

# TAX SECTION

## State Bar of Texas

### OFFICERS:

**Renisha Fountain (Chair)**  
Chamberlain, Hrdlicka, White, Williams &  
Aughtry, PC  
1200 Smith Street, Suite 1400  
Houston, Texas 77002  
(713) 658-2517  
[renisha.fountain@chamberlainlaw.com](mailto:renisha.fountain@chamberlainlaw.com)

**Robert D. Probasco (Chair-Elect)**  
Texas A&M University School of Law  
307 W. 7th Street, Suite LL50  
Fort Worth, Texas 76102  
(214) 335-7549  
[probasco@law.tamu.edu](mailto:probasco@law.tamu.edu)

**Abbey B. Garber (Secretary)**  
Holland & Knight  
1722 Routh Street, Suite 1500  
Dallas, Texas 75201  
(214) 969-1640  
[abbey.garber@hklaw.com](mailto:abbey.garber@hklaw.com)

**Leonora (Lee) S. Meyercord (Treasurer)**  
Holland & Knight  
1722 Routh Street, Suite 1500  
Dallas, Texas 75201  
(214) 969-1315  
[lee.meyercord@hklaw.com](mailto:lee.meyercord@hklaw.com)

### COUNCIL MEMBERS:

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**Pro Bono**  
Jaime Vasquez (San Antonio)  
Luciana Cristina Petry (Houston)



July 12, 2024

Via Federal eRulemaking Portal  
at [www.regulations.gov](http://www.regulations.gov)

Internal Revenue Service

RE: Comments on Proposed Regulations under Sections 643(i), 679,  
6039F, 6048, and 6677 (REG-124850-08)

Ladies and Gentlemen:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Department of the Treasury (the “Treasury”) and Internal Revenue Service (the “IRS” or “Service”) for comments in the Notice of Proposed Rulemaking (REG-124850-08) issued on May 8, 2024 (the “Proposed Regulations”), under Sections 643(i), 679, 6039F, 6048, and 6677 of the Internal Revenue Code of 1986, as amended (the “Code”).

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

Respectfully submitted,

A handwritten signature in dark ink, reading "Renesha Fountain". The signature is written in a cursive, flowing style.

Renesha Fountain, Chair  
State Bar of Texas, Tax Section

Enclosure

**COMMENTS ON PROPOSED REGULATIONS UNDER SECTIONS  
643(i), 679, 6039F, 6048, AND 6677**

These comments on the Proposed Regulations (the “Comments”) are submitted on behalf of the Tax Section of the State Bar of Texas. Matthew Roberts, Vice Chair of the Tax Controversy Committee primarily drafted these Comments. Joshua D. Smeltzer, Council Member for the Tax Section and Vice Chair of the Committee on Government Submissions reviewed these Comments and provided substantive comments. Lee Meyercord, Treasurer and the Chair of the Committee on Government Submissions also reviewed these Comments.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make this government submission.

Contact Persons:

Matthew L. Roberts  
Vice Chair, Tax Controversy Committee  
Gray Reed  
1601 Elm St., Suite 4600  
Dallas, Texas 75201  
[mroberts@grayreed.com](mailto:mroberts@grayreed.com)

Joshua Smeltzer  
Council Member, Tax Section  
Vice Chair, Committee on Government Submissions  
Gray Reed  
1601 Elm St., Suite 4600  
Dallas, Texas 75201  
[jsmeltzer@grayreed.com](mailto:jsmeltzer@grayreed.com)

Date: July 12, 2024

## I. INTRODUCTION

These Comments are provided in response to Treasury's and the IRS's request for comments regarding the Proposed Regulations. The Proposed Regulations relate to Sections 643(i), 679, 6039F, 6048, and 6677 of the Code.<sup>1</sup>

## II. TREATMENT OF MARRIED PERSONS WHO FILE JOINTLY

### A. Background

Section 6048 imposes reporting obligations on U.S. persons with certain interests in, or who have transactions with, foreign trusts. Under Section 6048(a), a "responsible party"<sup>2</sup> must provide "written notice" of any "reportable event." A "reportable event" is defined in Section 6048(a)(3)(A) to mean: (i) the creation of a foreign trust by a U.S. person; (ii) the transfer of money or property (directly or indirectly) to a foreign trust by a U.S. person, including a transfer by reason of death; and (iii) the death of a citizen or resident of the U.S. if the decedent was treated as the owner of any portion of the foreign trust under the grantor trust rules<sup>3</sup> or if any portion of the foreign trust was included in the decedent's gross estate.

