



LEXSEE TD 8817

Treasury Decisions  
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Rules and Regulations

DEPARTMENT OF THE TREASURY  
Internal Revenue Service (IRS)

**26 CFR Parts 1 and 602**

**64 FR 5713; RIN 1545-AV70**

**Notice of Certain Transfers to Foreign Partnerships and Foreign Corporations**

*T.D. 8817*

**DATE:** February 5, 1999

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations under section 6038B relating to information reporting requirements for certain transfers by United States persons to foreign partnerships. The regulations implement amendments made by the Taxpayer Relief Act of 1997 that require a United States person who transfers property to a foreign partnership to furnish certain information with respect to such transfer. This document also contains final regulations that require certain cash transfers to foreign corporations to be reported. The regulations provide guidance needed to comply with the reporting requirements with respect to transfers of cash to foreign corporations and transfers of property to foreign partnerships.

**DATES:** *Effective Dates:* These regulations are effective January 1, 1998, except that the amendments to § 1.6038B-1 are effective February 5, 1999.

*Dates of Applicability:* For dates of applicability of the amendments to § 1.6038B-1, see § 1.6038B-1(g). For dates of applicability of § 1.6038B-2, see § 1.6038B-2(j).

**FOR FURTHER INFORMATION CONTACT:** Eliana Dolgoff, 202-622-3860 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number

1545-1615. Responses to these collections 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 control number.

The collections of information contained in these final regulations are in §§ 1.6038B-1(b) and 1.6038B-2. The burden of complying with the collection of information required to be reported on Form 8865 is reflected in the burden for Form 8865. The burden of complying with the collection of information required to be reported on Form 926 is reflected in the burden for Form 926.

Comments concerning the accuracy of the burden estimates and suggestions for reducing the burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to these collections 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**

On September 9, 1998, the IRS published in the **Federal Register** proposed regulations relating to the reporting of certain transfers to foreign corporations and foreign partnerships under section 6038B. A public hearing was held on November 10, 1998, even though no requests to speak at the hearing were received. Written comments regarding the proposed regulations, however, were received. After consideration of all of the comments received, the proposed regulations under section 6038B are adopted as revised by this Treasury decision. The revisions are discussed below.

## **Public Comments**

Some commentators suggested that the final regulations provide that state and local government employee retirement plans be exempt from the section 6038B reporting requirements, asserting that contributions from such plans to foreign partnerships will not have federal income tax consequences. The final regulations provide that trusts relating to state and local government employee retirement plans are not required to report transfers to foreign partnerships under section 6038B, unless required to do so in the instructions to Form 8865.

One commentator noted that under the proposed regulations, if a United States person transfers property other than cash with a value in excess of \$ 100,000 to a foreign partnership, such person must report the names and addresses of all the other partners of the partnership, regardless of the size of the person's ownership interest in the foreign partnership after the transfer. The commentator requested that the final regulations provide that if a United States person owns less than a 10 percent interest in the foreign partnership after the transfer, regardless of the type of property transferred, such person does not have to report the names and addresses of all the other partners. Alternatively, the commentator requested that it be recognized that a person that makes a good faith effort to obtain such information will have reasonable cause preventing the imposition of any penalties under section 6038B if such person fails to obtain and submit the information.

The final regulations do not adopt the commentator's recommendations. As in the proposed regulations, the final regulations contain a reasonable cause exception that, if satisfied, prevents the IRS from imposing penalties under section 6038B. Whether reasonable cause exists for a failure to comply with the requirements of section 6038B is determined by the district director under all the facts and circumstances. Although the final regulations do not explicitly say so, a failure to submit the names and addresses of the other partners will constitute a failure to comply with the requirements of section 6038B and therefore will always be subject to the reasonable cause exception.

