

section 954(i)(2), if D Corp had received the income directly, because the \$110x invested by D Corp in DJ Partnership is equal to D Corp's reserves allocable to exempt contracts under section 954(i)(2)(A) and allowable surplus under section 954(i)(2)(B)(ii). Thus, D Corp's distributive share of DJ Partnership's income will be excluded from foreign personal holding company income under section 954(i).

\* \* \* \* \*

#### § 1.954-2T [Removed]

■ **Par. 3.** Section 1.954-2T is removed.

Dated: July 2, 2007.

**Kevin M. Brown,**

*Deputy Commissioner for Services and Enforcement.*

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9338]

RIN 1545-BG11

#### Information Returns Required with Respect to Certain Foreign Corporations and Certain Foreign-Owned Domestic Corporations

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations and removal of temporary regulations.

**SUMMARY:** This document contains final regulations that provide guidance under sections 6038 and 6038A of the Internal Revenue Code (Code). The final regulations clarify the information required to be furnished regarding certain related party transactions of certain foreign corporations and certain foreign-owned domestic corporations. The final regulations also increase the amount of certain penalties, and make certain other changes, to reflect the statutory changes made by the Taxpayer Relief Act of 1997.

**DATES:** *Effective Date:* These regulations are effective July 13, 2007.

*Applicability Date:* For dates of applicability, see §§ 1.6038-2(m) and 1.6038A-2(h).

**FOR FURTHER INFORMATION CONTACT:** Kate Y. Hwa (202) 622-3840 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

#### Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2020. Responses to this collection of information are mandatory.

The collection of information is in § 1.6038-2(f)(11). This information is required by the IRS pursuant to section 6038 of the Code. The likely recordkeepers are business or other for-profit institutions. The estimated burden is as follows:

*Estimated total annual reporting and/or recordkeeping burden:* 1250 hours.

*Estimated average annual burden per respondent:* 15 minutes.

*Estimated number of respondents:* 5,000.

*Estimated annual frequency of responses:* once.

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 control number assigned by the Office of Management and Budget.

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

This document contains final amendments to the Income Tax Regulations (26 CFR part 1) under sections 6038 and 6038A of the Code. On June 21, 2006, final and temporary regulations (TD 9268, 2006-30 IRB 94) under sections 6038 and 6038A were published in the **Federal Register** (71 FR 35524). On the same day, a notice of proposed rulemaking (REG-109512-05, 2006-30 IRB 100) was published by cross-reference to the temporary regulations in the **Federal Register** (71 FR 35592). The preamble of TD 9268 includes background information and an explanation of provisions regarding these regulations.

The IRS received no comments in response to the notice of proposed rulemaking. No requests to speak at a public hearing were received and no hearing was held. Accordingly, the proposed regulations are adopted without change by this Treasury decision and the corresponding temporary regulations are removed or removed and reserved.

The Treasury Department, however, is considering additional information reporting pursuant to section 6038A of the Code regarding section 163(j) to further the administration of the earning stripping rules.

#### 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 these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that these regulations only affect entities with significant foreign operations and any burden on small entities is minimal. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Drafting Information

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

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### 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 continues to read, in part, as follows:

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

■ **Par. 2.** Section 1.6038-2 is amended as follows:

■ 1. Paragraphs (a)(1) and (a)(2) are revised.

■ 2. Paragraphs (f)(11), (f)(12), (k)(1) and (m) are revised.

■ 3. Paragraph (k)(5) is amended by adding *Examples 3 and 4*.

The revisions and additions read as follows:

**§ 1.6038-2 Information returns required of United States persons with respect to annual accounting periods of certain foreign corporations beginning after December 31, 1962.**

(a) \* \* \*

(1) Form 2952, "Information Return with Respect to Controlled Foreign Corporations," if such taxable year ends before December 31, 1982;

(2) Form 5471, "Information Return of U.S. Persons with Respect to Certain Foreign Corporations," if such taxable year ends on or after December 31, 1983; or

\* \* \* \* \*

(f) \* \* \*

(11) *Transactions with certain related parties.* (i) A summary showing the total amount of each of the following types of transactions of the corporation, which took place during the annual accounting period, with the person required to file this return, any other corporation or partnership controlled by that person, or any United States person owning at the time of the transaction 10 percent or more in value of any class of stock outstanding of the foreign corporation, or of any corporation controlling that foreign corporation—

(A) Sales and purchases of stock in trade;

(B) Sales and purchases of tangible property other than stock in trade;

(C) Sales and purchases of patents, inventions, models, or designs (whether or not patented), copyrights, trademarks, secret formulas or processes, or any other similar property rights;

(D) Compensation paid and compensation received for the rendition of technical, managerial, engineering, construction, scientific, or like services;

(E) Commissions paid and commissions received;

(F) Rents and royalties paid and rents and royalties received;

(G) Amounts loaned and amounts borrowed (except open accounts resulting from sales and purchases reported under other items listed in this paragraph (f)(11) that arise and are collected in full in the ordinary course of business);

(H) Dividends paid and dividends received;

(I) Interest paid and interest received; and

(J) Premiums paid and premiums received for insurance or reinsurance.

