

## EFFECTIVE DATE OF 1982 AMENDMENT

Pub. L. 97-248, title III, §338(d), Sept. 3, 1982, 96 Stat. 631, provided that: "The amendments made by this section [amending this section] shall apply with respect to information for annual accounting periods ending after the date of the enactment of this Act [Sept. 3, 1982]."

## EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88-554 effective Aug. 31, 1964, except that for purposes of sections 302 and 304 of this title, such amendments shall not apply to distributions in payment for stock acquisitions or redemptions, if such acquisitions or redemptions occurred before Aug. 31, 1964, see section 4(c) of Pub. L. 88-554, set out as a note under section 318 of this title.

## EFFECTIVE DATE OF 1962 AMENDMENT

Pub. L. 87-834, §20(e)(1), Oct. 16, 1962, 76 Stat. 1063, provided that: "The amendments made by subsection (a) [amending this section] shall apply with respect to annual accounting periods of foreign corporations beginning after December 31, 1962."

## EFFECTIVE DATE

Pub. L. 86-780, §6(c), Sept. 14, 1960, 74 Stat. 1016, as amended by Pub. L. 99-514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: "The amendments made by subsection (a) [enacting this section and amending section 902 of this title] shall apply to taxable years of domestic corporations beginning after December 31, 1960, with respect to information relating to a foreign corporation or a foreign subsidiary described in section 6038(a) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] (as added by subsection (a)) for its annual accounting periods beginning after December 31, 1960."

### § 6038A. Information with respect to certain foreign-owned corporations

#### (a) Requirement

If, at any time during a taxable year, a corporation (hereinafter in this section referred to as the "reporting corporation")—

- (1) is a domestic corporation, and
- (2) is 25-percent foreign-owned,

such corporation shall furnish, at such time and in such manner as the Secretary shall by regulations prescribe, the information described in subsection (b) and such corporation shall maintain (in the location, in the manner, and to the extent prescribed in regulations) such records as may be appropriate to determine the correct treatment of transactions with related parties as the Secretary shall by regulations prescribe (or shall cause another person to so maintain such records).

#### (b) Required information

For purposes of subsection (a), the information described in this subsection is such information as the Secretary may prescribe by regulations relating to—

- (1) the name, principal place of business, nature of business, and country or countries in which organized or resident, of each person which—
  - (A) is a related party to the reporting corporation, and
  - (B) had any transaction with the reporting corporation during its taxable year,
- (2) the manner in which the reporting corporation is related to each person referred to in paragraph (1), and
- (3) transactions between the reporting corporation and each foreign person which is a related party to the reporting corporation.

#### (c) Definitions

For purposes of this section—

##### (1) 25-percent foreign-owned

A corporation is 25-percent foreign-owned if at least 25 percent of—

- (A) the total voting power of all classes of stock of such corporation entitled to vote, or
- (B) the total value of all classes of stock of such corporation,

is owned at any time during the taxable year by 1 foreign person (hereinafter in this section referred to as a "25-percent foreign shareholder").

##### (2) Related party

The term "related party" means—

- (A) any 25-percent foreign shareholder of the reporting corporation,
- (B) any person who is related (within the meaning of section 267(b) or 707(b)(1) to the reporting corporation or to a 25-percent foreign shareholder of the reporting corporation, and
- (C) any other person who is related (within the meaning of section 482) to the reporting corporation.

##### (3) Foreign person

The term "foreign person" means any person who is not a United States person. For purposes of the preceding sentence, the term "United States person" has the meaning given to such term by section 7701(a)(30), except that any individual who is a citizen of any possession of the United States (but not otherwise a citizen of the United States) and who is not a resident of the United States shall not be treated as a United States person.

##### (4) Records

The term "records" includes any books, papers, or other data.

##### (5) Section 318 to apply

Section 318 shall apply for purposes of paragraphs (1) and (2), except that—

- (A) "10 percent" shall be substituted for "50 percent" in section 318(a)(2)(C), and
- (B) subparagraphs (A), (B), and (C) of section 318(a)(3) shall not be applied so as to consider a United States person as owning stock which is owned by a person who is not a United States person.

