

(2) The cost to the reporting corporation of any property acquired in such transaction from the related party or transferred by such corporation in such transaction to the related party, may be determined by the District Director.

(b) *Determination of the amount.* The amount of the deduction or the cost to the reporting corporation shall be the amount determined by the District Director (in the District Director's sole discretion) from the District Director's own knowledge or from such information as the District Director may choose to obtain through testimony or otherwise. The District Director shall consider any information or materials that have been submitted by the reporting corporation or a foreign related party. The District Director, however, may disregard any information, documents, or records submitted by the reporting corporation or the related party if (in the District Director's sole discretion) the District Director deems that they are insufficiently probative of the relevant facts.

(c) *Separate application.* If the non-compliance penalty of this section applies with respect to transactions with a related party of the reporting corporation, it will not be applied with respect to any other related parties of the reporting corporation solely upon the basis of that failure. Thus, for example, if a reporting corporation engages in transactions with related party A and related party B, and the reporting corporation does not respond to a summons for records related to the transactions between the reporting corporation and related party A, the noncompliance penalty imposed as a result of such failure will not apply to the transactions between the reporting corporation and related party B. If a separate summons is issued for records relating to the transactions between the reporting corporation and related party B and the reporting corporation does not produce such records, the non-compliance penalty may be applied to those transactions.

(d) *Effective dates.* For effective dates for this section, see §1.6038A-1(n).

[T.D. 8353, 56 FR 28075, June 19, 1991]

§ 1.6038B-1 Reporting of certain transfers to foreign corporations.

(a) *Purpose and scope.* This section sets forth information reporting requirements under section 6038B concerning certain transfers of property to foreign corporations. Paragraph (b) of this section provides general rules explaining when and how to carry out the reporting required under section 6038B with respect to the transfers to foreign corporations. Paragraph (c) of this section and §1.6038B-1T(d) specify the information that is required to be reported with respect to certain transfers of property that are described in section 6038B(a)(1)(A) and 367(d), respectively. Section 1.6038B-1(e) describes the filing requirements for property transfers described in section 367(e). Paragraph (f) of this section sets forth the consequences of a failure to comply with the requirements of section 6038B and this section. For effective dates, see paragraph (g) of this section. For rules regarding transfers to foreign partnerships, see section 6038B(a)(1)(B) and any regulations thereunder.

(b) *Time and manner of reporting—(1) In general—(i) Reporting procedure.* Except for stock or securities qualifying under the special reporting rule of §1.6038B-1(b)(2), and certain exchanges described in section 354 or 356 (listed below), any U.S. person that makes a transfer described in section 6038B(a)(1)(A), 367(d) or (e), is required to report pursuant to section 6038B and the rules of §1.6038B-1 and must attach the required information to Form 926, "Return by a U.S. Transferor of Property to a Foreign Corporation." For special rules regarding cash transfers made in tax years beginning after February 5, 1999, see paragraphs (b)(3) and (g) of this section. For purposes of determining a U.S. transferor that is subject to section 6038B, the rules of §§1.367(a)-1T(c) and 1.367(a)-3(d) shall apply with respect to a transfer described in section 367(a), and the rules of §1.367(a)-1T(c) shall apply with respect to a transfer described in section 367(d). Additionally, if in an exchange described in section 354 or 356, a U.S. person exchanges stock or securities of a foreign corporation in a reorganization described in section 368(a)(1)(E), or

a U.S. person exchanges stock or securities of a domestic or foreign corporation pursuant to an asset reorganization described in section 368(a)(1) (involving a transfer of assets under section 361) that is not treated as an indirect stock transfer under § 1.367(a)-3(d), then the U.S. person exchanging stock or securities is not required to report under section 6038B. Notwithstanding any statement to the contrary on Form 926, the form and attachments must be attached to, and filed by the due date (including extensions) of the transferor's income tax return for the taxable year that includes the date of the transfer (as defined in § 1.6038B-1T(b)(4)). For taxable years beginning before January 1, 2003, any attachment to Form 926 required under the rules of this section is filed subject to the transferor's declaration under penalties of perjury on Form 926 that the information submitted is true, correct and complete to the best of the transferor's knowledge and belief. For taxable years beginning after December 31, 2002, Form 926 and any attachments shall be verified by signing the income tax return with which the form and attachments are filed.

