

LB&I International Practice Service Process Unit – Audit

IPS Level	Number	Title	UIL Code	Number
Shelf	N/A	Individual Outbound	–	–
Volume	11	Foreign Corporations	Level 1 UIL	9433
Part	11.1	Individuals with Investments in a CFC	Level 2 UIL	9433.01
Chapter	11.1.2	CFC Information Reporting Issues	Level 3 UIL	9433.01-02
Sub-Chapter	N/A	N/A	–	–

Unit Name	Failure to File the Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty
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Document Control Number (DCN)	FEN/9433.01_12(2016)
Date of Last Update	05/11/2016

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Process Overview

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Process Description

IRC § 6038B(a)(1)(A) provides that a U.S. Person (USP) (i.e. a U.S. citizen, a U.S. resident, a domestic corporation, or a domestic estate or trust) who transfers property to a foreign corporation in an exchange described in IRC §§ 332, 351, 354, 355 or 361 (“IRC § 6038B(a)(1)(A) transfer”) shall furnish information to the IRS as required by regulations.

Regulations issued under IRC § 6038B(a)(1)(A) generally require that a USP who transfers property in an IRC § 6038B(a)(1)(A) transfer shall file a Form 926 (“Return by a U.S. Transferor of Property to a Foreign Corporation”) and certain accompanying information.

IRC § 6038B(a)(1)(A) transfers include, but are not limited to:

1. A transfer by USP of property to a foreign corporation in exchange for the corporation’s stock, where USP, alone or together with others making contemporaneous transfers, controls the corporation immediately after the exchange.
2. An exchange by USP of stock or securities of a domestic corporation for stock of a foreign corporation pursuant to a plan of reorganization.
3. A transfer by a domestic corporation of its assets to a foreign corporation in a reorganization.

The Form 926 is filed with USP’s income tax return (e.g. Form 1040) for the taxable year that includes the date of the transfer. Treas. Reg. § 1.6038B-1(c).

Process Overview (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Process Description

USP's failure to comply with the reporting requirements for an IRC § 6038B(a)(1)(A) transfer (e.g. failure to timely file a Form 926) shall result in:

1. A penalty equal to 10 percent of the fair market value of the transferred property for which there was a failure to comply, up to \$100,000. This penalty should not be asserted if USP shows that the failure to comply was due to reasonable cause and not to willful neglect. The penalty is not limited to \$100,000 if the failure to furnish the information was due to intentional disregard.
2. The period of limitations on assessment of tax for the taxable year which includes the date of the transfer remains open. Specifically, the period will not expire before the date which is 3 years after the date on which the IRS is furnished the information required to be provided. Note: This rule will be limited to the item(s) relating to the failure to comply if the failure was due to reasonable cause and not willful neglect. IRC § 6501(c)(8); Treas. Reg. § 1.6038B-1(f)(1)(ii).
3. The "active trade or business" exception of IRC § 367(a)(3) being unavailable for the particular property for which there was a failure to comply. Treas. Reg. §1.367(a)-2T(a)(2).

Process Overview (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Process Description

Treas. Reg. § 1.6038B-1(f)(2) defines the “failure to comply” with the requirements of section 6038B as:

1. Failing to report at the proper time and in the proper manner any material information required to be reported under IRC § 6038B, or
2. Providing false or inaccurate information in purported compliance with requirements of IRC § 6038B.

Example Circumstances Under Which Process Applies

Examples of a “failure to comply” include but are not limited to:

- Failing to timely file a Form 926.
- Filing a Form 926 reporting that property will be used in the active conduct of a trade or business outside the United States when in fact the property continues to be used within the United States.

Determination of Process Applicability

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Criteria	Resources	6103 Protected Resources
<p>Filing Requirement: Who is required to file Form 926? Generally a “U.S. person” (USP), which includes:</p> <ul style="list-style-type: none"> ▪ U.S. citizen or resident ▪ Domestic corporation ▪ Domestic estate ▪ Domestic trust <p>IRC § 6038B requires that a USP file a Form 926 when the USP transfers certain property to a foreign corporation as described in IRC § 6038B(a)(1)(A), 367(d), or 367(e).</p>	<ul style="list-style-type: none"> ▪ Form 926 Instructions ▪ IRC 6038B - <i>Notice of certain transfers to foreign persons</i> ▪ Treas. Reg. 1.6038B-1 - <i>Reporting of certain transfers to foreign corporations</i> ▪ Treas. Reg. 1.6038B-1T - <i>Reporting of certain transactions to foreign corporations (temporary)</i> ▪ IRC 7701(a)(30) - <i>Definitions</i> 	
<p>Special Rule – Transfers by a Partnership: If the transferor is a partnership (domestic or foreign), the domestic partners of the partnership, not the partnership, are required to comply with IRC § 6038B and file Form 926. Each domestic partner is treated as a transferor of its proportionate share of the property.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.367(a)-1T(c)(3) - <i>Transfers to foreign corporations subject to section 367(a): In general (temporary)</i> ▪ Form 926 Instructions 	

Determination of Process Applicability (cont'd)


Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty		
Criteria	Resources	6103 Protected Resources
<p>Special Rule – Transfers by Spouses: Spouses who file a joint income tax return may file a single Form 926 with the return.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(b)(1)(iii) ▪ Form 926 Instructions 	
<p>Special Rule – Transfer of Cash: A USP that transfers cash in an IRC § 6038B(a)(1)(A) transfer must report the transfer if:</p> <ul style="list-style-type: none"> ▪ Immediately after the transfer the person holds directly or indirectly at least 10% of the total voting power or the total value of the foreign corporation, or ▪ The amount of cash transferred by the person to the foreign corporation during the 12-month period ending on the date of the transfer exceeds \$100,000. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(b)(3) ▪ Form 926 Instructions 	

