

## Section 679.—Foreign Trusts Having One or More United States Beneficiaries

26 CFR 1.679–2: Trusts treated as having a U. S. beneficiary.

T. D. 8955

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

#### Foreign Trusts That Have U.S. Beneficiaries

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 679 of the Internal Revenue Code relating to transfers of property by U.S. persons to foreign trusts having one or more United States beneficiaries. The final regulations affect United States persons who transfer property to foreign trusts.

DATES: *Effective Date:* These regulations are effective July 20, 2001.

*Applicability Date:* For dates of applicability, see §1.679–7.

FOR FURTHER INFORMATION CONTACT: Willard W. Yates at (202) 622-3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

#### Background

On August 7, 2000, the IRS and Treasury published a notice of proposed rule-making (REG–209038–89, 2000–34 I.R.B. 191) in the **Federal Register** (65 FR 48185) inviting comments relating to the treatment of U.S. persons who transfer property to foreign trusts that have one or more U.S. beneficiaries. Comments responding to the notice of proposed rule-making were received and a public hearing was held on November 8, 2000. After consideration of all of the comments, the proposed regulations are adopted as revised by this Treasury decision. The revisions are discussed below.

#### Explanation of Provisions

*Comments Relating to §1.679–2: Trusts Treated as Having a U.S. Beneficiary*

##### A. Benefit to a U.S. Person

Under §1.679–2(a)(1) of the proposed regulations, a foreign trust that has received property from a U.S. transferor is treated as having a U.S. beneficiary unless during the taxable year of the U.S. transferor both of the following tests are satisfied: (i) no part of the income or corpus of the trust may be paid or accumulated to or for the benefit of, either directly or indirectly, a U.S. person; and (ii) if the trust is terminated at any time during the taxable year, no part of the income or corpus of the trust could be paid to or for the benefit of, either directly or indirectly, a U.S. person.

Section 1.679–2(a)(2)(i) of the proposed regulations provides that, for purposes of applying these tests, income or corpus is considered to be paid or accumulated to or for the benefit of a U.S. person during a taxable year of the U.S. transferor if during that year, directly or indirectly, income may be distributed to, or accumulated for the benefit of a U.S. person, or corpus may be distributed to, or held for the future benefit of, a U.S. person. This determination is made without

regard to whether income or corpus is actually distributed to a U.S. person during that year, and without regard to whether a U.S. person's interest in the trust income or corpus is contingent on a future event. The proposed regulations provide a narrow exception with respect to certain contingent beneficiaries whose interests in the trust are so remote as to be negligible.

One commenter suggests that §1.679-2(a)(2) of the proposed regulations (specifically, *Example 5* of §1.679-2(a)(2)(iii)) is overly broad. The commenter suggests that a foreign trust should not be treated as having a U.S. beneficiary where the trust's only asset consists of stock of a foreign corporation, the trust will terminate one year after the death of a U.S. transferor, whereupon distributions of corpus or income may be made to a U.S. person, and the trust receives no income from the corporation during the term of its existence. The commenter argues that because the foreign trust receives no income from the foreign corporation during the trust's existence, the U.S. person's status as a beneficiary provides the U.S. person with nothing of value and, therefore, the foreign trust should not be treated as having a U.S. beneficiary.

The commenter's argument overlooks the clear legislative intent underlying section 679 that a foreign trust will be treated as having a U.S. beneficiary even in situations where there exists only the possibility of distribution of income or corpus to or the accumulation of corpus for the benefit of a U.S. person. H.R. Rep. No. 658, 94th Cong., 1st Sess., at 210 (1975). The fact that a foreign trust holds an asset, such as the stock of a foreign corporation, that produces no income during the term of the trust's existence is of no import for purposes of determining whether the trust will be treated as having a U.S. beneficiary. The determining factor in such a situation is that the trust holds corpus for the future benefit of a U.S. person, regardless of whether the corpus consists of stock with respect to which no dividends have been paid or some other asset that produces no current income. Accordingly, the final regulations adopt the rule of the proposed regulations.

#### B. Records and Documents

Section 1.679-2(a)(4) of the proposed regulations provides that a trust may be treated as having a U.S. beneficiary by

reference, *inter alia*, to written and oral agreements and understandings not contained in the trust document, and to whether the terms of the trust instrument are actually or reasonably expected to be disregarded by the parties to the trust. A commenter states that this rule creates new and unclear rules for purposes of determining whether an arrangement constitutes a trust for Federal income tax purposes.

The determination as to whether an arrangement will be treated as a trust is made pursuant to the rules set forth in §301.7701-4 of the regulations. The regulations under section 679 address only the determination of whether a foreign trust will be treated as having a U.S. beneficiary. The final regulations are not intended to provide factors in addition to the rules of §301.7701-4 for purposes of determining whether an arrangement constitutes a trust for federal income tax purposes.

#### C. Trusts Acquiring a U.S. Beneficiary

The proposed regulations anticipate situations where the beneficiary of a foreign trust may change. Section 1.679-2(c)(1) of the proposed regulations provides that if a foreign trust is not treated as having a U.S. beneficiary (within the meaning of §1.679-2(a)) but subsequently is treated as having a U.S. beneficiary, the U.S. transferor is treated as having additional income in the first taxable year of the U.S. transferor in which the trust is treated as having a U.S. beneficiary. The amount of the additional income is equal to the trust's undistributed net income, as defined in section 665(a), at the end of the U.S. transferor's immediately preceding taxable year and is subject to the rules of section 668, providing for an interest charge on accumulation distributions from foreign trusts.

A commenter suggests that the rule treating the U.S. transferor as having additional income in the first year the foreign trust acquires the U.S. beneficiary exceeds the authority of section 679, noting that in most cases the transferor will not have received any income from the trust.

Section 1.679-2(c)(1) of the proposed regulations follows closely the legislative history underlying section 679 regarding the U.S. transferor's recognition of addi-

tional income. The legislative history provides that the amount of the additional income shall be the foreign trust's undistributed net income, *i.e.*, accumulated income that would be taxable to a beneficiary upon distribution, as of the close of the immediately preceding taxable year. H.R. Rep. No. 658, 94th Cong., 1st Sess., at 211, Fn. 13 (1975). In short, the legislative history provides that the U.S. transferor's additional income shall receive the same treatment as accumulation distributions to beneficiaries of a foreign trust. Accumulated income distributions to beneficiaries of foreign trusts are subject to the interest charge provided for in section 668. Accordingly, the provision for additional income in §1.679-2(c)(1) of the final regulations, as well as the application of the interest charge provided for in section 668, are necessary to carry out the legislative purpose of section 679. The rule of the proposed regulations is adopted by the final regulations without change.

#### Comments Relating to §1.679-3: Transfers

##### A. Indirect Transfers - Principal Purpose of Tax Avoidance

Section 1.679-3(a) of the proposed regulations broadly defines the term *transfer* as any direct, indirect, or constructive transfer by a U.S. person to a foreign trust. Section 1.679-3(c) of the proposed regulations provides rules for determining when there is an indirect transfer. Under §1.679-3(c)(1) of the proposed regulations, a transfer to a foreign trust by any person to whom a U.S. person transfers property (referred to as an intermediary) is treated as an indirect transfer by a U.S. person if the transfer is made pursuant to a plan one of the principal purposes of which is the avoidance of U.S. tax. Section 1.679-3(c)(2) of the proposed regulations deems a transfer to have been made pursuant to such a plan if certain conditions are present.

The deemed-principal-purpose test of §1.679-3(c)(2) of the proposed regulations is similar to the deemed-principal-purpose test in §1.643(h)-1(a) of the regulations, which concerns distributions from foreign trusts to U.S. persons through intermediaries, except that the presumption in the proposed regulations applies without regard to the period of time between

the transfer from the U.S. person to the intermediary and from the intermediary to the foreign trust. In contrast, the deemed-principal-purpose test of §1.643(h)-1(a)(2)(ii) applies only if property is distributed to the U.S. person during the period beginning 24 months before and ending 24 months after the intermediary's receipt of property from the foreign trust. A commenter suggests that a similar time limit should be provided in §1.679-3(c)(2) with respect to outbound transfers.

In the context of section 643(h), Treasury and the IRS weighed the potential for abuse in that area against the possible adverse effect that the deemed-principal-purpose test could have on legitimate transactions, and concluded that a time limitation in §1.643(h)-1(a)(2) was appropriate. However, Treasury and the IRS believe the potential for abuse is greater in the case of outbound transfers to foreign trusts than in the case of inbound trust distributions to U.S. beneficiaries. Congress enacted section 679 in order to prevent the tax-free accumulation of income earned by foreign trusts over long periods of time that provided foreign trusts with an unwarranted advantage over domestic trusts. H.R. Rep. No. 658, 94th Cong., 1st Sess., at 207 (1975). Providing for a time limitation to the application of §1.679-3(c) could allow for easy circumvention of Congress' purpose in enacting section 679. Treasury and the IRS recognize that some transfers that were not intended to avoid U.S. tax may come within the presumption in the absence of a specific time limit. However, under such circumstances §1.679-3(c)(2)(ii) provides taxpayers with a way to rebut the application of the deemed-principal-purpose test. Therefore, the final regulations do not include a time limitation to the application of §1.679-3(c)(2)(i).