#### (d) Penalty for failure to furnish information or maintain records

##### (1) In general

If a reporting corporation—

- (A) fails to furnish (within the time prescribed by regulations) any information described in subsection (b), or
- (B) fails to maintain (or cause another to maintain) records as required by subsection (a),

such corporation shall pay a penalty of \$10,000 for each taxable year with respect to which such failure occurs.

##### (2) Increase in penalty where failure continues after notification

If any failure described in paragraph (1) continues for more than 90 days after the day on

which the Secretary mails notice of such failure to the reporting corporation, such corporation shall pay a penalty (in addition to the amount required under paragraph (1)) of \$10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period.

**(3) Reasonable cause**

For purposes of this subsection, the time prescribed by regulations to furnish information or maintain records (and the beginning of the 90-day period after notice by the Secretary) shall be treated as not earlier than the last day on which (as shown to the satisfaction of the Secretary) reasonable cause existed for failure to furnish the information or maintain the records.

**(e) Enforcement of requests for certain records**

**(1) Agreement to treat corporation as agent**

The rules of paragraph (3) shall apply to any transaction between the reporting corporation and any related party who is a foreign person unless such related party agrees (in such manner and at such time as the Secretary shall prescribe) to authorize the reporting corporation to act as such related party's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to any request by the Secretary to examine records or produce testimony related to any such transaction or with respect to any summons by the Secretary for such records or testimony. The appearance of persons or production of records by reason of the reporting corporation being such an agent shall not subject such persons or records to legal process for any purpose other than determining the correct treatment under this title of any transaction between the reporting corporation and such related party.

**(2) Rules where information not furnished**

If—

(A) for purposes of determining the correct treatment under this title of any transaction between the reporting corporation and a related party who is a foreign person, the Secretary issues a summons to such corporation to produce (either directly or as agent for such related party) any records or testimony,

(B) such summons is not quashed in a proceeding begun under paragraph (4) and is not determined to be invalid in a proceeding begun under section 7604(b) to enforce such summons, and

(C) the reporting corporation does not substantially comply in a timely manner with such summons and the Secretary has sent by certified or registered mail a notice to such reporting corporation that such reporting corporation has not so substantially complied,

the Secretary may apply the rules of paragraph (3) with respect to such transaction (whether or not the Secretary begins a proceeding to enforce such summons). If the reporting corporation fails to maintain (or cause another to maintain) records as required by subsection (a), and by reason of that failure,

the summons is quashed in a proceeding described in subparagraph (B) or the reporting corporation is not able to provide the records requested in the summons, the Secretary may apply the rules of paragraph (3) with respect to any transaction to which the records relate.

**(3) Applicable rules in cases of noncompliance**

If the rules of this paragraph apply to any transaction—

(A) the amount of the deduction allowed under subtitle A for any amount paid or incurred by the reporting corporation to the related party in connection with such transaction, and

(B) 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),

shall be the amount determined by the Secretary in the Secretary's sole discretion from the Secretary's own knowledge or from such information as the Secretary may obtain through testimony or otherwise.

**(4) Judicial proceedings**

**(A) Proceedings to quash**

Notwithstanding any law or rule of law, any reporting corporation to which the Secretary issues a summons referred to in paragraph (2)(A) shall have the right to begin a proceeding to quash such summons not later than the 90th day after such summons was issued. In any such proceeding, the Secretary may seek to compel compliance with such summons.

**(B) Review of secretarial determination of noncompliance**

Notwithstanding any law or rule of law, any reporting corporation which has been notified by the Secretary that the Secretary has determined that such corporation has not substantially complied with a summons referred to in paragraph (2) shall have the right to begin a proceeding to review such determination not later than the 90th day after the day on which the notice referred to in paragraph (2)(C) was mailed. If such a proceeding is not begun on or before such 90th day, such determination by the Secretary shall be binding and shall not be reviewed by any court.

**(C) Jurisdiction**

The United States district court for the district in which the person (to whom the summons is issued) resides or is found shall have jurisdiction to hear any proceeding brought under subparagraph (A) or (B). Any order or other determination in such a proceeding shall be treated as a final order which may be appealed.