Determination of Process Applicability (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty		
Criteria	Resources	6103 Protected Resources
<p>Exceptions to Filing Form 926 – Exchanges of Stock:</p> <p>If in an exchange described in IRC § 354 or 356 USP exchanges stock or securities of:</p> <ul style="list-style-type: none"> ▪ A foreign corporation in a IRC § 368(a)(1)(E) recapitalization, or ▪ A domestic or foreign corporation in a IRC § 368(a)(1) asset reorganization that is not an indirect stock transfer <p>then USP is not required to report under IRC § 6038B.</p>	<ul style="list-style-type: none"> ▪ IRC 354 – <i>Exchanges of stock and securities in certain reorganizations</i> ▪ IRC 356 – <i>Receipt of additional consideration</i> ▪ IRC 6038B ▪ Treas. Reg. 1.6038B-1(b)(1) ▪ IRC 368(a)(1)(E) - <i>Definitions relating to corporate reorganizations</i> ▪ Treas. Reg. 1.367(a)-3(d) - <i>Treatment of transfers of stock or securities to foreign corporations</i> ▪ Form 926 Instructions 	
<p>Exceptions to Filing Form 926 – Corporate Stock Distributions:</p> <p>Generally, a domestic corporation that distributes stock or securities of a domestic corporation under IRC § 355 is not required to file Form 926.</p>	<ul style="list-style-type: none"> ▪ IRC 355 – <i>Distribution of stock and securities of a controlled corporation</i> ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(e)(2) and (3) 	

Determination of Process Applicability (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Criteria	Resources	6103 Protected Resources
<p>Exceptions to Filing Form 926 – Corporate Stock Distributions, cont'd:</p> <p> CAUTION: This exception does not apply if the IRC § 355 distribution of stock or securities of a foreign controlled corporation is to distributee shareholders who are not qualified U.S. persons (U.S. citizen, U.S. resident or domestic corporation).</p>	<ul style="list-style-type: none"> ▪ IRC 355 ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(e)(2) and (3) 	
<p>Exceptions to Filing Form 926 – Stock Transfers:</p> <p>A USP that transfers stock or securities in a IRC § 6038B(a)(1)(A) transfer is deemed to have satisfied the reporting requirements if either of the following applies:</p> <p>(A) The U.S. transferor owned less than 5% of both the total voting power and the total value of the transferee foreign corporation immediately after the transfer, and either:</p> <ul style="list-style-type: none"> ▪ The U.S. transferor qualified for non-recognition treatment with respect to the transfer (i.e. the transfer was not taxable after the application of the IRC § 367(a) regulations), or ▪ The U.S. transferor is a tax-exempt entity and the income was not unrelated business income, or 	<ul style="list-style-type: none"> ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(b)(1)(i) ▪ Treas. Reg. 1.6038B-1(b)(2)(i)(A) ▪ Treas. Reg. 1.367(a)-3(c) 	

Determination of Process Applicability (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty		
Criteria	Resources	6103 Protected Resources
<p>Exceptions to Filing Form 926 – Stock Transfers, cont'd:</p> <ul style="list-style-type: none"> ▪ The transfer was taxable to the U.S. transferor under Treas. Reg. § 1.367(a)-3(c) and such person properly reported the income from the transferor on its timely filed return (including extensions) for the taxable year that includes the date of the transfer, or ▪ The transfer is considered to be to a foreign corporation solely by reason of Treas. Reg. § 1.83-6(d)(1) and the fair market value of the property transferred did not exceed \$100,000. <p style="text-align: center;">OR</p> <p>(B) The U.S. transferor owned 5% or more of the total voting power or the total value of the transferee foreign corporation immediately after the transfer, and either:</p> <ul style="list-style-type: none"> ▪ The U.S. transferor (or one or more successors): 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.367(a)-3(c) ▪ Treas. Reg. 1.83-6(d)(1) - <i>Deduction by employer</i> ▪ Form 926 Instructions <ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(b)(2)(i)(B) 	

Determination of Process Applicability (cont'd)


Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty		
Criteria	Resources	6103 Protected Resources
<p>Exceptions to Filing Form 926 – Stock Transfers, cont'd :</p> <ul style="list-style-type: none"> - Timely files an initial gain recognition agreement (GRA) under Treas. Reg. § 1.367(a)-8, without regard to the relief provision of Treas. Reg. § 1.367(a)-8(p), and - Timely files a Form 926 with its income tax return for the year of the transfer that: <ul style="list-style-type: none"> ▪ Notes that the GRA is being filed, ▪ Reports the fair market value (FMV), adjusted basis and gain recognized with respect to the transferred stock, 	<ul style="list-style-type: none"> ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(b)(1)(i) ▪ Treas. Reg. 1.6038B-1(b)(2)(i)(B) ▪ Treas. Reg. 1.367(a)-3(c) ▪ Treas. Reg. 1.367(a)-8 - <i>Gain recognition agreement requirements</i> 	