Commentators also questioned whether United States persons must report indirect transfers from a foreign partnership to another foreign partnership. The final regulations reserve on such reporting. If a foreign partnership transfers property to another foreign partnership, a United States person that is a partner of the transferor partnership is not required to report that transfer until such time as the IRS and Treasury implement rules requiring such reporting. However, the IRS remains concerned about transfers from one foreign partnership to another. In conjunction with its study of section 721(c), the IRS is evaluating whether there is a need for the reporting of transfers from foreign partnerships to foreign partnerships.

The final regulations also clarify that if a domestic partnership contributes property to a foreign partnership, the partners of the domestic partnership will be considered to have contributed a proportionate share of the property transferred. Therefore, the partners of the transferor domestic partnership may be required to report under section 6038B transfers made by the transferor partnership. The proposed regulations provide, however, that an indirect transferor does not have to report the contribution on Form 8865 if certain conditions are satisfied, including the filing by the indirect transferor of a statement with the IRS. In an attempt to reduce the burden imposed on taxpayers, the final regulations eliminate the requirement that indirect transferors must file a statement. If the domestic transferor partnership properly reports the transfer of property to a foreign partnership, a United States person that is an indirect transferor need not report the transfer.

The final regulations also modify the reporting requirements with respect to deemed contributions. The proposed regulations provided that if by reason of an adjustment under section 482 a contribution required to be reported under section 6038B is deemed to have been made, the information required to be reported will be furnished timely if filed by the due date (including extensions) of the income tax return for the taxable year during which the adjustment is made. The final regulations provide that deemed contributions resulting from IRS-initiated section 482 adjustments are not required to be reported under section 6038B. However, taxpayers must report deemed contributions resulting from taxpayer-initiated adjustments. Such information will be furnished timely if filed by the due date, including extensions, for filing the taxpayer's income tax return for the year in which the taxpayer makes the section 482 adjustment.

Additionally, the final regulations clarify that a transfer to a foreign partnership made on or after January 1, 1998, but before January 1, 1999, will be considered timely reported either if it is reported on a Form 8865 attached to the taxpayer's income tax return for the first taxable year beginning on or after January 1, 1999, or it is reported on a Form 926 attached to the taxpayer's income tax return for the taxable year in which the transfer occurred.

The final regulations also clarify that transfers that were made between August 5, 1997, and January 1, 1998, may be reported in accordance with the provisions of the final section 6038B regulations or in accordance with *Notice 98-17(1998-11 IRB 6)*.

### **Special Analyses**

It has been determined that this regulation is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collections of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that these final regulations reduce or eliminate the reporting requirements for certain United States persons. Moreover, in general, only a United States person that owns a significant interest in a foreign partnership, or transfers a substantial amount to a foreign partnership, will be subject to these regulations. Thus, 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 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 the impact of the proposed regulations on small business.

Drafting information. The principal authors of these regulations are Eliana Dolgoff and Philip Tretiak of the Office

of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

### **List of Subjects**

#### *26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

#### *26 CFR Part 602*

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 is amended by adding entries in numerical order to read in part as follows:

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

Section 1.6038B-1 also issued under *26 U.S.C. 6038B*.

Section 1.6038B-2 also issued under *26 U.S.C. 6038B*. \* \* \*

**Par. 2.** Section 1.6038B-1 is amended as follows:

1. The section heading is revised.
2. Paragraph (b)(1)(i), first sentence, is revised.
3. The text of paragraph (b)(3) is added.
4. Paragraph (c), first sentence, is revised
5. Paragraph (g) is revised.