#### *B. Indirect Transfers - Corporate Distributions*

One commenter asked about the application of the indirect transfer rules set forth in §1.679-3(c) of the proposed regulations to successive corporate distributions up a chain of wholly-owned corporations to an ultimate shareholder that is a foreign trust. The commenter expressed concern that, if one of the lower-tier corporations were a domestic corporation, §1.679-3(c) of the proposed regulations

could potentially treat the distributions as an indirect transfer from the domestic corporation to the foreign trust that would be subject to the general rule of §1.679-1.

Even if the distributions were characterized as an indirect transfer from a domestic corporation to a foreign trust under §1.679-3(c), the indirect transfer would generally be treated as a transfer for fair market value under the final sentence of §1.679-4(b)(1) and would therefore be excepted from the general rule of §1.679-1 pursuant to §1.679-4(a)(4). Therefore, no special rules have been added to the final regulations to address this situation.

#### *C. Transfers to Entities Owned by Foreign Trusts*

Section 1.679-3(f) of the proposed regulations provides specific rules regarding transfers by a U.S. person to an entity owned by a foreign trust if the U.S. person is related to the foreign trust. The transfer is treated as a transfer from the U.S. person to the foreign trust, followed by a transfer from the foreign trust to the entity owned by the foreign trust, unless the U.S. person demonstrates to the satisfaction of the Commissioner that the transfer to the entity is properly attributable to the U.S. person's ownership interest in the entity. A commenter noted potential conflicts with this rule and judicial doctrines concerning constructive corporate distributions.

Section 1.679-3(f) is not intended to override judicial doctrines concerning constructive corporate distributions. For example, if judicial doctrines would recharacterize a direct transfer of property by a domestic corporation to an entity owned by a foreign trust as a constructive dividend of the property to the domestic corporation's shareholder followed by a constructive transfer of the property by that shareholder to the foreign trust and a constructive contribution by the foreign trust to the entity owned by the foreign trust, then those judicial doctrines would apply (and §1.679-3(f) would not apply) to the transaction.

#### *Comments Relating to §1.679-4: Exceptions to General Rule - Transfers to Trusts Described in Section 501(c)(3)*

Section 1.679-4(a)(3) of the proposed regulations provides an exception to the

general rule of §1.679-1 for transfers to a foreign trust that has already received a ruling or determination letter from the IRS recognizing the trust's tax exempt status under section 501(c)(3), provided that the letter has been neither revoked nor modified. Commenters questioned the requirement that a foreign trust obtain a ruling or determination letter from the IRS recognizing the trust's tax exempt status under section 501(c)(3). They assert that the requirement may interfere with a U.S. person's ability to make contributions to a foreign charitable entity that may not be familiar with U.S. tax laws and may not have any reason to obtain a determination letter from the IRS. They suggest that the final regulations require only that the U.S. transferor disclose to the IRS, at such time and in such manner as the IRS may provide, that the transfer has been made and that the transferor believes the transferee is an organization described in section 501(c)(3).

In response to commenters' concerns, the final regulations eliminate the requirement that the foreign trust receive a ruling or determination letter from the IRS recognizing the trust's tax-exempt status under section 501(c)(3). The final regulations provide instead that the general rule of §1.679-1 does not apply to any transfer of property to a foreign trust that is described in section 501(c)(3). However, taxpayers should be aware that, under Notice 97-34 (1997-1 C.B. 422), the U.S. transferor has a reporting obligation on Form 3520 with respect to such a transfer, unless the foreign trust has received a ruling or determination letter from the IRS recognizing the trust's tax exempt status under section 501(c)(3). Moreover, if the IRS subsequently determines that the foreign trust is not described in section 501(c)(3), the exception will not apply for any taxable year of the U.S. transferor, and the U.S. transferor may be subject to interest and penalties, if applicable.

#### *Clarification Regarding Section 958*

The final regulations clarify the language of §1.958-1(b) of the proposed regulations with respect to persons who are treated as owners under sections 671 through 679 of any portion of a foreign trust that includes the stock of a foreign corporation.

## Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

## Drafting Information

The principal author of these final regulations is Willard W. Yates of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

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## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Section 1.679-1 also issued under 26 U.S.C. 643(a)(7) and 679(d).

Section 1.679-2 also issued under 26 U.S.C. 643(a)(7) and 679(d).

Section 1.679-3 also issued under 26 U.S.C. 643(a)(7) and 679(d).

Section 1.679-4 also issued under 26 U.S.C. 643(a)(7), 679(a)(3) and 679(d).

Section 1.679-5 also issued under 26 U.S.C. 643(a)(7) and 679(d).

Section 1.679-6 also issued under 26 U.S.C. 643(a)(7) and 679(d). \* \* \*

Par. 2. Sections 1.679-0, 1.679-1, 1.679-2, 1.679-3, 1.679-4, 1.679-5, 1.679-6, and 1.679-7 are added under the undesignated center heading “Grantors and Others Treated as Substantial Owners” to read as follows:

#### *§1.679-0 Outline of major topics.*

This section lists the major paragraphs contained in §§1.679-1 through 1.679-7 as follows:

#### *§1.679-1 U.S. transferor treated as owner of foreign trust.*

- (a) In general.
- (b) Interaction with sections 673 through 678.
- (c) Definitions.
  - (1) U.S. transferor.
  - (2) U.S. person.
  - (3) Foreign trust.
  - (4) Property.
  - (5) Related person.
  - (6) Obligation.
- (d) Examples.

#### *§1.679-2 Trusts treated as having a U.S. beneficiary.*

- (a) Existence of U.S. beneficiary.
  - (1) In general.
  - (2) Benefit to a U.S. person.
    - (i) In general.
    - (ii) Certain unexpected beneficiaries.
    - (iii) Examples.
  - (3) Changes in beneficiary’s status.
    - (i) In general.
    - (ii) Examples.
    - (4) General rules.
      - (i) Records and documents.
      - (ii) Additional factors.
      - (iii) Examples.
- (b) Indirect U.S. beneficiaries.
  - (1) Certain foreign entities.
  - (2) Other indirect beneficiaries.
  - (3) Examples.
- (c) Treatment of U.S. transferor upon foreign trust’s acquisition or loss of U.S. beneficiary.
  - (1) Trusts acquiring a U.S. beneficiary.
  - (2) Trusts ceasing to have a U.S. beneficiary.
  - (3) Examples.

#### *§1.679-3 Transfers.*

- (a) In general.
- (b) Transfers by certain trusts.

- (1) In general.
- (2) Example.
- (c) Indirect transfers.
  - (1) Principal purpose of tax avoidance.
  - (2) Principal purpose of tax avoidance deemed to exist.
  - (3) Effect of disregarding intermediary.
    - (i) In general.
    - (ii) Special rule.
    - (iii) Effect on intermediary.
  - (4) Related parties.
  - (5) Examples.
- (d) Constructive transfers.
  - (1) In general.
  - (2) Examples.
  - (e) Guarantee of trust obligations.
    - (1) In general.
    - (2) Amount transferred.
    - (3) Principal repayments.
    - (4) Guarantee.
    - (5) Examples.
  - (f) Transfers to entities owned by a foreign trust.
    - (1) General rule.
    - (2) Examples.

#### *§1.679-4 Exceptions to general rule.*

- (a) In general.
- (b) Transfers for fair market value.
  - (1) In general.
  - (2) Special rule.
    - (i) Transfers for partial consideration.
    - (ii) Example.
  - (c) Certain obligations not taken into account.
  - (d) Qualified obligations.
    - (1) In general.
    - (2) Additional loans.
    - (3) Obligations that cease to be qualified.
    - (4) Transfers resulting from failed qualified obligations.
    - (5) Renegotiated loans.
    - (6) Principal repayments.
    - (7) Examples.

#### *§1.679-5 Pre-immigration trusts.*

- (a) In general.
- (b) Special rules.
  - (1) Change in grantor trust status.
  - (2) Treatment of undistributed income.
- (c) Examples.

#### *§1.679-6 Outbound migrations of domestic trusts.*

- (a) In general.
- (b) Amount deemed transferred.

(c) Example.

*§1.679-7 Effective dates.*

(a) In general.

(b) Special rules.

*§1.679-1 U.S. transferor treated as owner of foreign trust.*

(a) *In general.* A U.S. transferor who transfers property to a foreign trust is treated as the owner of the portion of the trust attributable to the property transferred if there is a U.S. beneficiary of any portion of the trust, unless an exception in §1.679-4 applies to the transfer.

(b) *Interaction with sections 673 through 678.* The rules of this section apply without regard to whether the U.S. transferor retains any power or interest described in sections 673 through 677. If a U.S. transferor would be treated as the owner of a portion of a foreign trust pursuant to the rules of this section and another person would be treated as the owner of the same portion of the trust pursuant to section 678, then the U.S. transferor is treated as the owner and the other person is not treated as the owner.