Determination of Process Applicability (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty		
Criteria	Resources	6103 Protected Resources
<p>Exceptions to Filing Form 926 – Stock Transfers, cont'd:</p> <ul style="list-style-type: none"> ▪ Includes with it any other information that is required to be submitted for a transfer of the stock or securities under IRC § 6038B and the regulations (see Required Information for Transferred Property- Stock or Securities discussed below), and <ul style="list-style-type: none"> - Completes Part I and Part II of the Form 926. <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> ▪ The U.S. transferor is a tax-exempt entity and the income was not unrelated business income. <p style="text-align: center;">OR</p>	<ul style="list-style-type: none"> ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(b)(1)(i) ▪ Treas. Reg. 1.6038B-1(b)(2)(i)(B) ▪ Treas. Reg. 1.367(a)-3(c) 	

Determination of Process Applicability (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Criteria	Resources	6103 Protected Resources
<p>Exceptions to Filing Form 926 – Stock Transfers, cont'd:</p> <ul style="list-style-type: none"> ▪ The U.S. transferor properly reported the income from the transfer on its timely filed return for the taxable year that includes the date of the transfer. <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> ▪ The transfer is considered to be to a foreign corporation solely by reason of Treas. Reg. § 1.83-6(d)(1) and the fair market value of the property transferred did not exceed \$100,000. <p> CAUTION: A USP that files a GRA under Treas. Reg. § 1.367(a)-8 must comply in all material respects with the requirements of Treas. Reg. § 1.367(a)-8 in order to satisfy a reporting obligation under IRC § 6038B. For example, if USP fails to timely file an annual certification as required by Treas. Reg. § 1.367(a)-8(g), USP would not be in compliance with his or her reporting obligations under IRC § 6038B.</p>	<ul style="list-style-type: none"> ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(b)(1)(i) ▪ Treas. Reg. 1.6038B-1(b)(2)(i)(B) ▪ Treas. Reg. 1.367(a)-3(c) ▪ Treas. Reg. 1.83-6(d)(1) ▪ Treas. Reg. 1.367(a)-8 	

Summary of Process Steps

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1	Verify Failure to Properly File Form 926
Step 2	Establish Penalty Case File Controls and Issue Notice Letter
Step 3	Penalty Determination
Step 4	Penalty Application and Case Closing Procedures

Step 1

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Filing Considerations: Form 926 must be complete, accurate, and filed with USP's income tax return that includes the date of the IRC § 6038B(a)(1)(A) transfer by the due date of the return (including extensions). There are no separate extensions for a Form 926.</p>	<ul style="list-style-type: none"> ▪ IRM 20.1.9.7 - <i>Failure to Provide Notice of Transfers to Foreign Persons</i> ▪ Treas. Reg. 1.6038B-1(b)(1) ▪ IRC 6038B(a) ▪ Treas. Reg. 1.6038B-1 ▪ Treas. Reg. 1.6038B-1T 	
<p>Determining if the Return was Filed Late:</p> <ul style="list-style-type: none"> ▪ When the last day for filing a return is a Saturday, a Sunday, or a legal holiday in the District of Columbia, filing is considered timely if the filing is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 301.7503-1 - <i>Time for performance of acts where last day falls on Saturday, Sunday or legal holiday</i> ▪ IRC 7502 - <i>Timely mailing is treated as timely filing and paying</i> 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.


Considerations	Resources	6103 Protected Resources
<p>Determining if the Return was Filed Late, cont'd:</p> <ul style="list-style-type: none"> ▪ If a return was postmarked prior to the due date and received after the due date, the postmark date shall be deemed to be the date of delivery. 	<ul style="list-style-type: none"> ▪ IRC 7502 ▪ Treas. Reg. 301.7502-1 - <i>Timely mailing of documents and payments is treated as timely filing and paying</i> 	
<p>Failure to File:</p> <p>If you determine that USP was required to file a Form 926 but failed to file a Form 926 or otherwise failed to comply with the IRC § 6038B(a)(1)(A) regulations, then prepare a notice letter to notify USP of the failure. See Process Overview above for explanation of “failure to comply.” See Step 2 for additional details on Notice Letter procedures.</p>	<ul style="list-style-type: none"> ▪ Step 2 – Notice Letter ▪ IRM 20.1.9.7.2 - <i>Penalty Letters, Notice Letter, and Notices</i> ▪ IRC 6038B 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
 <p># [REDACTED]</p> <p>#</p>	<ul style="list-style-type: none"> IRM 21.7.12.5.6 - <i>Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation</i> 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Research IDRS for Penalties: Research if Penalties Were Ever Assessed: To verify whether previous civil penalties were assessed for Form 926, research IDRS for MFT 13 (Business Master File- BMF) or MFT 55 (Individual Master File- IMF). A transaction code 240 will indicate a miscellaneous civil penalty was assessed. Valid document codes with the TC 240 are 47, 54, and 51.</p>		

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.