**(D) Suspension of statute of limitations**

If the reporting corporation brings an action under subparagraph (A) or (B), the running of any period of limitations under section 6501 (relating to assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to any

affected taxable year shall be suspended for the period during which such proceeding, and appeals therein, are pending. In no event shall any such period expire before the 90th day after the day on which there is a final determination in such proceeding. For purposes of this subparagraph, the term “affected taxable year” means any taxable year if the determination of the amount of tax imposed for such taxable year is affected by the treatment of the transaction to which the summons relates.

**(f) Cross reference**

**For provisions relating to criminal penalties for violation of this section, see section 7203.**

(Added Pub. L. 97-248, title III, § 339(a), Sept. 3, 1982, 96 Stat. 632; amended Pub. L. 97-448, title III, § 306(b)(4), Jan. 12, 1983, 96 Stat. 2406; Pub. L. 98-369, div. A, title VII, § 714(l), July 18, 1984, 98 Stat. 963; Pub. L. 99-514, title XII, § 1245(a), (b)(1)-(4), Oct. 22, 1986, 100 Stat. 2581; Pub. L. 101-239, title VII, § 7403(a)-(d), Dec. 19, 1989, 103 Stat. 2358, 2359; Pub. L. 101-508, title XI, §§ 11315(b)(1), 11704(a)(23), Nov. 5, 1990, 104 Stat. 1388-457, 1388-519; Pub. L. 104-188, title I, § 1702(c)(5), 1704(f)(5)(B), Aug. 20, 1996, 110 Stat. 1869, 1880.)

AMENDMENTS

1996—Subsec. (b)(2) to (4). Pub. L. 104-188, § 1704(f)(5)(B), inserted “and” at end of par. (2), substituted a period for “, and” at end of par. (3), and struck out par. (4) which read as follows: “such information as the Secretary may require for purposes of carrying out the provisions of section 453C.”

Subsec. (e)(4)(D). Pub. L. 104-188, § 1702(c)(5), substituted “any affected taxable year” for “any transaction to which the summons relates” and inserted at end “For purposes of this subparagraph, the term ‘affected taxable year’ means any taxable year if the determination of the amount of tax imposed for such taxable year is affected by the treatment of the transaction to which the summons relates.”

1990—Subsec. (a)(1). Pub. L. 101-508, § 11315(b)(1), struck out “or is a foreign corporation engaged in trade or business within the United States” after “corporation”.

Subsec. (c)(3) to (6). Pub. L. 101-508, § 11704(a)(23), redesignated pars. (4) to (6) as (3) to (5), respectively.

1989—Subsec. (a). Pub. L. 101-239, § 7403(b), inserted before period at end “and such corporation shall maintain (in the location, in the manner, and to the extent prescribed in regulations) such records as may be appropriate to determine the correct treatment of transactions with related parties as the Secretary shall by regulations prescribe (or shall cause another person to so maintain such records)”.

Subsec. (a)(2). Pub. L. 101-239, § 7403(a)(1), amended par. (2) generally, substituting “is 25-percent foreign-owned,” for “is controlled by a foreign person.”

Subsec. (c). Pub. L. 101-239, § 7403(a)(2), amended subsec. (c) generally, substituting pars. (1) to (6) for former pars. (1) to (3) defining “control”, “related party”, and “foreign person”.

Subsec. (d). Pub. L. 101-239, § 7403(c), inserted “or maintain records” after “information” in heading and amended text generally, making changes in substance and structure of pars. (1) to (3).

Subsecs. (e), (f). Pub. L. 101-239, § 7403(d), added subsec. (e) and redesignated former subsec. (e) as (f).

1986—Subsec. (b)(1). Pub. L. 99-514, § 1245(a), substituted “each person” for “each corporation” in introductory provisions and amended subpar. (A) generally, substituting “related party to the reporting corporation” for “member of the same controlled group as the reporting corporation”.

Subsec. (b)(2). Pub. L. 99-514, § 1245(b)(1), substituted “each person” for “each corporation”.

Subsec. (b)(3). Pub. L. 99-514, § 1245(b)(2), (3), amended par. (3) generally, substituting “foreign person which is a related party to the reporting corporation, and” for “foreign corporation which is a member of the same controlled group as the reporting corporation.”

