2015

In 2015, legislation was approved asking for regulations modifying the due dates for certain tax and information returns. Notwithstanding, some of the changes have not been implemented and regulations have not been issued. Furthermore, the text of the statute itself is not well known among tax return preparers.

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (“**Public Law 114-41**”) was enacted on July 31, 2015. Among other items Public Law 114-41 provides as follows:

“SEC. 2006. TAX RETURN DUE DATES.

(b) MODIFICATION OF DUE DATES BY REGULATION.—In the case of returns for taxable years beginning after December 31, 2015, the Secretary of the Treasury, or the Secretary's designee, shall modify appropriate regulations to provide as follows:

...

(10) The due date of Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts, for calendar year filers shall be April 15 with a maximum extension for a 6-month period ending on October 15.”

Public Law 114-41 only refers to “calendar year filers” with a due date of April 15. In that case, the extended due date is October 15. Notwithstanding, Public Law 114-41 does not refer to Dual Residents with a due date of June 15. Furthermore, there is nothing in the legislative history suggesting that Congress intended Public Law 114-41 to apply to Dual Residents or any taxpayer other than U.S. persons with a regular filing due date of April 15.

In other words, for all taxpayers other than those expressly included in Public Law 114-41, the general authority granted by Congress under IRC Sections 6039F(a) and 6048(d)(3) should still apply.

II. Filing Obligations by Dual Residents

A. Definition Dual Resident

A “**Dual Resident**” is an individual who is deemed a resident of the U.S. pursuant to the internal laws of the U.S. and a resident of another treaty country pursuant to the internal laws of that country.¹³ Under certain circumstances, the general U.S. tax residency rules do not apply in the case of an individual who is considered a Dual Resident.¹⁴

A Dual Resident who determines his or her U.S. income tax liability as if such individual was a nonresident alien (“**NRA**”) should: (i) file a Form 1040NR, *U.S. Nonresident Alien Income Tax Return* (“**Form 1040NR**”), computing his or her income tax liability as a NRA; and (ii) attach IRS Form 8833, *Treaty-Based Position Disclosure Under Section 6114 or 7701(b)* (“**Form 8833**”).¹⁵

B. Information Returns by Dual Residents

Treasury Regulations clearly provide that, other than for the computation of individual’s tax liability, Dual Residents shall be treated a U.S. residents for all

¹³ See, Treas. Reg. Section 301.7701(b)-7(a)(1).

¹⁴ See, Treas. Reg. Section 301.7701(b)-7. When Congress enacted IRC Section 7701(b), it recognized that an individual who is treated as a resident alien under IRC Section 7701(b)(1)(A) may be treated as a nonresident alien under the so called “tie-breaker” rules of the income tax treaties to which the U.S. is a party.

¹⁵ See, IRC Section 6114(a) and Treas. Reg. Sections 301.7701-7(b) and (c).

purposes.¹⁶ This includes filing information returns, including Form 3520, unless an exception applies.¹⁷

C. Due Date of Tax Return

A nonresident alien is generally required to file Form 1040NR on the 15th day of the sixth month after the close of the taxable year (*i.e.*, June 15).¹⁸ Furthermore, a nonresident alien could be granted a 6-month automatic extension to file the tax return until December 15 by filing IRS Form 4868, *Application for Automatic Extension of Time to File U.S. Individual Income Tax Return*.¹⁹

The current regulations (the “**Current Regulations**”) provide that a Dual Resident who determines his U.S. tax liability as if he was a NRA shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a NRA, computing his tax liability as a NRA, and attaching Form 8833 to the Form 1040NR.²⁰

From a detailed review of the Current Regulations and its background, it should be clear that the intention of the Treasury when issuing the Current Regulations was to define the procedure (*e.g.*, the form and the due date) that a Dual Resident should follow to file a U.S. income tax return. Stated otherwise, the questions that the Current Regulations respond are (i) whether a Dual Resident should file Form 1040 (U.S. Individual Income Tax Return) or Form 1040NR, and (ii) whether the due date for the tax return should be April 15th or June 15th (with the applicable extensions).

i. Background of Current Regulations

a) 1987 Proposed Regulations: Form 1040 by April 15th

¹⁶ See, Treas. Reg. Section 301.7701(b)-7(a)(3).

