§ 1.6038A–5 Authorization of agent.

(a) Failure to authorize. The rules of § 1.6038A–7 shall apply to any transaction between a foreign related party and a reporting corporation (including any transaction engaged in by a partnership that is attributed to the reporting corporation under § 1.6038A–1(e)(2)), unless the foreign related party authorizes (in the manner described in paragraph (b) of this section) the reporting corporation to act as its agent solely for purposes of sections 7602, 7603, and 7604 with respect to any request to examine records or produce testimony that may be relevant to the tax treatment of any transaction between (name of the above-named foreign related party) and (name of reporting corporation) or with respect to any summons for such records or testimony.

Signature of or for (name of foreign related party)

(Title)

(Date)

(If signed by a corporate officer, partner, or fiduciary on behalf of a foreign related party: I certify that I have the authority to execute this authorization of agent to act on behalf of (name of foreign related party).)
(2) Authorization for prior years. A foreign related party shall authorize a reporting corporation to act as its agent with respect to taxable years for which a Form 5472 is required to be filed prior to the date on which the final regulations under section 6038A are published by providing the above executed authorization of agent within 30 days of a request by the Service for such an authorization.

(c) Foreign affiliated groups—(1) In general. A foreign corporation that has effective legal authority to make the authorization of agent under paragraph (b) of this section on behalf of any group of foreign related parties may execute such an authorization for any members of the group. A single authorization may be made on a consolidated basis. In such a case, the common parent must attach a schedule to the authorization of agent stating which members of the group would otherwise be required to separately authorize the reporting corporation as agent. The schedule must provide the name, address, relationship to the reporting corporation, and U.S. taxpayer identification number, if applicable, of each member.

(2) Application of noncompliance penalty adjustment. In circumstances where a consolidated authorization of agent has been executed, if the agency authorization for any member of the group is not legally effective for purposes of sections 7602, 7603, and 7604, the noncompliance penalty adjustment under section 6038A(e) and §1.6038A–7 shall apply.

(d) Legal effect of authorization of agent. The legal consequences of a foreign related party authorizing a reporting corporation to act as its agent for purposes of sections 7602, 7603, and 7604 of the Code are as follows.

(1) Agent for purposes of commencing judicial proceedings. A reporting corporation that is authorized by a foreign related party to act as its agent for purposes of sections 7602, 7603, and 7604 (including service of process) is also the agent of the foreign related party for purposes of—

(i) The filing of a petition to quash under section 6038A(e)(4)(A) or a petition to review an Internal Revenue Service determination of noncompliance under section 6038A(e)(4)(B), and

(ii) The commencement of a judicial proceeding to enforce a summons under section 7604, whether commenced in conjunction with a petition to quash under section 6038A(e)(4)(A) or commenced as a separate proceeding in the federal district court for the district in which the person to whom the summons is issued resides or is found.

(e) Successors in interest. A successor in interest to a related party must execute the authorization of agent as described in paragraph (b) of this section.

(f) Deemed compliance—(1) In general. In exceptional circumstances, the District Director may treat a reporting corporation as authorized to act as agent for a related party for purposes of sections 7602, 7603, and 7604 in the absence of an actual agency appointment by the foreign related party, in circumstances where the actual absence of an appointment is reasonable. Factors to be considered include—

(i) If neither the reporting corporation nor the other party to the transaction knew or had reason to know
that the two parties were related at
the time of the transaction, and
(ii) The extent to which the taxpayer
establishes to the satisfaction of the
District Director that all transactions
between the reporting corporation and
the related party were on arm’s length
terms and did not involve the participa-
tion of any known related party.

(2) Reason to know. Whether the re-
porting corporation or other party had
reason to know that the two parties
were related at the time of the trans-
action will be determined by all the
facts and circumstances.

(3) Effect of deemed compliance. If a re-
porting corporation is deemed under
this paragraph (f) to have been author-
ized to act as an agent for a foreign re-
lated party for purposes of sections
7602, 7603, and 7604, such deemed com-
pliance is applicable only for that par-
ticular transaction and other report-
able transactions entered into prior to
the time when the reporting corpora-
tion knew or had reason to know that
the related party, in fact, was related.
The noncompliance rule of §1.6038A–7
shall apply to any transaction subse-
quent to that time with the same re-
lated party, unless the related party
actually authorizes the reporting cor-
poration to act as its agent under para-
graph (a) of this section. In addition,
the record maintenance requirements
of §1.6038A–3 will apply to all subse-
quent transactions and, with respect to
prior transactions, will apply to rele-
vant records in existence at the time
the relationship was discovered.

(g) Effective dates. For effective dates
for this section, see §1.6038A–1(n).

§1.6038A–6 Failure to furnish informa-
tion.

(a) In general. The rules of §1.6038A–7
may be applied with respect to a trans-
action between a foreign related party
and the reporting corporation (includ-
ing any transaction engaged in by a
partnership that is attributed to the
reporting corporation under §1.6038A–
1(e)(2)) if a summons is issued to the re-
porting corporation to produce any
records or testimony, either directly or
as agent for such related party, to de-
terminate the correct treatment under
title 1 of the Code of such a transaction
between the reporting corporation and
the related party; and if—

(1)(i) The summons is not quashed in
a proceeding, if any, begun under sec-
tion 6038A(e)(4) and is not determined
to be invalid in a proceeding, if any,
begun under section 7604 to enforce
such summons; and

(ii) The reporting corporation does
not substantially and timely comply
with the summons, and the District Di-
rector has sent by certified or reg-
istered mail a notice under section
6038A(e)(2)(C) to the reporting corpo-
ration that it has not so complied; or

(2) The reporting corporation fails to
maintain or to cause another to main-
tain records as required by §1.6038A–3,
and by reason of that failure, the sum-
mons is quashed in a proceeding under
section 6038A(e)(4) or in a proceeding
begun under section 7604 to enforce
the summons, or the reporting corpo-
ration is not able to provide the records re-
quested in the summons.

(b) Coordination with treaties. Where
records of a related party are obtain-
able on a timely and efficient basis
under information exchange procedures
provided under a tax treaty or tax in-
formation exchange agreement (TIEA),
the Service generally will make use of
such procedures before issuing a sum-
mons. The absence or pendency of a
treaty or TIEA request may not be as-
serted as grounds for refusing to com-
ply with a summons or as a defense
against the assertion of the noncompli-
ance penalty adjustment under
§1.6038A–7. For purposes of this para-
graph, information is available on a
timely and efficient basis if it can be
obtained within 180 days of the request.

(c) Enforcement proceeding not re-
quired. The District Director is not re-
quired to begin an enforcement pro-
cedure to enforce the summons in
order to apply the rules of §1.6038A–7.

(d) De minimis failure. Where a report-
ing corporation’s failure to comply
with the requirement to furnish infor-
mation under this section is de minimis,
the District Director, in the exercise of
discretion, may choose not to apply the
noncompliance penalty. Thus, for ex-
ample, in cases where a particular doc-
ument or group of documents is not
furnished upon request or summons,