

portions of habitats, populations and ecological processes in the Sanctuary.

*Response:* NOAA's analysis identified that the differences among the three sub alternatives (Alternatives 1A, 1B, and 1C) are distinguished by management considerations, not ecological and socioeconomic impacts. As such, because the State of California closed the state water gaps associated with Alternative 1C, the net ecological benefits and socioeconomic impacts between Alternatives 1A (NOAA's original preferred alternative) and 1C (the State of California's recommended alternative) are the same. NOAA has determined, therefore, that Alternative 1C accomplishes the goals of the zoning network.

*Comment 3:* The FGC process to undertake a regulatory process to fill the gaps adds additional work and cost to an already overburdened agency.

*Response:* Only the FGC can determine if it has the resources to undertake a regulatory process. NOAA notes that the FGC concluded the regulatory process to fill the gaps on October 12, 2007 and the state regulations went into effect on December 17, 2007.

*Comment 4:* Overlaid federal regulations applicable network-wide would provide greater enforcement tools for both state and federal resource managers, including the authority to seek injunctive relief in cases where it is determined that there is injury, or imminent risk of injury, to a Sanctuary resource, as well as the assurance that penalties collected as a result of marine zone violations in the CINMS will be used directly to further the protection of CINMS resources. The State would lack these additional enforcement capabilities.

*Response:* In section 5.1 of the final environmental impact statement, NOAA detailed the administrative benefits of overlaying state waters with federal marine zone regulations, including enhancing enforcement and prosecution, as noted by the commenter. However, at this time, the State opposes NOAA issuance of sanctuary marine zone regulations in state waters of the Sanctuary. NOAA and the State have in the past worked collaboratively on the administration of the network, including enforcement, and will continue to do so in the future. If, for example, in the future the State determines that its enforcement capabilities could be further enhanced with complementary federal regulations in state waters, NOAA would consider a regulatory action to provide for overlaying federal marine zone regulations in state waters.

*Comment 5:* Alternative 1C creates confusion among Sanctuary users and the public, which could result in unintentional non-compliance with the existing marine zones. This also leaves the resources present in or traversing through the gaps unprotected, thereby fragmenting and decreasing the effectiveness of the existing state and soon-to-be finalized federal MPAs.

*Response:* The FGC concluded the regulatory process to fill the gaps on October 12, 2007 and the regulations went into effect December 17, 2007. NOAA is unaware of violations or non-compliance due to confusion during the time period from July 2007 to December 2007 when there were gaps between the state and federal marine zones.

*Comment 6:* Alternative 1A would align with the State's Marine Managed Areas Improvement Act (AB 1600), which directs the State to consolidate and simplify the range of MPAs within California.

*Response:* The terminology and definitions written into the Code of Federal Regulations were drafted to be as consistent as practicable with the State terms and definitions from the Marine Managed Areas Improvement Act. In addition, the combined state and federal marine zoning network remains consistent with the original geographic scope envisioned by the State and supported by NOAA in the Final Environmental Document adopted by the State in October 2002.

*Comment 7:* Alternative 1C will result in a fragmented, inefficient and piecemeal approach to the enforcement, monitoring, management, and public education efforts surrounding the Sanctuary MPAs. Implementation of Alternative 1A, on the other hand, would draw on the management and regulatory strengths of both federal and state agencies and thereby ensure that the implementation and protection of the MPA network is carried out in the most efficient, complementary and cohesive fashion.

*Response:* NOAA and the State strongly support a close, collaborative working relationship to implement the Sanctuary zoning network and to ensure that management of the network (e.g., enforcement, education and outreach, and monitoring) is implemented in a collaborative, efficient, and effective manner.

*Comment 8:* If the FGC were to alter state regulations governing state MPAs at some point in the future, the integrity of the entire network would be threatened.

*Response:* NOAA will work closely with the FGC on any future changes to the network. If the State were to alter its

regulations in a manner that, in NOAA's judgment, compromises the integrity of the network, NOAA will consider taking further action under the National Marine Sanctuaries Act to maintain the network's integrity.

*Comment 9:* If the State fails to close gaps by fall 2007, NOAA should expeditiously finalize regulations that will close the gaps by extending federal protections under the National Marine Sanctuaries Act into state waters to meet the boundaries of the state MPAs created in 2003.

*Response:* The FGC closed the gaps on October 12, 2007. The regulations became effective on December 17, 2007.

Dated: April 9, 2008.

**Daniel J. Basta,**

Director, Office of National Marine Sanctuaries.

[FR Doc. E8-7916 Filed 4-16-08; 8:45 am]

BILLING CODE 3510-NK-M

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 26 and 301

[REG-147775-06]

RIN 1545-BH63

#### Regulations Under Section 2642(g)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations providing guidance under section 2642(g)(1). The proposed regulations describe the circumstances and procedures under which an extension of time will be granted under section 2642(g)(1). The proposed guidance affects individuals (or their estates) who failed to make a timely allocation of generation-skipping transfer (GST) exemption to a transfer, and individuals (or their estates) who failed to make a timely election under section 2632(b)(3) or (c)(5). This document also provides notice of a public hearing.