The additions and revisions read as follows:

#### **§ 1.6038B-1 -- Reporting of certain transfers to foreign corporations.**

\* \* \* \* \*

(b) *Time and manner of reporting* -(1) *In general* -(i) *Reporting procedure*. Except for stock or securities qualifying under the special reporting rule of paragraph (b)(2) of this section, or cash, which is subject to special rules contained in paragraph (b)(3) of this section, any U.S. person that makes a transfer described in section 6038B(a)(1)(A), 367(d) or (e)(1), is required to report pursuant to section 6038B and the rules of this section and must attach the required information to Form 926, "Return by Transferor of Property to a Foreign Corporation." \* \* \*

\* \* \* \* \*

(3) *Special rule for transfers of cash.* A U.S. person that transfers cash to a foreign corporation must report the transfer if-

(i) Immediately after the transfer such person holds directly, indirectly, or by attribution (determined under the rules of section 318(a), as modified by section 6038(e)(2)) at least 10 percent of the total voting power or the total value of the foreign corporation; or

(ii) The amount of cash transferred by such person or any related person (determined under section 267(b)(1) through (3) and (10) through (12)) to such foreign corporation during the 12-month period ending on the date of the transfer exceeds \$ 100,000.

\* \* \* \* \*

(c) *Information required with respect to transfers described in section 6038B(a)(1)(A).* A United States person that transfers property to a foreign corporation in an exchange described in section 6038B(a)(1)(A) (including cash and other unappreciated property) must provide the following information, in paragraphs labeled to correspond with the number or letter set forth in this paragraph (c) and § 1.6038B-1T(c)(1) through (5). \* \* \*

\* \* \* \* \*

(g) *Effective dates.* This section applies to transfers occurring on or after July 20, 1998, except that the first sentence of paragraph (b)(1)(i), paragraph (b)(3), and the first sentence of paragraph (c) apply to transfers occurring in taxable years beginning after February 5, 1999. See § 1.6038B-1T for transfers occurring prior to July 20, 1998.

**Par. 3.** Section 1.6038B-2 is added to read as follows:

**§ 1.6038B-2 -- Reporting of certain transfers to foreign partnerships.**

(a) *Reporting requirements* -(1) *Requirement to report transfers.* A United States person that transfers property to a foreign partnership in a contribution described in section 721 (including section 721(b)) must report that transfer on Form 8865 "Information Return of U.S. Persons With Respect to Certain Foreign Partnerships" pursuant to section 6038B and the rules of this section, if-

(i) Immediately after the transfer, the United States person owns, directly, indirectly, or by attribution, at least a 10-percent interest in the partnership, as defined in section 6038(e)(3)(C) and the regulations thereunder; or

(ii) The value of the property transferred, when added to the value of any other property transferred in a section 721 contribution by such person (or any related person) to such partnership during the 12-month period ending on the date of the transfer, exceeds \$ 100,000.

(2) *Indirect transfer through a domestic partnership* -For purposes of this section, if a domestic partnership transfers property to a foreign partnership in a section 721 transaction, the domestic partnership's partners shall be considered to have transferred a proportionate share of the property to the foreign partnership. However, if the domestic partnership properly reports all of the information required under this section with respect to the contribution, no partner of the transferor partnership, whether direct or indirect (through tiers of partnerships), is also required to report under this section. For illustrations of this rule, see *Examples 4* and *5* of paragraph (a)(7) of this section.

(3) *Indirect transfer through a foreign partnership.* [Reserved]

(4) *Requirement to report dispositions* -(i) *In general.* If a United States person was required to report a transfer to a foreign partnership of appreciated property under paragraph (a)(1) or (2) of this section, and the foreign partnership disposes of the property while such United States person remains a direct or indirect partner, that United States person

must report the disposition by filing Form 8865. The form must be attached to, and filed by the due date (including extensions) of, the United States person's income tax return for the year in which the disposition occurred.

(ii) *Disposition of contributed property in nonrecognition transaction.* If a foreign partnership disposes of contributed appreciated property in a nonrecognition transaction and substituted basis property is received in exchange, and the substituted basis property has built-in gain under § 1.704-3(a)(8), the original transferor is not required to report the disposition. However, the transferor must report the disposition of the substituted basis property in the same manner as provided for the contributed property.

(5) *Time for filing Form 8865* -(i) *General rule.* The Form 8865 on which a transfer is reported must be attached to the transferor's timely filed (including extensions) income tax return (including a partnership return of income) for the tax year that includes the date of the transfer.