Section 6048(b) requires U.S. persons to "submit such information as the Secretary may prescribe" if the person is treated as the owner of any portion of a foreign trust under the grantor trust rules at any time during a tax year. In addition, these persons must "ensure that . . . the foreign trust makes a return for such year which sets forth a full and complete accounting of all trust activities and operations for the year, the name of the United States agent for such trust, and such other information as the Secretary may prescribe[.]"<sup>4</sup>

Section 6048(c) requires U.S. persons who receive (directly or indirectly) any distribution from a foreign trust to "make a return with respect to such trust for such year[.]"

If a U.S. person fails to comply with a Section 6048 reporting obligation, the IRS may impose civil penalties under Section 6677. Generally, the Section 6677 civil penalty is equal to the greater of \$10,000 or 35 percent of the "gross reportable amount" unless the penalty relates to a violation of Section 6048(b).<sup>5</sup> For violations of Section 6048(b), the penalty is equal to the greater of \$10,000 or 5 percent of the "gross reportable amount."<sup>6</sup> The gross reportable amount

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<sup>1</sup> Unless otherwise noted, references in these Comments to a "Section" mean provisions of the Internal Revenue Code of 1986, as amended.

<sup>2</sup> A "responsible party" means: (i) the grantor if the transaction relates to an *inter vivos* trust; (ii) the transferor if the transaction relates to the transfer of money or property (except due to death); and (iii) in all other instances, the executor of the decedent's estate. See I.R.C. § 6048(a)(4).

<sup>3</sup> See I.R.C. §§ 671-679.

<sup>4</sup> I.R.C. § 6048(b).

<sup>5</sup> I.R.C. § 6677(a), (b).

<sup>6</sup> I.R.C. § 6677(b).

differs based on the reporting obligation. The gross reportable amount means: (i) the gross value of the property involved in the event (determined as of the date of the event) in the case of a failure relating to Section 6048(a); (ii) the gross value of the portion of the trust's assets at the close of the year treated as owned by the U.S. person in the case of a failure relating to Section 6048(b); or (iii) the gross amount of the distribution in the case of a failure relating to Section 6048(c).<sup>7</sup> The Section 6677 civil penalty is not subject to the deficiency procedures.<sup>8</sup>

On June 2, 1997, Treasury and the IRS issued Notice 97-34, 1997-1 C.B. 422 ("Notice 97-34"), which provides guidance on Sections 6048 and 6677. Under Notice 97-34, U.S. persons satisfy their Section 6048 reporting obligations by filing IRS Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Foreign Gifts* ("IRS Form 3520"), and IRS Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner (Under Section 6048(b))* ("IRS Form 3520-A").

## **B. Proposed Regulations**

Under the Proposed Regulations, U.S. persons satisfy their Section 6048 reporting obligations by filing IRS Forms 3520 and 3520-A.<sup>9</sup> If married U.S. taxpayers file one IRS Form 3520 for a tax year, the Proposed Regulations treat them as a single U.S. person for that year.<sup>10</sup> The Proposed Regulations also provide an "anti-abuse rule" where married U.S. taxpayers file a joint income tax return but do not file a required IRS Form 3520. The anti-abuse rule provides:

[T]he Commissioner may treat married U.S. persons who file a joint income tax return under section 6013 for a tax year as a single U.S. person for that year, unless the Commissioner determines that, based on all of the facts and circumstances, only one of the married individuals was subject to the information reporting requirement under [Section 6048] (for example, because only one spouse had an interest in the property constituting the transfer to, or receipt from, a foreign trust).<sup>11</sup>

According to the preamble in the Proposed Regulations, this anti-abuse rule is necessary because "it can be difficult for the IRS to determine who, between spouses, should be treated as a transferor, grantor, or owner of, or the recipient of a distribution from a foreign trust." The preamble further explains that the anti-abuse rule promotes the IRS's interest in enforcing Section 6048 while also permitting each spouse to demonstrate whether joint and several liability should apply.

