

(3) *Cessation of accrual.* The monetary penalty will cease to accrue if the reporting corporation either files Form 5472 (in the case of a failure to file Form 5472), furnishes information to substantially complete Form 5472, or demonstrates compliance with respect to the maintenance of records (in the case of a failure to maintain records) for the taxable year in which the examination occurs and subsequent years to the satisfaction of the District Director. The monetary penalty also will cease to accrue if requested information, documents, or records, kept outside the United States under the requirements of § 1.6038A-3(f) and not produced within the time specified are produced or moved to the United States under the rules of paragraph (f)(2)(ii) of this section.

(4) *Continued failures.* If a failure under this section relating to a taxable year beginning before July 11, 1989 occurs, and if the failure continues following 90 days after the notice of failure under this paragraph is sent, the amount of the additional penalty to be assessed under this paragraph is \$10,000 for each 30-day period beginning after November 5, 1990, during which the failure continues. There is no limitation on the amount of the monetary penalty that may be assessed after November 5, 1990.

(e) *Other penalties.* For criminal penalties for failure to file a return and filing a false or fraudulent return, see sections 7203 and 7206 of the Code. For the penalty relating to an underpayment of tax, see section 6662.

(f) *Examples.* The following examples illustrate the rules of this section.

*Example 1 Failure to file Form 5472.* Corp X, a U.S. reporting corporation, engages in related party transactions with FC. Corp X does not timely file a Form 5472 or maintain records relating to the transactions with FC for Year 1 or subsequent years. The Service Center with which Corp X files its income tax return imposes a \$10,000 penalty for each of Years 1, 2, and 3 under section 6038A (d) and this section for failure to provide information as required on Form 5472 and mails a notice of failure to provide information. Corp X does not file Form 5472. Ninety days following the mailing of the notice of failure to Corp X an additional penalty of \$10,000 is imposed. On the 135th day following the mailing of the notice of failure, Corp X files Form 5472 for Years 1, 2, and 3. The total pen-

alty owed by Corp X for Year 1 is \$30,000. (\$10,000 for not timely filing Form 5472, \$10,000 for the first 30-day period following the expiration of the 90-day period, and \$10,000 for the fraction of the second 30-day period). The penalty for Years 2 and 3 for the failure to file Form 5472 is also \$30,000 for each year, calculated in the same manner as for Year 1. The total penalty for failure to file Form 5472 for Years 1, 2, and 3 is \$90,000.

*Example 2 Failure to maintain records.* Assume the same facts as in *Example 1*. In Year 5, Corp X is audited for Years 1 through 3. Corp X has not been maintaining records relating to the transactions with FC. The District Director issues a notice of failure to maintain records. Corp X has already been subject to the monetary penalty of \$10,000 for each of Years 1, 2, and 3 for failure to file Form 5472 and, therefore, a monetary penalty under paragraph (a) of this section for failure to maintain records is not assessed. However, an additional penalty is assessed after the 90th day following the mailing of the notice of failure to maintain records. Corp X develops a record maintenance system as required by section 6038A and § 1.6038A-3. On the 180th day following the mailing of the notice of failure to maintain records, Corp X demonstrates to the satisfaction of the District Director that the newly developed record maintenance system will comply with the requirements of § 1.6038A-3 and the increase in the monetary penalty after notification ceases to accrue. The additional penalty for failure to maintain records is \$30,000. An additional penalty of \$30,000 per year is assessed for each of years 2 and 3 for the failure to maintain records for a total of \$90,000.

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

[T.D. 8353, 56 FR 28072, June 19, 1991]

#### § 1.6038A-5 Authorization of agent.

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

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records or testimony. The fact that a reporting corporation is authorized to act as an agent for a foreign related party is to be disregarded for purposes of determining whether the foreign related party either has a trade or business in the United States for purposes of the Code or a permanent establishment or fixed base in the United States for purposes of an income tax treaty.

