

Instructions for Form 8858 (Rev. January 2008), Information Return of U.S. Persons With Respect to Foreign Disregarded Entities

Purpose: This is the first circulated draft of the Instructions for Form 8858 (Rev. January 2008) for your review and comments. See below for a discussion of the major changes.

TPCC: None, but one may be arranged if requested.

Prior version: The Instructions for Form 8858 (Rev. January 2006) are found at: <http://www.irs.gov/pub/irs-pdf/i8858.pdf>.

Form: Form 8858 (Rev. December 2007) was circulated earlier at: http://taxforms.web.irs.gov/Products/Drafts/2007-2/07f8858_d1.pdf.

Other products: Circulations of draft tax forms, instructions, notices, and publications are posted at: <http://taxforms.web.irs.gov/Circulations/index.htm>.

Comments: Please email, fax, call or mail any comments to me by January 28, 2008. Comments should also be sent to the review at Doris.E.Williams@irs.gov.

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Major Changes to Instructions for Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities

We updated the year references as appropriate.

What's New

We noted that final regulations regarding the dual consolidated loss rules have been issued (T.D. 9315).

Schedule G, Question 4.

At the request of CC:INTL, we inserted reference to Treasury Regulations section 1.1503(d)-6(d) or (g) in the last sentence reads "Otherwise, if you are checking the "Yes" box, you may need to attach an elective relief agreement and/or an annual certification as provided in Regulations section 1.1503-2(g)(2) or 1.1503(d)-6(d) or (g)." The change is based on final regulations (T.D. 9315) which added to the rules for the annual certification regarding the use of a dual consolidated loss.



Instructions for Form 8858

(Rev. January 2008)

(Use with the December 2007 revision of Form 8858)

Information Return of U.S. Persons With Respect To Foreign Disregarded Entities

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

What's New

Final regulations regarding the dual consolidated loss rules have been issued. See Regulations section 1.1503(d)-1 through 8 for more information.

Purpose of Form

Form 8858 is used by certain U.S. persons that own a foreign disregarded entity (FDE) directly or, in certain circumstances, indirectly or constructively. See *U.S. Person Filing Form 8858* below. The form and schedules are used to satisfy the reporting requirements of sections 6011, 6012, 6031, and 6038, and related regulations.

Who Must File

The following U.S. persons that are **tax owners** of FDEs (see definitions below), or that own certain interests in foreign tax owners of FDEs, must file Form 8858.

1. U.S. Persons That Are Tax Owners of FDEs at any time during the U.S. person's taxable year or annual accounting period. Complete the entire Form 8858, but do not complete the separate Schedule M.

2. Certain U.S. Persons That Are Required To File Form 5471 With Respect To a Controlled Foreign Corporation (CFC) That is a Tax Owner of an FDE at any time during the CFC's annual accounting period:

Category 4 filers of Form 5471.

Complete the entire Form 8858 and the separate Schedule M.

Category 5 filers of Form 5471.

Complete only the identifying information on page 1 of Form 8858 (i.e., everything above Schedule C) and Schedules G and H on page 2 of Form 8858. Do not complete the separate Schedule M.

3. Certain U.S. Persons That Are Required To File Form 8865 With Respect To a Controlled Foreign Partnership (CFP) That is a Tax Owner of an FDE at any time during the CFP's annual accounting period:

Category 1 filers of Form 8865.

Complete the entire Form 8858 and the separate Schedule M.

Category 2 filers of Form 8865.

Complete only the identifying information on page 1 of Form 8858 (i.e., everything above Schedule C) and Schedules G and H on page 2 of Form 8858. Do not complete the separate Schedule M. You are not required to complete Form 8858 if there is a Category 1 filer of Form 8865 that completes the entire Form 8858 and separate Schedule M with respect to the FDE.

Note. Complete a **separate** Form 8858 and all applicable schedules for **each** FDE.

Exceptions To Filing Form 8858

Multiple filers of the same information.