(c) *Definitions.* The following definitions apply for purposes of this section and §§1.679-2 through 1.679-7:

(1) *U.S. transferor.* The term *U.S. transferor* means any U.S. person who makes a transfer (as defined in §1.679-3) of property to a foreign trust.

(2) *U.S. person.* The term *U.S. person* means a United States person as defined in section 7701(a)(30), a nonresident alien individual who elects under section 6013(g) to be treated as resident of the United States, and an individual who is a dual resident taxpayer within the meaning of §301.7701(b)-7(a) of this chapter.

(3) *Foreign trust.* Section 7701(a)(31)(B) defines the term *foreign trust*. See also §301.7701-7 of this chapter.

(4) *Property.* The term *property* means any property including cash.

(5) *Related person.* A person is a *related person* if, without regard to the transfer at issue, the person is—

(i) A grantor of any portion of the trust (within the meaning of §1.671-2(e)(1));

(ii) An owner of any portion of the trust under sections 671 through 679;

(iii) A beneficiary of the trust; or

(iv) A person who is related (within the meaning of section 643(i)(2)(B)) to any

grantor, owner or beneficiary of the trust.

(6) *Obligation.* The term *obligation* means any bond, note, debenture, certificate, bill receivable, account receivable, note receivable, open account, or other evidence of indebtedness, and, to the extent not previously described, any annuity contract.

(d) *Examples.* The following examples illustrate the rules of paragraph (a) of this section. In these examples, *A* is a resident alien, *B* is *A*'s son, who is a resident alien, *C* is *A*'s father, who is a resident alien, *D* is *A*'s uncle, who is a nonresident alien, and *FT* is a foreign trust. The examples are as follows:

*Example 1. Interaction with section 678.* *A* creates and funds *FT*. *FT* may provide for the education of *B* by paying for books, tuition, room and board. In addition, *C* has the power to vest the trust corpus or income in himself within the meaning of section 678(a)(1). Under paragraph (b) of this section, *A* is treated as the owner of the portion of *FT* attributable to the property transferred to *FT* by *A* and *C* is not treated as the owner thereof.

*Example 2. U.S. person treated as owner of a portion of FT.* *D* creates and funds *FT* for the benefit of *B*. *D* retains a power described in section 676 and §1.672(f)-3(a)(1). *A* transfers property to *FT*. Under sections 676 and 672(f), *D* is treated as the owner of the portion of *FT* attributable to the property transferred by *D*. Under paragraph (a) of this section, *A* is treated as the owner of the portion of *FT* attributable to the property transferred by *A*.

*§1.679-2 Trusts treated as having a U.S. beneficiary.*

(a) *Existence of U.S. beneficiary—(1) In general.* The determination of whether a foreign trust has a U.S. beneficiary is made on an annual basis. A foreign trust is treated as having a U.S. beneficiary unless during the taxable year of the U.S. transferor—

(i) No part of the income or corpus of the trust may be paid or accumulated to or for the benefit of, directly or indirectly, a U.S. person; and

(ii) If the trust is terminated at any time during the taxable year, no part of the income or corpus of the trust could be paid to or for the benefit of, directly or indirectly, a U.S. person.

(2) *Benefit to a U.S. person—(i) In general.* For purposes of paragraph (a)(1) of this section, income or corpus may be paid or accumulated to or for the benefit of a U.S. person during a taxable year of the U.S. transferor if during that year, directly or indirectly, income may be distributed to, or accumulated for the benefit

of, a U.S. person, or corpus may be distributed to, or held for the future benefit of, a U.S. person. This determination is made without regard to whether income or corpus is actually distributed to a U.S. person during that year, and without regard to whether a U.S. person's interest in the trust income or corpus is contingent on a future event.

(ii) *Certain unexpected beneficiaries.* Notwithstanding paragraph (a)(2)(i) of this section, for purposes of paragraph (a)(1) of this section, a person who is not named as a beneficiary and is not a member of a class of beneficiaries as defined under the trust instrument is not taken into consideration if the U.S. transferor demonstrates to the satisfaction of the Commissioner that the person's contingent interest in the trust is so remote as to be negligible. The preceding sentence does not apply with respect to persons to whom distributions could be made pursuant to a grant of discretion to the trustee or any other person. A class of beneficiaries generally does not include heirs who will benefit from the trust under the laws of intestate succession in the event that the named beneficiaries (or members of the named class) have all deceased (whether or not stated as a named class in the trust instrument).

(iii) *Examples.* The following examples illustrate the rules of paragraphs (a)(1) and (2) of this section. In these examples, *A* is a resident alien, *B* is *A*'s son, who is a resident alien, *C* is *A*'s daughter, who is a nonresident alien, and *FT* is a foreign trust. The examples are as follows:

*Example 1. Distribution of income to U.S. person.* *A* transfers property to *FT*. The trust instrument provides that all trust income is to be distributed currently to *B*. Under paragraph (a)(1) of this section, *FT* is treated as having a U.S. beneficiary.

*Example 2. Income accumulation for the benefit of a U.S. person.* In 2001, *A* transfers property to *FT*. The trust instrument provides that from 2001 through 2010, the trustee of *FT* may distribute trust income to *C* or may accumulate the trust income. The trust instrument further provides that in 2011, the trust will terminate and the trustee may distribute the trust assets to either or both of *B* and *C*, in the trustee's discretion. If the trust terminates unexpectedly prior to 2011, all trust assets must be distributed to *C*. Because it is possible that income may be accumulated in each year, and that the accumulated income ultimately may be distributed to *B*, a U.S. person, under paragraph (a)(1) of this section *FT* is treated as having a U.S. beneficiary during each of *A*'s tax years from 2001 through 2011. This result applies even though no U.S. person may receive dis-

distributions from the trust during the tax years 2001 through 2010.

*Example 3. Corpus held for the benefit of a U.S. person.* The facts are the same as in *Example 2*, except that from 2001 through 2011, all trust income must be distributed to *C*. In 2011, the trust will terminate and the trustee may distribute the trust corpus to either or both of *B* and *C*, in the trustee's discretion. If the trust terminates unexpectedly prior to 2011, all trust corpus must be distributed to *C*. Because during each of *A*'s tax years from 2001 through 2011 trust corpus is held for possible future distribution to *B*, a U.S. person, under paragraph (a)(1) of this section *FT* is treated as having a U.S. beneficiary during each of those years. This result applies even though no U.S. person may receive distributions from the trust during the tax years 2001 through 2010.

*Example 4. Distribution upon U.S. transferor's death.* *A* transfers property to *FT*. The trust instrument provides that all trust income must be distributed currently to *C* and, upon *A*'s death, the trust will terminate and the trustee may distribute the trust corpus to either or both of *B* and *C*. Because *B* may receive a distribution of corpus upon the termination of *FT*, and *FT* could terminate in any year, *FT* is treated as having a U.S. beneficiary in the year of the transfer and in subsequent years.

*Example 5. Distribution after U.S. transferor's death.* The facts are the same as in *Example 4*, except the trust instrument provides that the trust will not terminate until the year following *A*'s death. Upon termination, the trustee may distribute the trust assets to either or both of *B* and *C*, in the trustee's discretion. All trust assets are invested in the stock of *X*, a foreign corporation, and *X* makes no distributions to *FT*. Although no U.S. person may receive a distribution until the year after *A*'s death, and *FT* has no realized income during any year of its existence, during each year in which *A* is living corpus may be held for future distribution to *B*, a U.S. person. Thus, under paragraph (a)(1) of this section *FT* is treated as having a U.S. beneficiary during each of *A*'s tax years from 2001 through the year of *A*'s death.

*Example 6. Constructive benefit to U.S. person.* *A* transfers property to *FT*. The trust instrument provides that no income or corpus may be paid directly to a U.S. person. However, the trust instrument provides that trust corpus may be used to satisfy *B*'s legal obligations to a third party by making a payment directly to the third party. Under paragraphs (a)(1) and (2) of this section, *FT* is treated as having a U.S. beneficiary.

*Example 7. U.S. person with negligible contingent interest.* *A* transfers property to *FT*. The trust instrument provides that all income is to be distributed currently to *C*, and upon *C*'s death, all corpus is to be distributed to whomever of *C*'s three children is then living. All of *C*'s children are nonresident aliens. Under the laws of intestate succession that would apply to *FT*, if all of *C*'s children are deceased at the time of *C*'s death, the corpus would be distributed to *A*'s heirs. *A*'s living relatives at the time of the transfer consist solely of two brothers and two nieces, all of whom are nonresident aliens, and two first cousins, one of whom, *E*, is a U.S. citizen. Although it is possible under certain circumstances that *E* could receive a corpus distribution under the applicable laws of intestate succession, for

each year the trust is in existence *A* is able to demonstrate to the satisfaction of the Commissioner under paragraph (a)(2)(ii) of this section that *E*'s contingent interest in *FT* is so remote as to be negligible. Provided that paragraph (a)(4) of this section does not require a different result, *FT* is not treated as having a U.S. beneficiary.