Considerations	Resources	6103 Protected Resources
<p>Review Each Form 926 for Completeness: Form 926 Required Information:</p> <ul style="list-style-type: none"> ▪ Part I - The name and ID number of the transferor. If the transferor was a subsidiary member of an affiliated group of corporations filing a consolidated income tax return, the name and EIN of the common parent corporation is provided at line 1c. If the transferor was a partnership, questions 2a through 2d of Form 926 regarding the partnership must be completed. ▪ Part II – Information for the transferee foreign corporation including ID (if any), address, country code, foreign law characterization, and whether it is a controlled foreign corporation. 	<ul style="list-style-type: none"> ▪ IRC 6038B(c) ▪ Treas. Reg. 1.6038B-1(a) and (b) ▪ Treas. Reg. 1.6038B-1(b)(1) ▪ Form 926 ▪ Form 926 Instructions 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Review Each Form 926 for Completeness, cont'd:</p> <ul style="list-style-type: none"> ▪ Part III and Attachments - Information for each category of property transferred and supplemental information, as required for each category by the regulations. <p> CAUTION: As discussed below, the information required to be reported differs for each category.</p> <ul style="list-style-type: none"> ▪ Part IV - Additional information regarding the transfer of property including USP's interest in the foreign transferee corporation before and after the transfer. 	<ul style="list-style-type: none"> ▪ IRC 6038B(c) ▪ Treas. Reg. 1.6038B-1(a) and (b) ▪ Treas. Reg. 1.6038B-1(b)(1) ▪ Form 926 ▪ Form 926 Instructions 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Review Each Form 926 for Completeness, cont'd: Additional Requirements: Form 926 must be filed in English and all amounts must be stated in U.S. dollars. Spouses who file a joint income tax return may file a single Form 926.</p> <p>REMEMBER: Form 926 is considered timely filed only if it is attached to, and filed by, the due date (including extensions) of the transferor's income tax return (e.g. Form 1040) for the taxable year that includes the date of the transfer.</p>	<ul style="list-style-type: none"> ▪ IRC 6038B(c) ▪ Form 926 ▪ Form 926 Instructions ▪ Treas. Reg. 1.6038B-1(b)(1)(i) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Review Each Form 926 for Completeness, cont'd: Required Information for Transferred Property: For each property transferred, USP must provide a description of the property, including the estimated FMV and adjusted basis of the property, divided into the following categories:</p> <ul style="list-style-type: none"> ▪ Active Business Property ▪ Stock or Securities ▪ Depreciated Property ▪ Property to be Leased ▪ Property to be Sold 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <ul style="list-style-type: none"> ▪ Transfers to Foreign Sales Corporations ▪ Tainted Property (including inventory and certain intangible property) ▪ Foreign Loss Branch ▪ Other Intangibles <p>Additional information particular to each category is also required as discussed next.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property: Active Business Property: A description of any transferred property to be used in an active trade or business outside of the United States. The following information must be provided for such property with the Form 926:</p> <ul style="list-style-type: none"> ▪ A general description of the business conducted (or to be conducted) by the transferee, including <ul style="list-style-type: none"> – Location of the business – Number of employees – Nature of the business – Copies of the most recently prepared balance sheet and profit and loss statement 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4)(i) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Active Business Property:</p> <ul style="list-style-type: none"> ▪ Property may be identified by general type, as appropriate for the type of business. For example, a reasonable description of property for a manufacturing business might include office equipment, supplies, computers, motor vehicles, major categories of manufacturing equipment, etc. ▪ If property would be includible under this category as well as under one or more other categories (e.g. Depreciated property), the particular information required under the other categories must be provided as well. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4)(i) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Stock or Securities:</p> <p>A description of the stock or securities including:</p> <ul style="list-style-type: none"> ▪ Adjusted basis ▪ FMV ▪ Class or type ▪ Amount ▪ Characteristics <p>Additionally, information regarding the corporation that issued the transferred stock must be provided including:</p> <ul style="list-style-type: none"> ▪ Address ▪ Place of incorporation ▪ Description of the issuing corporation 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4) ▪ Treas. Reg. 1.6038B-1T(c)(4)(ii) ▪ Treas. Reg. 1.367(a)-3T ▪ IRC 367 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Stock or Securities:</p> <p>Also, supporting information should be provided if a USP claims application of the provisions of Treas. Reg. § 1.367(a)-3T, treating the stock or securities transfer as an exception to an IRC § 367(a)(1) transfer.</p>		
<p>Intangible Property:</p> <p>A USP that transfers intangible property to a foreign corporation in an IRC §§ 351 or 361 exchange is required to provide the following additional information:</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(d) ▪ IRC 351 - <i>Transfer to corporation controlled by transferor</i> ▪ IRC 361 - <i>Nonrecognition of gain or loss to corporations; treatment of distributions</i> 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Intangible Property:</p> <ul style="list-style-type: none"> ▪ General description of the transfer including: <ul style="list-style-type: none"> – A description of any larger transaction of which the transfer forms a part – Chronological order of the transfers – Identification of each of the other parties involved in the transaction ▪ Consideration received. ▪ Separate identification of each intangible property transferred including: <ul style="list-style-type: none"> – Description of intangible property 	<ul style="list-style-type: none"> ▪ IRC 367(d) - <i>Foreign Corporations</i> ▪ Treas. Reg. 1.367(d)-1T - <i>Transfers of intangible property to foreign corporations (temporary)</i> ▪ Treas. Reg. 1.6038B-1T(d) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Intangible Property:</p> <ul style="list-style-type: none"> – Adjusted Basis – Note that foreign goodwill and going concern value should be so identified and classified <p>A USP that transfers intangible property to a foreign corporation in an IRC §§ 351 or 361 exchange is required to provide the following additional information:</p> <ul style="list-style-type: none"> ▪ Calculation of the annual deemed payment for the use of the intangible property required to be recognized by the transferor under the rules of IRC § 367(d). 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(d) ▪ IRC 351 ▪ IRC 361 ▪ IRC 367(d) ▪ Treas. Reg. 1.367(d)-1T 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Intangible Property:</p> <p>Note: Generally, when a USP transfers intangible property (within the meaning of IRC § 936(h)(3)(B)) to a foreign corporation in an IRC § 351 or 361 exchange, USP is treated as having transferred the property in exchange for annual payments contingent on the use of the property over the useful life of the property and the transferor must include the payments in income. IRC § 367(d).</p> <ul style="list-style-type: none"> ▪ List of intangibles for which an election is being made to treat the transfer as a sale under Treas. Reg. § 1.367(d)-1T(g)(2). 	<ul style="list-style-type: none"> ▪ IRC 936 ▪ Treas. Reg. 1.6038B-1T(d) ▪ IRC 351 ▪ IRC 361 ▪ IRC 367(d) ▪ Treas. Reg. 1.367(d)-1T 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Depreciated Property :</p> <ul style="list-style-type: none"> ▪ Description of property that is subject to recapture under Treas. Reg. § 1.367(a)-4T(b). ▪ Property separately identified to the same extent as was required for previously claimed depreciation deduction. ▪ For each property: <ul style="list-style-type: none"> – Relevant recapture provision – Number of months in which the property was in use within the United States – Total number of months the property was in use 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4)(iii) ▪ Treas. Reg. 1.367(a)-4T(b) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.


Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Depreciated Property :</p> <ul style="list-style-type: none"> – FMV – Depreciation deduction schedule for the property – Calculation of the depreciation required to be recaptured 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4)(iii) ▪ Treas. Reg. 1.367(a)-4T(b) 	
<p>Other Property Transfers:</p> <p>Note that additional information is required under the regulations for the following transferred property or transfers:</p> <ul style="list-style-type: none"> ▪ Property to be leased ▪ Property to be sold 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4)(iv)-(v) 	

Step 1 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 1: Verify Failure to Properly File Form 926

You have determined that USP engaged in an IRC § 6038B(a)(1)(A) transfer with a foreign corporation as outlined previously in the Process Applicability section. Before commencing a penalty case file, you must first verify whether USP complied with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer, including timely filing a Form 926 as needed. USP may have timely filed his or her income tax return for the taxable year that includes the date of the IRC § 6038B(a)(1)(A) transfer but failed to attach to the return a Form 926 or otherwise failed to comply with the reporting requirements of IRC § 6038B and its regulations.

Considerations	Resources	6103 Protected Resources
<p>Required Information for Transferred Property, cont'd:</p> <p>Other Property Transfers:</p> <ul style="list-style-type: none"> ▪ Transfers to FSCs ▪ Tainted property under Treas. Reg. § 1.367(a)-5T ▪ Foreign loss branch 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1T(c)(4)(vi)-(vii) ▪ Treas. Reg. 1.367(a)-5T 	
<p> DECISION POINT : You must determine if the taxpayer has or has not failed to properly comply with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer. If the taxpayer has failed to timely file or failed to file required information, proceed to Step 2.</p>	<ul style="list-style-type: none"> ▪ IRC 6038B 	

Step 2

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 2: Establish Penalty Case File Controls and Issue Notice Letter

You have determined that USP has failed to comply with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer because USP has not timely filed a complete Form 926. The next step is to establish a penalty case file and prepare and issue the notice letter.

Considerations	Resources	6103 Protected Resources
<p>Establish a Penalty Case File:</p> <ul style="list-style-type: none"> ▪ Establish controls and prepare a penalty case file. This file must include the information that establishes there is a filing requirement and the Form(s) 926 have not been timely filed. ▪ Submit Form 5345-D for managerial approval to establish controls: <ul style="list-style-type: none"> – Check box for “Control Penalty Investigation.” – MFT = PW, Activity Code = 586, Source Code = 99. – Assessment Statute Expiration Date (ASED) will default to 04/EE/XX (Form 1040 due date plus 3 years) for non-filer. Upon receipt of delinquent information returns, update ASED to three years from receipt date. 	<ul style="list-style-type: none"> ▪ IRC 6038B ▪ IRM 20.1.9.2 - <i>Assessment Procedures for Penalties Not Subject to Deficiency Procedures</i> ▪ Exhibit 20.1.9-1 - <i>Quick Reference Guide to International Penalties</i> ▪ IRM 20.1.9.2.1 - <i>Penalty Case Controls</i> ▪ IRM 20.1.9.2(12) - <i>Notice Letter Provisions</i> 	

Step 2 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 2: Establish Penalty Case File Controls and Issue Notice Letter

You have determined that USP has failed to comply with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer because USP has not timely filed a complete Form 926. The next step is to establish a penalty case file and prepare and issue the notice letter.

Considerations	Resources	6103 Protected Resources
<p>Establish a Penalty Case File, cont'd:</p> <ul style="list-style-type: none"> – Reason for Request is “To control penalty investigations for Form 926 -information returns not filed.” ▪ Examiners charge time to the penalty case file. ▪ Issue the Notice Letter. 		
<p>Form 926 Penalty Notice Letter Issuance:</p> <p>If you determine that USP has failed to comply because USP failed to timely file the Form 926, prepare a Notice (Pattern) Letter for Failure to File Form 926.</p> <ul style="list-style-type: none"> ▪ Delegation orders allow the pattern letters to be signed by an LB&I internal revenue agent or a group manager of SB/SE, as applicable. ▪ Each individual or entity required to file the Form 926 must be given a separate pattern letter. 	<ul style="list-style-type: none"> ▪ Form 926 ▪ IRM 20.1.9.2(13) - <i>Notice Letters</i> ▪ IRM 20.1.9.7.2 	

Step 2 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 2: Establish Penalty Case File Controls and Issue Notice Letter

You have determined that USP has failed to comply with the reporting requirements for the IRC § 6038B(a)(1)(A) transfer because USP has not timely filed a complete Form 926. The next step is to establish a penalty case file and prepare and issue the notice letter.