In the case of category 4 or 5 filers of Form 5471 or category 1 filers of Form 8865 who are also required to file Form 8858, one person may file Form 8858 and Schedule M, if applicable, for other persons who have the same filing requirements with respect to both Form 8858 and Form 5471 or Form 8865. If you and one or more other persons are required to furnish information for the same FDE for the same period, this information may be included with or attached to, and filed in the same manner as, the multiple filer information provided with respect to the CFC or the CFP. See *Multiple filers of same information* in the Form 5471 instructions or *Multiple Category 1 filers* in the Form 8865 instructions.

When and Where to File

Form 8858 is due when your income tax return or information return is due, including extensions. If you are the tax owner of the FDE, attach Form 8858 and the separate Schedule M, if required, to your income tax return or information return. If you are not the tax owner of the FDE, attach Form 8858 to any Form 5471 or Form 8865 you are filing with respect to the CFC or the CFP that is the tax owner of the FDE.

Definitions

U.S. person

A U.S. person is:

- A citizen or resident alien of the United States (see Pub. 519, U.S. Tax Guide for Aliens, for guidance on determining resident alien status),
- A domestic partnership,

- A domestic corporation,
- Any estate (other than a foreign estate, within the meaning of section 7701(a)(31)(A)), and
- Any domestic trust.

A domestic trust is any trust if:

1. A court within the United States is able to exercise primary supervision over the administration of the trust and
2. One or more U.S. persons have the authority to control all substantial decisions of the trust.

U.S. Person Filing Form 8858

The U.S. person filing Form 8858 is any U.S. person that:

- Is the tax owner of an FDE.
- Owns a specified interest in an FDE indirectly or constructively through a CFC or a CFP. See items 2 and 3 of *Who Must File* above for more detailed information.

Throughout these instructions, when the pronouns "you" and "your" are used, they are used in reference to the U.S. person filing Form 8858.

Foreign Disregarded Entity (FDE)

An FDE is an entity that is not created or organized in the United States and that is disregarded as an entity separate from its owner for U.S. income tax purposes under Regulations sections 301.7701-2 and -3. See the instructions for Form 8832, Entity Classification Election, for more information.

Tax Owner of FDE

The tax owner of the FDE is the person that is treated as owning the assets and liabilities of the FDE for purposes of U.S. income tax law.

Direct Owner of FDE

The direct owner of an FDE is the legal owner of the disregarded entity.

For example, assume A, a U.S. individual, is a 60% partner of CFP, a controlled foreign partnership. FDE 1 is a foreign disregarded entity owned by CFP, and FDE 2 is a foreign disregarded entity owned by FDE 1. In this example, FDE 1 is the direct owner of FDE 2, and CFP is the direct owner of FDE 1. CFP is the tax owner with respect to both FDE 1 and FDE 2. A would be required to file the Forms 8858 relating to FDE 1 and FDE 2 with the Form 8865 it files with respect to CFP.

Penalties

Failure to file information required by section 6038(a) (Form 8858 and Schedule M).

- A \$10,000 penalty is imposed for each annual accounting period of each CFC or CFP for failure to furnish the required information within the time prescribed. If the information is not filed within 90 days after the IRS has mailed a notice of the failure to the U.S. person, an additional \$10,000 penalty (per CFC or CFP) is charged for each 30-day period, or fraction thereof, during which the failure continues after the 90-day period has expired. The additional penalty is limited to a maximum of \$50,000 for each failure.
- Any person who fails to file or report all of the information required within the time prescribed will be subject to a reduction of 10% of the foreign taxes available for credit under sections 901, 902, and 960. If the failure continues 90 days or more after the date the IRS mails notice of the failure to the U.S. person, an additional 5% reduction is made for each 3-month period, or fraction thereof, during which the failure continues after the 90-day period has expired. See section 6038(c)(2) for limits on the amount of this penalty.

