

Internal Revenue Service, Treasury

§ 28.2801-0

§ 26.7701-1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701-15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after December 31, 2008.

[T.D. 9436, 73 FR 78453, Dec. 22, 2008]

§ 26.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) *In general.* For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see § 301.7701-18 of this chapter.

(b) *Applicability date.* The rules of this section apply to taxable years ending on or after September 2, 2016.

[T.D. 9785, 81 FR 60616, Sept. 2, 2016]

PART 27 [RESERVED]

PART 28—IMPOSITION OF TAX ON GIFTS AND BEQUESTS FROM COVERED EXPATRIATES

Sec.

28.2801-0 Table of contents.

28.2801-1 Tax on certain gifts and bequests from covered expatriates.

28.2801-2 Definitions.

28.2801-3 Rules and exceptions applicable to covered gifts and covered bequests.

28.2801-4 Liability for and payment of tax on covered gifts and covered bequests; computation of tax.

28.2801-5 Foreign trusts.

28.2801-6 Special rules and cross-references.

28.2801-7 Determining responsibility under section 2801.

28.6001-1 Records required to be kept.

28.6011-1 Returns.

28.6060-1 Reporting requirements for tax return preparers.

28.6071-1 Time for filing returns.

28.6081-1 Extension of time for filing returns reporting gifts and bequests from covered expatriates.

28.6091-1 Place for filing returns.

28.6101-1 Period covered by returns.

28.6107-1 Tax return preparer must furnish copy of return or claim for refund to taxpayer and must retain a copy or record.

28.6109-1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

28.6151-1 Time and place for paying tax shown on returns.

28.6694-1 Section 6694 penalties applicable to return preparer.

28.6694-2 Penalties for understatement due to an unreasonable position.

28.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

28.6694-4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

28.6695-1 Other assessable penalties with respect to the preparation of tax returns for other persons.

28.6696-1 Claims for credit or refund by tax return preparers and appraisers.

28.7701-1 Tax return preparer.

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§ 28.2801-0 Table of contents.

This section lists the headings in §§ 28.2801-1 through 28.2801-7.

§ 28.2801-1 *Tax on certain gifts and bequests from covered expatriates.*

(a) *In general.*

(b) *Applicability date.*

§ 28.2801-2 *Definitions.*

(a) *Overview.*

(b) *U.S. citizen or resident.*

(c) *Domestic trust.*

§ 28.2801-0

26 CFR Ch. I (4-1-25 Edition)

- (d) Foreign trust.
 - (1) In general.
- (2) Electing foreign trust.
- (3) Non-electing foreign trust.
- (e) U.S. recipient.
- (f) Covered bequest.
- (g) Covered gift.
- (h) Expatriate and covered expatriate.
- (i) Indirect acquisition of property.
- (j) Power of appointment.
- (k) Section 2801 tax.
 - (1) Section 2801(c) amount.
 - (m) Statutory references.
 - (1) Code.
 - (2) Subtitle B.
 - (n) Applicability date.

§ 28.2801-3 Rules and exceptions applicable to covered gifts and covered bequests.

- (a) Covered gift.
- (b) Covered bequest.
- (c) Exceptions to covered gift and covered bequest.
 - (1) Reported taxable gifts.
 - (2) Property reported as subject to estate tax.
 - (3) Covered bequest previously subject to section 2801 tax as a covered gift.
 - (4) Transfers to charity.
 - (5) Transfers to spouse.
 - (6) Qualified disclaimers.
- (d) Covered gifts and covered bequests made in trust.
 - (e) Powers of appointment.
 - (1) Covered expatriate as holder of power.
 - (2) Covered expatriate as grantor of power.
 - (f) Examples.
 - (g) Applicability date.

§ 28.2801-4 Liability for and payment of tax on covered gifts and covered bequests; computation of tax.

- (a) Liability for tax.
 - (1) U.S. citizen or resident.
 - (2) Domestic trust.
 - (i) In general.
 - (ii) Generation-skipping transfer tax.
 - (iii) [Reserved].
 - (iv) Migrated foreign trust.
 - (3) Foreign trust.
 - (i) In general.
 - (ii) Income tax deduction.
 - (b) Computation of tax.
 - (1) In general.
 - (2) Net covered gifts and covered bequests.
 - (c) Value of covered gift or covered bequest.
 - (d) Date of receipt.
 - (1) In general.
 - (2) Covered gift.
 - (3) Covered bequest.
 - (4) Domestic trusts and electing foreign trusts.
 - (5) Non-electing foreign trusts.
 - (6) Powers of appointment.
 - (i) Covered expatriate as holder of power.

- (ii) Covered expatriate as grantor of power.
- (7) Indirect receipts.
- (8) Future interest in property not in trust.
- (i) Date of receipt.
 - (ii) Date-of-receipt election for future interest in property not in trust.
- (e) Reduction of tax for foreign gift or estate tax paid.
 - (1) In general.
 - (2) Protective claim for refund.
 - (f) Examples.
 - (g) Applicability date.

§ 28.2801-5 Foreign trusts.

- (a) In general.
- (b) Distribution defined.
- (c) Amount of distribution attributable to covered gift or covered bequest.
 - (1) Section 2801 ratio.
 - (i) In general.
 - (ii) Computation.
 - (2) Effect of reported transfer and tax payment.
 - (3) Inadequate information to calculate section 2801 ratio.
 - (d) Foreign trust treated as domestic trust.
 - (1) Election required.
 - (2) Effect of election.
 - (3) Time and manner of making the election.
 - (i) When to make the election.
 - (ii) Requirements for a valid election.
 - (iii) Section 2801 tax payable with the election.
 - (iv) Designation of U.S. agent.
 - (A) In general.
 - (B) Role of designated agent.
 - (C) Effect of appointment of agent.
 - (4) Filing requirement.
 - (5) Duration of status as electing foreign trust.
 - (i) In general.
 - (ii) Termination.
 - (A) Manner of termination.
 - (B) Effective date of termination.
 - (C) Notice requirements upon termination.
 - (iii) Subsequent elections.
 - (6) Dispute as to amount of section 2801 tax owed by electing foreign trust.
 - (i) Procedure.
 - (ii) Effect of compliance.
 - (iii) Effect of failing to comply (imperfect election).
 - (A) In general.
 - (B) Notice to permissible distributees.
 - (C) Reasonable cause.
 - (D) Interim period.
 - (7) No overpayment caused solely by virtue of defect in election.
 - (e) Examples.
 - (f) Applicability date.