¹⁷ See, for example, Treas. Reg. Section 1.6038D-2(e)(2) expressly providing that a Dual Resident who computes his tax liability as a NRA and files Form 1040NR (attaching Form 8833) is not required to file Form 8938, *Statement of Specified Foreign Financial Assets*.

¹⁸ See, IRC Section 6072(c). However, in certain circumstances an alien that had wages sourced in the U.S., may be required to file by April 15. See, IRC Section 6072(c); Treas. Reg. § 1.6072-1(c).

¹⁹ See, Treas. Reg. § 1.6081-4.

²⁰ See, Treas. Reg. Section 301.7701(b)-7(b). (“**Filing Requirements.** An alien individual described in paragraph (a) of this section [a Dual Resident] who determines his or her U.S. tax liability as if he or she were a nonresident alien shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident. The individual shall prepare a return and compute his or her tax liability as a nonresident alien. The individual shall attach a statement (in the form required in paragraph (c) of this section) to the Form 1040NR. The Form 1040NR and the attached statement, shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. The filing of a Form 1040NR by an individual described in paragraph (a) of this section may affect the determination by the Immigration and Naturalization Service as to whether the individual qualifies to maintain a residency permit.”) (underlined added)

In 1987, the Treasury issued proposed regulations describing the procedure to claim treaty benefits by the Dual Residents (the “**1987 Proposed Regs.**”). In short, the 1987 Proposed Regs. provided that a Dual Resident had to file Form 1040 (attaching Form 1040NR) by the due date for filing a return as a resident (e.g., April 15th). The actual wording of the Proposed Regs. was as follows:²¹

*“§ 301.7701(b)-7(b). **Filing Requirements.** An alien individual described in paragraph (a) of this section shall make a return on Form 1040 on or before the date prescribed by law (including extensions) for making an income tax return as a resident. Such individual shall prepare such return and compute his tax liability as a resident alien, without regard to any treaty benefit to which he may be entitled. If the individual has any item of income for the taxable year covered by a treaty with respect to which the individual is claiming a treaty benefit to reduce his United States liability, he shall attach Form 1040NR to his return. Such individual shall complete Form 1040 and compute his tax liability as a nonresident alien. He shall indicate on Form 1040NR (or on a statement attached thereto) any item of income for which he is claiming a treaty benefit. The full return, consisting of Form 1040 and Form 1040NR (with any attached statements), shall be filed with the Internal Revenue Service Center with which Form 1040 of such individual is required to be filed.” (underlined added)*

Stated otherwise, the 1987 Proposed Regs. treated a Dual Resident as a U.S. resident for purposes of determining his formal filing obligations, including the due date and form required to be filed for his tax return (i.e., Form 1040).

b) *Current Regulations: Form 1040NR by June 15th*

In 1992, the Treasury issued final regulations (which are the “**Current Regulations**”) providing that a Dual Resident only has to file Form 1040NR attaching Form 8833. Also, consistent with the requirement to file a tax return as a NRA, the Current Regulations state that the due date for filing the tax return should be the due date for filing a tax return as a NRA (e.g., June 15th).²² The Current Regulations read as follows:²³

*“§ 301.7701(b)-7(b). **Filing Requirements.** An alien individual described in paragraph (a) of this section who determines his or*

²¹ See, Notice of Proposed Rulemaking, September 10, 1987, 52 FR 34320-02, 1987-2 C.B. 946.

²² The explanation provided by the Treasury for this change was “In response to several comments, the filing requirements of paragraph (b) have been amended. Paragraph (b) now provides that an alien individual described in paragraph (a) must file his or her United States income tax return as a nonresident alien on Form 1040NR on or before the date prescribed by law (including extensions). As part of that return, the alien individual must attach a statement (in the form required by paragraph (c)) to the Form 1040NR. ...” See T.D. 8411, April 27, 1992.

²³ See, T.D. 8411, April 27, 1992.

her U.S. tax liability as if he or she were a nonresident alien shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident. The individual shall prepare a return and compute his or her tax liability as a nonresident alien. The individual shall attach a statement (in the form required in paragraph (c) of this section) to the Form 1040NR. The Form 1040NR and the attached statement, shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. The filing of a Form 1040NR by an individual described in paragraph (a) of this section may affect the determination by the Immigration and Naturalization Service as to whether the individual qualifies to maintain a residency permit.” (underlined added)

In other words, the Current Regulations provided a simplified method of filing returns, which provides for homogenous due dates for filing returns, which is in benefit of the administration of tax and informational returns.