*Example 8. U.S. person with non-negligible contingent interest.* *A* transfers property to *FT*. The trust instrument provides that all income is to be distributed currently to *D*, *A*'s uncle, who is a nonresident alien, and upon *A*'s death, the corpus is to be distributed to *D* if he is then living. Under the laws of intestate succession that would apply to *FT*, *B* and *C* would share equally in the trust corpus if *D* is not living at the time of *A*'s death. *A* is unable to demonstrate to the satisfaction of the Commissioner that *B*'s contingent interest in the trust is so remote as to be negligible. Under paragraph (a)(2)(ii) of this section, *FT* is treated as having a U.S. beneficiary as of the year of the transfer.

*Example 9. U.S. person as member of class of beneficiaries.* *A* transfers property to *FT*. The trust instrument provides that all income is to be distributed currently to *D*, *A*'s uncle, who is a nonresident alien, and upon *A*'s death, the corpus is to be distributed to *D* if he is then living. If *D* is not then living, the corpus is to be distributed to *D*'s descendants. *D*'s grandson, *E*, is a resident alien. Under paragraph (a)(2)(ii) of this section, *FT* is treated as having a U.S. beneficiary as of the year of the transfer.

*Example 10. Trustee's discretion in choosing beneficiaries.* *A* transfers property to *FT*. The trust instrument provides that the trustee may distribute income and corpus to, or accumulate income for the benefit of, any person who is pursuing the academic study of ancient Greek, in the trustee's discretion. Because it is possible that a U.S. person will receive distributions of income or corpus, or will have income accumulated for his benefit, *FT* is treated as having a U.S. beneficiary. This result applies even if, during a tax year, no distributions or accumulations are actually made to or for the benefit of a U.S. person. *A* may not invoke paragraph (a)(2)(ii) of this section because a U.S. person could benefit pursuant to a grant of discretion in the trust instrument.

*Example 11. Appointment of remainder beneficiary.* *A* transfers property to *FT*. The trust instrument provides that the trustee may distribute current income to *C*, or may accumulate income, and, upon termination of the trust, trust assets are to be distributed to *C*. However, the trust instrument further provides that *D*, *A*'s uncle, may appoint a different remainder beneficiary. Because it is possible that a U.S. person could be named as the remainder beneficiary, and because corpus could be held in each year for the future benefit of that U.S. person, *FT* is treated as having a U.S. beneficiary for each year.

*Example 12. Trust not treated as having a U.S. beneficiary.* *A* transfers property to *FT*. The trust instrument provides that the trustee may distribute income and corpus to, or accumulate income for the benefit of *C*. Upon termination of the trust, all income and corpus must be distributed to *C*. Assume that paragraph (a)(4) of this section is not applicable under the facts and circumstances and that *A* establishes to the satisfaction of the Commissioner under paragraph (a)(2)(ii) of this section that no U.S. persons are reasonably expected to benefit from the trust. Because no part of the income or corpus of the

trust may be paid or accumulated to or for the benefit of, either directly or indirectly, a U.S. person, and if the trust is terminated, no part of the income or corpus of the trust could be paid to or for the benefit of, either directly or indirectly, a U.S. person, *FT* is not treated as having a U.S. beneficiary.

*Example 13. U.S. beneficiary becomes non-U.S. person.* In 2001, *A* transfers property to *FT*. The trust instrument provides that, as long as *B* remains a U.S. resident, no distributions of income or corpus may be made from the trust to *B*. The trust instrument further provides that if *B* becomes a nonresident alien, distributions of income (including previously accumulated income) and corpus may be made to him. If *B* remains a U.S. resident at the time of *FT*'s termination, all accumulated income and corpus is to be distributed to *C*. In 2007, *B* becomes a nonresident alien and remains so thereafter. Because income may be accumulated during the years 2001 through 2007 for the benefit of a person who is a U.S. person during those years, *FT* is treated as having a U.S. beneficiary under paragraph (a)(1) of this section during each of those years. This result applies even though *B* cannot receive distributions from *FT* during the years he is a resident alien and even though *B* might remain a resident alien who is not entitled to any distribution from *FT*. Provided that paragraph (a)(4) of this section does not require a different result and that *A* establishes to the satisfaction of the Commissioner under paragraph (a)(2)(ii) of this section that no other U.S. persons are reasonably expected to benefit from the trust, *FT* is not treated as having a U.S. beneficiary under paragraph (a)(1) of this section during tax years after 2007.

(3) *Changes in beneficiary's status—(i) In general.* For purposes of paragraph (a)(1) of this section, the possibility that a person that is not a U.S. person could become a U.S. person will not cause that person to be treated as a U.S. person for purposes of paragraph (a)(1) of this section until the tax year of the U.S. transferor in which that individual actually becomes a U.S. person. However, if a person who is not a U.S. person becomes a U.S. person for the first time more than 5 years after the date of a transfer to the foreign trust by a U.S. transferor, that person is not treated as a U.S. person for purposes of applying paragraph (a)(1) of this section with respect to that transfer.

(ii) *Examples.* The following examples illustrate the rules of paragraph (a)(3) of this section. In these examples, *A* is a resident alien, *B* is *A*'s son, who is a resident alien, *C* is *A*'s daughter, who is a nonresident alien, and *FT* is a foreign trust. The examples are as follows:

*Example 1. Non-U.S. beneficiary becomes U.S. person.* In 2001, *A* transfers property to *FT*. The trust instrument provides that all income is to be distributed currently to *C* and that, upon the termination of *FT*, all corpus is to be distributed to *C*. Assume that paragraph (a)(4) of this section is not applicable

under the facts and circumstances and that *A* establishes to the satisfaction of the Commissioner under paragraph (a)(2)(ii) of this section that no U.S. persons are reasonably expected to benefit from the trust. Under paragraph (a)(3)(i) of this section, *FT* is not treated as having a U.S. beneficiary during the tax years of *A* in which *C* remains a nonresident alien. If *C* first becomes a resident alien in 2004, *FT* is treated as having a U.S. beneficiary commencing in that year under paragraph (a)(3) of this section. See paragraph (c) of this section regarding the treatment of *A* upon *FT*'s acquisition of a U.S. beneficiary.

*Example 2. Non-U.S. beneficiary becomes U.S. person more than 5 years after transfer.* The facts are the same as in *Example 1*, except *C* first becomes a resident alien in 2007. *FT* is treated as not having a U.S. beneficiary under paragraph (a)(3)(i) of this section with respect to the property transfer by *A*. However, if *C* had previously been a U.S. person during any prior period, the 5-year exception in paragraph (a)(3)(i) of this section would not apply in 2007 because it would not have been the first time *C* became a U.S. person.

(4) *General rules*—(i) *Records and documents.* Even if, based on the terms of the trust instrument, a foreign trust is not treated as having a U.S. beneficiary within the meaning of paragraph (a)(1) of this section, the trust may nevertheless be treated as having a U.S. beneficiary pursuant to paragraph (a)(1) of this section based on the following—

(A) All written and oral agreements and understandings relating to the trust;

(B) Memoranda or letters of wishes;

(C) All records that relate to the actual distribution of income and corpus; and

(D) All other documents that relate to the trust, whether or not of any purported legal effect.

(ii) *Additional factors.* For purposes of determining whether a foreign trust is treated as having a U.S. beneficiary within the meaning of paragraph (a)(1) of this section, the following additional factors are taken into account—

(A) If the terms of the trust instrument allow the trust to be amended to benefit a U.S. person, all potential benefits that could be provided to a U.S. person pursuant to an amendment must be taken into account;

(B) If the terms of the trust instrument do not allow the trust to be amended to benefit a U.S. person, but the law applicable to a foreign trust may require payments or accumulations of income or corpus to or for the benefit of a U.S. person (by judicial reformation or otherwise), all potential benefits that could be provided to a U.S. person pursuant to the law must

be taken into account, unless the U.S. transferor demonstrates to the satisfaction of the Commissioner that the law is not reasonably expected to be applied or invoked under the facts and circumstances; and

(C) If the parties to the trust ignore the terms of the trust instrument, or if it is reasonably expected that they will do so, all benefits that have been, or are reasonably expected to be, provided to a U.S. person must be taken into account.

(iii) *Examples.* The following examples illustrate the rules of paragraph (a)(4) of this section. In these examples, *A* is a resident alien, *B* is *A*'s son, who is a resident alien, *C* is *A*'s daughter, who is a nonresident alien, and *FT* is a foreign trust. The examples are as follows:

*Example 1. Amendment pursuant to local law.* *A* creates and funds *FT* for the benefit of *C*. The terms of *FT* (which, according to the trust instrument, cannot be amended) provide that no part of the income or corpus of *FT* may be paid or accumulated during the taxable year to or for the benefit of any U.S. person, either during the existence of *FT* or at the time of its termination. However, pursuant to the applicable foreign law, *FT* can be amended to provide for additional beneficiaries, and there is an oral understanding between *A* and the trustee that *B* can be added as a beneficiary. Under paragraphs (a)(1) and (a)(4)(ii)(B) of this section, *FT* is treated as having a U.S. beneficiary.