§ 28.2801-6 Special rules and cross-references.

- (a) Determination of basis.
- (b) Generation-skipping transfer tax.

- (c) Information returns.
- (1) Gifts and bequests.
- (2) Foreign trust distributions.
- (3) Penalties and use of information.
- (d) Application of penalties.
- (1) Accuracy-related penalties on underpayments.
- (2) Penalty for substantial and gross valuation misstatements attributable to incorrect appraisals.
- (3) Penalty for failure to file a return and to pay tax.
- (e) Applicability date.

§ 28.2801-7 Determining responsibility under section 2801.

- (a) Responsibility of U.S. citizens or residents receiving gifts or bequests from expatriates.
- (b) Disclosure of return and return information.
- (1) In general.
- (2) Rebuttable presumption.
- (c) Protective return.
- (d) Applicability date.

§ 28.2801-1 Tax on certain gifts and bequests from covered expatriates.

(a) *In general.* Section 2801 of the Internal Revenue Code (Code) imposes a tax (section 2801 tax) on covered gifts and covered bequests, including distributions attributable to covered gifts and covered bequests from non-electing foreign trusts, received by a U.S. citizen or resident from a covered expatriate during a calendar year. Domestic trusts, as well as electing foreign trusts, are subject to tax under section 2801 in the same manner as if the trusts were U.S. citizens. *See* section 2801(e)(4)(A)(i) and (B)(iii). Accordingly, the section 2801 tax is paid by the U.S. citizen or resident, domestic trust, or electing foreign trust that receives the covered gift or covered bequest, including distributions attributable to covered gifts and covered bequests from non-electing foreign trusts. For purposes of the regulations in this part 28 (26 CFR part 28), references to U.S. citizens are considered to include domestic trusts and electing foreign trusts.

(b) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.2801-2 Definitions.

(a) *Overview.* This section provides definitions of terms applicable solely

for purposes of section 2801 of the Code and the regulations in this part 28.

(b) *U.S. citizen or resident.* A *U.S. citizen or resident* is an individual who is a citizen or resident of the United States for purposes of chapter 11 or 12 of subtitle B, as the case may be, at the time of receipt of the covered gift or covered bequest. Furthermore, references to a U.S. citizen also include a domestic trust, as well as an electing foreign trust. *See* § 28.2801-1(a).

(c) *Domestic trust.* The term *domestic trust* means a trust defined in section 7701(a)(30)(E) of the Code. References to a domestic trust include an electing foreign trust.

(d) *Foreign trust*—(1) *In general.* The term *foreign trust* means a trust defined in section 7701(a)(31)(B).

(2) *Electing foreign trust.* The term *electing foreign trust* means a foreign trust that has in effect a valid election to be treated as a domestic trust for purposes of section 2801. *See* § 28.2801-5(d).

(3) *Non-electing foreign trust.* The term *non-electing foreign trust* means any foreign trust other than an electing foreign trust described in paragraph (d)(2) of this section.

(e) *U.S. recipient.* The term *U.S. recipient* means a U.S. citizen or resident, a domestic trust, or an electing foreign trust that receives a covered gift or covered bequest, whether directly or indirectly, during the calendar year. The term U.S. recipient includes a U.S. citizen or resident receiving a distribution from a non-electing foreign trust if the distribution is attributable (in whole or in part) to one or more covered gifts or covered bequests received by the non-electing foreign trust. *See* § 28.2801-5(c) to determine the amount of a distribution attributable to covered gifts and covered bequests. This term also includes the U.S. citizen or resident shareholders, partners, or other interest-holders, as the case may be (if any), of a business entity that receives a covered gift or covered bequest.

(f) *Covered bequest.* The term *covered bequest* means any property acquired by a recipient on or after June 17, 2008, directly or indirectly by reason of the death of a covered expatriate, regardless of the situs of the property and of

whether such property was acquired by the covered expatriate before or after expatriation from the United States, but only to the extent the property would have been included in the covered expatriate's gross estate for Federal estate tax purposes if the covered expatriate had been a U.S. citizen immediately before death. See paragraph (i) of this section for guidance in determining when property is acquired indirectly for purposes of this paragraph (f). The term *covered bequest* also includes any other property that would have been included in the covered expatriate's gross estate for Federal estate tax purposes (for example, under section 2035 of the Code) if the covered expatriate had been a U.S. citizen immediately before death, as well as distributions made by reason of the death of a covered expatriate from a non-electing foreign trust to the extent the distributions are attributable to covered gifts and covered bequests made to the non-electing foreign trust on or after June 17, 2008. See § 28.2801-3 for additional rules and exceptions applicable to the term *covered bequest*.

(g) *Covered gift*. The term *covered gift* means any property acquired by a recipient on or after June 17, 2008, by gift directly or indirectly from an individual who is a covered expatriate at the time the property is received by the recipient, regardless of the situs of such property and of whether such property was acquired by the covered expatriate before or after expatriation from the United States. See paragraph (i) of this section for guidance in determining when property is acquired indirectly for purposes of this paragraph (g). The term *covered gift* also includes distributions made, other than by reason of the death of a covered expatriate, from a non-electing foreign trust to the extent the distributions are attributable to covered gifts and covered bequests made to the non-electing foreign trust on or after June 17, 2008. See § 28.2801-3 for additional rules and exceptions applicable to the term *covered gift*.