Criminal penalties. Criminal penalties under sections 7203, 7206, and 7207 may apply for failure to file the information required by section 6038.

Note. Any person required to file Form 8858 and Schedule M who agrees to have another person file the form and schedules for him or her may be subject to the above penalties if the other person does not file a correct and proper form and schedule.

Other Reporting Requirements

Reporting Exchange Rates on Form 8858

When translating amounts from functional currency to U.S. dollars, you must use the method specified in these instructions. But, regardless of the specific method required, all exchange rates must be reported using a “divide-by convention” rounded to at least 4 places. That is, the exchange rate must be reported in terms of the amount by which the functional currency amount must be divided in order to reflect an equivalent amount of U.S. dollars. As such, the exchange rate must be reported as the units of foreign currency that equal one U.S. dollar, rounded to at least 4 places. **Do not** report the exchange rate as the number of U.S. dollars that equal one unit of foreign currency.

Note. You **must** round the result to more than 4 places if failure to do so would materially distort the exchange rate or the equivalent amount of U.S. dollars.

Example. During its annual accounting period, an FDE owned by a

U.S. person had current income of 30,255,400 Yen on Schedule H, line 6. The Schedule H instructions specify that the filer must translate these amounts into U.S. dollars at the average exchange rate for the tax year in accordance with the rules of section 989(b). The average exchange rate is 118.5050 Japanese Yen to 1 U.S. dollar (0.00843846 U.S. dollars to 1 Japanese Yen). Divide 30,255,400 Yen by 118.5050 to determine the U.S. dollar amount to enter on line 7 of Schedule H. Enter 118.5050 after the flush language following line 7.

Electronic Filing of Form 8858

If you file your income tax return electronically, see the instructions for your income tax return for general information about electronic filing.

Note. If you are filing Form 1120 electronically, you **must** attach Form 8858 electronically (as an attachment to your electronically filed Form 5471, Form 8865, or Form 1120). If you are filing Form 1040, 1041, or 1065 electronically (with or without a Form 5471 or Form 8865), attach Form 8858 to the applicable Form 8453.

Computer-Generated Form 8858 and Schedules

A computer-generated Form 8858 and its schedules may be filed if they conform to and do not deviate from the official form and schedules. Generally, all computer-generated forms must receive prior approval from the IRS and are subject to an annual review.

Submit all requests for approval to: Internal Revenue Service, Attention: Substitute Forms Program, SE:W:CAR:MP:T:T:SP, 1111 Constitution Avenue NW, IR-6406, Washington, DC 20224.

Important: Be sure to attach the approval letter to Form 8858.

Every year, the IRS issues a revenue procedure to provide guidance for filers of computer-generated forms. In addition, every year the IRS issues Pub. 1167, General Rules and Specifications For Substitute Forms and Schedules, which reprints the most recent applicable revenue procedure. Pub. 1167 can be ordered by calling 1-800-TAX-FORM (1-800-829-3676). This publication is also available from the IRS website at www.irs.gov.

Dormant FDEs

Announcement 2004-4, 2004-4 I.R.B. 357, provides for a summary filing procedure for filing Form 8858 for a dormant FDE. A dormant FDE is an FDE that would be a dormant controlled foreign corporation (CFC) if it were treated as a foreign corporation for U.S. tax purposes.

If you elect the summary procedure, complete only the identifying information above Schedule C on page 1 of Form 8858 for each dormant FDE as follows:

- The top margin of the summary return must be labeled “Filed Pursuant to Announcement 2004-4 for Dormant FDE.”
- Include the name, address, identifying number, and tax year of the U.S. person filing Form 8858 (see definition on page 1).
- Include the annual accounting period of the dormant FDE (below the title of the form) and complete items 1a through 1e and 1g.
- Complete items 3a through 3d, if applicable.
- Complete items 4a through 4c, if applicable.

File this summary return in the manner described in *When and Where To File* on page 1.