**DATES:** Written or electronic comments must be received by July 16, 2008. Outlines of topics to be discussed at the public hearing scheduled for August 5, 2008, must be received by July 15, 2008.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-147775-06), Internal Revenue Service, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through

Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-147775-06), 1111 Constitution Avenue, NW., Washington, DC 20224; or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS-REG-147775-06). The public hearing will be held in the IRS auditorium.

**FOR FURTHER INFORMATION CONTACT:**

Concerning the proposed regulations, Theresa M. Melchiorre, (202) 622-3090; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard Hurst at [Richard.A.Hurst@irs.counsel.treas.gov](mailto:Richard.A.Hurst@irs.counsel.treas.gov) or (202) 622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Paperwork Reduction Act**

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, *Attn:* Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, *Attn:* IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by *June 16, 2008*.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The reporting requirement in these proposed regulations is in § 26.2642-7(h)(2) and (3). This information must be reported by transferors or the executors of transferors' estates

requesting relief under section 2642(g)(1). This information will be used by the IRS to determine whether to grant a transferor or a transferor's estate an extension of time to: (1) Allocate GST exemption, as defined in section 2631, to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)).

The following estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on the information that is available to the IRS. Individual respondents may require greater or less time, depending on their particular circumstances.

*Estimated total annual reporting burden:* 1,800 hours.

*Estimated average annual burden:* 2 hours.

*Estimated number of respondents:* 900.

*Estimated annual frequency of response:* When relief is requested.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Background**

The proposed regulations provide guidance on the application of section 2642(g)(1). Congress added section 2642(g)(1) to the Internal Revenue Code (Code) in section 564 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), (Pub. L. 107-16, § 564, 115 Stat. 91). This section directs the Secretary to issue regulations describing the circumstances and procedures under which an extension of time will be granted to: (1) Allocate GST exemption, as defined in section 2631(a), to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an

indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)). In determining whether to grant relief, section 2642(g)(1) directs that all relevant circumstances be considered including evidence of intent contained in the trust instrument or the instrument of transfer.

The legislative history accompanying section 2642(g)(1) indicates that Congress believed that, in appropriate circumstances, an individual should be granted an extension of time to allocate GST exemption regardless of whether any period of limitations had expired. Those circumstances include situations in which the taxpayer intended to allocate GST exemption and the failure to allocate the exemption was inadvertent. H.R. Conf. Rep. No. 107-84, 202 (2001).

After the enactment of section 2642(g)(1), the IRS issued Notice 2001-50 (2001-2 CB 189), which announced that transferors may seek an extension of time to make an allocation of GST exemption. The Notice provides, generally, that relief will be granted under § 301.9100-3 of the Procedure and Administration Regulations if the taxpayer satisfies the requirements of those regulations and establishes to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that a grant of the requested relief will not prejudice the interests of the Government. If relief is granted under § 301.9100-3 and the allocation is made, the amount of GST exemption allocated to the transfer is the Federal gift or estate tax value of the property as of the date of the transfer and the allocation is effective as of the date of the transfer. (Notice 2001-50 will be made obsolete upon the publication of the Treasury decision adopting these proposed regulations as final regulations in the **Federal Register**.)

On August 2, 2004, the IRS issued Rev. Proc. 2004-46 (2004-2 CB 142), which provides an alternate simplified method to obtain an extension of time to allocate GST exemption in certain situations. Generally, this method is available only with regard to an inter vivos transfer to a trust from which a GST may be made and only if each of the following requirements is met: (1) The transfer qualified for the gift tax annual exclusion under section 2503(b); (2) the sum of the amount of the transfer and all other gifts by the transferor to the donee in the same year did not exceed the applicable annual exclusion amount for that year; (3) no GST

exemption was allocated to the transfer; (4) the taxpayer has unused GST exemption to allocate to the transfer as of the filing of the request for relief; and (5) no taxable distributions or taxable terminations have occurred as of the filing of the request for relief.

To date, the IRS has issued numerous private letter rulings under § 301.9100-3 granting an extension of time to timely allocate GST exemption in situations in which transferors (or their executors) failed to allocate GST exemption to a trust on a timely filed Federal gift or estate tax return. These proposed regulations are intended to replace § 301.9100-3 with regard to relief under section 2642(g)(1).

Accordingly, § 301.9100-3 will be amended to provide that relief under section 2642(g)(1) cannot be obtained through the provisions of §§ 301.9100-1 and 301.9100-3 after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Relief under § 301.9100-2(b) (the automatic 6-month extension) will continue to be available to transferors or transferor's estates qualifying for that relief. In addition, the procedures contained in Revenue Procedure 2004-46 will remain effective for transferors within the scope of that Revenue Procedure.

#### Explanation of Provisions

The proposed regulations identify the standards that the IRS will apply in determining whether to grant a transferor or a transferor's estate an extension of time to: (1) Allocate GST exemption, as defined in section 2631, to a transfer; (2) elect under section 2632(b)(3) (the election not to have the deemed allocation of GST exemption apply to a direct skip); (3) elect under section 2632(c)(5)(A)(i) (the election not to have the deemed allocation of GST exemption apply to an indirect skip or transfers made to a particular trust); and (4) elect under section 2632(c)(5)(A)(ii) (the election to treat any trust as a GST trust for purposes of section 2632(c)). The proposed regulations also identify situations with facts that do not satisfy the standards for granting relief and in which, as a result, an extension of time will not be granted.