(h) *Expatriate and covered expatriate*. The term *expatriate* has the same meaning for purposes of section 2801 as that term has in section 877A(g)(2) of the Code. The term *covered expatriate* has

the same meaning for purposes of section 2801 as that term has in section 877A(g)(1). The determination of whether an individual is a covered expatriate is made as of the expatriation date as defined in section 877A(g)(3), and if an expatriate meets the definition of a covered expatriate, the expatriate is a covered expatriate for purposes of section 2801 at all times after the expatriation date. However, an expatriate is not treated as a covered expatriate for purposes of section 2801 during any period beginning after the expatriation date during which such individual is subject to United States estate or gift tax (chapter 11 or chapter 12 of subtitle B) as a U.S. citizen or resident. See section 877A(g)(1)(C). An individual's status as a covered expatriate will be determined as of the date of the most recent expatriation, if there has been more than one.

(i) *Indirect acquisition of property*. For purposes of paragraphs (f) and (g) of this section, an indirect acquisition of property means the receipt of an interest in property, gratuitously passed from or conferred by the covered expatriate, by or on behalf of the recipient through another person, or by a trust or entity in which the recipient has an interest, regardless of the means or device employed. Such an indirect acquisition includes but is not limited to—

(1) Property acquired by a recipient through a transfer to a corporation or other entity other than a trust or estate, to the extent of the ownership interest of the recipient in that corporation or other entity;

(2) Money paid or property distributed by a covered expatriate, or distributed from a non-electing foreign trust that received a covered gift or covered bequest, in satisfaction of a debt or liability of the recipient, regardless of the payee of that payment or distribution;

(3) Property acquired by or on behalf of a recipient pursuant to the exercise, release, or lapse (without regard to the exception in section 2041(b)(2) or 2514(e) of the Code) of a non-covered expatriate's power of appointment granted by a covered expatriate over property not in trust, unless the property previously was subjected to section 2801 tax upon the grant of the power or the covered

expatriate had no more than a non-general power of appointment over that property; and

(4) Property acquired through or from any person not subject to the section 2801 tax that is, in substance, a covered gift or covered bequest from a covered expatriate.

(j) *Power of appointment.* The term *power of appointment* refers to both a general and non-general power of appointment, except as expressly limited to one or the other in a particular provision of the regulations in this part 28. The term *general power of appointment* has the same meaning as in sections 2041(b)(1) and 2514(c). The term *non-general power of appointment* means any power of appointment that is not a general power of appointment. For purposes of section 2801, the term *power of appointment* is defined without regard to the exception in section 2041(b)(2) or 2514(e).

(k) *Section 2801 tax.* The term *section 2801 tax* has the meaning provided in § 28.2801-1(a).

(l) *Section 2801(c) amount.* The term *section 2801(c) amount* is the dollar amount of the per-donee gift tax exclusion in effect under section 2503(b) for that calendar year.

(m) *Statutory references*—(1) *Code.* The term *Code* means the Internal Revenue Code.

(2) *Subtitle B.* The term *subtitle B* means subtitle B of the Code.

(n) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.2801-3 Rules and exceptions applicable to covered gifts and covered bequests.

(a) *Covered gift.* Subject to the provisions of paragraphs (c) through (e) of this section, the term *gift* as used in the definition of *covered gift* in § 28.2801-2(g) has the same meaning as in chapter 12 of subtitle B, but without regard to the exceptions in section 2501(a)(2), (4), and (5) of the Code, the per-donee exclusion under section 2503(b) of the Code for certain transfers of a present interest, the exclusion under section 2503(e) for certain educational or medical expenses, and the waiver of certain pension rights under section 2503(f).

(b) *Covered bequest.* Subject to the provisions of paragraphs (c) through (e) of this section, property acquired *by reason of the death of a covered expatriate* (one of the types of transfers defined as a covered bequest in § 28.2801-2(f)) includes any property that would have been includible in the gross estate of the covered expatriate under chapter 11 of subtitle B if the covered expatriate had been a U.S. citizen at the time of death. Therefore, property acquired by reason of a covered expatriate's death includes, without limitation, property or an interest in property acquired by reason of a covered expatriate's death—

(1) By bequest, devise, trust provision, beneficiary designation, or other contractual arrangement, or by operation of law, to the extent the property would have been includible in the covered expatriate's gross estate if the covered expatriate had been a U.S. citizen at death;

(2) That was transferred by the covered expatriate during life, either before or after expatriation, and that would have been includible in the covered expatriate's gross estate under section 2036, 2037, or 2038 of the Code had the covered expatriate been a U.S. citizen at death;

(3) That was received for the benefit of a covered expatriate from such covered expatriate's spouse, or predeceased spouse, for which a valid qualified terminable interest property (QTIP) election was made on such spouse's, or predeceased spouse's, Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, Form 709-NA, *United States Gift (and Generation-Skipping Transfer) Tax Return of Nonresident Not a Citizen of the United States*, Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, or Form 706-NA, *United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of nonresident not a citizen of the United States*, which would have been includible in the covered expatriate's gross estate under section 2044 of the Code if the covered expatriate had been a U.S. citizen at death; or

(4) That otherwise passed from the covered expatriate by reason of his or her death, such as—

(i) Property held by the covered expatriate and another person as joint tenants with right of survivorship or as tenants by the entirety, but only to the extent such property would have been includible in the covered expatriate's gross estate under section 2040 of the Code if the covered expatriate had been a U.S. citizen at death;

(ii) Any annuity or other payment that would have been includible in the covered expatriate's gross estate if the covered expatriate had been a U.S. citizen at death;

(iii) Property subject to a general power of appointment held by the covered expatriate at death that would have been includible in the covered expatriate's gross estate under section 2041 if the covered expatriate had been a U.S. citizen at death; or

(iv) Life insurance proceeds payable upon the covered expatriate's death that would have been includible in the covered expatriate's gross estate under section 2042 of the Code if the covered expatriate had been a U.S. citizen at death.

(c) *Exceptions to covered gift and covered bequest.* Notwithstanding the definitions of *covered gift* and *covered bequest* in § 28.2801-2(f) and (g), respectively, as further described in paragraphs (a) and (b) of this section, the terms *covered gift* and *covered bequest* do not include property described in paragraphs (c)(1) through (6) of this section.