*Example 2. Actions in violation of the terms of the trust.* *A* transfers property to *FT*. The trust instrument provides that no U.S. person can receive income or corpus from *FT* during the term of the trust or at the termination of *FT*. Notwithstanding the terms of the trust instrument, a letter of wishes directs the trustee of *FT* to provide for the educational needs of *B*, who is about to begin college. The letter of wishes contains a disclaimer to the effect that its contents are only suggestions and recommendations and that the trustee is at all times bound by the terms of the trust as set forth in the trust instrument. Under paragraphs (a)(1) and (a)(4)(ii)(C) of this section, *FT* is treated as having a U.S. beneficiary.

(b) *Indirect U.S. beneficiaries*—(1) *Certain foreign entities.* For purposes of paragraph (a)(1) of this section, an amount is treated as paid or accumulated to or for the benefit of a U.S. person if the amount is paid to or accumulated for the benefit of—

(i) A controlled foreign corporation, as defined in section 957(a);

(ii) A foreign partnership, if a U.S. person is a partner of such partnership; or

(iii) A foreign trust or estate, if such trust or estate has a U.S. beneficiary (within the meaning of paragraph (a)(1) of this section).

(2) *Other indirect beneficiaries.* For purposes of paragraph (a)(1) of this section, an amount is treated as paid or accumulated to or for the benefit of a U.S. person if the amount is paid to or accumulated for the benefit of a U.S. person through an intermediary, such as an agent or nominee, or by any other means where a U.S. person may obtain an actual or constructive benefit.

(3) *Examples.* The following examples illustrate the rules of this paragraph (b). Unless otherwise noted, *A* is a resident alien. *B* is *A*'s son and is a resident alien. *FT* is a foreign trust. The examples are as follows:

*Example 1. Trust benefitting foreign corporation.* *A* transfers property to *FT*. The beneficiary of *FT* is *FC*, a foreign corporation. *FC* has outstanding solely 100 shares of common stock. *B* owns 49 shares of the *FC* stock and *FC2*, also a foreign corporation, owns the remaining 51 shares. *FC2* has outstanding solely 100 shares of common stock. *B* owns 49 shares of *FC2* and nonresident alien individuals own the remaining 51 *FC2* shares. *FC* is a controlled foreign corporation (as defined in section 957(a), after the application of section 958(a)(2)). Under paragraphs (a)(1) and (b)(1)(i) of this section, *FT* is treated as having a U.S. beneficiary.

*Example 2. Trust benefitting another trust.* *A* transfers property to *FT*. The terms of *FT* permit current distributions of income to *B*. *A* transfers property to another foreign trust, *FT2*. The terms of *FT2* provide that no U.S. person can benefit either as to income or corpus, but permit current distributions of income to *FT*. Under paragraph (a)(1) of this section, *FT* is treated as having a U.S. beneficiary and, under paragraphs (a)(1) and (b)(1)(iii) of this section, *FT2* is treated as having a U.S. beneficiary.

*Example 3. Trust benefitting another trust after transferor's death.* *A* transfers property to *FT*. The terms of *FT* require that all income from *FT* be accumulated during *A*'s lifetime. In the year following *A*'s death, a share of *FT* is to be distributed to *FT2*, another foreign trust, for the benefit of *B*. Under paragraphs (a)(1) and (b)(1)(iii) of this section, *FT* is treated as having a U.S. beneficiary beginning with the year of *A*'s transfer of property to *FT*.

*Example 4. Indirect benefit through use of debit card.* *A* transfers property to *FT*. The trust instrument provides that no U.S. person can benefit either as to income or corpus. However, *FT* maintains an account with *FB*, a foreign bank, and *FB* issues a debit card to *B* against the account maintained by *FT* and *B* is allowed to make withdrawals. Under paragraphs (a)(1) and (b)(2) of this section, *FT* is treated as having a U.S. beneficiary.

*Example 5. Other indirect benefit.* *A* transfers property to *FT*. *FT* is administered by *FTC*, a foreign trust company. *FTC* forms *IBC*, an international business corporation formed under the laws of a foreign jurisdiction. *IBC* is the beneficiary of *FT*. *IBC* maintains an account with *FB*, a foreign bank. *FB* issues a debit card to *B* against the account maintained by *IBC* and *B* is allowed to make with-

drawals. Under paragraphs (a)(1) and (b)(2) of this section, *FT* is treated as having a U.S. beneficiary.

(c) *Treatment of U.S. transferor upon foreign trust's acquisition or loss of U.S. beneficiary*—(1) *Trusts acquiring a U.S. beneficiary*. If a foreign trust to which a U.S. transferor has transferred property is not treated as having a U.S. beneficiary (within the meaning of paragraph (a) of this section) for any taxable year of the U.S. transferor, but the trust is treated as having a U.S. beneficiary (within the meaning of paragraph (a) of this section) in any subsequent taxable year, the U.S. transferor is treated as having additional income in the first such taxable year of the U.S. transferor in which the trust is treated as having a U.S. beneficiary. The amount of the additional income is equal to the trust's undistributed net income, as defined in section 665(a), at the end of the U.S. transferor's immediately preceding taxable year and is subject to the rules of section 668, providing for an interest charge on accumulation distributions from foreign trusts.

(2) *Trusts ceasing to have a U.S. beneficiary*. If, for any taxable year of a U.S. transferor, a foreign trust that has received a transfer of property from the U.S. transferor ceases to be treated as having a U.S. beneficiary, the U.S. transferor ceases to be treated as the owner of the portion of the trust attributable to the transfer beginning in the first taxable year following the last taxable year of the U.S. transferor during which the trust was treated as having a U.S. beneficiary (unless the U.S. transferor is treated as an owner thereof pursuant to sections 673 through 677). The U.S. transferor is treated as making a transfer of property to the foreign trust on the first day of the first taxable year following the last taxable year of the U.S. transferor during which the trust was treated as having a U.S. beneficiary. The amount of the property deemed to be transferred to the trust is the portion of the trust attributable to the prior transfer to which paragraph (a)(1) of this section applied. For rules regarding the recognition of gain on transfers to foreign trusts, see section 684.

(3) *Examples*. The rules of this paragraph (c) are illustrated by the following examples. *A* is a resident alien, *B* is *A*'s son, and *FT* is a foreign trust. The examples are as follows:

*Example 1. Trust acquiring U.S. beneficiary.* (i) In 2001, *A* transfers stock with a fair market value of

\$100,000 to *FT*. The stock has an adjusted basis of \$50,000 at the time of the transfer. The trust instrument provides that income may be paid currently to, or accumulated for the benefit of, *B* and that, upon the termination of the trust, all income and corpus is to be distributed to *B*. At the time of the transfer, *B* is a nonresident alien. *A* is not treated as the owner of any portion of *FT* under sections 673 through 677. *FT* accumulates a total of \$30,000 of income during the taxable years 2001 through 2003. In 2004, *B* moves to the United States and becomes a resident alien. Assume paragraph (a)(4) of this section is not applicable under the facts and circumstances.

(ii) Under paragraph (c)(1) of this section, *A* is treated as receiving an accumulation distribution in the amount of \$30,000 in 2004 and immediately transferring that amount back to the trust. The accumulation distribution is subject to the rules of section 668, providing for an interest charge on accumulation distributions.

(iii) Under paragraphs (a)(1) and (3) of this section, beginning in 2005, *A* is treated as the owner of the portion of *FT* attributable to the stock transferred by *A* to *FT* in 2001 (which includes the portion attributable to the accumulated income deemed to be retransferred in 2004).

*Example 2. Trust ceasing to have U.S. beneficiary.* (i) The facts are the same as in *Example 1*. In 2008, *B* becomes a nonresident alien. On the date *B* becomes a nonresident alien, the stock transferred by *A* to *FT* in 2001 has a fair market value of \$125,000 and an adjusted basis of \$50,000.

(ii) Under paragraph (c)(2) of this section, beginning in 2009, *FT* is not treated as having a U.S. beneficiary, and *A* is not treated as the owner of the portion of the trust attributable to the prior transfer of stock. For rules regarding the recognition of gain on the termination of ownership status, see section 684.

### §1.679–3 Transfers.

(a) *In general*. A transfer means a direct, indirect, or constructive transfer.

(b) *Transfers by certain trusts*—(1) *In general*. If any portion of a trust is treated as owned by a U.S. person, a transfer of property from that portion of the trust to a foreign trust is treated as a transfer from the owner of that portion of the foreign trust.

(2) *Example*. The following example illustrates this paragraph (b):

*Example*. In 2001, *A*, a U.S. citizen, creates and funds *DT*, a domestic trust. *A* has the power to revest absolutely in himself the title to the property in *DT* and is treated as the owner of *DT* pursuant to section 676. In 2004, *DT* transfers property to *FT*, a foreign trust. *A* is treated as having transferred the property to *FT* in 2004 for purposes of this section.

(c) *Indirect transfers*—(1) *Principal purpose of tax avoidance*. A transfer to a foreign trust by any person (intermediary) to whom a U.S. person transfers property is treated as an indirect transfer by a U.S. person to the foreign trust if such transfer

is made pursuant to a plan one of the principal purposes of which is the avoidance of United States tax.