(ii) *Time for filing when transferor also required to report information about the partnership under section 6038.* If the United States person required to file under this section is also required to file a Form 8865 under section 6038 for the period in which the transfer occurs, then the United States person must report under this section on the Form 8865 for the foreign partnership's annual accounting period in which the transfer occurred (not its own taxable year) and file with its income tax return for that year as provided in Section 6038 and the regulations thereunder.

(6) *Returns to be made* -(i) *Separate returns for each partnership.* If a United States person transfers property reportable under this section to more than one foreign partnership in a taxable year, the United States person must submit a separate Form 8865 for each partnership.

(ii) *Duplicate form to be filed.* If required by the instructions accompanying Form 8865, a duplicate Form 8865 (including attachments and schedules) must also be filed by the due date for submitting the original Form 8865 under paragraph (a)(5)(i) or (ii) of this section, as applicable.

(7) *Examples.* The application of this paragraph (a) may be illustrated by the following examples:

*Example 1.* On November 1, 2001, *US*, a United States person that uses the calendar year as its taxable year, contributes \$ 200,000 to *FP*, a foreign partnership, in a transaction subject to section 721. After the contribution, *US* owns a 5% interest in *FP*. *US* must report the contribution by filing Form 8865 for its taxable year ending December 31, 2001. On March 1, 2002, *US* makes a \$ 40,000 section 721 contribution to *FP*, after which *US* owns a 6% interest in *FP*. *US* must report the \$ 40,000 contribution by filing Form 8865 for its taxable year ending December 31, 2002, because the contribution, when added to the value of the other property contributed by *US* to *FP* during the 12-month period ending on the date of the transfer, exceeds \$ 100,000.

*Example 2.* *F*, a nonresident alien, is the brother of *US*, a United States person. *F* owns a 15% interest in *FP*, a foreign partnership. *US* contributes \$ 99,000 to *FP*, in exchange for a 1-percent partnership interest. Under sections 6038(e)(3)(C) and 267(c)(2), *US* is considered to own at least a 10-percent interest in *FP* and, therefore, *US* must report the \$ 99,000 contribution under this section.

*Example 3.* *US*, a United States person, owns 40 percent of *FC*, a foreign corporation. *FC* owns a 20-percent interest in *FP*, a foreign partnership. Under section 267(c)(1), *US* is considered to own 8 percent of *FP* due to its ownership of *FC*. *US* contributes \$ 50,000 to *FP* in exchange for a 5-percent partnership interest. Immediately after the contribution, *US* is considered to own at least a 10-percent interest in *FP* and, therefore, must report the \$ 50,000 contribution under this section.

*Example 4.* *US*, a United States person, owns a 60-percent interest in *USP*, a domestic partnership. On March 1, 2001, *USP* contributes \$ 200,000 to *FP*, a foreign partnership, in exchange for a 5-percent partnership interest. Under paragraph (a)(2) of this section, *US* is considered as having contributed \$ 120,000 to *FP* (\$ 200,000 x 60%). However, under paragraph (a)(2), if *USP* properly reports the contribution to *FP*, *US* is not required to report its \$ 120,000

contribution. If *US* directly contributes \$ 5,000 to *FP* on June 10, 2001, *US* must report the \$ 5,000 contribution because *US* is considered to have contributed more than \$ 100,000 to *FP* in the 12-month period ending on the date of the \$ 5,000 contribution.