(1) *Reported taxable gifts.* Property transferred as a taxable gift under section 2503(a) that is reported on the donor's timely filed Form 709 or Form 709-NA is not a covered gift. However, property excluded from the definition of a taxable gift, such as a present interest not in excess of the annual exclusion amount under section 2503(b), is not excluded from the definition of a covered gift under this paragraph (c)(1) even if reported on the donor's Form 709 or Form 709-NA.

(2) *Property reported as subject to estate tax.* Property that is includible in the gross estate of the covered expatriate and is reported on a timely filed Form 706, Form 706-NA, or Form 706-QDT, *U.S. Estate Tax Return for Qualified Domestic Trusts*, or any successor form, is not a covered bequest. Thus, if the covered expatriate's gross estate is not of

sufficient value to require the filing of a Form 706-NA, for example, and no Form 706-NA is timely filed, the property passing from that covered expatriate is not excluded from the definition of a covered bequest under the rule of this paragraph (c)(2). Further, this exclusion does not apply to the property not reported on such a form, whether or not subject to United States estate tax (that is, non-U.S. situs property that passes to U.S. citizens or residents).

(3) *Covered bequest previously subject to section 2801 tax as a covered gift.* If a covered bequest from a covered expatriate previously constituted a covered gift from that covered expatriate (for example, because of a retained power or right described in section 2036), the property is a covered bequest only to the extent that the value of the covered bequest exceeds the value of the covered gift that was subject to section 2801.

(4) *Transfers to charity.* A gift to a donee described in section 2522(b) of the Code or a bequest to a beneficiary described in section 2055(a) of the Code is not a covered gift or covered bequest to the extent a charitable deduction under section 2522 or 2055 would have been allowed if the covered expatriate had been a U.S. citizen at the time of the transfer.

(5) *Transfers to spouse.* Property transferred from a covered expatriate to the covered expatriate's spouse generally is not a covered gift or covered bequest to the extent a marital deduction under section 2523 or 2056 of the Code would have been allowed if the covered expatriate had been a U.S. citizen at the time of the transfer. To the extent that a gift or bequest of property to a trust (or to a separate share of the trust) would qualify for the marital deduction, the property transferred in the gift or bequest is not a covered gift or covered bequest. To the extent the gift or bequest of property to the trust (or to a separate share of the trust) would not qualify for the marital deduction, the property transferred in the gift or bequest is a covered gift or covered bequest to the trust, and in the case of a non-electing foreign trust, distributions attributable to such gift or bequest will subject the U.S. citizen

or resident spouse receiving such distributions to the section 2801 tax. *See* §§ 28.2801-4(a)(3) and 28.2801-5(a). For qualified terminable interest property (QTIP) described in section 2056(b)(7) and for property in a qualified domestic trust (QDOT) described in section 2056A of the Code, a valid QTIP and/or QDOT election must be made by the covered expatriate or covered expatriate's estate in order for the gift or bequest of such property to qualify for the marital exclusion under section 2801(e)(3), and, thus not be a covered gift or covered bequest under this paragraph (c)(5). Such an election can be made only with respect to the transfer of property subject to gift or estate tax under section 2511(a) or 2103 of the Code. Furthermore, to exclude from covered bequests property in a QDOT for the benefit of a covered expatriate, funded pursuant to a bequest by the covered expatriate's predeceased spouse who also was a covered expatriate, a valid QDOT election must have been made in the predeceased covered expatriate's estate.

(6) *Qualified disclaimers.* Property transferred pursuant to a covered expatriate's qualified disclaimer, as defined in section 2518(b) of the Code, is not a covered gift or covered bequest from that covered expatriate.

(d) *Covered gifts and covered bequests made in trust.* For transfers of property to a trust that are covered gifts or covered bequests as described in §§ 28.2801-2 and 28.2801-3, the property is treated as a covered gift or covered bequest to the trust without regard to the beneficial interests in the trust or whether any person has a general power of appointment or a power of withdrawal over trust property. Accordingly, the rules in section 2801(e)(4) and § 28.2801-4(a) apply to determine liability for payment of the section 2801 tax. The U.S. recipient of a covered gift or a covered bequest made to a domestic trust or to an electing foreign trust is the domestic or electing foreign trust, and the U.S. recipient of a covered gift or a covered bequest made to a non-electing foreign trust is each U.S. citizen or resident receiving a distribution from the non-electing foreign trust (without regard to whether that distribution is or is not pursuant to the

exercise or release of a general power of appointment). *See* § 28.2801-2(e) for the definition of a U.S. recipient.

(e) *Powers of appointment—(1) Covered expatriate as holder of power.* The exercise or release of a general power of appointment held by a covered expatriate over property, whether or not in trust (even if that covered expatriate was a U.S. citizen or resident when the general power of appointment was granted), for the benefit of a U.S. citizen or resident is a covered gift or covered bequest. For this purpose, the lapse of a general power of appointment held by a covered expatriate is treated as a release to the extent provided in sections 2041(b)(2) and 2514(e) of the Code. Furthermore, the exercise of a power of appointment by a covered expatriate that creates another power of appointment as described in section 2041(a)(3) or 2514(d) for the benefit of a U.S. citizen or resident is a covered gift or a covered bequest.

(2) *Covered expatriate as grantor of power.* The grant by a covered expatriate to an individual who is a U.S. citizen or resident of a general power of appointment over property not held in trust is a covered gift or covered bequest to the powerholder. For the rule applying to the grant by a covered expatriate of a general power of appointment over property in trust, see paragraph (d) of this section.

(f) *Examples.* The provisions of this section are illustrated by the following examples:

(1) *Example 1: Transfer to spouse.* In Year 1, CE, a covered expatriate domiciled in Country F, a foreign country with which the United States does not have a gift tax treaty, gives \$300,000 cash to his wife, W, a U.S. resident and citizen of Country F. Under paragraph (c)(5) of this section, the \$100,000 exclusion for a noncitizen spouse, as indexed for inflation in Year 1, is excluded from the definition of a covered gift under section 2801 because only that amount of the transfer would have qualified for the gift tax marital deduction if CE had been a U.S. citizen at the time of the gift. *See* sections 2801(e)(3), 2523(i), and 2503(b). The remaining amount (\$300,000, less the \$100,000 exclusion for a noncitizen spouse, as indexed for inflation) is a covered gift from CE to W.