(2) *Principal purpose of tax avoidance deemed to exist*. For purposes of paragraph (c)(1) of this section, a transfer is deemed to have been made pursuant to a plan one of the principal purposes of which was the avoidance of United States tax if—

(i) The U.S. person is related (within the meaning of paragraph (c)(4) of this section) to a beneficiary of the foreign trust, or has another relationship with a beneficiary of the foreign trust that establishes a reasonable basis for concluding that the U.S. transferor would make a transfer to the foreign trust; and

(ii) The U.S. person cannot demonstrate to the satisfaction of the Commissioner that—

(A) The intermediary has a relationship with a beneficiary of the foreign trust that establishes a reasonable basis for concluding that the intermediary would make a transfer to the foreign trust;

(B) The intermediary acted independently of the U.S. person;

(C) The intermediary is not an agent of the U.S. person under generally applicable United States agency principles; and

(D) The intermediary timely complied with the reporting requirements of section 6048, if applicable.

(3) *Effect of disregarding intermediary*—(i) *In general*. Except as provided in paragraph (c)(3)(ii) of this section, if a transfer is treated as an indirect transfer pursuant to paragraph (c)(1) of this section, then the intermediary is treated as an agent of the U.S. person, and the property is treated as transferred to the foreign trust by the U.S. person in the year the property is transferred, or made available, by the intermediary to the foreign trust. The fair market value of the property transferred is determined as of the date of the transfer by the intermediary to the foreign trust.

(ii) *Special rule*. If the Commissioner determines, or if the taxpayer can demonstrate to the satisfaction of the Commissioner, that the intermediary is an agent of the foreign trust under generally applicable United States agency principles, the property will be treated as transferred to the foreign trust in the year the U.S. person transfers the property to the interme-

diary. The fair market value of the property transferred will be determined as of the date of the transfer by the U.S. person to the intermediary.

(iii) *Effect on intermediary.* If a transfer of property is treated as an indirect transfer under paragraph (c)(1) of this section, the intermediary is not treated as having transferred the property to the foreign trust.

(4) *Related parties.* For purposes of this paragraph (c), a U.S. transferor is treated as related to a U.S. beneficiary of a foreign trust if the U.S. transferor and the beneficiary are related for purposes of section 643(i)(2)(B), with the following modifications—

(i) For purposes of applying section 267 (other than section 267(f)) and section 707(b)(1), “at least 10 percent” is used instead of “more than 50 percent” each place it appears; and

(ii) The principles of section 267(b)(10), using “at least 10 percent” instead of “more than 50 percent,” apply to determine whether two corporations are related.

(5) *Examples.* The rules of this paragraph (c) are illustrated by the following examples:

*Example 1. Principal purpose of tax avoidance.* A, a U.S. citizen, creates and funds FT, a foreign trust, for the benefit of A’s children, who are U.S. citizens. In 2004, A decides to transfer an additional 1000X to the foreign trust. Pursuant to a plan with a principal purpose of avoiding the application of section 679, A transfers 1000X to I, a foreign person. I subsequently transfers 1000X to FT. Under paragraph (c)(1) of this section, A is treated as having made a transfer of 1000X to FT.

*Example 2. U.S. person unable to demonstrate that intermediary acted independently.* A, a U.S. citizen, creates and funds FT, a foreign trust, for the benefit of A’s children, who are U.S. citizens. On July 1, 2004, A transfers XYZ stock to D, A’s uncle, who is a nonresident alien. D immediately sells the XYZ stock and uses the proceeds to purchase ABC stock. On January 1, 2007, D transfers the ABC stock to FT. A is unable to demonstrate to the satisfaction of the Commissioner, pursuant to paragraph (c)(2) of this section, that D acted independently of A in making the transfer to FT. Under paragraph (c)(1) of this section, A is treated as having transferred the ABC stock to FT. Under paragraph (c)(3) of this section, D is treated as an agent of A, and the transfer is deemed to have been made on January 1, 2007.

*Example 3. Indirect loan to foreign trust.* A, a U.S. citizen, previously created and funded FT, a foreign trust, for the benefit of A’s children, who are U.S. citizens. On July 1, 2004, A deposits 500X with FB, a foreign bank. On January 1, 2005, FB loans 450X to FT. A is unable to demonstrate to the satisfaction of the Commissioner, pursuant to para-

graph (c)(2) of this section, that FB has a relationship with FT that establishes a reasonable basis for concluding that FB would make a loan to FT or that FB acted independently of A in making the loan. Under paragraph (c)(1) of this section, A is deemed to have transferred 450X directly to FT on January 1, 2005. Under paragraph (c)(3) of this section, FB is treated as an agent of A. For possible exceptions with respect to qualified obligations of the trust, and the treatment of principal repayments with respect to obligations of the trust that are not qualified obligations, see §1.679-4.

*Example 4. Loan to foreign trust prior to deposit of funds in foreign bank.* The facts are the same as in Example 3, except that A makes the 500X deposit with FB on January 2, 2005, the day after FB makes the loan to FT. The result is the same as in Example 3.

(d) *Constructive transfers—(1) In general.* For purposes of paragraph (a) of this section, a constructive transfer includes any assumption or satisfaction of a foreign trust’s obligation to a third party.

(2) *Examples.* The rules of this paragraph (d) are illustrated by the following examples. In each example, A is a U.S. citizen and FT is a foreign trust. The examples are as follows:

*Example 1. Payment of debt of foreign trust.* FT owes 1000X to Y, an unrelated foreign corporation, for the performance of services by Y for FT. In satisfaction of FT’s liability to Y, A transfers to Y property with a fair market value of 1000X. Under paragraph (d)(1) of this section, A is treated as having made a constructive transfer of the property to FT.

*Example 2. Assumption of liability of foreign trust.* FT owes 1000X to Y, an unrelated foreign corporation, for the performance of services by Y for FT. A assumes FT’s liability to pay Y. Under paragraph (d)(1) of this section, A is treated as having made a constructive transfer of property with a fair market value of 1000X to FT.

(e) *Guarantee of trust obligations—(1) In general.* If a foreign trust borrows money or other property from any person who is not a related person (within the meaning of §1.679-1(c)(5)) with respect to the trust (lender) and a U.S. person (U.S. guarantor) that is a related person with respect to the trust guarantees (within the meaning of paragraph (e)(4) of this section) the foreign trust’s obligation, the U.S. guarantor is treated for purposes of this section as a U.S. transferor that has made a transfer to the trust on the date of the guarantee in an amount determined under paragraph (e)(2) of this section. To the extent this paragraph causes the U.S. guarantor to be treated as having made a transfer to the trust, a lender that is a U.S. person shall not be treated as having transferred that amount to the foreign trust.

(2) *Amount transferred.* The amount deemed transferred by a U.S. guarantor

described in paragraph (e)(1) of this section is the guaranteed portion of the adjusted issue price of the obligation (within the meaning of §1.1275-1(b)) plus any accrued but unpaid qualified stated interest (within the meaning of §1.1273-1(c)).

(3) *Principal repayments.* If a U.S. person is treated under this paragraph (e) as having made a transfer by reason of the guarantee of an obligation, payments of principal to the lender by the foreign trust with respect to the obligation are taken into account on and after the date of the payment in determining the portion of the trust attributable to the property deemed transferred by the U.S. guarantor.

(4) *Guarantee.* For purposes of this section, the term guarantee—

(i) Includes any arrangement under which a person, directly or indirectly, assures, on a conditional or unconditional basis, the payment of another’s obligation;

(ii) Encompasses any form of credit support, and includes a commitment to make a capital contribution to the debtor or otherwise maintain its financial viability; and

(iii) Includes an arrangement reflected in a comfort letter, regardless of whether the arrangement gives rise to a legally enforceable obligation. If an arrangement is contingent upon the occurrence of an event, in determining whether the arrangement is a guarantee, it is assumed that the event has occurred.

(5) *Examples.* The rules of this paragraph (e) are illustrated by the following examples. In all of the examples, A is a U.S. resident and FT is a foreign trust. The examples are as follows:

*Example 1. Foreign lender.* X, a foreign corporation, loans 1000X of cash to FT in exchange for FT’s obligation to repay the loan. A guarantees the repayment of 600X of FT’s obligation. Under paragraph (e)(2) of this section, A is treated as having transferred 600X to FT.

*Example 2. Unrelated U.S. lender.* The facts are the same as in Example 1, except X is a U.S. person that is not a related person within the meaning of §1.679-1(c)(5). The result is the same as in Example 1.

(f) *Transfers to entities owned by a foreign trust—(1) General rule.* If a U.S. person is a related person (as defined in §1.679-1(c)(5)) with respect to a foreign trust, any transfer of property by the U.S. person to an entity in which the foreign trust holds an ownership interest is treated as a transfer of such property by the U.S.

person to the foreign trust followed by a transfer of the property from the foreign trust to the entity owned by the foreign trust, unless the U.S. person demonstrates to the satisfaction of the Commissioner that the transfer to the entity is properly attributable to the U.S. person's ownership interest in the entity.