If an extension of time to allocate GST exemption is granted under section 2642(g)(1), the allocation of GST exemption will be considered effective as of the date of the transfer, and the value of the property transferred for purposes of chapter 11 or chapter 12 will determine the amount of GST exemption to be allocated. If an extension of time to elect out of the automatic allocation of GST exemption

under section 2632(b)(3) or (c)(5)(A)(i) is granted under section 2642(g)(1), the election will be considered effective as of the date of the transfer. If an extension of time to elect to treat any trust as a GST trust under section 2632(c)(5)(A)(ii) is granted under section 2642(g)(1), the election will be considered effective as of the date of the first (or each) transfer covered by that election.

The amount of GST exemption that may be allocated to a transfer pursuant to an extension granted under section 2642(g)(1) is limited to the amount of the transferor's unused GST exemption under section 2631(c) as of the date of the transfer. Thus, if the amount of GST exemption has increased since the date of the transfer, no portion of the increased amount may be applied by reason of the grant of relief under section 2642(g)(1) to a transfer taking place in an earlier year and prior to the effective date of that increase.

Requests for relief under section 2642(g)(1) will be granted when the taxpayer establishes to the satisfaction of the IRS that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

For purposes of section 2642(g)(1), the following nonexclusive list of factors will be used to determine whether a transferor or the executor of a transferor's estate acted reasonably and in good faith: (1) The intent of the transferor or the executor of the transferor's estate to timely allocate GST exemption or to timely make an election under section 2632(b)(3) or (c)(5) as evidenced in the trust instrument, instrument of transfer, or contemporaneous documents, such as Federal gift or estate tax returns or correspondence; (2) the occurrence of intervening events beyond the control of the transferor as defined in section 2652(a), or of the executor of the transferor's estate as defined in section 2203, that caused the failure to allocate GST exemption to a transfer or the failure to elect under section 2632(b)(3) or (c)(5); (3) the lack of awareness by the transferor or the executor of the transferor's estate of the need to allocate GST exemption to a transfer after exercising reasonable diligence, taking into account the experience of the transferor or the executor of the transferor's estate and the complexity of the GST issue; (4) evidence of consistency by the transferor in allocating (or not allocating) the transferor's GST exemption, although evidence of consistency may be less relevant if there is evidence of a change of circumstances or change of trust

beneficiaries that would otherwise support a deviation from prior GST tax exemption allocation practices; and (5) reasonable reliance by the transferor or the executor of the transferor's estate on the advice of a qualified tax professional retained or employed by either (or both) of them, and the failure of the transferor or executor, in reliance on or consistent with that advice, to allocate GST exemption to the transfer or to make an election described in section 2632(b)(3) or (c)(5). The IRS will consider all relevant facts and circumstances in making this determination.

For purposes of section 2642(g)(1), the following nonexclusive list of factors will be used to determine whether the interests of the Government would be prejudiced: (1) The grant of requested relief would permit the use of hindsight to produce an economic advantage or other benefit that either would not have been available if the allocation or election had been timely made, or that results from the selection of one out of a number of alternatives (other than whether or not to make an allocation or election) that were available at the time the allocation or election could have been made timely; (2) if the transferor or the executor of the transferor's estate delayed the filing of the request for relief with the intent to deprive the IRS of sufficient time (by reason of the expiration or the impending expiration of the applicable statute of limitations or otherwise) to challenge the claimed identity of the transferor, the value of the transferred property that is the subject of the requested relief, or any other aspect of the transfer that is relevant for transfer tax purposes; and (3) a determination by the IRS that, in the event of a grant of relief under section 2642(g)(1), it would be unreasonably disruptive or difficult to adjust the GST tax consequences of a taxable termination or a taxable distribution that occurred between the time for making a timely allocation of GST exemption or a timely election described in section 2632(b)(3) or (c)(5) and the time at which the request for relief under section 2642(g)(1) was filed. The IRS will consider all relevant facts and circumstances in making this determination.

Relief under section 2642(g)(1) will not be granted when the standard of reasonableness, good faith and lack of prejudice to the interests of the Government is not met. This standard is not met in the following situations: (1) The transferor or the executor of the transferor's estate made an allocation of GST exemption as described in § 26.2632-1(b)(4)(ii)(A)(1), or an election under section 2632(b)(3) or

(c)(5), on a timely filed Federal gift or estate tax return, and the relief requested would decrease or revoke that allocation or election; (2) the transferor or the transferor's executor delayed in requesting relief in order to preclude the IRS, as a practical matter, from challenging the identity of the transferor, the value of the transferred interest on the Federal estate or gift tax return, or any other aspect of the transaction that is relevant for Federal estate or gift tax purposes; (3) the action or inaction that is the subject of the request for relief reflected or implemented the decision with regard to the allocation of GST exemption or an election described in section 2632(b)(3) or (c)(5) that was made by the transferor or executor of the transferor's estate who had been accurately informed in all material respects by a qualified tax professional retained or employed by either (or both) of them; or (4) the IRS determines that the transferor's request is an attempt to benefit from hindsight.