W must timely file Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, and timely pay the tax. See §§ 28.6011-1(a), 28.6071-1(a), and 28.6151-1(a). W also must report the transfer on Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, and any other required form. See § 28.2801-6(c)(1).

(2) *Example 2: Reporting property as subject to estate tax*—(i) *Year 1.* CE, a covered expatriate domiciled in Country F, a foreign country with which the United States does not have an estate tax treaty, owns a condominium in the United States with son, S, a U.S. citizen. CE and S each contributed their actuarial share of the purchase price when purchasing the condominium and own it as joint tenants with rights of survivorship. On December 14, Year 1, CE dies. At the time of CE's death, the fair market value of CE's share of the condominium, \$250,000, is included in CE's gross estate under sections 2040 and 2103.

(ii) *Year 2.* On September 14 of the following calendar year, Year 2, the executor of CE's estate timely files a Form 4768, *Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes*, requesting a 6-month extension of time to file Form 706-NA, and a 1-year extension of time to pay the estate tax. The Internal Revenue Service grants both extensions, but CE's executor fails to file the Form 706-NA until after March 14 of Year 3.

(iii) *Analysis.* S learns that the executor of CE's estate did not timely file Form 706-NA. CE's estate remains liable for estate tax on CE's interest in the condominium. In addition, because CE is a covered expatriate and CE's estate failed to timely file the tax return reporting the transaction, S received a covered bequest as defined in § 28.2801-2(f) and paragraph (b) of this section and must timely file Form 708 and pay the section 2801 tax. See §§ 28.6011-1(a), 28.6071-1(a), and 28.6151-1(a). S also must file Form 3520 to report a large gift or bequest from a foreign person and any other required form. See § 28.2801-6(c)(1).

(3) *Example 3: Covered gift in trust with grant of general power of appointment*

over trust property—(i) *Facts.* On October 20, Year 1, CE, a covered expatriate domiciled in Country F, a foreign country with which the United States does not have a gift tax treaty, transfers \$500,000 in cash from an account in Country F to an irrevocable foreign trust created on that same date. The foreign trust does not elect to be treated as a domestic trust for purposes of section 2801. Under section 2511(a), no gift tax is imposed on the transfer and thus, CE is not required to file a U.S. gift tax return. Under the terms of the foreign trust, A, CE's child and a U.S. resident, and Q, A's child and a U.S. citizen, may receive discretionary distributions of income and principal during life. At A's death, the assets remaining in the foreign trust will be distributed to B, CE's other U.S. resident child, or if B is not living at the time of A's death, then to CE's then-living issue, per stirpes. The terms of the foreign trust also allow A to appoint trust principal and/or income to A, A's estate, A's creditors, the creditors of A's estate, or A's issue at any time. On March 5, Year 2, A exercises this power to appoint and causes the trustee to distribute \$100,000 to Q.

(ii) *Effects on Q.* On October 20, Year 1, the irrevocable, non-electing foreign trust receives a covered gift for purposes of section 2801, but no section 2801 tax is imposed at that time. On March 5, Year 2, when Q receives \$100,000 from the irrevocable foreign trust pursuant to the exercise of A's power of appointment, Q receives a distribution attributable to a covered gift and section 2801 tax is imposed on Q. See § 28.2801-4(d)(5). Q must timely file Form 708 to report the covered gift from a foreign person (specifically, from CE). See section 6039F(a) and §§ 28.6011-1(a), 28.6071-1(a), and 28.6151-1(a). Furthermore, because the \$100,000 is being distributed from a foreign trust, Q must report the gift on a Form 3520 as a distribution from a foreign trust. See § 28.2801-6(c)(2).

(iii) *Effects on A.* Although A has no section 2801 reporting requirement, under section 2501, A makes a taxable gift to Q of \$100,000 when A exercises the general power of appointment for Q's benefit. See section 2514(b). Accordingly, A must report A's \$100,000 gift to

Q on a timely filed Form 709. See section 6019. Because A is considered the transferor of the \$100,000 for gift and GST tax purposes, the distribution to Q is not a generation-skipping transfer under chapter 13. See § 26.2652-1(a)(1) of this chapter.

(4) *Example 4: Lapse of power of appointment held by covered expatriate.* A, a U.S. citizen, creates an irrevocable domestic trust for the benefit of A's issue, CE, and CE's children. CE is a covered expatriate, but CE's children are U.S. citizens. CE has the right to withdraw \$5,000 in each year in which A makes a contribution to the trust, but the withdrawal right lapses 30 days after the date of the contribution. In Year 1, A funds the trust, but CE fails to exercise CE's right to withdraw \$5,000 within 30 days of the contribution. The \$5,000 lapse is not considered to be a release of the power by CE, so it is neither a gift for U.S. gift tax purposes, nor a covered gift for purposes of section 2801 under paragraph (e)(1) of this section.

(5) *Example 5: Property subject to section 2801 tax as a covered gift and as a covered bequest.* F, a CE, transfers an income interest in property to A, a U.S. citizen, while retaining the remainder interest. F was not required to, and did not, file a gift tax return. Upon F's death, A receives full title to the property. The initial transfer of the income interest was a covered gift valued at \$1,000,000, upon which A paid the section 2801 tax. The value of the property at F's death is \$4,500,000. Because the full value of the property would have been included in F's gross estate if F had died as a U.S. citizen, there is a covered bequest at F's death. The covered bequest is subject to section 2801 tax on the excess of the value of the covered bequest over the value of the covered gift (\$4,500,000 minus \$1,000,000), or \$3,500,000.

(g) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.2801-4 Liability for and payment of tax on covered gifts and covered bequests; computation of tax.