Subsec. (b)(4). Pub. L. 99-514, § 1245(b)(3), added par. (4).

Subsec. (c)(2). Pub. L. 99-514, § 1245(b)(4), amended par. (2) generally. Prior to amendment, par. (2), controlled group, read as follows: “The term ‘controlled group’ means any controlled group of corporations within the meaning of section 1563(a); except that—

“(A) ‘at least 50 percent’ shall be substituted—

“(1) for ‘at least 80 percent’ each place it appears in section 1563(a)(1), and

“(ii) for ‘more than 50 percent’ each place it appears in section 1563(a)(2)(B), and

“(B) the determination shall be made without regard to subsections (a)(4), (b)(2)(C), and (e)(3)(C) of section 1563.”

1984—Subsec. (c)(1). Pub. L. 98-369 substituted section “6038(e)(1)” for “6038(d)(1)”.

1983—Subsec. (c)(2)(B). Pub. L. 97-448 inserted “, (b)(2)(C),” after “(a)(4)”.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 1702(c)(5) of Pub. L. 104-188 effective, except as otherwise expressly provided, as if included in the provision of the Revenue Reconciliation Act of 1990, Pub. L. 101-508, title XI, to which such amendment relates, see section 1702(i) of Pub. L. 104-188, set out as a note under section 38 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-508, title XI, § 11315(c), Nov. 5, 1990, 104 Stat. 1388-457, provided that: “The amendments made by this section [enacting section 6038C of this title and amending this section] shall apply to—

“(1) any requirement to furnish information under section 6038C(a) of the Internal Revenue Code of 1986 (as added by this section) if the time for furnishing such information under such section is after the date of the enactment of this Act [Nov. 5, 1990],

“(2) any requirement under such section 6038C(a) to maintain records which were in existence on or after March 20, 1990,

“(3) any requirement to authorize a corporation to act as a limited agent under section 6038C(d)(1) of such Code (as so added) if the time for authorizing such action is after the date of the enactment of this Act, and

“(4) any summons issued after such date of enactment, without regard to when the taxable year (to which the information, records, authorization, or summons relates) began.”

EFFECTIVE DATE OF 1989 AMENDMENT

Pub. L. 101-239, title VII, § 7403(e), Dec. 19, 1989, 103 Stat. 2361, provided that: “The amendments made by this section [amending this section] shall apply to taxable years beginning after July 10, 1989.”

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99-514, title XII, § 1245(c), Oct. 22, 1986, 100 Stat. 2581, provided that: “The amendments made by this section [amending this section and section 6038 of this title] shall apply to taxable years beginning after December 31, 1986.”

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 effective as if included in the provision of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, to which such amendment relates, see section 715 of Pub. L. 98-369, set out as a note under section 31 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97-448 effective as if included in the provisions of the Tax Equity and Fiscal Respon-

sibility Act of 1982, Pub. L. 97-248, to which such amendment relates, see section 311(d) of Pub. L. 97-448, set out as a note under section 31 of this title.

EFFECTIVE DATE

Pub. L. 97-248, title III, § 339(c), Sept. 3, 1982, 96 Stat. 633, provided that: “The amendments made by this section [enacting this section] shall apply to taxable years beginning after December 31, 1982.”

APPLICABILITY OF 1989 AMENDMENT

Pub. L. 101-508, title XI, § 11314, Nov. 5, 1990, 104 Stat. 1388-455, provided that:

“(a) GENERAL RULE.—The amendments made by section 7403 of the Revenue Reconciliation Act of 1989 [Pub. L. 101-239, amending this section] shall apply to—

“(1) any requirement to furnish information under section 6038A(a) of the Internal Revenue Code of 1986 (as amended by such section 7403) if the time for furnishing such information under such section is after the date of the enactment of this Act [Nov. 5, 1990],

“(2) any requirement under such section 6038A(a) to maintain records which were in existence on or after March 20, 1990,

“(3) any requirement to authorize a corporation to act as a limited agent under section 6038A(e)(1) of such Code (as so amended) if the time for authorizing such action is after the date of the enactment of this Act, and

“(4) any summons issued after such date of enactment,

without regard to when the taxable year (to which the information, records, authorization, or summons relates) began. Such amendments shall also apply in any case to which they would apply without regard to this section.