*Example 5.* *US*, a United States person, owns an 80-percent interest in *USP*, a domestic partnership. *USP* owns an 80-percent interest in *USPI*, a domestic partnership. On March 1, 2001, *USPI* contributes \$ 200,000 to *FP*, a foreign partnership, in exchange for a 3-percent partnership interest. Under paragraph (a)(2) of this section, *USP* is considered to have contributed \$ 160,000 ( $\$ 200,000 \times 80\%$ ) to *FP*. *US* is considered to have contributed \$ 128,000 to *FP* ( $\$ 200,000 \times 80\% \times 80\%$ ). However, if *USP* reports the transfer of the \$ 200,000 to *FP*, neither *US* nor *USP* are required to report under this section the amounts they are considered to have contributed. Additionally, regardless of whether *USPI* reports the \$ 200,000 contribution, if *USP* reports the \$ 160,000 contribution it is considered to have made, *US* does not have to report under this section the \$ 128,000 contribution *US* is considered to have made.

(b) *Transfers by trusts relating to state and local government employee retirement plans.* Trusts relating to state and local government employee retirement plans are not required to report transfers under this section, unless otherwise specified in the instructions to Form 8865.

(c) *Information required with respect to transfers of property.* With respect to transfers required to be reported under paragraph (a)(1) or (2) of this section, the return must contain information in such form or manner as Form 8865 (and its accompanying instructions) prescribes with respect to reportable events, including-

- (1) The name, address, and U.S. taxpayer identification number of the United States person making the transfer;
- (2) The name, U.S. taxpayer identification number (if any), and address of the transferee foreign partnership, and the type of entity and country under whose laws the partnership was created or organized;
- (3) A general description of the transfer, and of any wider transaction of which it forms a part, including the date of transfer;
- (4) The names and addresses of the other partners in the foreign partnership, unless the transfer is solely of cash and the transferor holds less than a 10-percent interest in the transferee foreign partnership immediately after the transfer;
- (5) A description of the partnership interest received by the United States person, including a change in partnership interest;
- (6) A separate description of each item of contributed property that is appreciated property subject to the allocation rules of section 704(c)(except to the extent that the property is permitted to be aggregated in making allocations under section 704(c)), or is intangible property, including its estimated fair market value and adjusted basis.
- (7) A description of other contributed property, not specified in paragraph (c)(6) of this section, aggregated by the following categories (with, in each case, a brief description of the property)-
  - (i) Stock in trade of the transferor (inventory);
  - (ii) Tangible property (other than stock in trade) used in a trade or business of the transferor;
  - (iii) Cash;
  - (iv) Stock, notes receivable and payable, and other securities; and
  - (v) Other property.
- (d) *Information required with respect to dispositions of property.* In respect of dispositions required to be reported

under paragraph (a)(4) of this section, the return must contain information in such form or manner as Form 8865 (and its accompanying instructions) prescribes with respect to reportable events, including-

- (1) The date and manner of disposition;
- (2) The gain and depreciation recapture amounts, if any, realized by the partnership; and
- (3) Any such amounts allocated to the United States person.

(e) *Method of reporting.* Except as otherwise provided on Form 8865, or the accompanying instructions, all amounts reported as required under this section must be expressed in United States currency, with a statement of the exchange rates used. All statements required on or with Form 8865 pursuant to this section must be in the English language.

(f) *Reporting under this section not required of partnerships excluded from the application of subchapter K -(1) Election to be wholly excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761-2(a), if such partnership has validly elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in the manner specified in § 1.761-2(b)(2)(i).

(2) *Deemed excluded.* The reporting requirements of this section will not apply to any United States person in respect of an eligible partnership as described in § 1.761-2(a), if such partnership is validly deemed to have elected to be excluded from all of the provisions of subchapter K of chapter 1 of the Internal Revenue Code in accordance with the provisions of § 1.761-2(b)(2)(ii).

(g) *Deemed contributions.* Deemed contributions resulting from IRS-initiated section 482 adjustments are not required to be reported under section 6038B. However, taxpayers must report deemed contributions resulting from taxpayer-initiated adjustments. Such information will be furnished timely if filed by the due date, including extensions, for filing the taxpayer's income tax return for the year in which the adjustment is made.