Specific Instructions

Important: If the information required in a given section exceeds the space provided within that section, **do not** write “see attached” in the section and then attach all of the information on additional sheets. Instead, complete all entry spaces in the section and attach the remaining information on additional sheets. The additional sheets must conform with the IRS version of that section.

Identifying Information

Annual Accounting Period

Enter, in the space provided below the title of Form 8858, the annual accounting period of the FDE for which you are furnishing information. The annual accounting period of an FDE is the annual accounting period or taxable year of the tax owner. Therefore, in the case of a U.S. tax owner, the annual accounting period of the FDE is the taxable year of the U.S. tax owner; and in the case of a CFC or CFP that is a tax owner, the annual accounting period of the FDE is the annual accounting period of the CFC or CFP.

Person Filing This Return

In the spaces provided at the top of page 1 of Form 8858, provide the identifying information for the U.S. person filing Form 8858 (see definition on page 1).

If a U.S. corporation is the U.S. person filing Form 8858 and is a member of a consolidated group, list the common parent as the person filing the return and enter its identifying information in the spaces provided at the top of page 1 of the form.

Name Change

If the name of the person filing the return, the tax owner, the direct owner, or the FDE whose activities are being reported changed within the past 3 years, show the prior name(s) in parentheses after the current name.

Addresses

Use the following instructions to complete lines 1a, 2a, 2b, 3a, 4a, and the entry spaces at the top of page 1 of the form for the filer's address.

U.S. Addresses. Include the suite, room, or other unit number after the street address. If the Post Office does not deliver mail to the street address and the U.S. person has a P.O. box, show the box number instead.

Foreign Addresses. Enter the information in the following order: city, province or state, and country. Follow the country's practice for entering the postal code, if any. Do not abbreviate the country name.

Identifying Numbers

Use the following instruction to complete lines 1b, 3c, 4c, and the entry space at the top of page 1 of the form for the filer's identifying number. The identifying number of an individual is his or her social security number (SSN). The identifying number of all others is their employer identification number (EIN).

If a U.S. corporation is the U.S. person filing Form 8858 and is a member of a consolidated group, see *Person Filing This Return* on page 2.

Functional Currency

Use the following instruction to complete lines 1i, 3e, and 4d.

Enter the entity's functional currency.

See sections 985 and 989, and Regulations sections 1.985-1(a) through (c) and 1.989(a)-1(b) for rules for determining the functional currency of a qualified business unit (QBU) and the definition of a QBU.

Hyperinflationary exception. An entity that otherwise would be required to use a hyperinflationary currency as its functional currency must use the U.S. dollar as its functional currency and compute income or loss or earnings and profits using the U.S. dollar approximate separate transactions method of accounting (DASTM) under the special rules of Regulations section 1.985-3. See Regulations section 1.985-1(b)(2).

Line 1h — Principal Business Activity

Enter a brief description of the FDE's principal business activity.

Line 3b

If the tax owner is a CFC, enter the annual accounting period covered by Form 5471 (as described in Regulations section 1.6038-2(e)). If the tax owner is a CFP, enter the annual accounting period covered by Form 8865 (as described in Regulations section 1.6038-3(f)).

Line 5

You must attach an organizational chart that includes the following information with respect to the chain of ownership between the tax owner and the FDE and

the chain of ownership between the FDE and all entities in which the FDE has a 10% or more direct or indirect interest:

- The name and percentage of ownership of all entities in the chain of ownership, including partnerships and entities disregarded as separate from their owners.
- The FDE's position in the chain of ownership.
- The tax classification of all entities in the chain of ownership (see Form 8832 instructions for tax classification rules and related definitions).
- The country under whose law each entity is organized.

For these purposes, the rules of section 958(a) (relating to "direct and indirect ownership") apply.

Each filer of Form 8858 that is required to file an organizational chart with respect to more than one FDE may satisfy this requirement by filing a single organizational chart that includes the required information with respect to all FDEs.