(a) *Liability for tax—(1) U.S. citizen or resident.* A U.S. citizen or resident who

receives a covered gift or covered bequest is liable for payment of the section 2801 tax.

(2) *Domestic trust—(i) In general.* A domestic trust that receives a covered gift or covered bequest is treated as a U.S. citizen and is liable for payment of the section 2801 tax. See section 2801(e)(4)(A)(i) and § 28.2801-2(b).

(ii) *Generation-skipping transfer tax.* A trust's payment of the section 2801 tax does not result in a taxable distribution under section 2621 of the Code to any trust beneficiary for purposes of the generation-skipping transfer tax to the extent that the trust, rather than the beneficiary, is liable for the section 2801 tax.

(iii) [Reserved].

(iv) *Migrated foreign trust.* A non-electing foreign trust that has previously received a covered gift or covered bequest and that subsequently becomes a domestic trust as defined under section 7701(a)(30)(E) of the Code (migrated foreign trust), must file a timely Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, for the taxable year in which the trust becomes a domestic trust. The section 2801 tax, if any, must be paid by the due date of that Form 708. On that Form 708, the section 2801 tax is calculated in the same manner as if such trust were making an election under § 28.2801-5(d) to be treated as a domestic trust solely for purposes of the section 2801 tax. Accordingly, the trustee must report and pay the section 2801 tax on all covered gifts and covered bequests received by the trust during the year in which the trust becomes a domestic trust, as well as on the portion of the trust's value at the end of the year preceding the year in which the trust becomes a domestic trust that is attributable to all prior covered gifts and covered bequests. Because the migrated foreign trust will be treated for purposes of section 2801 as a domestic trust for the entire year during which it became a domestic trust, distributions made to U.S. citizens or residents during that year but before the date on which the trust became a domestic trust will not be subject to section 2801.

(3) *Foreign trust—(i) In general.* A foreign trust that receives a covered gift

or covered bequest is not liable for payment of the section 2801 tax unless the trust makes an election to be treated as a domestic trust solely for purposes of section 2801 as provided in § 28.2801-5(d). Absent such an election, each U.S. recipient is liable for payment of the section 2801 tax on that person's receipt, either directly or indirectly, of a distribution from the foreign trust to the extent that the distribution is attributable to a covered gift or covered bequest made to the foreign trust. See § 28.2801-5(b) and (c) regarding distributions from non-electing foreign trusts.

(ii) *Income tax deduction.* The U.S. recipient of a distribution from a non-electing foreign trust is allowed a deduction against income tax under section 164 in the calendar year in which the U.S. recipient paid or accrued the section 2801 tax. Thus, for cash method taxpayers, the calendar year in which the payment of the section 2801 tax occurs is later than the year in which the distribution is received and becomes subject to income tax. The amount of the deduction is equal to the portion of the section 2801 tax attributable to such distribution, but only to the extent that portion of the distribution is included in the U.S. recipient's gross income (which, for this purpose, also includes accumulation distributions under section 665(b)). The amount of the deduction allowed under section 164 is calculated as follows:

(A) First, the U.S. recipient must determine the total amount of distribution(s) from all non-electing foreign trusts treated as covered gifts and covered bequests received by that U.S. recipient during the calendar year to which the section 2801 tax payment relates.

(B) Second, of the amount determined in paragraph (a)(3)(ii)(A) of this section, the U.S. recipient must determine the amount that also is included in the U.S. recipient's gross income for that calendar year. For purposes of this paragraph (a)(3)(ii)(B), distributions from non-electing foreign trusts included in the U.S. recipient's gross income are deemed first to consist of the portion of those distributions, if any, that are attributable to covered gifts and covered bequests.

(C) Finally, the U.S. recipient must determine the portion of the section 2801 tax paid for that calendar year that is attributable to the amount determined in paragraph (a)(3)(ii)(B) of this section, the covered gifts and covered bequests received from non-electing foreign trusts that also are included in the U.S. recipient's gross income. This amount is the allowable deduction. Thus, for a calendar year taxpayer, the deduction is determined by multiplying the section 2801 tax paid during the calendar year by the ratio of the amount determined in paragraph (a)(3)(ii)(B) of this section to the total covered gifts and covered bequests received by the U.S. recipient during the calendar year to which that tax payment relates (that is, 2801 tax liability x [non-electing foreign trust distributions attributable to covered gifts and covered bequests that are also included in gross income/total covered gifts or covered bequests received]).

(b) *Computation of tax—(1) In general.* The section 2801 tax is computed by multiplying the net covered gifts and covered bequests (as defined in paragraph (b)(2) of this section) received by a U.S. recipient during the calendar year by the highest rate of estate tax under section 2001(c) in effect for that calendar year. See paragraph (f)(1) of this section (*Example 1*).

(2) *Net covered gifts and covered bequests.* The net covered gifts and covered bequests received by a U.S. recipient during the calendar year is the total value of all covered gifts and covered bequests received by that U.S. recipient during the calendar year, less the section 2801(c) amount, which is the dollar amount of the per-donee exclusion in effect under section 2503(b) for that calendar year. The total value of all covered gifts and covered bequests received by a U.S. recipient during the calendar year includes distributions made from a non-electing foreign trust to the extent the distributions are attributable to covered gifts or covered bequests made to the foreign trust on or after June 17, 2008.

(c) *Value of covered gift or covered bequest.* The value of a covered gift or covered bequest is the fair market value of the property as of the date of its receipt by the U.S. recipient. See

paragraph (d) of this section regarding the determination of the date of receipt. As in the case of chapters 11 and 12, the fair market value of a covered gift or covered bequest is the price, as of the date of receipt, at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a covered gift is determined in accordance with the Federal gift tax valuation principles of section 2512 and chapter 14 and the corresponding regulations. The fair market value of a covered bequest is determined by applying the Federal estate tax valuation principles of section 2031 and chapter 14, to the extent applicable, and the corresponding regulations, but without regard to sections 2032 and 2032A.

(d) *Date of receipt*—(1) *In general.* The section 2801 tax is imposed upon the receipt of a covered gift or covered bequest by a U.S. recipient.