(2) *Examples.* The rules of this paragraph (f) are illustrated by the following examples. In all of the examples, *A* is a U.S. citizen, *FT* is a foreign trust, and *FC* is a foreign corporation. The examples are as follows:

*Example 1. Transfer treated as transfer to trust.* *A* creates and funds *FT*, which is treated as having a U.S. beneficiary under §1.679-2. *FT* owns all of the outstanding stock of *FC*. *A* transfers property directly to *FC*. Because *FT* is the sole shareholder of *FC*, *A* is unable to demonstrate to the satisfaction of the Commissioner that the transfer is properly attributable to *A*'s ownership interest in *FC*. Accordingly, under this paragraph (f), *A* is treated as having transferred the property to *FT*, followed by a transfer of such property by *FT* to *FC*. Under §1.679-1(a), *A* is treated as the owner of the portion of *FT* attributable to the property treated as transferred directly to *FT*. Under §1.367(a)-1T(c)(4)(ii), the transfer of property by *FT* to *FC* is treated as a transfer of the property by *A* to *FC*.

*Example 2. Transfer treated as transfer to trust.* The facts are the same as in *Example 1*, except that *FT* is not treated as having a U.S. beneficiary under §1.679-2. Under this paragraph (f), *A* is treated as having transferred the property to *FT*, followed by a transfer of such property by *FT* to *FC*. *A* is not treated as the owner of *FT* for purposes of §1.679-1(a). For rules regarding the recognition of gain on the transfer, see section 684.

*Example 3. Transfer not treated as transfer to trust.* *A* creates and funds *FT*. *FC* has outstanding solely 100 shares of common stock. *FT* owns 50 shares of *FC* stock, and *A* owns the remaining 50 shares. On July 1, 2001, *FT* and *A* each transfer 1000X to *FC*. *A* is able to demonstrate to the satisfaction of the Commissioner that *A*'s transfer to *FC* is properly attributable to *A*'s ownership interest in *FC*. Accordingly, under this paragraph (f), *A*'s transfer to *FC* is not treated as a transfer to *FT*.

#### §1.679-4 Exceptions to general rule.

(a) *In general.* Section 1.679-1 does not apply to—

(1) Any transfer of property to a foreign trust by reason of the death of the transferor;

(2) Any transfer of property to a foreign trust described in sections 402(b), 404(a)(4), or 404A;

(3) Any transfer of property to a foreign trust described in section 501(c)(3) (without regard to the requirements of section 508(a)); and

(4) Any transfer of property to a foreign trust to the extent the transfer is for fair market value.

(b) *Transfers for fair market value—(1) In general.* For purposes of this section, a transfer is for fair market value only to the extent of the value of property received from the trust, services rendered by the trust, or the right to use property of the trust. For example, rents, royalties, interest, and compensation paid to a trust are transfers for fair market value only to the extent that the payments reflect an arm's length price for the use of the property of, or for the services rendered by, the trust. For purposes of this determination, an interest in the trust is not property received from the trust. For purposes of this section, a distribution to a trust with respect to an interest held by such trust in an entity other than a trust or an interest in certain investment trusts described in §301.7701-4(c) of this chapter, liquidating trusts described in §301.7701-4(d) of this chapter, or environmental remediation trusts described in §301.7701-4(e) of this chapter is considered to be a transfer for fair market value.

(2) *Special rule—(i) Transfers for partial consideration.* For purposes of this section, if a person transfers property to a foreign trust in exchange for property having a fair market value that is less than the fair market value of the property transferred, the exception in paragraph (a)(4) of this section applies only to the extent of the fair market value of the property received.

(ii) *Example.* This paragraph (b) is illustrated by the following example:

*Example.* *A*, a U.S. citizen, transfers property that has a fair market value of 1000X to *FT*, a foreign trust, in exchange for 600X of cash. Under this paragraph (b), §1.679-1 applies with respect to the transfer of 400X (1000X less 600X) to *FT*.

(c) *Certain obligations not taken into account.* Solely for purposes of this section, in determining whether a transfer by a U.S. transferor that is a related person (as defined in §1.679-1(c)(5)) with respect to the foreign trust is for fair market value, any obligation (as defined in §1.679-1(c)(6)) of the trust or a related person (as defined in §1.679-1(c)(5)) that is not a qualified obligation within the meaning of paragraph (d)(1) of this section shall not be taken into account.

(d) *Qualified obligations—(1) In general.* For purposes of this section, an

obligation is treated as a qualified obligation only if—

(i) The obligation is reduced to writing by an express written agreement;

(ii) The term of the obligation does not exceed five years (for purposes of determining the term of an obligation, the obligation's maturity date is the last possible date that the obligation can be outstanding under the terms of the obligation);

(iii) All payments on the obligation are denominated in U.S. dollars;

(iv) The yield to maturity is not less than 100 percent of the applicable Federal rate and not greater than 130 percent of the applicable Federal rate (the applicable Federal rate for an obligation is the applicable Federal rate in effect under section 1274(d) for the day on which the obligation is issued, as published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter));

(v) The U.S. transferor extends the period for assessment of any income or transfer tax attributable to the transfer and any consequential income tax changes for each year that the obligation is outstanding, to a date not earlier than three years after the maturity date of the obligation (this extension is not necessary if the maturity date of the obligation does not extend beyond the end of the U.S. transferor's taxable year for the year of the transfer and is paid within such period); when properly executed and filed, such an agreement is deemed to be consented to for purposes of §301.6501(c)-1(d) of this chapter; and

(vi) The U.S. transferor reports the status of the loan, including principal and interest payments, on Form 3520 for every year that the loan is outstanding.

(2) *Additional loans.* If, while the original obligation is outstanding, the U.S. transferor or a person related to the trust (within the meaning of §1.679-1(c)(5)) directly or indirectly obtains another obligation issued by the trust, or if the U.S. transferor directly or indirectly obtains another obligation issued by a person related to the trust, the original obligation is deemed to have the maturity date of any such subsequent obligation in determining whether the term of the original obligation exceeds the specified 5-year term. In addition, a series of obligations issued and repaid by the trust (or a person

related to the trust) is treated as a single obligation if the transactions giving rise to the obligations are structured with a principal purpose to avoid the application of this provision.

(3) *Obligations that cease to be qualified.* If an obligation treated as a qualified obligation subsequently fails to be a qualified obligation (e.g., renegotiation of the terms of the obligation causes the term of the obligation to exceed five years), the U.S. transferor is treated as making a transfer to the trust in an amount equal to the original obligation's adjusted issue price (within the meaning of §1.1275-1(b)) plus any accrued but unpaid qualified stated interest (within the meaning of §1.1273-1(c)) as of the date of the subsequent event that causes the obligation to no longer be a qualified obligation. If the maturity date is extended beyond five years by reason of the issuance of a subsequent obligation by the trust (or person related to the trust), the amount of the transfer will not exceed the issue price of the subsequent obligation. The subsequent obligation is separately tested to determine if it is a qualified obligation.

(4) *Transfers resulting from failed qualified obligations.* In general, a transfer resulting from a failed qualified obligation is deemed to occur on the date of the subsequent event that causes the obligation to no longer be a qualified obligation. However, based on all of the facts and circumstances, the Commissioner may deem a transfer to have occurred on any date on or after the issue date of the original obligation. For example, if at the time the original obligation was issued, the transferor knew or had reason to know that the obligation would not be repaid, the Commissioner could deem the transfer to have occurred on the issue date of the original obligation.

(5) *Renegotiated loans.* Any loan that is renegotiated, extended, or revised is treated as a new loan, and any transfer of funds to a foreign trust after such renegotiation, extension, or revision under a pre-existing loan agreement is treated as a transfer subject to this section.

(6) *Principal repayments.* The payment of principal with respect to any obligation that is not treated as a qualified obligation under this paragraph is taken into account on and after the date of the payment in determining the portion of the trust attributable to the property transferred.

(7) *Examples.* The rules of this paragraph (d) are illustrated by the following examples. In the examples, *A* and *B* are U.S. residents and *FT* is a foreign trust. The examples are as follows:

*Example 1. Demand loan.* *A* transfers 500X to *FT* in exchange for a demand note that permits *A* to require repayment by *FT* at any time. *A* is a related person (as defined in §1.679-1(c)(5)) with respect to *FT*. Because *FT*'s obligation to *A* could remain outstanding for more than five years, the obligation is not a qualified obligation within the meaning of paragraph (d) of this section and, pursuant to paragraph (c) of this section, it is not taken into account for purposes of determining whether *A*'s transfer is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, §1.679-1 applies with respect to the full 500X transfer to *FT*.

*Example 2. Private annuity.* *A* transfers 4000X to *FT* in exchange for an annuity from the foreign trust that will pay *A* 100X per year for the rest of *A*'s life. *A* is a related person (as defined in §1.679-1(c)(5)) with respect to *FT*. Because *FT*'s obligation to *A* could remain outstanding for more than five years, the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section and, pursuant to paragraph (c) of this section, it is not taken into account for purposes of determining whether *A*'s transfer is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, §1.679-1 applies with respect to the full 4000X transfer to *FT*.