(h) *Failure to comply with reporting requirements -(1) Consequences of failure.* If a United States person is required to file a return under paragraph (a) of this section and fails to comply with the reporting requirements of section 6038B and this section, then such person is subject to the following penalties:

(i) The United States person is subject to a penalty equal to 10 percent of the fair market value of the property at the time of the contribution. Such penalty with respect to a particular transfer is limited to \$ 100,000, unless the failure to comply with respect to such transfer was due to intentional disregard.

(ii) The United States person must recognize gain (reduced by the amount of any gain recognized, with respect to that property, by the transferor after the transfer) as if the contributed property had been sold for fair market value at the time of the contribution. Adjustments to the basis of the partnership's assets and any relevant partner's interest as a result of gain being recognized under this provision will be made as though the gain was recognized in the year in which the failure to report was finally determined.

(2) *Failure to comply.* A failure to comply with the requirements of section 6038B includes-

(i) The failure to report at the proper time and in the proper manner any information required to be reported under the rules of this section; and

(ii) The provision of false or inaccurate information in purported compliance with the requirements of this section.

(3) *Reasonable cause exception.* Under section 6038B(c)(2) and this section, the provisions of paragraph (h)(1) of this section will not apply if the transferor shows that a failure to comply was due to reasonable cause and not willful



neglect. The transferor may attempt to do so by providing a written statement to the district director having jurisdiction of the taxpayer's return for the year of the transfer, setting forth the reasons for the failure to comply. Whether a failure to comply was due to reasonable cause will be determined by the district director under all the facts and circumstances.

(4) *Statute of limitations.* For exceptions to the limitations on assessment in the event of a failure to provide information under section 6038B, see section 6501(c)(8).

(i) *Definitions* -(1) *Appreciated property.* Appreciated property is property that has a fair market value in excess of basis.

(2) *Domestic partnership.* A domestic partnership is a partnership described in section 7701(a)(4).

(3) *Foreign partnership.* A foreign partnership is a partnership described in section 7701(a)(5).

(4) *Related person.* Persons are related persons if they bear a relationship described in section 267(b)(1) through (3) or (10) through (12), after application of section 267(c) (except for (c)(3)), or in section 707(b)(1)(B).

(5) *Substituted basis property.* Substituted basis property is property described in section 7701(a)(42).

(6) *Taxpayer-initiated adjustment.* A taxpayer-initiated adjustment is a section 482 adjustment that is made by the taxpayer pursuant to § 1.482-1(a)(3).

(7) *United States person.* A United States person is a person described in section 7701(a)(30).

(j) *Effective dates* -(1) *In general.* This section applies to transfers made on or after January 1, 1998. However, for a transfer made on or after January 1, 1998, but before January 1, 1999, the filing requirements of this section may be satisfied by-

(i) Filing a Form 8865 with the taxpayer's income tax return (including a partnership return of income) for the first taxable year beginning on or after January 1, 1999; or

(ii) Filing a Form 926 with the taxpayer's income tax return (including a partnership return of income) for the taxable year in which the transfer occurred.

(2) *Transfers made between August 5, 1997 and January 1, 1998.* A United States person that made a transfer of property between August 5, 1997, and January 1, 1998, that is required to be reported under section 6038B may satisfy its reporting requirement by reporting in accordance with the provisions of this section or in accordance with the provisions of *Notice 98-17 (1998-11 IRB 6)*(see § 601.601(d)(2) of this chapter).

\* \* \* \* \*

## **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 (c) is amended by adding an entry in numerical order to the table to read as follows:

### **§ 602.101 -- OMB Control numbers.**

\* \* \* \* \*

T.D. 8817

(c) \* \* \*

CFR part or section where identified and described	Current OMB Control No.
* * * * *	
1.6038B-1	1545-1615
* * * * *	
1.6038B-2	1545-1615

**Robert E. Wenzel,**

*Deputy Commissioner of Internal Revenue.*

Approved: January 29, 1999.

**Donald C. Lubick,**

*Assistant Secretary of the Treasury.*

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