A request for relief under section 2642(g)(1) does not reopen, suspend or extend the period of limitations on assessment of any estate, gift, or GST tax under section 6501. Thus, the IRS may request that the transferor or the transferor's executor consent under section 6501(c)(4) to extend the period of limitations on assessment of any or all gift and GST taxes on the transfer(s) for which relief under section 2642(g)(1) has been requested. The transferor or the transferor's executor has the right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time. See section 6501(c)(4)(B).

If the grant of relief under section 2642(g)(1) results in a potential tax refund claim, no refund will be paid or credited to the taxpayer or the taxpayer's estate if, at the time of filing the request for relief, the period of limitations for filing a claim for a credit or refund of Federal gift, estate, or GST tax under section 6511 on the transfer for which relief is granted has expired.

Relief provided under section 2642(g)(1) will be granted through the IRS letter ruling program.

#### Proposed Effective Date

Section 26.2642-7 applies to requests for relief filed on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

#### Availability of IRS Documents

The IRS notice and revenue procedure cited in this preamble are published in

the Cumulative Bulletin and are available at <http://www.irs.gov>.

#### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The applicability of this rule is limited to individuals (or their estates) and trusts, which are not small entities as defined by the RFA (5 U.S.C. 601). Although it is anticipated that there may be a beneficial economic impact for some small entities, including entities that provide tax and legal services that assist individuals in the private letter ruling program, any benefit to those entities would be indirect. Further, this indirect benefit will not affect a substantial number of these small entities because only a limited number of individuals (or their estates) and trusts would submit a private letter ruling request under this rule. Therefore, only a small fraction of tax and legal services entities would generate business or benefit from this rule. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small entities.

#### Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and also on how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for August 5, 2008 in the IRS auditorium. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For more information about having your name placed on the list to attend the

hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written (a signed original and eight (8) copies) or electronic comments by July 16, 2008 and an outline of the topics to be discussed and the time to be devoted to each topic by July 15, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

#### Drafting Information

The principal author of these regulations is Theresa M. Melchiorre, Office of Chief Counsel, IRS.

#### List of Subjects

##### 26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

##### 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 26 and 301 are proposed to be amended as follows:

#### **PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986**

**Paragraph 1.** The authority citation for part 26 is amended by adding an entry in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 26.2642-7 also issued under 26 U.S.C. 2642(g) \* \* \*

**Par. 2.** Section 26.2642-7 is added to read as follows:

#### **§ 26.2642-7 Relief under section 2642(g)(1).**

(a) *In general.* Under section 2642(g)(1)(A), the Secretary has the authority to issue regulations describing the circumstances in which a transferor, as defined in section 2652(a), or the executor of a transferor's estate, as defined in section 2203, will be granted an extension of time to allocate generation-skipping transfer (GST) exemption as described in sections 2642(b)(1) and (2). The Secretary also

has the authority to issue regulations describing the circumstances under which a transferor or the executor of a transferor's estate will be granted an extension of time to make the elections described in section 2632(b)(3) and (c)(5). Section 2632(b)(3) provides that an election may be made by or on behalf of a transferor not to have the transferor's GST exemption automatically allocated under section 2632(b)(1) to a direct skip, as defined in section 2612(c), made by the transferor during life. Section 2632(c)(5)(A)(i) provides that an election may be made by or on behalf of a transferor not to have the transferor's GST exemption automatically allocated under section 2632(c)(1) to an indirect skip, as defined in section 2632(c)(3)(A), or to any or all transfers made by such transferor to a particular trust. Section 2632(c)(5)(A)(ii) provides that an election may be made by or on behalf of a transferor to treat any trust as a GST trust, as defined in section 2632(c)(3)(B), for purposes of section 2632(c) with respect to any or all transfers made by that transferor to the trust. This section generally describes the factors that the Internal Revenue Service (IRS) will consider when an extension of time is sought by or on behalf of a transferor to timely allocate GST exemption and/or to make an election under section 2632(b)(3) or (c)(5). Relief provided under this section will be granted through the IRS letter ruling program. See paragraph (h) of this section.

(b) *Effect of Relief.* If an extension of time to allocate GST exemption is granted under this section, the allocation of GST exemption will be considered effective as of the date of the transfer, and the value of the property transferred for purposes of chapter 11 or chapter 12 will determine the amount of GST exemption to be allocated. If an extension of time to elect out of the automatic allocation of GST exemption under section 2632(b)(3) or (c)(5) is granted under this section, the election will be considered effective as of the date of the transfer. If an extension of time to elect to treat any trust as a GST trust under section 2632(c)(5)(A)(ii) is granted under this section, the election will be considered effective as of the date of the first (or each) transfer covered by that election.