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<sup>7</sup> I.R.C. § 6677(c).

<sup>8</sup> I.R.C. § 6677(e).

<sup>9</sup> Prop. Reg. §§ 1.6048-2, 1.6048-3, 1.6048-4.

<sup>10</sup> Prop. Reg. § 1.6677-1(f)(1).

<sup>11</sup> Prop. Reg. § 1.6677-1(f)(2).

Proposed Regulation Section 1.6677-1(f)(3) also provides that “[i]f married U.S. persons are treated as a single U.S. person for a tax year, such married U.S. persons have joint and several liability with respect to any penalties imposed under [Section 6677].”

### **C. Discussion**

Proposed Regulation Section 1.6677-1(f)(2) and Proposed Regulation Section 1.6677-1(f)(3) appear inconsistent with the plain statutory language of Sections 6048 and 6677. Section 6048 imposes a reporting obligation only on any U.S. person who transacts with, or has ownership in, a foreign trust. Section 6677(a) grants the IRS authority to impose a penalty but solely against “the person required to file” the information return. Neither Section 6048 nor Section 6677 suggest that the IRS has the authority to impose a penalty against a married taxpayer who does not have a Section 6048 reporting obligation.

We recognize that Section 6013(d)(3) may require joint and several liability if a joint income tax return has been filed. By its terms, however, that provision applies only to income taxes associated with the joint return. Because the Section 6677 civil penalty is located within Subchapter B of Chapter 68, the “assessable penalty” should not be considered an income tax liability within the meaning of Section 6013(d)(3). *Cf. Chavis v. Comm’r*, 158 T.C. 175 (2022) (trust fund recovery penalty under Section 6672 was not a joint and several liability).

An IRS Chief Counsel Advice Memorandum<sup>12</sup> similarly concluded that a similar international information return penalty under Section 6038(b) is not an income tax subject to joint and several liability under Section 6013(d)(3). The same rationale should apply here to the Section 6677 civil penalty.

### **D. Recommendation**

We believe that, in order to accomplish the IRS goals of a fair and administrable tax system, Treasury and the IRS should consider amending the Proposed Regulations to strike Proposed Regulation Section 1.6677-1(f)(2) and (f)(3).

## **III. COVERED EXPATRIATE**

### **A. Background**

Section 6039F requires U.S. persons to report the receipt of “foreign gifts” that in the aggregate exceed \$10,000 in any tax year. A “foreign gift” is defined generally as “any amount received from a person other than a United States person which the recipient treats as a gift or

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<sup>12</sup> IRS Chief Counsel Advice Memorandum 202129010.

bequest.”<sup>13</sup> For tax years after December 31, 1999, the \$10,000 reporting threshold is increased by a cost-of-living adjustment.<sup>14</sup>

Section 6039F(c) imposes a civil penalty for the failure to comply with the reporting requirements under Section 6039F(a). The penalty is 5 percent of the amount of the foreign gift for each month in which the failure continues (not to exceed 25 percent in the aggregate).<sup>15</sup>

On June 2, 1997, Treasury and the IRS issued Notice 97-34, which provides guidance on Section 6039F. Under Notice 97-34, a U.S. person complies with the Section 6039F reporting requirement by filing an IRS Form 3520. In addition, Notice 97-34 modified the reporting threshold under Section 6039F(a) for receipts of foreign gifts from individuals. Under Notice 97-34, U.S. persons must file an IRS Form 3520 if they receive foreign gifts from an individual aggregating more than \$100,000. For foreign gifts from corporations and partnerships, the \$10,000 reporting threshold (as modified by the cost-of-living adjustment) continues to apply.