Schedule C

Use Schedule C to report a summary income statement for the FDE computed in the FDE's functional currency in accordance with U.S. generally accepted accounting principles (GAAP). Enter in the U.S. dollar column each line item functional currency amount translated into dollars using U.S. GAAP translation rules. If the FDE does not maintain U.S. GAAP income statements in U.S. dollars, you can use the average exchange rate as determined under section 989(b). The rate used should be the rate stated on line 7, Schedule H. If you choose to use the average exchange rate rather than the U.S. GAAP translation rules, check the box above line 1 on Schedule C.

Special rules for DASTM. If the FDE uses DASTM, the functional currency column should reflect local hyperinflationary currency amounts computed in accordance with U.S. GAAP. The U.S. dollar column should reflect such amounts translated into dollars under U.S. GAAP translation rules. Differences between this U.S. dollar GAAP column and the U.S. dollar income or loss figured for tax purposes under Regulations section 1.985-3(c) should be accounted for on Schedule H. See *Schedule H, Special rules for DASTM*, below.

Line 7. Include on line 7, adjustments for extraordinary items, prior period adjustments, and the provision for income, war profits, and excess profits taxes deducted in accordance with U.S. GAAP. The terms "extraordinary items" and "prior period adjustments" have the same meaning given to them by U.S. GAAP (see Opinion No. 30 of the Accounting Principles Board and Statement No. 16 of the Financial Accounting Standards Board).

Important: Differences between this functional currency amount and the amount of taxes that reduce E&P (in the case of an FDE of a CFC) or are deductible in computing U.S. taxable income (in the case of an FDE of a U.S. person or a CFP) should be accounted for on line 2 or 3 of Schedule H.

Schedule C-1

Complete a separate Schedule C-1 for each recipient that has a functional currency that is different than the functional currency of the FDE. See section 987(3) for rules relating to branch remittances.

Schedule F

Use Schedule F to report a summary balance sheet for the FDE computed and translated into U.S. dollars in accordance with U.S. GAAP.

Special rule for DASTM. If the FDE uses DASTM, Schedule F should be prepared and translated into U.S. dollars according to Regulations section 1.985-3(d), rather than U.S. GAAP.

Schedule G

Question 3

If the tax owner of the FDE is claiming a section 165 loss with respect to worthless stock or with respect to certain obligations, see Regulations section 1.6011-4 for information relating to a disclosure statement that must be attached to Form 8858 if certain requirements are met.

Question 4

If the FDE is **not** owned directly or indirectly by a domestic corporation or the FDE did **not** incur an NOL for the year, please write "N/A" across the "Yes/No" entry spaces for line 4 to indicate that the question is not applicable. Otherwise, if you are checking the "Yes" box, you may need to attach an elective relief agreement and/or an annual certification as provided in Regulations sections 1.1503-2(g)(2) or 1.1503(d)-6(d) or (g).

Schedule H

Use Schedule H to report the FDE's current earnings and profits (E&P) (if the tax owner is a CFC) or taxable income (if the tax owner is a U.S. person or a CFP). Generally, enter the amounts on lines 1 through 6 in functional currency.

Special rules for DASTM. If the FDE uses DASTM, enter on line 1 the dollar GAAP income or (loss) from line 8 of Schedule C. Enter on lines 2 and 3 the adjustments made in figuring current E&P or taxable income for U.S. tax purposes. Report these amounts in U.S. dollars. Enter on line 5 the DASTM gain or loss figured under Regulations section 1.985-3(d).

Lines 2 and 3. Certain adjustments must be made to the FDE's line 1 net book income or (loss) to determine its

current E&P or taxable income. The adjustments may include those needed to conform the foreign book income to U.S. GAAP and to U.S. tax accounting principles. If the FDE's books are maintained in functional currency in accordance with U.S. GAAP, enter on line 1 the functional currency GAAP income or (loss) from line 8 of Schedule C, rather than starting with foreign book income, and show GAAP-to-tax adjustments on lines 2 and 3.

