

(vii) *Affiliate*. An affiliate is a corporation that is a member of the same affiliated group (as defined in section 1504(a), without regard to section 1504(b)(3)) as the transferee foreign corporation.

(7) *Certain transfers in connection with performance of services*. Section 367(a)(1) shall not apply to a domestic corporation's transfer of its own stock or securities in connection with the performance of services, if the transfer is considered to be to a foreign corporation solely by reason of § 1.83-6(d)(1).

(8) *Examples*. This paragraph (c) may be illustrated by the following examples:

*Example 1. Ownership presumption.* (i) FC, a foreign corporation, issues 51 percent of its stock to the shareholders of S, a domestic corporation, in exchange for their S stock, in a transaction described in section 367(a)(1).

(ii) Under paragraph (c)(2) of this section, all shareholders of S who receive stock of FC in the exchange are presumed to be U.S. persons. Unless this ownership presumption is rebutted, the condition set forth in paragraph (c)(1)(i) of this section will not be satisfied, and the exception in paragraph (c)(1) of this section will not be available. As a result, all U.S. persons that transferred S stock will recognize gain on the exchange. To rebut the ownership presumption, S must comply with the reporting requirements contained in paragraph (c)(4)(ii) of this section, obtaining ownership statements (described in paragraph (c)(6)(i) of this section) from a sufficient number of non-U.S. persons who received FC stock in the exchange to demonstrate that the amount of FC stock received by U.S. persons in the exchange does not exceed 50 percent.

*Example 2. Filing of Gain Recognition Agreement.* (i) The facts are the same as in *Example 1*, except that FC issues only 40 percent of its stock to the shareholders of S in the exchange. FC satisfies the active trade or business test (described in paragraph (c)(1)(iii) of this section). A, a U.S. person, owns 10 percent of S's stock immediately before the transfer. All other shareholders of S own less than five percent of its stock. None of S's officers or directors owns any stock in FC immediately after the transfer. A will own 15 percent of the stock of FC immediately after the transfer, 4 percent received in the exchange, and the balance being stock in FC that A owned prior to and independent of the transaction. No S shareholder besides A owns five percent or more of FC immediately after the transfer. The reporting requirements

under paragraph (c)(4)(i) of this section are satisfied.

(ii) The condition set forth in paragraph (c)(1)(i) of this section is satisfied because, even after application of the presumption in paragraph (c)(2) of this section, U.S. transferors could not receive more than 50 percent of FC's stock in the transaction. There is no control group because five-percent target shareholders and officers and directors of S do not, in the aggregate, own more than 50 percent of the stock of FC immediately after the transfer (A, the sole five-percent target shareholder, owns 15 percent of the stock of FC immediately after the transfer, and no officers or directors of S own any stock of FC immediately after the transfer). Therefore, the condition set forth in paragraph (c)(1)(ii) of this section is satisfied (and A's cross-ownership of FC stock is not taken into account). The facts assume that the condition set forth in paragraph (c)(1)(iii) of this section is satisfied. Thus, U.S. persons that are not five-percent transferee shareholders will not recognize gain on the exchange of S shares for FC shares. A, a five-percent transferee shareholder, will not be required to include in income any gain realized on the exchange in the year of the transfer if he files a gain recognition agreement (GRA) and complies with section 6038B. The duration of the GRA is five years if all U.S. transferors own in the aggregate less than 50 percent of the total voting power and the total value of FC immediately after the transfer, and ten years if this condition is not satisfied. If A lacks the information to determine whether he is eligible to file a five-year GRA (because the determination includes a cross-ownership inquiry for all U.S. transferors), he is required to file a ten-year GRA.

*Example 3. Control Group.* (i) The facts are the same as in *Example 2*, except that B, another U.S. person, is a 5-percent target shareholder, owning 25 percent of S's stock immediately before the transfer. B owns 40 percent of the stock of FC immediately after the transfer, 10 percent received in the exchange, and the balance being stock in FC that B owned prior to and independent of the transaction.

(ii) A control group exists because A and B, each a five-percent target shareholder within the meaning of paragraph (c)(6)(iii) of this section, together own more than 50 percent of FC immediately after the transfer (counting both stock received in the exchange and stock owned prior to and independent of the exchange). As a result, the condition set forth in paragraph (c)(1)(ii) of this section is not satisfied, and all U.S. persons (not merely A and B) who transferred S stock will recognize gain on the exchange.

*Example 4. Partnerships.* (i) The facts are the same as in *Example 3*, except that B is a partnership (domestic or foreign) that has five equal partners, only two of whom, X and Y, are U.S. persons. X and Y are treated as the owners and transferors of 5 percent each

of the S stock owned and transferred by B and as owners of 8 percent each of the FC stock owned by B immediately after the transfer. Five-percent target shareholders thus own a total of 31 percent of the stock of FC immediately after the transfer (A's 15 percent, plus X's 8 percent, plus Y's 8 percent).

(ii) Because no control group exists, the condition in paragraph (c)(1)(ii) of this section is satisfied. The conditions in paragraphs (c)(1) (i) and (iii) of this section also are satisfied. Thus, U.S. persons that are not five-percent transferee shareholders will not recognize gain on the exchange of S shares for FC shares. A, X, and Y, each a five-percent transferee shareholder, will not be required to include in income in the year of the transfer any gain realized on the exchange if they file GRAs and comply with section 6038B. The duration of the GRA is five years if all U.S. transferors own in the aggregate less than 50 percent of the total voting power and the total value of FC immediately after the transfer, and ten years if this condition is not satisfied. If A, X, and Y lack the information to determine whether they are eligible to file five-year GRAs (because the determination includes a cross-ownership inquiry for all U.S. transferors), they are required to file ten-year GRAs.

(9) *Effective date*. This paragraph (c) applies to transfers occurring after April 17, 1994. However, paragraph (c)(1)(iii) of this section applies only to transfers occurring after January 25, 1996. For transfers occurring before December 17, 1987, see § 1.367(a)-3T(c) (1) through (4) as contained in 26 CFR Part 1 revised April 1, 1995.

(d) *Transfers of stock or securities of foreign corporations*. For guidance, see Notice 87-85 (1987-2 C.B. 395). See § 601.601(d)(2) of this chapter.

(e) [Reserved.] For transfers occurring before December 17, 1987, see § 1.367(a)-3T(e) as contained in 26 CFR Part 1 revised April 1, 1995.

(f) [Reserved.] For transfers occurring before December 17, 1987, see § 1.367(a)-3T(f) as contained in 26 CFR Part 1 revised April 1, 1995.

(g) *Transferor's agreement to recognize gain upon later disposition by transferee*—(1) *In general*. A transfer of stock or securities shall not be subject to section 367(a)(1) if—

(i) The transferor complies with the reporting requirements of section 6038B and any regulations thereunder; and

(ii) The transferor files a binding agreement to recognize gain upon the transferee corporation's later disposition of the transferred stock or securities, in