(c) *Limitation on relief.* The amount of GST exemption that may be allocated to a transfer as the result of relief granted under this section is limited to the amount of the transferor's unused GST exemption under section 2631(c) as of the date of the transfer. Thus, if, by the time of the making of the allocation or election pursuant to relief granted under

this section, the GST exemption amount under section 2631(c) has increased to an amount in excess of the amount in effect for the date of the transfer, no portion of the increased amount may be applied to that earlier transfer by reason of the relief granted under this section.

(d) *Basis for determination*—(1) *In general.* Requests for relief under this section will be granted when the transferor or the executor of the transferor's estate provides evidence (including the affidavits described in paragraph (h) of this section) to establish to the satisfaction of the IRS that the transferor or the executor of the transferor's estate acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government. Paragraphs (d)(2) and (d)(3) of this section set forth nonexclusive lists of factors the IRS will consider in determining whether this standard of reasonableness, good faith, and lack of prejudice to the interests of the Government has been met so that such relief will be granted. In making this determination, IRS will consider these factors, as well as all other relevant facts and circumstances. Paragraph (e) of this section sets forth situations in which this standard has not been met and, as a result, in which relief under this section will not be granted.

(2) *Reasonableness and good faith.* The following is a nonexclusive list of factors that will be considered to determine whether the transferor or the executor of the transferor's estate acted reasonably and in good faith for purposes of this section:

(i) The intent of the transferor to timely allocate GST exemption to a transfer or to timely make an election under section 2632(b)(3) or (c)(5), as evidenced in the trust instrument, the instrument of transfer, or other relevant documents contemporaneous with the transfer, such as Federal gift and estate tax returns and correspondence. This may include evidence of the intended GST tax status of the transfer or the trust (for example, exempt, non-exempt, or partially exempt), or more explicit evidence of intent with regard to the allocation of GST exemption or the election under section 2632(b)(3) or (c)(5).

(ii) Intervening events beyond the control of the transferor or of the executor of the transferor's estate as the cause of the failure to allocate GST exemption to a transfer or the failure to make an election under section 2632(b)(3) or (c)(5).

(iii) Lack of awareness by the transferor or the executor of the transferor's estate of the need to allocate

GST exemption to the transfer, despite the exercise of reasonable diligence, taking into account the experience of the transferor or the executor of the transferor's estate and the complexity of the GST issue, as the cause of the failure to allocate GST exemption to a transfer or to make an election under section 2632(b)(3) or (c)(5).

(iv) Consistency by the transferor with regard to the allocation of the transferor's GST exemption (for example, the transferor's consistent allocation of GST exemption to transfers to skip persons or to a particular trust, or the transferor's consistent election not to have the automatic allocation of GST exemption apply to transfers to one or more trusts or skip persons pursuant to section 2632(b)(3) or (c)(5)). Evidence of consistency may be less relevant if there has been a change of circumstances or change of trust beneficiaries that would otherwise explain a deviation from prior GST exemption allocation decisions.

(v) Reasonable reliance by the transferor or the executor of the transferor's estate on the advice of a qualified tax professional retained or employed by one or both of them and, in reliance on or consistent with that advice, the failure of the transferor or the executor to allocate GST exemption to the transfer or to make an election described in section 2632(b)(3) or (c)(5). Reliance on a qualified tax professional will not be considered to have been reasonable if the transferor or the executor of the transferor's estate knew or should have known that the professional either—

(A) Was not competent to render advice on the GST exemption; or  
(B) Was not aware of all relevant facts.

(3) *Prejudice to the interests of the Government.* The following is a nonexclusive list of factors that will be considered to determine whether the interests of the Government would be prejudiced for purposes of this section:

(i) The interests of the Government would be prejudiced to the extent to which the request for relief is an effort to benefit from hindsight. The interests of the Government would be prejudiced if the IRS determines that the requested relief is an attempt to benefit from hindsight rather than to achieve the result the transferor or the executor of the transferor's estate intended at the time when the transfer was made. A factor relevant to this determination is whether the grant of the requested relief would permit an economic advantage or other benefit that would not have been available if the allocation or election had been timely made. Similarly, there would be prejudice if a grant of the

requested relief would permit an economic advantage or other benefit that results from the selection of one out of a number of alternatives (other than whether or not to make an allocation or election) that were available at the time the allocation or election could have been timely made, if hindsight makes the selected alternative more beneficial than the other alternatives. Finally, in a situation where the only choices were whether or not to make a timely allocation or election, prejudice would exist if the transferor failed to make the allocation or election in order to wait to see (thus, with the benefit of hindsight) whether or not the making of the allocation of exemption or election would be more beneficial.

(ii) The timing of the request for relief will be considered in determining whether the interests of the Government would be prejudiced by granting relief under this section. The interests of the Government would be prejudiced if the transferor or the executor of the transferor's estate delayed the filing of the request for relief with the intent to deprive the IRS of sufficient time to challenge the claimed identity of the transferor of the transferred property that is the subject of the request for relief, the value of that transferred property for Federal gift or estate tax purposes, or any other aspect of the transfer that is relevant for Federal gift or estate tax purposes. The fact that any period of limitations on the assessment or collection of transfer taxes has expired prior to the filing of a request for relief under this section, however, will not by itself prohibit a grant of relief under this section. Similarly, the combination of the expiration of any such period of limitations with the fact that the asset or interest was valued for transfer tax purposes with the use of a valuation discount will not by itself prohibit a grant of relief under this section.