The adjustments may include the following:

- Capital gains and losses.
- Depreciation, amortization, and depletion.
- Investment or incentive allowance.
- Charges to statutory reserves.
- Inventory adjustments. Inventories must be taken into account according to the rules of sections 471 (incorporating the provisions of section 263A) and 472 and the related regulations.
- Taxes. See the instructions for Schedule C, line 7.

Attach a separate schedule that lists each applicable adjustment item. For each adjustment item, indicate the adjustment amount and whether the amount is a net addition or net subtraction. The separate schedule should also show two totals, the total net additions amount to be entered on line 2, and the total net subtractions amount to be entered on line 3.

Line 5. DASTM gain or (loss), reflecting unrealized exchange gain or loss, should be entered on line 5 only for FDEs that use DASTM.

Line 7. Enter the line 6 functional currency amount translated into U.S. dollars at the average exchange rate for

the FDE's tax year. See section 989(b). Report the exchange rate using the "divide-by convention" specified under *Reporting Exchange Rates on Form 8858* on page 2. If the FDE uses DASTM, enter on line 7 the same amount entered on line 6.

Blocked income. The E&P or taxable income of the FDE, as reflected on Schedule H, must not be reduced by all or any part of such E&P or taxable income that could not have been distributed by the FDE due to currency or other restrictions or limitations imposed under the laws of any foreign country.

Schedule M

Important: In translating the amounts from functional currency to U.S. dollars, use the average exchange rate for the FDE's tax year. See section 989(b). Report the exchange rate in the entry space provided at the top of Schedule M using the "divide-by convention" specified under *Reporting Exchange Rates on Form 8858* on page 2.

Every U.S. person that is required to file Schedule M (see *Who Must File* on page 1) must file the schedule to report the transactions that occurred during the FDE's annual accounting period ending with or within the U.S. person's tax year.

If a U.S. corporation is the U.S. person filing Schedule M and is a member of a consolidated group, list the common parent as the U.S. person filing Schedule M.

Column headings. There are 2 sets of column headings above lines 1 through 19. The first set of column headings is to be used in cases where the tax owner is a CFP. The second set of column headings

is to be used in cases where the tax owner is a CFC. If you are completing Schedule M for an FDE for which the tax owner is a CFP, check the box for CFPs and complete lines 1 through 19 using the headings in columns (a) through (e) of the CFP set of columns. If you are completing Schedule M for an FDE for which the tax owner is a CFC, check the box for CFCs and complete lines 1 through 19 using the headings in columns (a) through (f) of the CFC set of columns.

Column (e). Use column (e) to report transactions between the FDE and any U.S. person with a 10% or more direct interest in the CFP or any 10% or more U.S. shareholder of any corporation controlling the CFC. If you are a Category 1 filer of Form 8865, or a Category 4 filer of Form 5471, do not report transactions between yourself and the FDE under column (e). Report the transactions only under column (b).

Line 6. Report on line 6 dividends received by the FDE that were not previously taxed under subpart F in the current year or in any prior year.

Lines 18 and 19. Report on lines 18 and 19 the largest outstanding balances during the year of gross amounts borrowed from, and gross amounts loaned to, the related parties described in columns (b) through (f). Do not enter aggregate cash flows, year-end loan balances, average balances, or net balances. Do not include open account balances resulting from sales and purchases reported under other items listed on Schedule M that arise and are collected in full in the ordinary course of business.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form and related schedules will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is approved under OMB control number 1545-0074 and is included in the estimates shown in the instructions for their individual income tax return. The estimated burden for all other taxpayers who file this form is shown below.

Form	Recordkeeping	Learning about the law or the form	Preparing and sending the form to the IRS
8858	17 hr., 56 min.	4 hr., 10 min.	4 hr., 38 min.
Sch. M (8858)	24 hr., 9 min.	6 min.	30 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form and related schedules simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.