(2) *Covered gift.* The date of receipt of a covered gift is the same as the date of the gift for purposes of chapter 12 of subtitle B as if the covered expatriate had been a U.S. citizen at the time of the transfer (subject to the other provisions of this paragraph (d)). For example, for a gift of stock, if the covered expatriate delivers a properly endorsed stock certificate to the U.S. recipient, the date of delivery is the date of receipt for purposes of this section. Alternatively, if the covered expatriate delivers the stock certificate to the issuing corporation or its transfer agent in order to transfer title to the U.S. recipient, the date of receipt is the date the stock is transferred on the books of the corporation. However, for an asset or property interest subject to a claim of right of another involving a bona fide dispute, the date of receipt is the date on which such claim is extinguished.

(3) *Covered bequest.* The date of receipt of a covered bequest is the date of distribution from the estate or the decedent's revocable trust rather than the date of death of the covered expatriate (subject to the other provisions of this subparagraph (d)). However, the date of receipt for property passing on

the death of the covered expatriate by operation of law, or by beneficiary designation or other contractual agreement, is the date of death of the covered expatriate. Notwithstanding the previous sentences, for an asset subject to a claim of right of another involving a bona fide dispute, the date of receipt is the date on which such claim is extinguished.

(4) *Domestic trusts and electing foreign trusts.* The U.S. recipient of a covered gift or covered bequest made to a domestic trust or an electing foreign trust is the trust. For a lifetime transfer of assets by a covered expatriate to a domestic trust or an electing foreign trust, the date of receipt of the covered gift is the date of the gift for purposes of chapter 12 of subtitle B, determined as if the covered expatriate had been a U.S. citizen at the time of the transfer. For example, in the event of a transfer by a covered expatriate to a revocable trust, the date of receipt is the later of the date the right to revoke the trust is relinquished or extinguished and the date when all powers over or interests in the trust (if any) that would prevent the transfer from being a completed transfer for gift tax purposes (determined as if the covered expatriate had been a U.S. citizen) are extinguished. Similarly, in the event of a transfer by a covered expatriate to an irrevocable domestic trust or electing foreign trust over or in which the covered expatriate retains powers or interests that would prevent the transfer from being a completed gift for gift tax purposes (determined as if the covered expatriate had been a U.S. citizen), the date of receipt by the trust is the date all such powers or interests are extinguished. Additionally, if before the relinquishment of the right to revoke the trust or relinquishment of some other powers or interests that would render the gift incomplete (determined as if the covered expatriate had been a U.S. citizen), such trust distributes property to a U.S. recipient not in discharge of a support or other obligation of the donor, then the U.S. recipient of that distribution receives a covered gift on the date of that distribution.

(5) *Non-electing foreign trusts.* A U.S. citizen or resident is treated as receiving a covered gift or covered bequest on

the date that person receives a distribution from a non-electing foreign trust attributable to a covered gift or covered bequest that was received by the trust. The date of such a receipt by a U.S. citizen or resident is the date of each distribution from the non-electing foreign trust. In the event of a sale, encumbrance, monetization, or other disposition of a U.S. recipient's interest in a non-electing foreign trust, the date of receipt is the date of such sale, encumbrance, monetization, or other disposition of the interest.

(6) *Powers of appointment*—(i) *Covered expatriate as holder of power*. In the case of the exercise, release, or lapse of a power of appointment held by a covered expatriate that is a covered gift pursuant to § 28.2801-3(e)(1), the date of receipt is the date of the exercise, release, or lapse of the power. In the case of the exercise, release, or lapse of a power of appointment held by a covered expatriate that is a covered bequest pursuant to § 28.2801-3(e)(1), the date of receipt is the date the property subject to the power is distributed from the decedent's estate or any trust if the power of appointment is over property in such estate or trust, or the date of the covered expatriate's death if the power of appointment is over property passing on the covered expatriate's death by operation of law, or by beneficiary designation, or other contractual agreement.

(ii) *Covered expatriate as grantor of power*. The date of receipt of property subject to a general power of appointment granted by a covered expatriate to a U.S. citizen or resident over property not transferred in trust that constitutes a covered gift or covered bequest pursuant to § 28.2801-3(e)(2) is the first date on which both the general power of appointment is exercisable by the U.S. citizen or resident and the property subject to the general power of appointment has been irrevocably transferred by the covered expatriate. The date of receipt of property subject to a general power of appointment over property in a domestic trust or an electing foreign trust is determined in accordance with paragraphs (d)(2) through (4) of this section, and over property in a non-electing foreign trust is determined in accordance with para-

graph (d)(5) of this section. See § 28.2801-3(d) for the rule applying to covered gifts and covered bequests made in trust.

(7) *Indirect receipts*. The date of receipt by a U.S. recipient of a covered gift or covered bequest received indirectly from a covered expatriate is the date of its receipt, as determined under this paragraph (d), by the U.S. citizen or resident who is the first recipient of that property from the covered expatriate to be subject to section 2801 with regard to that property. For example, the date of receipt of property subject to a non-general power of appointment over property not held in trust given by a covered expatriate to a foreign person (other than another covered expatriate) is the date that property is received by the U.S. recipient in whose favor the power was exercised. Further, the date of receipt of property received through one or more entities not subject to section 2801 is the date of its receipt by the U.S. recipient from a conduit entity.

(8) *Future interest in property not in trust*—(i) *Date of receipt*. The date of receipt by a U.S. recipient (including a domestic trust or an electing foreign trust) of a future interest in property not held in trust is the earlier of the date such interest may be transferred by the U.S. recipient and the date that is the later of the date that such interest vests in the U.S. recipient or the date that the last intervening interest in the property is extinguished. For this purpose, a transfer includes a sale, encumbering, monetization, or other disposition of the interest.

(ii) *Date-of-receipt election for future interest in property not in trust*. A U.S. recipient of a covered gift or covered bequest that is a future interest in property not held in trust instead may elect to treat the date of receipt as the date of the donor's transfer of that future interest in the event of a covered gift, or as the date of death of the covered expatriate in the event of a covered bequest. Such an election will be made on Form 708 for the year in which this elective date of receipt occurs, in accordance with the instructions for such form.