(iii) The occurrence and effect of an intervening taxable termination or taxable distribution will be considered in determining whether the interests of the Government would be prejudiced by granting relief under this section. The interests of the Government may be prejudiced if a taxable termination or taxable distribution occurred between the time for making a timely allocation of GST exemption or a timely election described in section 2632(b)(3) or (c)(5) and the time at which the request for relief under this section was filed. The impact of a grant of relief on (and the difficulty of adjusting) the GST tax consequences of that intervening termination or distribution will be considered in determining whether the

occurrence of a taxable termination or taxable distribution constitutes prejudice.

(e) *Situations in which the standard of reasonableness, good faith, and lack of prejudice to the interests of the Government has not been met.* Relief under this section will not be granted if the IRS determines that the transferor or the executor of the transferor's estate has not acted reasonably and in good faith, and/or that the grant of relief would prejudice the interests of the Government. The following situations provide illustrations of some circumstances under which the standard of reasonableness, good faith, and lack of prejudice to the interests of the Government has not been met, and as a result, in which relief under this section will not be granted:

(1) *Timely allocations and elections.* Relief will not be granted under this section to decrease or revoke a timely allocation of GST exemption as described in § 26.2632-1(b)(4)(ii)(A)(1), or to revoke an election under section 2632(b)(3) or (c)(5) made on a timely filed Federal gift or estate tax return.

(2) *Timing.* Relief will not be granted if the transferor or executor delayed the filing of the request for relief with the intent to deprive the IRS of sufficient time to challenge the claimed identity of the transferor or the valuation of the transferred property for Federal gift or estate tax purposes. (However, see paragraph (d)(3)(ii) of this section for examples of facts which alone do not constitute prejudice.)

(3) *Failure after being accurately informed.* Relief will not be granted under this section if the decision made by the transferor or the executor of the transferor's estate (who had been accurately informed in all material respects by a qualified tax professional retained or employed by either (or both) of them with regard to the allocation of GST exemption or an election described in section 2632(b)(3) or (c)(5) was reflected or implemented by the action or inaction that is the subject of the request for relief.

(4) *Hindsight.* Relief under this section will not be granted if the IRS determines that the requested relief is an attempt to benefit from hindsight rather than an attempt to achieve the result the transferor or the executor of the transferor's estate intended when the transfer was made. One factor that will be relevant to this determination is whether the grant of relief will give the transferor the benefit of hindsight by providing an economic advantage that may not have been available if the allocation or election had been timely made. Thus, relief will not be granted if

that relief will shift GST exemption from one trust to another trust unless the beneficiaries of the two trusts, and their respective interests in those trusts, are the same. Similarly, relief will not be granted if there is evidence that the transferor or executor had not made a timely allocation of the exemption in order to determine which of the various trusts achieved the greatest asset appreciation before selecting the trust that should have a zero inclusion ratio.

(f) *Period of limitations under section 6501.* A request for relief under this section does not reopen, suspend, or extend the period of limitations on assessment or collection of any estate, gift, or GST tax under section 6501. Thus, the IRS may request that the transferor or the transferor's executor consent, under section 6501(c)(4), to an extension of the period of limitation on assessment or collection of any or all gift and GST taxes for the transfer(s) that are the subject of the requested relief. The transferor or the transferor's executor has the right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time. See section 6501(c)(4)(B).

(g) *Refunds.* The filing of a request for relief under section 2642(g)(1) with the IRS does not constitute a claim for refund or credit of an overpayment and no implied right to refund will arise from the filing of such a request for relief. Similarly, the filing of such a request for relief does not extend the period of limitations under section 6511 for filing a claim for refund or credit of an overpayment. In the event the grant of relief under section 2642(g)(1) results in a potential claim for refund or credit of an overpayment, no such refund or credit will be allowed to the taxpayer or to the taxpayer's estate if the period of limitations under section 6511 for filing a claim for a refund or credit of the Federal gift, estate, or GST tax that was reduced by the granted relief has expired. The period of limitations under section 6511 is generally the later of three years from the time the original return is filed or two years from the time the tax was paid. If the IRS and the taxpayer agree to extend the period for assessment of tax, the period for filing a claim for refund or credit will be extended. Section 6511(c). The taxpayer or the taxpayer's estate is responsible for preserving any potential claim for refund or credit. A taxpayer who seeks and is granted relief under section 2642(g)(1) will not be regarded as having filed a claim for refund or credit by requesting such relief. In order to preserve a right of refund or credit, the taxpayer or the executor of the

taxpayer's estate also must file before the expiration of the period of limitations under section 6511 for filing such a claim any required forms for requesting a refund or credit in accordance with the instructions to such forms and applicable regulations.

(h) *Procedural requirements*—(1) *Letter ruling program.* The relief described in this section is provided through the IRS's private letter ruling program. See Revenue Procedure 2008-1 (2008-1 IRB 1), or its successor, (which are available at <http://www.irs.gov>). Requests for relief under this section that do not meet the requirements of § 301.9100-2 of this chapter must be made under the rules of this section.