Considerations	Resources	6103 Protected Resources
<p>Form 926 Penalty Notice Letter Issuance, cont'd:</p> <ul style="list-style-type: none"> ▪ The pattern letter informs the taxpayer that a penalty will be assessed. It then directs the taxpayer to Treas. Reg. § 1.6038B-1(f)(3) for information regarding reasonable cause relief. ▪ The pattern letter must be addressed to the USP responsible for filing the Form 926. ▪ The pattern letter must be sent by certified mail, or hand delivered, to the taxpayer. The examiner should keep a copy of the pattern letter signed by the taxpayer when it is hand delivered as proof that it was received. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(f)(3) ▪ IRM 20.1.9.2(13) ▪ IRM 20.1.9.7.2 	

Step 3

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Penalty Structure:</p> <p>If Form 926 is not filed by the due date (including extensions) of USP's income tax return (e.g. Form 1040) that includes the date of the transfer, generally the property will not be considered to have been transferred for use in the active conduct of a trade or business outside of the U.S. for purposes of IRC § 367(a) and, as a result, USP may be required to recognize gain to the extent required under Section § 367(a).</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.367(a)-2T(a)(2) - <i>Exceptions for transfers of property for use in the active conduct of a trade or business (temporary)</i>▪ IRC 367(a)	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Penalty Structure, cont'd:</p> <p>USP will also be subject to a penalty for failure to comply with the reporting requirements under IRC § 6038B(c) equal to 10% of the fair market value of the particular property for which there was a failure to comply. The penalty is limited to \$100,000 unless the failure to comply was due to intentional disregard. The penalty will not apply if USP shows that the failure was due to reasonable cause and not to willful neglect.</p> <p>NOTE: The period of limitations on assessment shall not expire before the date which is 3 years after the date on which the IRS receives the information required under IRC § 6038B, including the Form 926.</p>	<ul style="list-style-type: none"> ▪ IRC 6038B(c) ▪ Treas. Reg. 1.6038B-1(f)(1) ▪ IRC 6501(c)(8) - <i>Limitations of assessment and collection, Failure to notify Secretary of certain foreign transfers</i> 	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Penalty Structure, cont'd: An additional penalty under IRC § 6662 can be imposed on any portion of an underpayment attributable to an undisclosed foreign financial asset understatement.</p>	<ul style="list-style-type: none"> ▪ IRC 6662(j) - <i>Imposition of accuracy-related penalty on underpayments, Undisclosed foreign financial asset understatement</i> ▪ Treas. Reg. 1.6662-5 - <i>Substantial and gross valuation misstatements under chapter 1</i> 	
<p>Amount of Penalty: The penalty is based on the fair market value of the transferred property at the time of the IRC § 6038B transfer.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(f)(1) ▪ Treas. Reg. 1.6038B-1T(c)(4) ▪ Form 926 Instructions ▪ Step 1 	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Reasonable Cause Exception:</p> <p>If USP fails to timely comply with any reporting requirement under IRC § 6038B and the regulations, USP can avoid the application of the failure to comply penalty if it can show that the failure was due to reasonable cause and not to willful neglect.</p>	<ul style="list-style-type: none"> ▪ IRM Exhibit 20.1.9-5 - <i>Reasonable Cause Relief</i> ▪ IRC 6038B(c)(2) ▪ Treas. Reg. 1.6038B-1(f)(3) 	
<p>Reasonable Cause Procedures:</p> <p>Promptly after USP becomes aware of the failure to timely comply, USP must:</p> <ul style="list-style-type: none"> ▪ File an amended return for the taxable year to which the failure relates that includes the information (e.g. Form 926) that should have been included with the original return for such taxable year, ▪ Include with the amended return a written statement explaining the reasons for the failure to timely comply, 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(f)(3) 	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Reasonable Cause Procedures, cont'd:</p> <ul style="list-style-type: none"> ▪ If USP is under examination for any taxable year when the amended return is filed, deliver a copy of the amended return package to the IRS personnel conducting the examination, and ▪ If USP is not under examination for any taxable year when the amended return is filed, deliver a copy of the amended return package to the DFO. <p>While typically the day-to-day development of a request for relief will be conducted by you, the LB&I Cross Border Activities Practice Area DFO makes the final determination as to whether the taxpayer is granted relief for the failure to timely comply under Treas. Reg. § 1.6038B-1(f)(3).</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(f)(3) 	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Development of Request for Reasonable Cause Relief:</p> <ul style="list-style-type: none"> ▪ Whether USP has shown that the failure to comply was due to reasonable cause and not willful neglect may require you to conduct factual development. For example, USP's written statement may prompt you to issue follow-up questions requesting additional information. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(f)(3) 	
<p>Review the Factors of Reasonable Cause:</p> <p>Reasonable cause is typically evaluated in terms of whether the taxpayer exercised ordinary business care and prudence.</p> <ul style="list-style-type: none"> ▪ The IRM lists factors that may be relevant whether USP exercised ordinary business care and prudence. Facts that may be relevant include but are not limited to: 	<ul style="list-style-type: none"> ▪ IRM 20.1.1.3.2.2.5 - <i>Erroneous Advice or Reliance</i> ▪ IRM 20.1.1.3.2.2.1 - <i>Death, Serious Illness, or Unavoidable Absence</i> ▪ IRM 20.1.1.3.2.2.6 - <i>Ignorance of the Law</i> 	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Review the Factors of Reasonable Cause, cont'd:</p> <ul style="list-style-type: none"> - Reliance on advice of a tax professional regarding a matter of law, - Inability to obtain records, and - Death, serious illness, or unavoidable absence. <p>▪ The fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the required information and/or refusal on the part of a foreign trustee to provide information for any other reason should not constitute reasonable cause.</p>	<ul style="list-style-type: none"> ▪ IRM 20.1.1.3.2.2.3 - <i>Unable to Obtain Records</i> ▪ IRM 20.1.1.3.2.2.1 ▪ IRM 20.1.9.22.5(3) - <i>Reasonable Cause</i> 	

