

Section 6038.—Information Reporting With Respect to Certain Foreign Corporations and Partnerships

T.D. 9033

DEPARTMENT OF THE TREASURY

**Internal Revenue Service
26 CFR Parts 1 and 602**

Section 6038—Returns Required With Respect to Controlled Foreign Partnerships

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulation.

SUMMARY: This document contains final and temporary regulations relating to controlled foreign partnerships. This document requires that the United States partner must follow the filing requirements that are specified in the instructions for Form 8865. The text of the temporary regulation also serves as the text of the proposed regulation (REG-124069-02) on page 488 of this Bulletin.

DATES: *Effective Date:* These regulations are effective December 23, 2003.

Applicability Date: For dates of applicability, see §§ 1.6038-3(l) and 1.6038-3T(l).

FOR FURTHER INFORMATION CONTACT: Tasheaya Warren, (202) 622-3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1617. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published elsewhere in this issue of the Bulletin.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

In 1997, Congress amended section 6038 to require information reporting by certain United States persons with direct and indirect interests in controlled foreign partnerships (CFPs). Treas. Reg. § 1.6038-3 was published in 1999 (T.D. 8850, 2000-1 C.B. 265 [64 FR 72545] (1999)) (the "1999 Final Regulations") and provides guidance regarding the reporting requirements under section 6038 with respect to CFPs. A United States person required to report under section 6038 with respect to a CFP must file Form 8865, *Return of U.S. Persons With Respect To Certain Foreign Partnerships*. In addition to the reporting obligation imposed on certain partners in foreign partnerships under section 6038, sec-

tion 6031 requires certain foreign partnerships to file Form 1065, *U.S. Return of Partnership Income* or Form 1065-B, *U.S. Return for Electing Large Partnerships*.

Treas. Reg. § 1.6038-3(j)(1) provides that if a foreign partnership completes and files Form 1065 and a United States partner is required to file Form 8865 with respect to that partnership, the United States partner must attach to its Form 8865 copies of the Form 1065 schedules filed by the partnership instead of completing the Form 8865 schedules that are equivalent to Form 1065 schedules. This rule was added to the 1999 Final Regulations to reduce the burden imposed by those regulations where there is an overlap between section 6038 and section 6031. However, this rule does not directly address the filing requirements for Form 8865, when a United States partner files electronically its income tax return (including any attachments such as Form 8865).

Explanation of Provisions

To facilitate revisions to the filing requirements for Form 8865 (such as electronic filing of Form 8865), the temporary regulation amends Treas. Reg. § 1.6038-3 to provide that a United States partner must follow the filing requirements that are specified in the instructions for Form 8865 when the United States partner must file Form 8865 and the partnership completes and files Form 1065 or Form 1065-B. As a transitional matter, for the next filing season it is anticipated that the instructions for Form 8865 will continue to provide for the existing filing procedure pursuant to which a United States partner attaches certain schedules from Form 1065 or Form 1065-B to its Form 8865 as well as provide for an alternative electronic filing procedure for Form 8865.

The final regulation also makes two revisions to the 1999 Final Regulations. If a U.S. person is required to file Form 8865, Treas. Reg. § 1.6038-3(g)(1) provides that a U.S. person must submit any information that Form 8865 or its accompanying instructions require to be submitted. The final regulation clarifies the requirement under Treas. Reg. § 1.6038-3, as reflected in the Form 8865 instructions, that the United States partner must include the foreign partnership's name, address, and taxpayer identification number on Form 8865. The final

regulation also corrects a cross reference in Treas. Reg. § 1.6038-3(b)(9) (*Example 1*).

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 has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published elsewhere in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, this temporary regulation will be 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 this regulation is Tasheaya Warren, Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in its development.

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Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1 — INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:
Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.6038-3 is amended as follows:

1. The last sentence in paragraph (b)(9) *Example 1* is revised.

2. Paragraphs (g)(1)(i) through (g)(1)(v) are redesignated as paragraphs (g)(1)(ii) through (g)(1)(vi), respectively.

3. New paragraph (g)(1)(i) is added.

4. Paragraphs (j) and (l) are revised.

The revisions and addition read as follows:

§ 1.6038-3 *Information returns required of certain United States persons with respect to controlled foreign partnerships (CFPs)*.

(b) ***

(9) ***

Example 1. Sole U.S. partner does not own more than a fifty-percent interest.

* * *

See also § 1.6046A-1(f)(1) regarding the overlap between sections 6038B and 6046A).

(g) *** (1) ***

(i) The name, address, and taxpayer identification number (if any) of the foreign partnership of which the person qualified as a controlling fifty-percent partner or a controlling ten-percent partner;

(j) [Reserved]. For further guidance, see § 1.6038-3T(j).

(l) *Effective date.* Except as otherwise provided, this section shall apply for tax years of a foreign partnership ending on or after December 31, 2000. For tax years of

a foreign partnership prior to December 23, 2003, see § 1.6038-3(j) in effect prior to these amendments (see 26 CFR part 1 revised April 1, 2002).

Par. 3. Section 1.6038-3T is added to read as follows:

§ 1.6038-3T Information returns required of certain United States persons with respect to controlled foreign partnership (CFPs) (temporary).

(a) through (i)(2) [Reserved]. For further guidance, see § 1.6038-3(a) through (i)(2).

(j) *Overlap with section 6031.* A partner may be required to file Form 8865 under this section and the foreign partnership in which it is a partner may also be required to file a Form 1065 or Form 1065-B under section 6031(e) for the same partnership tax year. For cases where a United States person is a controlling fifty-percent partner or a controlling ten-percent partner with respect to a foreign partnership, and that foreign partnership completes and

files Form 1065 or Form 1065-B, the instructions for Form 8865 will specify the filing requirements that address this overlap in reporting obligations.

(k) [Reserved]. For further guidance, see § 1.6038-3(k).

(l) *Effective date.* This section shall apply to tax years of a foreign partnership ending on or after December 23, 2003. The applicability of this section expires on December 20, 2005.

PART 602 — OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

(b) ***

CFR part or section where identified and described

Current OMB control No.

1.6038-37 1545-1617

Robert E. Wenzel,
Deputy Commissioner of
Internal Revenue.

Approved December 5, 2002.

Pamela F. Olson,
Assistant Secretary of the Treasury.