Section 2801 imposes a tax on a U.S. citizen or resident who receives a “covered gift or bequest.”<sup>16</sup> For these purposes, a “covered gift or bequest” means: (i) any property acquired by gift directly or indirectly from an individual who, at the time of such acquisition, is a covered expatriate, and (ii) any property acquired directly or indirectly by reason of the death of an individual who, immediately before such death, was a covered expatriate.<sup>17</sup> The Section 2801 tax applies only to the extent that the value of the covered gifts and bequests received by the U.S. citizen or resident during the calendar year exceeds the annual gift tax exclusion amount in effect under Section 2503(b).<sup>18</sup>

Under Section 2801(f), a “covered expatriate” has the same meaning as such term is used in Section 877A(g)(1), which defines “covered expatriate” as any expatriate who meets the requirements of Section 877(a)(2)(A), (B), or (C). Under Section 877(a)(2), an individual is a covered expatriate if the individual falls within one or more of three categories. First, an individual is a covered expatriate if “the average net income tax (as defined in section 38(c)(1)) of such individual for the period of 5 taxable years ending before the date of the loss of the United States citizenship is greater than \$124,000.”<sup>19</sup> Second, an individual is a covered expatriate if “the net worth of the individual as of such date is \$2,000,000 or more.”<sup>20</sup> Third, an individual is a covered expatriate if “such individual fails to certify under penalty of perjury that he has met

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<sup>13</sup> I.R.C. § 6039F(b).

<sup>14</sup> I.R.C. § 6039F(d).

<sup>15</sup> I.R.C. § 6039F(c).

<sup>16</sup> I.R.C. §§ 2801(a), (b).

<sup>17</sup> I.R.C. § 2801(e).

<sup>18</sup> I.R.C. § 2801(c).

<sup>19</sup> I.R.C. § 877(a)(2)(A). This \$124,000 amount is indexed for inflation for calendar years after 2004. *See id.*

<sup>20</sup> I.R.C. § 877(a)(2)(B).

the requirements of this title for the 5 preceding taxable years or fails to submit such evidence of such compliance as the Secretary may require.”<sup>21</sup>

Section 6039G requires taxpayers to file a statement with the Treasury Secretary for the year in which a taxpayer becomes a covered expatriate. The Treasury Secretary publicly releases the names of covered expatriates quarterly in the Federal Register.

## **B. Proposed Regulations**

The Proposed Regulations require U.S. persons who receive a foreign gift under Section 6039F to file an IRS Form 3520.<sup>22</sup> Under Proposed Regulation Section 1.6039F-1(b)(2), a U.S. person generally does not have an IRS Form 3520 reporting obligation if the person receives in the aggregate \$100,000 or less (as modified by a cost-of-living adjustment in the Proposed Regulations) in foreign gifts. Proposed Regulation Section 1.6039F-1(c)(2)(ii) provides that an IRS Form 3520 must be filed, however, if the U.S. person receives a covered gift or bequest from an individual that exceeds the annual exclusion amount under Section 2503(b). The Proposed Regulations provide that Proposed Regulation Section 1.6039F-1(c)(2)(ii) will go into effect on the date the final regulations under Section 2801 are published in the Federal Register.

## **C. Discussion**

By requiring a U.S. person to report a “covered gift or bequest,” the Proposed Regulations impose a burdensome obligation on U.S. persons to determine whether the donor is a covered expatriate. Although Treasury publishes the names of covered expatriates quarterly, this information is not readily available to taxpayers. In addition, we believe that there will be instances where the donor will not provide information to the donee regarding the donor’s status as a covered expatriate. For example, many donors who are covered expatriates may not want to share with the donee that their average net income tax was more than \$124,000 under section 877(a)(2)(A) or share that their net worth as of the date of the loss of their U.S. citizenship was \$2 million or more under section 877(a)(2)(B).