(2) *Affidavit and declaration of transferor or the executor of the transferor's estate*—(i) The transferor or the executor of the transferor's estate must submit a detailed affidavit describing the events that led to the failure to timely allocate GST exemption to a transfer or the failure to timely elect under section 2632(b)(3) or (c)(5), and the events that led to the discovery of the failure. If the transferor or the executor of the transferor's estate relied on a tax professional for advice with respect to the allocation or election, the affidavit must describe—

(A) The scope of the engagement;

(B) The responsibilities the transferor or the executor of the transferor's estate believed the professional had assumed, if any; and

(C) The extent to which the transferor or the executor of the transferor's estate relied on the professional.

(ii) Attached to each affidavit must be copies of any writing (including, without limitation, notes and e-mails) and other contemporaneous documents within the possession of the affiant relevant to the transferor's intent with regard to the application of GST tax to the transaction for which relief under this section is being requested.

(iii) The affidavit must be accompanied by a dated declaration, signed by the transferor or the executor of the transferor's estate that states: "Under penalties of perjury, I declare that I have examined this affidavit, including any attachments thereto, and to the best of my knowledge and belief, this affidavit, including any attachments thereto, is true, correct, and complete. In addition, under penalties of perjury, I declare that I have examined all the documents included as part of this request for relief, and, to the best of my knowledge and belief, these documents collectively contain all the relevant facts relating to the request for relief, and

such facts are true, correct, and complete."

(3) *Affidavits and declarations from other parties*—(i) The transferor or the executor of the transferor's estate must submit detailed affidavits from individuals who have knowledge or information about the events that led to the failure to allocate GST exemption or to elect under section 2632(b)(3) or (c)(5), and/or to the discovery of the failure. These individuals may include individuals whose knowledge or information is not within the personal knowledge of the transferor or the executor of the transferor's estate. The individuals described in paragraph (h)(3)(i) of this section must include—

(A) Each agent or legal representative of the transferor who participated in the transaction and/or the preparation of the return for which relief is being requested;

(B) The preparer of the relevant Federal estate and/or gift tax return(s);

(C) Each individual (including an employee of the transferor or the executor of the transferor's estate) who made a substantial contribution to the preparation of the relevant Federal estate and/or gift tax return(s); and

(D) Each tax professional who advised or was consulted by the transferor or the executor of the transferor's estate with regard to any aspect of the transfer, the trust, the allocation of GST exemption, and/or the election under section 2632(b)(3) or (c)(5).

(ii) Each affidavit must describe the scope of the engagement and the responsibilities of the individual as well as the advice or service(s) the individual provided to the transferor or the executor of the transferor's estate.

(iii) Attached to each affidavit must be copies of any writing (including, without limitation, notes and e-mails) and other contemporaneous documents within the possession of the affiant relevant to the transferor's intent with regard to the application of GST tax to the transaction for which relief under this section is being requested.

(iv) Each affidavit also must include the name, and current address of the individual, and be accompanied by a dated declaration, signed by the individual that states: "Under penalties of perjury, I declare that I have personal knowledge of the information set forth in this affidavit, including any attachments thereto. In addition, under penalties of perjury, I declare that I have examined this affidavit, including any attachments thereto, and, to the best of my knowledge and belief, the affidavit contains all the relevant facts of which I am aware relating to the request for relief filed by or on behalf of [transferor

or the executor of the transferor's estate], and such facts are true, correct, and complete."

(v) If an individual who would be required to provide an affidavit under paragraph (h)(3)(i) of this section has died or is not competent, the affidavit required under paragraph (h)(2) of this section must include a statement to that effect, as well as a statement describing the relationship between that individual and the transferor or the executor of the transferor's estate and the information or knowledge the transferor or the executor of the transferor's estate believes that individual had about the transfer, the trust, the allocation of exemption, or the election. If an individual who would be required to provide an affidavit under paragraph (h)(3)(i) of this section refuses to provide the transferor or the executor of the transferor's estate with such an affidavit, the affidavit required under paragraph (h)(2) of this section must include a statement that the individual has refused to provide the affidavit, a description of the efforts made to obtain the affidavit from the individual, the information or knowledge the transferor or the executor of the transferor's estate believes the individual had about the transfer, and the relationship between the individual and the transferor or the executor of the transferor's estate.

(i) *Effective/applicability date.* Section 26.2642-7 applies to requests for relief filed on or after the date of publication of the Treasury decision adopting these proposed rules as final regulations in the **Federal Register**.

## PART 301—PROCEDURE AND ADMINISTRATION

**Par. 3.** The authority citation for part 301 continues to read in part as follows:

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

**Par. 4.** Section 301.9100-3 is amended by adding a new paragraph (g) to read as follows:

### § 301.9100-3 Other extensions.

\* \* \* \* \*

(g) *Relief under section 2642(g)(1)*—(1) *Procedures.* The procedures set forth in this section are not applicable for requests for relief under section 2642(g)(1). For requests for relief under section 2642(g)(1), see § 26.2642-7.