(ii) *Special rule for banks.* For purposes of this paragraph (f)(11), if the United States person is a bank, as defined in section 581, or is controlled within the meaning of section 368(c) by a bank, the term transactions shall not, as to a corporation with respect to which a return is filed, include banking

transactions entered into on behalf of customers; in any event, however, deposits in accounts between a foreign corporation, controlled (within the meaning of paragraph (b) of this section) by a United States person, and a person described in this paragraph (f)(11) and withdrawals from such accounts shall be summarized by reporting end-of-month balances.

(12) *Accrued payments and receipts.* For purposes of the required summary under paragraph (f)(11) of this section, a corporation that uses an accrual method of accounting shall use accrued payments and accrued receipts for purposes of computing the total amount of each of the types of transactions listed.

\* \* \* \* \*

(k) *Failure to furnish information—(1) Dollar amount penalty—(i) In general.* If any person required to file Form 5471 under section 6038 and this section fails to furnish any information described in paragraphs (f) and (g) of this section within the time prescribed by paragraph (i) of this section, such person shall pay a penalty of \$10,000 for each annual accounting period of each foreign corporation with respect to which such failure occurs.

(ii) *Increase in penalty for continued failure after notification.* If a failure described in paragraph (k)(1)(i) of this section continues for more than 90 days after the date on which the Director of Field Operations, Area Director, or Director of Compliance Campus Operations mails notice of such failure to the person required to file Form 5471, such person shall pay a penalty of \$10,000, in addition to the penalty imposed by section 6038(b)(1) and paragraph (k)(1)(i) of this section, for each 30-day period (or a fraction of) during which such failure continues after such 90-day period has expired. The additional penalty imposed by section 6038(b)(2) and this paragraph (k)(1)(ii) shall be limited to a maximum of \$50,000 for each failure.

\* \* \* \* \*

(5) \* \* \*

*Example 3.* A, a U.S. person, owns 100 percent of the stock of FC. On April 15, 2008, A timely filed its 2007 income tax return but did not file Form 5471 with respect to FC's 2007 annual accounting period. On June 1, 2008, the Director of Field Operations mailed a notice to A of A's failure to file Form 5471 for 2007 with respect to FC. On August 1, 2008, A submits a written statement asserting facts for reasonable cause for failure to file the 2007 Form 5471 for FC. Based on A's statement and discussions with A, the Director of Field Operations agrees that A had reasonable cause for failure to file FC's 2007 Form 5471 and determined that it is

reasonable for A to file FC's 2007 Form 5471 by September 15, 2008. The time prescribed for furnishing information under paragraph (i) of this section is September 15, 2008, and the 90-day period described under paragraphs (k)(1)(ii) and (k)(2)(iv)(A) of this section begins on that same date. Thus, if A files a completed Form 5471 by September 15, 2008, A is not subject to the penalties under paragraphs (k)(1) and (k)(2) of this section. If A does not file a completed Form 5471 by December 14, 2008, in addition to the penalties under paragraphs (k)(1) and (k)(2) of this section, A will also be subject to the penalties for continued failure under paragraphs (k)(1)(ii) and (k)(2)(iv)(A) of this section.

*Example 4.* The facts are the same as in *Example 3* except A submits the written statement to the Director before a notice of failure to furnish information is mailed to A. The notice is mailed to A on September 7, 2008. Under these facts, the time prescribed for furnishing information under paragraph (i) of this section is September 15, 2008, and the 90-day period after mailing of notice of failure under paragraphs (k)(1)(ii) and (k)(2)(iv)(A) of this section begins on that same date.

\* \* \* \* \*

(m) *Effective/applicability dates.* Except as otherwise provided, this section applies with respect to information for annual accounting periods beginning on or after June 21, 2006. Paragraphs (k)(1) and (k)(5) *Examples 3* and *4* of this section apply June 21, 2006.

**§ 1.6038-2T [Amended]**

■ **Par. 3.** In § 1.6038-2T, paragraphs (e) through (m) are revised to read as follows:

**§ 1.6038-2T Information returns required of United States persons with respect to annual accounting periods of certain foreign corporations (temporary).**

\* \* \* \* \*

(e) through (l) [Reserved]. For further guidance, see § 1.6038-2(e) through (l).

(m) *Effective/applicability date.* Paragraph (d) of this section shall apply for taxable years ending after October 22, 2004.

■ **Par. 4.** Section 1.6038A-2 is amended by revising paragraphs (b)(8) and (h) to read as follows:

**§ 1.6038A-2 Requirement of return.**

\* \* \* \* \*

(b) \* \* \*

(8) *Accrued payments and receipts.* For purposes of this section, a reporting corporation that uses an accrual method of accounting shall use accrued payments and accrued receipts for purposes of computing the total amount of each of the types of transactions listed in this section.

\* \* \* \* \*

(h) *Effective/applicability date.* Except as otherwise provided, for applicability dates for this section for certain reporting corporations, see § 1.6038A-1(n). Paragraph (b)(8) of this section applies with respect to information for annual accounting periods beginning on or after June 21, 2006.