(ii) *Reporting by corporate transferor.* For transfers by corporations in taxable years beginning before January 1, 2003, Form 926 must be signed by an authorized officer of the corporation if the transferor is not a member of an affiliated group under section 1504(a)(1) that files a consolidated Federal income tax return and by an authorized officer of the common parent corporation if the transferor is a member of such an affiliated group. For transfers by corporations in taxable years beginning after December 31, 2002, Form 926 shall be verified by signing the income tax return to which the form is attached.

(iii) *Transfers of jointly-owned property.* If two or more persons transfer jointly-owned property to a foreign corporation in a transfer with respect to which a notice is required under this section, then each person must report with respect to the particular interest transferred, specifying the nature and extent of the interest. However, a husband and wife who jointly file a single

Federal income tax return may file a single Form 926 with their tax return.

(2) *Exceptions and special rules for transfers of stock or securities under section 367(a)*—(i) *Transfers on or after July 20, 1998.* A U.S. person that transfers stock or securities on or after July 20, 1998 in a transaction described in section 6038B(a)(1)(A) will be considered to have satisfied the reporting requirement under section 6038B and paragraph (b)(1) of this section if either—

(A) The U.S. transferor owned less than 5 percent of both the total voting power and the total value of the transferee foreign corporation immediately after the transfer (taking into account the attribution rules of section 318 as modified by section 958(b)), and either:

(1) The U.S. transferor qualified for nonrecognition treatment with respect to the transfer (i.e., the transfer was not taxable under §§ 1.367(a)-3(b) or (c)); or

(2) The U.S. transferor is a tax-exempt entity and the income was not unrelated business income; or

(3) The transfer was taxable to the U.S. transferor under § 1.367(a)-3(c), and such person properly reported the income from the transfer on its timely-filed (including extensions) Federal income tax return for the taxable year that includes the date of the transfer; or

(4) The transfer is considered to be to a foreign corporation solely by reason of § 1.83-6(d)(1) and the fair market value of the property transferred did not exceed \$100,000; or

(B) The U.S. transferor owned 5 percent or more of the total voting power or the total value of the transferee foreign corporation immediately after the transfer (taking into account the attribution rules of section 318 as modified by section 958(b)) and either:

(1) The transferor (or one or more successors) properly entered into a gain recognition agreement under § 1.367(a)-8; or

(2) The transferor is a tax-exempt entity and the income was not unrelated business income; or

(3) The transferor properly reported the income from the transfer on its timely-filed (including extensions) Federal income tax return for the taxable

year that includes the date of the transfer; or

(4) The transfer is considered to be to a foreign corporation solely by reason of §1.83-6(d)(1) and the fair market value of the property transferred did not exceed \$100,000.

(ii) *Transfers before July 20, 1998.* With respect to transfers occurring after December 16, 1987, and prior to July 20, 1998, a U.S. transferor that transferred U.S. or foreign stock or securities in a transfer described in section 367(a) is not subject to section 6038B if such person is described in paragraph (b)(2)(i)(A) of this section.

(3) *Special rule for transfers of cash.* A U.S. person that transfers cash to a foreign corporation in a transfer described in section 6038B(a)(1)(A) must report the transfer if—

(i) Immediately after the transfer such person holds directly, indirectly, or by attribution (determined under the rules of section 318(a), as modified by section 6038(e)(2)) at least 10 percent of the total voting power or the total value of the foreign corporation; or

(ii) The amount of cash transferred by such person or any related person (determined under section 267(b)(1) through (3) and (10) through (12)) to such foreign corporation during the 12-month period ending on the date of the transfer exceeds \$100,000.

(4) [Reserved]. For further guidance, see §1.6038B-1T(b)(4).

(c) *Information required with respect to transfers described in section 6038B(a)(1)(A).* A United States person that transfers property to a foreign corporation in an exchange described in section 6038B(a)(1)(A) (including cash transferred in taxable years beginning after February 5, 1999, and other unappreciated property) must provide the following information, in paragraphs labeled to correspond with the number or letter set forth in this paragraph (c) and §1.6038B-1T(c)(1) through (5). If a particular item is not applicable to the subject transfer, the taxpayer must list its heading and state that it is not applicable. For special rules applicable to transfers of stock or securities, see paragraph (b)(2)(ii) of this section.

(1) through (5) [Reserved]. For further guidance, see §1.6038B-1T(c)(1) through (5).

(6) *Application of section 367(a)(5).* If the asset is transferred in an exchange described in section 361(a) or (b), a statement that the conditions set forth in the second sentence of section 367(a)(5) and any regulations under that section have been satisfied, and an explanation of any basis or other adjustments made pursuant to section 367(a)(5) and any regulations thereunder.