(2) *Effective/applicability date.* Paragraph (g) of this section applies to requests for relief under section 2642(g)(1) filed on or after the date of publication of the Treasury decision



adopting these rules as final regulations in the **Federal Register**.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E8-8033 Filed 4-16-08; 8:45 am]

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[REG-141998-06]

RIN 1545-BG13

#### Withdrawal of Regulations Under Old Section 6323(b)(10)

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations related to the validity and priority of the Federal tax lien against certain persons under section 6323 of the Internal Revenue Code (the Code). The proposed regulations update the corresponding Treasury Regulations in various respects. The proposed regulations reflect the adjustment within section 6323(b) of certain dollar amounts as well as the amendment of section 6323(b)(10) by the IRS Restructuring and Reform Act of 1998 (RRA 1998). In addition, the proposed regulations amend the existing regulations under section 6323(c), (g), and (h) to reflect that a notice of Federal tax lien (NFTL) is not treated as meeting the filing requirements until it is both filed and indexed in the office designated by the state (in the case of real property located in a state where a deed is not valid against a purchaser until the filing of such deed has been entered and recorded in the public index); the lien will be extinguished if an NFTL contains a certificate of release and the NFTL is not timely refiled; and current law provides the IRS with a 10-year period to collect an assessed tax. The proposed regulations also make changes to the existing regulations under section 6323(f) to clarify the IRS's authority to file NFTLs electronically. Finally, the proposed regulations make incidental changes throughout the existing regulations under section 6323 to make the dates in the examples more contemporaneous with the present and to remove language deemed no longer necessary.

**DATES:** Written or electronic comments and requests for a public hearing must be received by *June 16, 2008*.

**ADDRESSES:** Send submissions to CC:PA:LPD:PR (REG-141998-06), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-141998-06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS-141998-06).

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Debra A. Kohn at (202) 622-7985; concerning submissions of comments and the hearing, Regina Johnson at (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) under section 6323 of the Code. If any person liable for tax neglects or refuses to pay after demand, the amount of that tax is a lien in favor of the United States against all property and rights to property of such person under section 6321. Section 6323 provides that a Federal tax lien is only valid against certain persons if an NFTL is filed and addresses generally the validity and priority of the Federal tax lien against such persons. Section 6323(b) and (c) addresses the protection of certain interests even though an NFTL has been filed. Section 6323(f) prescribes the place for filing and the form of an NFTL. Section 6323(g) addresses the refile of an NFTL. Section 6323(h) contains definitions of certain terms used throughout section 6323.

Since 1976, there have been numerous amendments to section 6323 that are not reflected in the existing regulations. Section 6323(b)(10) has been amended by RRA 1998. In addition, several subsections of section 6323(b) have been amended to increase the dollar amounts these sections reference. Also, section 6323(f)(4) was amended by the Revenue Act of 1978 to provide that an NFTL does not meet the filing requirements with respect to real property until the filing is entered and recorded in a public index maintained by the state if the laws of the state provide that a deed is not valid against a purchaser unless it is recorded in a public index. Moreover, section 6502, the statute that governs the period the

IRS has to take collection action (referenced in various places throughout § 301.6323(g)-1(c)), was amended by the Revenue Act of 1990 to change the period from six years to 10 years.

There have also been several changes to IRS practice that are not reflected in the existing regulations. Section 301.6323(f)-1(d)(2) of the existing regulations provides that an NFTL may be filed electronically if the state in which it is being filed permits electronic filing. Whether a state "permits" electronic filing of NFTLs has been subject to varying interpretations, thus casting doubt on the validity of NFTLs filed electronically in jurisdictions that do not specifically provide for electronic filing. However, the requirements for proper filing of liens are a matter of Federal, not state, law. *United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 82 S. Ct. 349, 7 L. Ed. 2d 294 (1961). Thus, the IRS already possesses the authority to dictate the form and content of its NFTLs. The proposed regulations remove the "permits" language so that they correctly reflect the IRS's authority to file NFTLs electronically.

Section 301.6323(g)-1(a)(3) and (4) of the existing regulations states that the IRS may refile an NFTL once the filing period has elapsed and that failure to refile within the specified period does not affect the existence of the lien. The existing regulations also provide that failure to refile during the specified period does not affect the NFTL with respect to property that is the subject matter of a suit or that was levied upon prior to the expiration of the required refile period. These provisions concerning the effect of a failure to refile are, to some extent, inconsistent with current IRS practice. Most filed NFTLs now contain a certificate of release that automatically releases the lien as of the date the NFTL prescribes, which is the date at the end of the required refile period. Therefore, if the IRS does not refile an NFTL within the specified period, the certificate of release contained in the NFTL extinguishes the lien. The proposed regulations update the regulations under section 6323 to reflect these changes in IRS practice.

The Code currently provides a 10-year period for instituting a proceeding in court or serving a levy to collect an assessed tax liability, while § 301.6323(g)-1(c) of the existing regulations references the 6-year period that existed until 1990. The proposed regulations update § 301.6323(g)-1(c) to reflect this change in the law.

The proposed regulations also update the regulations under section 6323(h) to reflect changes made by the Uniform