*Example 3. Loan to unrelated foreign trust.* *B* transfers 1000X to *FT* in exchange for an obligation of the trust. The term of the obligation is fifteen years. *B* is not a related person (as defined in §1.679-1(c)(5)) with respect to *FT*. Because *B* is not a related person, the fair market value of the obligation received by *B* is taken into account for purposes of determining whether *B*'s transfer is eligible for the fair market value exception of paragraph (a)(4) of this section, even though the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section.

*Example 4. Transfer for an obligation with term in excess of 5 years.* *A* transfers property that has a fair market value of 5000X to *FT* in exchange for an obligation of the trust. The term of the obligation is ten years. *A* is a related person (as defined in §1.679-1(c)(5)) with respect to *FT*. Because the term of the obligation is greater than five years, the obligation is not a qualified obligation within the meaning of paragraph (d)(1) of this section and, pursuant to paragraph (c) of this section, it is not taken into account for purposes of determining whether *A*'s transfer is eligible for the fair market value exception of paragraph (a)(4) of this section. Accordingly, §1.679-1 applies with respect to the full 5000X transfer to *FT*.

*Example 5. Transfer for a qualified obligation.* The facts are the same as in *Example 4*, except that the term of the obligation is 3 years. Assuming the other requirements of paragraph (d)(1) of this section are satisfied, the obligation is a qualified obligation and its adjusted issue price is taken into account for purposes of determining whether *A*'s transfer is eligible for the fair market value exception of paragraph (a)(4) of this section.

*Example 6. Effect of subsequent obligation on original obligation.* *A* transfers property that has a fair market value of 1000X to *FT* in exchange for an obligation that satisfies the requirements of paragraph (d)(1) of this section. *A* is a related person (as defined in §1.679-1(c)(5)) with respect to *FT*. Two years later, *A* transfers an additional 2000X to *FT* and receives another obligation from *FT* that has a maturity date four years from the date that the second obligation was issued. Under paragraph (d)(2) of this section, the original obligation is deemed to have the maturity date of the second obligation. Under paragraph (a) of this section, *A* is treated as having made a transfer in an amount equal to the original obligation's adjusted issue price (within the meaning of §1.1275-1(b)) plus any accrued but unpaid qualified stated interest (within the meaning of §1.1273-1(c)) as of the date of issuance of the second obligation. The second obligation is tested separately to determine whether it is a qualified obligation for purposes of applying paragraph (a) of this section to the second transfer.

#### §1.679-5 Pre-immigration trusts.

(a) *In general.* If a nonresident alien individual becomes a U.S. person and the individual has a residency starting date (as determined under section 7701(b)(2)(A)) within 5 years after directly or indirectly transferring property to a foreign trust (the original transfer), the individual is treated as having transferred to the trust on the residency starting date an amount equal to the portion of the trust attributable to the property transferred by the individual in the original transfer.

(b) *Special rules—(1) Change in grantor trust status.* For purposes of paragraph (a) of this section, if a nonresident alien individual who is treated as owning any portion of a trust under the provisions of subpart E of part I of subchapter J, chapter 1 of the Internal Revenue Code, subsequently ceases to be so treated, the individual is treated as having made the original transfer to the foreign trust immediately before the trust ceases to be treated as owned by the individual.

(2) *Treatment of undistributed income.* For purposes of paragraph (a) of this section, the property deemed transferred to the foreign trust on the residency starting date includes undistributed net income, as defined in section 665(a), attributable to the property deemed transferred. Undistributed net income for periods before the individual's residency starting date is taken into account only for purposes of determining the amount of the property deemed transferred.

(c) *Examples.* The rules of this section are illustrated by the following examples:

*Example 1. Nonresident alien becomes resident alien.* On January 1, 2002, *A*, a nonresident alien individual, transfers property to a foreign trust, *FT*. On January 1, 2006, *A* becomes a resident of the United States within the meaning of section 7701(b)(1)(A) and has a residency starting date of January 1, 2006, within the meaning of section 7701(b)(2)(A). Under paragraph (a) of this section, *A* is treated as a U.S. transferor and is deemed to transfer the property to *FT* on January 1, 2006. Under paragraph (b)(2) of this section, the property deemed transferred to *FT* on January 1, 2006, includes the undistributed net income of the trust, as defined in section 665(a), attributable to the property originally transferred.

*Example 2. Nonresident alien loses power to revest property.* On January 1, 2002, *A*, a nonresident alien individual, transfers property to a foreign trust, *FT*. *A* has the power to revest absolutely in himself the title to such property transferred and is treated as the owner of the trust pursuant to sections 676 and 672(f). On January 1, 2008, the terms of *FT* are amended to remove *A*'s power to revest in himself title to the property transferred, and *A* ceases to be treated as the owner of *FT*. On January 1, 2010, *A* becomes a resident of the United States. Under paragraph (b)(1) of this section, for purposes of paragraph (a) of this section *A* is treated as having originally transferred the property to *FT* on January 1, 2008. Because this date is within five years of *A*'s residency starting date, *A* is deemed to have made a transfer to the foreign trust on January 1, 2010, his residency starting date. Under paragraph (b)(2) of this section, the property deemed transferred to the foreign trust on January 1, 2010, includes the undistributed net income of the trust, as defined in section 665(a), attributable to the property deemed transferred.

#### §1.679-6 *Outbound migrations of domestic trusts.*

(a) *In general.* Subject to the provisions of paragraph (b) of this section, if an individual who is a U.S. person transfers property to a trust that is not a foreign trust, and such trust becomes a foreign trust while the U.S. person is alive, the U.S. individual is treated as a U.S. transferor and is deemed to transfer the property to a foreign trust on the date the domestic trust becomes a foreign trust.

(b) *Amount deemed transferred.* For purposes of paragraph (a) of this section, the property deemed transferred to the trust when it becomes a foreign trust includes undistributed net income, as defined in section 665(a), attributable to the property previously transferred. Undistributed net income for periods prior to the migration is taken into account only for purposes of determining the portion of the trust that is attributable to the property transferred by the U.S. person.

(c) *Example.* The following example illustrates the rules of this section. For purposes of the example, *A* is a resident alien, *B* is *A*'s son, who is a resident alien, and *DT* is a domestic trust. The example is as follows:

*Example. Outbound migration of domestic trust.* On January 1, 2002, *A* transfers property to *DT*, for the benefit of *B*. On January 1, 2003, *DT* acquires a foreign trustee who has the power to determine whether and when distributions will be made to *B*. Under section 7701(a)(30)(E) and §301.7701-7(d)(ii)(A) of this chapter, *DT* becomes a foreign trust on January 1, 2003. Under paragraph (a) of this section, *A* is treated as transferring property to a foreign trust on January 1, 2003. Under paragraph (b) of this section, the property deemed transferred to the trust when it becomes a foreign trust includes undistributed net income, as defined in section 665(a), attributable to the property deemed transferred.

#### §1.679-7 *Effective dates.*

(a) *In general.* Except as provided in paragraph (b) of this section, the rules of §§ 1.679-1, 1.679-2, 1.679-3, and 1.679-4 apply with respect to transfers after August 7, 2000.

(b) *Special rules.* (1) The rules of §1.679-4(c) and (d) apply to an obligation issued after February 6, 1995, whether or not in accordance with a pre-existing arrangement or understanding. For purposes of the rules of §1.679-4(c) and (d), if an obligation issued on or before February 6, 1995, is modified after that date, and the modification is a significant modification within the meaning of §1.1001-3, the obligation is treated as if it were issued on the date of the modification. However, the penalty provided in section 6677 applies only to a failure to report transfers in exchange for obligations issued after August 20, 1996.

(2) The rules of §1.679-5 apply to persons whose residency starting date is after August 7, 2000.

(3) The rules of §1.679-6 apply to trusts that become foreign trusts after August 7, 2000.

Par. 3. In §1.958-1, the first sentence of paragraph (b) is revised to read as follows:

#### §1.958-1 *Direct and indirect ownership of stock.*

\* \* \* \* \*

(b) \* \* \* For purposes of paragraph (a)(2) of this section, stock owned, directly or indirectly, by or for a foreign

corporation, foreign partnership, foreign trust (within the meaning of section 7701(a)(31)) described in sections 671 through 679, or other foreign trust or foreign estate (within the meaning of section 7701(a)(31)) shall be considered as being owned proportionately by its shareholders, partners, grantors or other persons treated as owners under sections 671 through 679 of any portion of the trust that includes the stock, or beneficiaries, respectively. \* \* \*

\* \* \* \* \*

#### §1.958-2 [Amended]

Par. 4. In §1.958-2, paragraph (c)(1)(ii)(b) is amended by removing the language “678” and adding “679” in its place.

Robert E. Wenzel,  
*Deputy Commissioner  
of Internal Revenue.*

Approved July 9, 2001.

Mark Weinberger,  
*Assistant Secretary of  
the Treasury (Tax Policy).*

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