“(b) CONTINUATION OF OLD FAILURES.—In the case of any failure with respect to a taxable year beginning on or before July 10, 1989, which first occurs on or before the date of the enactment of this Act [Nov. 5, 1990] but which continues after such date of enactment, section 6038A(d)(2) of the Internal Revenue Code of 1986 (as amended by subsection (c) of such section 7403) shall apply for purposes of determining the amount of the penalty imposed for 30-day periods referred to in such section 6038A(d)(2) which begin after the date of the enactment of this Act.”

**§ 6038B. Notice of certain transfers to foreign persons**

**(a) In general**

Each United States person who—

(1) transfers property to—

(A) a foreign corporation in an exchange described in section 332, 351, 354, 355, 356, or 361, or

(B) a foreign partnership in a contribution described in section 721 or in any other contribution described in regulations prescribed by the Secretary, or

(2) makes a distribution described in section 336 to a person who is not a United States person,

shall furnish to the Secretary, at such time and in such manner as the Secretary shall by regulations prescribe, such information with respect to such exchange or distribution as the Secretary may require in such regulations.

**(b) Exceptions for certain transfers to foreign partnerships; special rule**

**(1) Exceptions**

Subsection (a)(1)(B) shall apply to a transfer by a United States person to a foreign partnership only if—

(A) the United States person holds (immediately after the transfer) directly or indirectly at least a 10-percent interest (as defined in section 6046A(d)) in the partnership, or

(B) the value of the property transferred (when added to the value of the property transferred by such person or any related person to such partnership or a related partnership during the 12-month period ending on the date of the transfer) exceeds \$100,000.

For purposes of the preceding sentence, the value of any transferred property is its fair market value at the time of its transfer.

**(2) Special rule**

If by reason of an adjustment under section 482 or otherwise, a contribution described in subsection (a)(1) is deemed to have been made, such contribution shall be treated for purposes of this section as having been made not earlier than the date specified by the Secretary.

**(c) Penalty for failure to furnish information**

**(1) In general**

If any United States person fails to furnish the information described in subsection (a) at the time and in the manner required by regulations, such person shall pay a penalty equal to 10 percent of the fair market value of the property at the time of the exchange (and, in the case of a contribution described in subsection (a)(1)(B), such person shall recognize gain as if the contributed property had been sold for such value at the time of such contribution).

**(2) Reasonable cause exception**

Paragraph (1) shall not apply to any failure if the United States person shows such failure is due to reasonable cause and not to willful neglect.

**(3) Limit on penalty**

The penalty under paragraph (1) with respect to any exchange shall not exceed \$100,000 unless the failure with respect to such exchange was due to intentional disregard.

(Added Pub. L. 98-369, div. A, title I, § 131(d)(1), July 18, 1984, 98 Stat. 664; amended Pub. L. 105-34, title XI, § 1144(a)-(c), Aug. 5, 1997, 111 Stat. 984, 985; Pub. L. 105-206, title VI, § 6011(g), July 22, 1998, 112 Stat. 818; Pub. L. 109-135, title IV, § 409(c), Dec. 21, 2005, 119 Stat. 2636.)

AMENDMENTS

2005—Subsec. (a)(1)(B). Pub. L. 109-135 inserted “or” at end.

1998—Subsec. (c). Pub. L. 105-206, § 6011(g), made technical amendment to directory language of Pub. L. 105-206, § 1144(c). See 1997 Amendment note below.

1997—Subsec. (a)(1). Pub. L. 105-34, § 1144(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: “transfers property to a foreign corporation in an exchange described in section 332, 351, 354, 355, 356, or 361, or”.

Subsec. (b). Pub. L. 105-34, § 1144(b), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 105-34, § 1144(c), as amended by Pub. L. 105-206, § 6011(g), substituted “equal to 10 percent of the fair market value of the property at the time of the exchange (and, in the case of a contribution described in subsection (a)(1)(B), such person shall rec-