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
<p>Reasonable Cause Relief Recommendation:</p> <ul style="list-style-type: none">▪ After development of the facts, the appropriate management official will determine whether the taxpayer has demonstrated that the failure was due to reasonable cause and not willful neglect.▪ # [REDACTED] <p>#</p>		

Step 3 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 3: Penalty Determination

The penalty case file has been established and the Notice Letter has been mailed to the taxpayer. Now you must determine which penalties may apply and how they are computed, as well as whether the taxpayer can argue reasonable cause for failure to file.

Considerations	Resources	6103 Protected Resources
Reasonable Cause Relief Recommendation, cont'd: # [REDACTED] [REDACTED] [REDACTED] #		

Step 4

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>Application of Penalty:</p> <p>Now that you understand the penalty structure and reasonable cause considerations, let us discuss how these penalties are applied. Examiners must first take steps to secure appropriate documentation to support the requirements to file the returns and keep them in the penalty file. Second, when the examiner secures a delinquent Form 926, the examiner must determine whether it provides all required information and is accurate with respect to each applicable part of the form. If inaccurate or incomplete, the examiner must inform the taxpayer that the return is not considered filed until it is complete and accurate.</p>	<ul style="list-style-type: none">▪ Steps 1-3▪ IRM 20.1.9.7.3 - <i>Penalty Assertion</i>▪ IRM 20.1.9.7.2	

Step 4 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>Application of Penalty, cont'd: The penalty is applied by examiners on Form 8278 using Penalty Reference Number (PRN) 676 for Form 926. This penalty can be asserted at the time of the issuance of the Pattern Letter for Failure to File Form 926.</p>	<ul style="list-style-type: none">▪ <i>Form 8278 - Assessment and Abatement of Miscellaneous Civil Penalties</i>	

Step 4 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>Application of Penalty, cont'd: Example: After conducting factual development, the examiner has concluded that the taxpayer, a USP, transferred \$2,000,000 (cash or property) to a foreign corporation in an IRC § 6038B transfer and did not file Form 926. The examiner issued a Notice Letter informing the taxpayer that it failed to file a Form 926. The taxpayer has not provided the Form 926 and has not requested reasonable cause relief. The examiner has determined that the failure to file was not due to intentional disregard. What should be the assessment? The assessment under PRN 676 will be \$100,000 (10% of \$2,000,000 capped at \$100,000).</p>	<ul style="list-style-type: none"> ▪ IRC 6038B 	

Step 4 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>Form 8278 – Assessment of Miscellaneous Civil Penalties:</p> <ul style="list-style-type: none"> ▪ The assessment document for international penalties is Form 8278. Failure to file under IRC § 6038B has a penalty section on the Form 8278 which covers the penalty for Form 926. ▪ The examiner will enter the dollar amount of the penalty on Form 8278 and attach Form 886-A, Explanation of Items. ▪ The taxpayer's signature is not required with respect to this penalty. ▪ Manager's signature is required in block 11a to meet the provision of IRC § 6751. 	<ul style="list-style-type: none"> ▪ IRC 6038B ▪ Form 8278 ▪ IRM 20.1.9.7.3 ▪ IRC 6751 	

Step 4 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>Payments:</p> <ul style="list-style-type: none"> ▪ Use Form 3244, Payment Posting Voucher, to list the payment amount with Transaction Code (TC) 640 if the payment is received prior to assessment or with TC 670 if the payment is received after the assessment. Include the appropriate Designated Payment Code 99. ▪ The payment will be posted to MFT 55 for Individuals and MFT 13 for Entities. 	<ul style="list-style-type: none"> ▪ Form 3244 ▪ IRM 20.1.9.2(21) - <i>Payment</i> ▪ IRM 21.3.4.7.1.3 - <i>Designated Payment Code</i> 	

Step 4 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>No Filing Requirement or Accepting the Filing Without Penalties:</p> <ul style="list-style-type: none"> ▪ If the examiner determines that there is no filing requirement or that reasonable cause exist, do not prepare Form 8278. Document in the civil penalty file case history all reasonable cause provided by the taxpayer for not asserting the penalty. Advise the group secretary that no penalties were asserted and Disposal Code 02 should be used to decontrol the case. 	<ul style="list-style-type: none"> ▪ IRM 20.1.9.2.1(3) 	

Step 4 (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Step 4: Penalty Application and Case Closing Procedures

Now that the Notice Letter has been issued and you understand the penalty determination factors, the final steps in this process are penalty application or non-application, and case closing procedures.