(b) *Authorization by related party*—(1) *In general.* Upon request by the Service, a foreign related party shall authorize as its agent (solely for purposes of sections 7602, 7603, and 7604) the reporting corporation with which it engages in transactions. The authorization must be signed by the foreign related party or an officer of the foreign related party possessing the authority to authorize an agent for purposes of Rule 4 of the Federal Rules of Civil Procedure. The reporting corporation will accept this appointment by providing a statement to that effect, signed by an officer of the reporting corporation possessing the authority to accept such an appointment. The agency shall be effective at all times. For taxable years beginning after July 10, 1989, the authorization and acceptance must be provided to the Service within 30 days of a request by the Service to the reporting corporation for such an authorization. The authorization must contain a heading and statement as set forth below. A foreign government is not subject to the authorization of agent requirement.

**AUTHORIZATION OF AGENT**

“[Name of foreign related party] hereby expressly authorizes [name of reporting corporation] to act as its agent solely for purposes of sections 7602, 7603, and 7604 of the Internal Revenue Code with respect to any request to examine records or produce testimony that may be relevant to the U.S. income tax treatment of any transaction between [name of the above-named foreign related party] and [name of reporting corporation] or with respect to any summons for such records or testimony.

\_\_\_\_\_  
Signature of or for [name of foreign related party]

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

(If signed by a corporate officer, partner, or fiduciary on behalf of a foreign related

party: I certify that I have the authority to execute this authorization of agent to act on behalf of [name of foreign related party]).

\_\_\_\_\_  
Type or print your name below if signing for a foreign related party that is not an individual.

\_\_\_\_\_  
[Name of reporting corporation] accepts this appointment to act as agent for [name of foreign related party] for the above purpose.

\_\_\_\_\_  
Signature for (Name of Reporting Corporation)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

I certify that I have the authority to accept this appointment to act as agent on behalf of (name of foreign related party) and agree to accept service of process for the above purposes.

Type or print your name below.

(2) *Authorization for prior years.* A foreign related party shall authorize a reporting corporation to act as its agent with respect to taxable years for which a Form 5472 is required to be filed prior to the date on which the final regulations under section 6038A are published by providing the above executed authorization of agent within 30 days of a request by the Service for such an authorization.

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

(2) *Application of noncompliance penalty adjustment.* In circumstances where a consolidated authorization of agent has been executed, if the agency authorization for any member of the

group is not legally effective for purposes of sections 7602, 7603, and 7604, the noncompliance penalty adjustment under section 6038A(e) and §1.6038A-7 shall apply.

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

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

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

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

(2) *Foreign related party found where reporting corporation found.* For any purposes relating to sections 7602, 7603, or 7604 (including service of process), a foreign related party that authorizes a reporting corporation to act on its behalf under section 6038A(e)(1) and this section may be found anywhere where the reporting corporation has residence or is found.

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

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

(i) If neither the reporting corporation nor the other party to the transaction knew or had reason to know that the two parties were related at the time of the transaction, and

(ii) The extent to which the taxpayer establishes to the satisfaction of the District Director that all transactions between the reporting corporation and the related party were on arm's length terms and did not involve the participation of any known related party.

(2) *Reason to know.* Whether the reporting corporation or other party had reason to know that the two parties were related at the time of the transaction will be determined by all the facts and circumstances.

(3) *Effect of deemed compliance.* If a reporting corporation is deemed under this paragraph (f) to have been authorized to act as an agent for a foreign related party for purposes of sections 7602, 7603, and 7604, such deemed compliance is applicable only for that particular transaction and other reportable transactions entered into prior to the time when the reporting corporation knew or had reason to know that the related party, in fact, was related. The noncompliance rule of §1.6038A-7 shall apply to any transaction subsequent to that time with the same related party, unless the related party actually authorizes the reporting corporation to act as its agent under paragraph (a) of this section. In addition, the record maintenance requirements of §1.6038A-3 will apply to all subsequent transactions and, with respect to prior transactions, will apply to relevant records in existence at the time the relationship was discovered.

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

[T.D. 8353, 56 FR 28073, June 19, 1991; T.D. 8353, 56 FR 41792, Aug. 23, 1991]

**§ 1.6038A-6 Failure to furnish information.**

(a) *In general.* The rules of §1.6038A-7 may be applied with respect to a transaction between a foreign related party and the reporting corporation (including any transaction engaged in by a partnership that is attributed to the reporting corporation under §1.6038A-1(e)(2)) if a summons is issued to the reporting corporation to produce any