**Kevin M. Brown,**

*Deputy Commissioner for Services and Enforcement.*

Approved: July 2, 2007.

**Eric Solomon,**

*Assistant Secretary of the Treasury (Tax Policy).*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9321]

RIN 1545-BE79

#### Application of Section 409A to Nonqualified Deferred Compensation Plans; Correction

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**SUMMARY:** This document contains corrections to final regulations that were published in the *Federal Register* on Tuesday, April 17, 2007 (73 FR 19234), relating to section 409A.

**DATES:** This correction is effective April 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Stephen Tackney, (202) 622-9639 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

The final regulations that are subject to these corrections are under section 409A of the Internal Revenue Code.

##### Need for Correction

As published, final regulations (TD 9321) contain errors that may prove misleading and are in need of correction.

##### Correction of Publication

Accordingly, the publication of the final regulations (TD 9321), which were the subject of FR Doc. 07-1820, is corrected as follows:

1. On page 19235, column 3, in the preamble the paragraph heading III. the language "Definition of Nonqualified Deferred Compensation Plan", is corrected to read "Definition of Deferral of Compensation".

2. On page 19243, column 1, in the preamble, paragraph E., the last sentence in the first paragraph, the language "The final regulations adopt this suggestion, so long as the risk of forfeiture to which the stock is subject constitutes a substantial risk of forfeiture for purposes of section 409A." is corrected to read "The final regulations adopt this suggestion."

3. On page 19243, column 2, paragraph G., line 2 from the bottom of the paragraph, the language "Q&A-7 and section II.E. of the preamble" is corrected to read "Q&A-7 and sections II.E. and VI.E. of the preamble."

4. On page 19247, column 2, in the preamble, lines 3 and 4 from the bottom of the last paragraph, the language "limited period of time not to exceed one year following the initial existence of" is corrected to read "limited period of time not to exceed two years following the initial existence of".

5. On page 19258, column 2, in the preamble the tenth line from the bottom of the column, the language "average level of bona fide service" is corrected to read "average level of bona fide services".

6. On page 19264, column 1, in the preamble, paragraph D. line 9 from the bottom of the first paragraph, the language "with section 409A if the service" is corrected to read "with section 409A only if the service".

7. On page 19264, column 2, in the preamble, paragraph D., the last sentence of the top paragraph, the language "For a discussion of the ability to provide for different times and forms of payment due to different types of separations from service, including separations from service due to certain disabilities, see section VII.C.4 of this preamble." is removed.

8. On page 19265, column 1, in the preamble under paragraph G., the third sentence of the paragraph, the language "The final regulations clarify that for these purposes, the availability of payments due to the unforeseeable emergency under any other nonqualified deferred compensation plan as defined for purposes of section 409A, including plans that would be nonqualified deferred compensation plans for purposes of section 409A except due to the effective date of the statute, or under any qualified plan (including any assets available by obtaining a loan under a qualified plan), need not be considered in determining whether an emergency is or may be relieved through other means." is corrected to read "The final regulations clarify that for these purposes, the availability of payments under any qualified plan (including any amount

available by obtaining a loan under a qualified plan), or under any other nonqualified deferred compensation plan due to the unforeseeable emergency, including plans that would be nonqualified deferred compensation plans for purposes of section 409A except due to the effective date of the statute, need not be considered in determining whether an emergency is or may be relieved through other means."

9. On page 19265, column 1, in the preamble under paragraph G., lines 1 through 5 from the bottom of the first paragraph, the language "qualified plan, from a grandfathered nonqualified deferred compensation plan, or from another nonqualified deferred compensation plan that is subject to section 409A." is corrected to read "qualified plan, or from another nonqualified deferred compensation plan (including a grandfathered plan) due to the unforeseeable emergency."

10. On page 19267, column 2, in the preamble under paragraph B., lines 4 and 5 from the bottom of the column, the language "Where the change in control event consists of an asset purchase, the" is corrected to read "Solely for purposes of this rule, the".

11. On page 19270, column 2, in the preamble under paragraph A., lines 2, 3, and 4 from the top of the paragraph, the language "contributions, each up to the section 402(g) dollar limit on elective deferrals, are separate, additive limits and are not" is corrected to read "contributions is subject to two separate, additive limits and not".

12. On page 19272, column 1, in the preamble, the paragraph heading of paragraph XII., the language "Effective Date of Final Regulations" is corrected to read "Applicability Date of Final Regulations".

13. On page 19272, column 2, in the preamble under paragraph B., line 2, the language "effective January 1, 2008. For periods" is corrected to read "applicable January 1, 2008. For periods".

14. On page 19272, column 2, in the preamble, paragraph B., line 7 from the top of the first paragraph, the language "relief for periods before the effective" is corrected to read "relief for periods before the applicability".

15. On page 19272, column 2, in the preamble, paragraph B., line 3 from the top of the second paragraph, the language "becoming effective January 1, 2008, on" is corrected to read "becoming applicable January 1, 2008, on".

16. On page 19272, column 2, in the preamble, paragraph C., line 5 from the top of the paragraph, the language "rights issued before the effective date