In addition, it is doubtful that Congress intended Treasury and the IRS to use Section 6039F as a mechanism to report covered gifts or bequests. Under Section 6039F(a), a reportable obligation arises if the foreign gift exceeds \$10,000 (as modified by a cost-of-living adjustment). For the 2024 tax year, the Section 6039F(a) reporting threshold is \$19,570. By comparison, the annual exclusion amount referred to in Section 2801(c) is \$18,000 for 2024. Because there may be instances where a covered gift exceeds the annual exclusion but is below the Section 6039F(a) reporting threshold, Treasury and the IRS’s interpretation of Section 6039F to require the reporting of covered gifts or bequests could violate the plain language of Section 6039F(a). Moreover, Section 6039F(a) makes no reference to Section 2801.

## **D. Recommendation**

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<sup>21</sup> I.R.C. § 877(a)(2)(C).

<sup>22</sup> Prop. Reg. § 1.6039F-1(a).



We believe that, in order to accomplish the IRS goals of a fair and administrable tax system, the IRS and Treasury should consider amending the Proposed Regulations to strike Proposed Regulation Section 1.6039F-1(c)(2)(ii).

#### **IV. TAX-FAVORED FOREIGN RETIREMENT TRUSTS**

##### **A. Background**

Section 6048(d)(4) allows Treasury and the IRS to “suspend or modify” any Section 6048 reporting requirement if these agencies determine that the United States has no significant tax interest in obtaining the required information. Treasury and the IRS have previously issued guidance suspending or modifying the Section 6048 reporting obligations in various circumstances.<sup>23</sup>

On March 16, 2020, the IRS issued Rev. Proc. 2020-17. That revenue procedure exempts certain tax-favored foreign retirement trusts that were established and operated exclusively or almost exclusively to provide pension or retirement benefits, provided the U.S. person and trust meet certain requirements.

First, the U.S. person must be an “eligible individual,” defined in the revenue procedure as:

an individual who is, or at the time was, a U.S. citizen or resident (within the meaning of section 7701(a)(30)(A)) and who, for any period during which an amount of tax may be assessed under section 6501 (without regard to section 6501(c)(8)), is compliant (or comes into compliance) with all requirements for filing a U.S. federal income tax return (or returns) covering the period such individual was a U.S. citizen or resident, and to the extent required under U.S. tax law, has reported as income any contributions to, earnings of, or distributions from, an applicable tax-favored foreign trust on the applicable return (including on an amended return).

Second, the foreign trust must meet the definition in the revenue procedure of a “tax-favored retirement trust.” For these purposes, a tax-favored retirement trust means a foreign trust that is created, organized, or otherwise established under the laws of a foreign jurisdiction as a trust, plan, fund, scheme, or other arrangement to operate exclusively or almost exclusively to provide, or to earn income for the provision of, pension or retirement benefits and ancillary or incidental benefits, and that meets the following additional requirements:

- The trust is generally exempt from income tax or is otherwise tax-favored under the laws of the trust’s jurisdiction;

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<sup>23</sup> See Notice 97-34, Sec. V; Rev. Proc. 2014-55, 2014-44 I.R.B. 753.

- Annual information reporting with respect to the trust (or of its participants or beneficiaries) is provided, or is otherwise available, to the relevant tax authorities in the trust's jurisdiction;
- Only contributions with respect to income earned from the performance of personal services are permitted;
- Contributions to the trust are limited by a percentage of earned income of the participant, are subject to an annual limit of \$50,000 or less to the trust, or are subject to a lifetime limit of \$1,000,000 or less to the trust ("Contribution Limitation");
- Withdrawals, distributions, or payments from the trust are conditioned upon reaching a specified retirement age, disability, or death, or penalties apply to withdrawals, distributions, or payments made before such conditions are met.
- If the trust is an "employer-maintained trust," the trust must meet certain additional requirements, including nondiscriminatory rules applicable to its employees' participation in the trust.