(d) [Reserved]. For further guidance, see §1.6038B-1T(d).

(e) *Transfers subject to section 367(e)—*

(1) *In general.* If a domestic corporation (distributing corporation) makes a distribution described in section 367(e)(1) or section 367(e)(2), the distributing corporation must comply with the reporting requirements of this paragraph (e). Unless otherwise provided in this section, a distributing corporation making a distribution described in sections 367(e)(1) or 367(e)(2) must file a Form 926, "Return by a U.S. Transferor of Property to a Foreign Corporation (under section 367)," as amended and modified by this section.

(2) *Reporting requirements for section 367(e)(1) distributions of domestic controlled corporations.* A domestic distributing corporation making a distribution of the stock or securities of a domestic corporation under section 355 is not required to file a Form 926, as described in paragraph (e)(1) of this section, and shall have no other reporting requirements under section 6038B.

(3) *Reporting requirements for section 367(e)(1) distributions of foreign controlled corporations.* If the distributing corporation makes a section 355 distribution of the stock or securities of a foreign controlled corporation to distributee shareholders who are not qualified U.S. persons, as defined in §1.367(e)-1(b)(1), then the distributing corporation shall complete Part 1 of the Form 926 and attach a signed copy of such form to its U.S. income tax return for the year of the distribution. The distributing corporation shall also attach to its U.S. income tax return for the year of distribution a statement signed under the penalties of perjury entitled, "Addendum to Form 926." The

addendum shall contain a brief description of the transaction, state the number of shares distributed to distributees who are not qualified U.S. persons (applying the rules contained in § 1.367(e)-1(d)), and state the basis and fair market value of the distributed stock or securities (including a list stating the amounts that were distributed to distributees who were not qualified U.S. persons and distributees who were qualified U.S. persons).

(4) *Reporting rules for section 367(e)(2) distributions by domestic liquidating corporations.* If the distributing corporation makes a distribution of property in complete liquidation under section 332 to a foreign distributee corporation that meets the stock ownership requirements of section 332(b) with respect to the stock of the distributing corporation, then the distributing corporation shall complete a Form 926 and attach a signed copy of such form to its U.S. income tax return for the year of the distribution. The property description contained in Part III of the Form 926 shall contain a description of all property distributed by the liquidating corporation (regardless of whether the property qualifies for nonrecognition). The description shall also identify the property excepted from gain recognition under § 1.367(e)-2(b)(2)(ii) and (iii). If the distributing corporation distributes property that will be used by the foreign distributee corporation in a U.S. trade or business and the distributing corporation does not recognize gain on such distribution under § 1.367(e)-2(b)(2)(i), then the distributing corporation may satisfy the requirements of this section by completing Part 1 of the Form 926, noting thereon that the information required by the Form 926 is contained in the statement required by § 1.367(e)-2(b)(2)(i)(C)(2), and attaching a signed copy of the Form 926 to its U.S. income tax return for the year of the distribution.

(f) *Failure to comply with reporting requirements—(1) Consequences of failure.* If a U.S. person is required to file a notice (or otherwise comply) under paragraph (b) of this section and fails to comply with the applicable requirements of section 6038B and this section, then with respect to the particular

property as to which there was a failure to comply—

(i) That property shall not be considered to have been transferred for use in the active conduct of a trade or business outside of the United States for purposes of section 367(a) and the regulations thereunder;

(ii) The U.S. person shall pay a penalty under section 6038B(b)(1) equal to 10 percent of the fair market value of the transferred property at the time of the exchange, but in no event shall the penalty exceed \$100,000 unless the failure with respect to such exchange was due to intentional disregard (described under paragraph (g)(4) of this section); and

(iii) The period of limitations on assessment of tax upon the transfer of that property does not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under this section. See section 6501(c)(8) and any regulations thereunder.

(2) *Failure to comply.* A failure to comply with the requirements of section 6038B is—

(i) The failure to report at the proper time and in the proper manner any material information required to be reported under the rules of this section; or

(ii) The provision of false or inaccurate information in purported compliance with the requirements of this section. Thus, a transferor that timely files Form 926 with the attachments required under the rules of this section shall, nevertheless, have failed to comply if, for example, the transferor reports therein that property will be used in the active conduct of a trade or business outside of the United States, but in fact the property continues to be used in a trade or business within the United States.