III. Request for Clarification

In order to provide certainty to taxpayers and tax return preparers, the Treasury and/or IRS could clarify that the extended due date for filing Form 3520 by Dual Residents is (a) October 15 or (b) December 15. For that purpose, the clarification could be made through (i) the Instructions to Form 3520 or (ii) Treasury Regulations.

A. Update Instructions to Form 3520 Providing that the Extended Due Date for Dual Residents is December 15

This alternative would require updating the Instructions to Form 3520 to reflect that the extended due date for Dual Residents is December 15. For example, Instructions to Form 3520 could read as follows:

“Note. If a U.S. person is granted an extension of time to file an income tax return, the due date for filing Form 3520 is the 15th day of the 10th month (October 15) following the end of the U.S. person’s tax year. If a dual resident taxpayer whose regular due date for filing an income tax return is June 15 and is granted an extension of time to file an income tax return, the due date for filing Form 3520 is the 15th day of the 12th month (December 15) following the end of the dual resident’s tax year.” (underlined added)

The authors consider that Treasury and the IRS have sufficient authority under IRC Sections 6039F and 6048(d)(3) to impose the extended due date for filing Form 3520 by Dual Residents.

Having the same due date for Form 3520 as the Dual Resident's income tax return would be consistent with the treatment provided to other taxpayers who are not Dual Residents. This proposed change will help the IRS and taxpayers to avoid confusion by having the same extended due dates for returns relating to the same taxable year.

B. Issue Regulations Providing that the Extended Due Date for Dual Residents is December 15

In addition, it would provide more certainty to issue Treasury Regulations clarifying that the extended due date for Dual Residents is December 15.

C. Issue Regulations Providing that the Extended Due Date for All Taxpayers, including Dual Residents, is October 15

The authors consider that in case that it is determined that the extended due date for Dual Residents filing Form 3520 should also be October 15, this should be clarified via Treasury Regulations, to avoid potential conflicting authority. For example, even if the instructions are updated to reflect that the extended due date for Dual Residents is October 15, it could be considered that the regulations contradict IRS Notice 97-34, which provides that the due date is the same due date that the taxpayer's income tax return. Thus, it would be preferable to have Treasury Regulations on point.

D. Update Instructions to Form 3520 Providing that the Extended Due Date for All Taxpayers, including Dual Residents, is October 15

Lastly, if the Treasury and/or IRS determination is that the extended due date for filing Form 3520 Dual Resident should be October 15, at the very least a statement should be included in the Instructions to Form 3520. This would provide more certainty to Taxpayers and tax return preparers, avoiding different interpretations and surprises in the application of law.

For example, the Instructions to Form 3520 could be updated as follows:

*“**Note.** If a U.S. person (including dual resident taxpayers whose income tax return due date may be June 15) is granted an extension of time to file an income tax return, the due date for filing Form 3520 is the 15th day of the 10th month (October 15) following the end of the U.S. person's tax year.” (underlined added)*

This should be accompanied with a statement emphasizing the clarification made, in order to call for the attention of the tax return preparers.

IV. Conclusion

Dual Residents currently do not have certainty as to the due date to file Form 3520 when they are granted an extension to file IRS Forms 1040NR. IRS internal policy, including IRS Notice 97-35 and the IRM, seem to indicate that the due date to file Form 3520 is the same as the due date to file taxpayer's income tax return which, in the case of Dual Residents, generally is December 15. The Instructions to Form 3520 do not expressly address the extended due date for Dual Residents.

Public Law 114-41 is not widely known among tax return preparers. Furthermore, Public Law 114-41 requires the issuance of regulations and does not by itself establish a mandate for taxpayers. Lastly, Public Law 114-41 does not specifically address the due date for Dual Residents, but refers only to calendar year taxpayers, while authorizing a 6-month extension.

It would be in the benefit of the tax administration to have consistent due dates for all the applicable tax and information returns for a single taxpayer for the same tax year. IRC Sections 6039F and 6048(d) grant enough authority to the Secretary of the Treasury to issue guidance providing for the extended due date for filing Form 3520 by Dual Residents.

In any case, the issuance of guidance (either in the form of regulations or updated Instructions to Form 3520) expressly addressing the extended due date for Dual Residents would give certainty to taxpayers and their tax return preparers.