## **B. Proposed Regulation**

Under its authority in Section 6048(d)(4), the Proposed Regulations extend the Section 6048 reporting exemptions for certain tax-favored foreign retirement trusts. Similar to Rev. Proc. 2020-17, the U.S. person must be an "eligible individual" and the foreign trust must meet the definition of a "tax-favored retirement trust."<sup>24</sup>

Proposed Regulation Section 1.6048-5(b)(1) defines an "eligible individual similarly to Rev. Proc. 2020-17."<sup>25</sup> Proposed Regulation Section 1.6048-5(b)(2) defines a "tax-favored retirement trust" generally the same as Rev. Proc. 2020-17 with some modifications. According to the preamble in the Proposed Regulations, these modifications were made to address comments received after the release of Rev. Proc. 2020-17, many of which sought an increase in the applicable contribution limitation thresholds, rules for tax-favored foreign retirement trusts that may allow limited contributions of unearned income, and relief for certain trusts that did not fall within the listed categories but that have values below certain thresholds.

One proposed change from Rev. Proc. 2020-17 in the Proposed Regulations relates to the Contribution Limitation. Proposed Regulation Section 1.6048-5(b)(2)(iv) provides that a foreign trust may meet the definition of a tax-favored foreign retirement trust if it meets either a value threshold or any one of the contribution limitations. Proposed Regulation Section 1.6048-5(b)(2)(iv)(1) states that a foreign trust meets the value threshold if the aggregate value of the trust(s) in the trust's jurisdiction is limited to no more than \$600,000 at any point during the

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<sup>24</sup> Prop. Reg. § 1.6048-5(b).

<sup>25</sup> *Id.*

taxable year regardless of the number of trusts established. Proposed Regulation Section 1.6048-5(b)(2)(iv)(2) states that a foreign trust may alternatively meet a contribution limit if the contribution to the trust in the trust's jurisdiction is limited to any one of the following: (i) a percentage of earned income of the participant; (ii) an annual limit of \$75,000 or less; or (iii) a lifetime limit of \$1,000,000.

### **C. Discussion**

We commend Treasury and the IRS for exercising their authority under Section 6048(d)(4) to exempt additional tax-favored retirement trusts from the Section 6048 reporting requirements. We believe the new Proposed Regulations will provide welcome relief to many U.S. taxpayers, particularly those who have been employed overseas and who have pensions or other retirement vehicles in foreign jurisdictions.

Given the structure and purpose of the Proposed Regulations, we interpret Proposed Regulation Section 1.6048-5(b)(2)(iv)(1) as providing taxpayers with another means to qualify for relief from the Section 6048 reporting requirements if, among other requirements, the aggregate value of the trust or trusts a taxpayer has in a foreign jurisdiction or multiple jurisdictions does not exceed \$600,000 at any point during the tax year (as determined under Proposed Regulation Section 1.6048-5(b)(2)(iv)(3)), regardless of the number of foreign retirement trusts a taxpayer has in those foreign jurisdictions. Because we believe the Proposed Regulations are ambiguous in this regard, we respectfully request that such provision be modified to avoid any ambiguities.

### **D. Recommendation**

We believe that, in order to accomplish the IRS goals of a fair and administrable tax system, the Treasury and the IRS should consider revising Proposed Regulation Section 1.6048-5(b)(2)(iv)(i) as follows:

(1) Value Threshold. The fair market value of an eligible person's trust does not exceed \$600,000 at any time during the taxable year (as adjusted under paragraph (b)(2)(iv)(3) of this section). If an eligible person has more than one trust in any tax year, this provision shall be satisfied if the aggregate fair market value of all of the trusts does not exceed \$600,000 at any time during the taxable year (as adjusted under paragraph (b)(2)(iv)(3) of this section).

Because we believe that many U.S. taxpayers will rely on Proposed Regulation Section 1.6048-5(b)(2)(iv)(i), we believe the Treasury and IRS should consider adding examples related to this provision.