(3) *Reasonable cause exception.* The provisions of paragraph (f)(1) of this section shall not apply if the transferor shows that a failure to comply was due to reasonable cause and not willful neglect. The transferor may do so by providing a written statement to the district director having jurisdiction of the taxpayer's return for the year of the transfer, setting forth the reasons for

the failure to comply. Whether a failure to comply was due to reasonable cause shall be determined by the district director under all the facts and circumstances.

(4) *Definition of intentional disregard.* If the transferor fails to qualify for the exception under paragraph (f)(3) of this section and if the taxpayer knew of the rule or regulation that was disregarded, the failure will be considered an intentional disregard of section 6038B, and the monetary penalty under paragraph (f)(1)(ii) of this section will not be limited to \$100,000. See § 1.6662-3(b)(2).

(g) *Effective dates.* (1) This section applies to transfers occurring on or after July 20, 1998, except for transfers of cash made in tax years beginning on or before February 5, 1999 (which are not required to be reported under section 6038B), except for transfers described in paragraphs (g)(2) through (4) of this section, and except for transfers described in paragraph (e) of this section, which applies to transfers that are subject to §§ 1.367(e)-1(f) and 1.367(e)-2(e). See § 1.6038B-1T for transfers occurring prior to July 20, 1998. See also § 1.6038B-1T(e) in effect prior to August 9, 1999 (as contained in 26 CFR part 1 revised April 1, 1999), for transfers described in section 367(e) that are not subject to §§ 1.367(e)-1(f) and 1.367(e)-2(e).

(2) The rules of paragraph (b)(1)(i) of this section as they apply to section 368(a)(1)(A) reorganizations (including reorganizations described in section 368(a)(2)(D) or (E)) apply to transfers occurring on or after January 23, 2006.

(3) The rules of paragraph (b)(1)(i) of this section that provide an exception from reporting under section 6038B for transfers of stock or securities in a section 354 or 356 exchange, pursuant to a section 368(a)(1)(G) reorganization that is not treated as an indirect stock transfer under § 1.367(a)-3(d), apply to transfers occurring on or after January 23, 2006.

(4) The rules of paragraph (b)(1)(i) of this section that provide an exception from reporting under section 6038B for transfers of stock in a section 354 or 356 exchange, pursuant to a section 368(a)(1)(E) reorganization or an asset reorganization under section 368(a)(1) that is not treated as an indirect stock

transfer under § 1.367(a)-3(d), apply to transfers occurring on or after January 23, 2006. The rules of paragraph (b)(1)(i) of this section that provide an exception from reporting under section 6038B for transfers of securities in a section 354 or 356 exchange, pursuant to a section 368(a)(1)(E) reorganization or an asset reorganization under section 368(a)(1) that is not treated as an indirect stock transfer under § 1.367(a)-3(d), apply only to transfers occurring after January 5, 2005 (although taxpayers may apply such provision to transfers of securities occurring on or after July 20, 1998 and on or before January 5, 2005 if done consistently to all transactions). See § 1.6038B-1T(b)(i), as contained in 26 CFR part 1 revised as of April 1, 2005, for transfers occurring prior to the effective dates described in paragraphs (g)(2) through (4) of this section.

[T.D. 8770, 63 FR 33568, June 19, 1998, as amended by T.D. 8817, 64 FR 5715, Feb. 5, 1999; 64 FR 15686, 15687, Apr. 1, 1999; T.D. 8834, 64 FR 43082, Aug. 9, 1999; T.D. 8850, 64 FR 72553, Dec. 28, 1999; T.D. 9100, 68 FR 70708, Dec. 19, 2003; T.D. 9243, 71 FR 4293, Jan. 26, 2006; T.D. 9300, 71 FR 71045, Dec. 8, 2006]

§ 1.6038B-1T Reporting of certain transactions to foreign corporations (temporary).

(a) through (b)(3) [Reserved]. For further guidance, see § 1.6038B-1(a) through (b)(3).

(4) *Date of transfer*—(i) *In general.* For purposes of this section, the date of a transfer described in section 367 is the first date on which title to, possession of, or rights to the use of stock, securities, or other property passes pursuant to the plan for purposes of subtitle A of the Internal Revenue Code. A transfer will not be considered to begin with a decision of a board of directors or similar action unless the transaction otherwise takes effect for purposes of subtitle A of the Internal Revenue Code on that date.

(ii) *Termination of section 1504(d) election.* A transfer deemed to occur as a result of the termination of an election under section 1504(d) will be considered to occur on the date the contiguous country corporation first fails to continue to qualify for the election under