Considerations	Resources	6103 Protected Resources
<p>Miscellaneous Case Closing Considerations:</p> <ul style="list-style-type: none"> ▪ The case file should contain all working papers, correspondences and an activity record in addition to the Form 8278 and Form 886-A. ▪ The case file will be closed with a Form 3198. ▪ The ERCS PW record may have to remain open if it represents other penalties besides those associated with a Form 926. If so, ensure the earliest expiring penalty statute is reflected in ERCS. 	<ul style="list-style-type: none"> ▪ Form 8278 ▪ Form 886-A ▪ Form 3198 ▪ IRM 20.1.9.22.3.2(2) - <i>Asserting Penalty on MFT 55 Modules, Initial Penalty and Continuation Penalty</i> 	

Other Considerations / Impact to Audit

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Considerations	Resources
<p>Specific Powers of Attorney (POA) or Authorization to Disclose Tax Information: A Form 2848 (POA) is required prior to discussing penalty issues with a person other than the person subject to the assessment or required to file the returns. A POA for the income tax return alone does NOT cover the penalty issue.</p> <p>Form 2848 Item #3 “Description of Matter” should include words similar to “Miscellaneous Penalty Under IRC § 6038B.”</p>	<ul style="list-style-type: none"> ▪ Form 2848 - Power of Attorney and Declaration of Representative
<p>Filing Due Date: Because Form 926 and required attachments are filed with the applicable U.S. tax return of the U.S. person that conducted the IRC § 6038B(a)(1)(A) transfer, the filing due date matches the due date of the U.S. tax return being filed with Form 926. Keep in mind that there may be different due dates based upon the type of U.S. tax return being filed.</p>	<ul style="list-style-type: none"> ▪ IRC 6038B
<p>When and How to File: Form 926 must be filed with the U.S. transferor’s income tax return for the tax year that includes the date of the transfer.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(b)
<p>Additional Information Filed with Form 926: There may be additional information required to be filed with Form 926.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038B-1(c) ▪ Treas. Reg. 1.6038B-1T(c)(1) through (5) ▪ Treas. Reg. 1.6038B-1T(d) ▪ Step 1

Other Considerations / Impact to Audit (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Considerations	Resources
<p>Other Forms that may be Required:</p> <p>Persons filing Form 926 may be required to file the following forms:</p> <ul style="list-style-type: none"> ▪ FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR) (formerly Form TD F 90-22.1) ▪ Form 5471, Information Return of U.S. Person With Respect to Certain Foreign Corporations 	
<p>Other Forms that may be Required:</p> <p>A U.S. Transferor that is required to enter into a gain recognition agreement under IRC § 367 to qualify for non-recognition treatment must file Form 8838, Consent to Extend the Time to Assess Tax Under Section 367 – Gain Recognition Agreement, or a similar statement, to extend the statute of limitations with respect to the gain realized but not recognized on the transfer.</p> <p>For example, if USP fails to timely file an annual certification as required by Treas. Reg. § 1.367(a)-8(g), USP would not be in compliance with his or her reporting obligations under IRC § 6038B.</p>	<ul style="list-style-type: none"> ▪ IRC 367 ▪ IRC 6038B ▪ Treas. Reg. 1.367(a)-8(f) ▪ Treas. Reg. 1.367(a)-8(g)

Training and Additional Resources

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty

Type of Resource	Description(s) and/or Instructions for Accessing	References
Other Training Materials	<ul style="list-style-type: none"> ▪ Additional information on the treatment of IRC § 6038B transfers under other Code sections can be found in Lesson 1, Foreign Joint Ventures, on the International Portal webpage under International Training, Training Option: Phase III. ▪ Examples and various types of outbound property transactions, transactions between related parties, and the treatment of gain or loss from the transactions are discussed in Lesson 2, Outbound Transfers by U.S. Person, found on the International Portal webpage under International Training, Training Option: Phase II. <p>WARNING: This text was last updated in April 2009; some information may be outdated</p>	<ul style="list-style-type: none"> ▪ Foreign Joint Ventures, Lesson 1 ▪ Outbound Transfers by U.S. Person, Lesson 2

Training and Additional Resources (cont'd)

Failure to File Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty		
Type of Resource	Description(s) and/or Instructions for Accessing	References
Other Training Materials	<ul style="list-style-type: none"> ▪ Exhibit A - Summary Chart: Reporting Requirements for Foreign Investments and Accounts, can be found on the LB&I website for FJV, Foreign Partnership, & CTB – Exempt Organizations' Reporting Requirements for Foreign Investments and Accounts <p>WARNING: This text was last updated in August 2005; some information may be outdated</p>	<ul style="list-style-type: none"> ▪ Exhibit A - Summary Chart: Reporting Requirements for Foreign Investments and Accounts

Glossary of Terms and Acronyms

Term/Acronym	Definition
ASED	Assessment Statute Expiration Date
BMF	Business Master File
CFC	Controlled Foreign Corporation
E&P	Earnings & Profit
ERCS	Examination Returns Control System
FSC	Foreign Service Corporation
IDRS	Integrated Data Retrieval System
IMF	Individual Master File
IPS	International Practice Service
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
LB&I	Large Business & International Division
MFT	Master File Transaction
POA	Powers of Attorney
PRC	Penalty Reason Code
PRN	Penalty Reference Number
SB/SE	Small Business Self Employed
TC	Transaction Code

Index of Related Issues

Issue	Associated UILs	References
Failure to File the Form 5471 – Category 2 & 3 Filers – Monetary Penalty	9433.01-02	Practice Unit to be developed
Failure to File the Form 5471 – Category 4 & 5 Filers – Monetary Penalty	9433.01-02	Practice Unit “Failure to File the Form 5471 – Category 4 and 5 Filers – Monetary Penalty,” DCN: FEN/9433.01_06(2013)(b)
Issues Associated with Offshore Bank Accounts	9435.04	Practice Unit to be developed
Form 5471 Penalty Provisions	9560.01	Practice Unit to be developed
Check-The-Box Rules for Foreign Entities	TBD	Practice Unit to be developed