(e) *Reduction of tax for foreign gift or estate tax paid*—(1) *In general.* The section 2801 tax is reduced by the amount of any gift or estate tax paid to a foreign country with respect to the covered gift or covered bequest. For this purpose, the term *foreign country* includes territories and political subdivisions of foreign states. However, no reduction is allowable for interest and penalties paid in connection with those foreign taxes. To claim the reduction of section 2801 tax, the U.S. recipient must attach to the Form 708 a copy of the foreign gift or estate tax return and a copy of the receipt or cancelled check for payment of the foreign gift or estate tax. The U.S. recipient also must report on an attachment to the Form 708:

(i) The amount of foreign gift or estate tax paid with respect to each covered gift or covered bequest and the amount and date of each payment thereof;

(ii) A description and the value of the property with respect to which such taxes were imposed;

(iii) Whether any refund of part or all of the foreign gift or estate tax has been or will be claimed or allowed, and the amount of such refund; and

(iv) All other information necessary for the verification and computation of the amount of the reduction of section 2801 tax.

(2) *Protective claim for refund.* A protective claim for refund under this section may be filed to preserve the U.S. recipient's right to claim a refund in the event any gift or estate tax with respect to the covered gift or covered bequest is owed but not yet paid to a foreign country until after the expiration of the period of limitation for filing a claim for refund. Such a protective claim may be filed at any time before the expiration of the period of limitation prescribed in section 6511(a) for the filing of a claim for refund and shall be made in accordance with the usual procedures for filing a claim for refund. See <https://www.irs.gov> and Form 843, *Claim for Refund and Request for Abatement*, and its instructions. Action on a protective claim will proceed after the U.S. recipient has notified the Internal Revenue Service within a reasonable period that the gift or estate

tax with respect to the covered gift or covered bequest has been paid to a foreign country.

(f) *Examples.* The provisions of this section are illustrated by the following examples.

(1) *Example 1: Computation of tax.* In Year 1, A, a U.S. citizen, receives a \$50,000 covered gift from B and an \$80,000 covered bequest from C. Both B and C are covered expatriates. In Year 1, the highest estate tax rate is 40 percent and the section 2801(c) amount is \$16,000. A's section 2801 tax for Year 1 is computed by multiplying A's net covered gifts and covered bequests by 40 percent. A's net covered gifts and covered bequests for Year 1 are \$114,000, which is determined by reducing A's total covered gifts and covered bequests received during Year 1, \$130,000 (\$50,000 + \$80,000), by the section 2801(c) amount of \$16,000. A's section 2801 tax liability then is reduced by any foreign gift or estate tax paid under paragraph (e) of this section. Assuming A, B, and C paid no foreign gift or estate tax on the transfers, A's section 2801 tax liability for Year 1 is \$45,600 ($\$114,000 \times 0.4$).

(2) *Example 2: Deduction of section 2801 tax for income tax purposes.* In Year 1, B receives a covered bequest of \$25,000. Also in Year 1, B receives an aggregate \$500,000 of distributions from a non-electing foreign trust of which \$100,000 was attributable to a covered gift. In Year 1, the highest estate and gift tax rate is 40 percent and the section 2801(c) amount is \$16,000. Based on information provided by the trustee of the non-electing foreign trust, B includes \$50,000 of the aggregate distributions from the non-electing foreign trust in B's gross income for Year 1. Under paragraph (a)(3)(ii) of this section, B (a cash basis taxpayer) is entitled to an income tax deduction under section 164 for the calendar year in which the section 2801 tax is paid. In Year 2, B timely reports the distributions from the non-electing foreign trust and pays \$43,600 in section 2801 tax ($(\$125,000 - \$16,000) \times 0.4$). In Year 2, B is entitled to an income tax deduction because B paid the section 2801 tax in Year 2 on the Year 1 covered gift and covered bequest. B's Year 2 income tax deduction is computed as follows:

(i) \$100,000 of B's total covered gifts and covered bequests of \$125,000 received in Year 1 consisted of the portion of the distributions from the non-electing foreign trust attributable to covered gifts and covered bequests received by the trust. See paragraph (a)(3)(ii)(A) of this section.

(ii) \$50,000 of the \$500,000 of trust distributions were includible in B's gross income for Year 1. This amount is deemed to consist first of distributions subject to the section 2801 tax (\$100,000). Thus, the entire amount included in B's gross income (\$50,000) also is subject to the section 2801 tax, and is used in the numerator to determine the income tax deduction available to B. See paragraph (a)(3)(ii)(B) of this section.

(iii) The portion of B's section 2801 tax liability attributable to distributions from a non-electing foreign trust that are both covered gifts or covered bequests and includible in B's taxable income is \$17,440 ($\$43,600 \times (\$50,000 / \$125,000)$). Therefore, B's deduction under section 164 is \$17,440. See paragraph (a)(3)(ii)(C) of this section.

(3) *Example 3: Date of receipt; bona fide claim.* On October 10, Year 1, CE, a covered expatriate, died testate as a resident of Country F, a foreign country with which the United States does not have an estate tax treaty. CE designated his son, S, as the beneficiary of CE's retirement account. S is a U.S. citizen. CE's wife, W, who is a citizen and resident of Country F, elects to take her elective share of CE's estate under local law. S contests whether the retirement account is property subject to the elective share. S and W agree to settle their respective claims by dividing CE's assets equally between them. On December 15 of Year 2, Country F's court enters an order accepting the terms of the settlement agreement and dismissing the case. Under paragraph (d)(3) of this section, S received a covered bequest of one-half of CE's retirement account on December 15, Year 2, when W's claim of right was extinguished.

(g) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.2801-5 Foreign trusts.

(a) *In general.* The section 2801 tax is imposed on a U.S. recipient who receives distributions, whether of income or principal, from a non-electing foreign trust to the extent the distributions are attributable to one or more covered gifts or covered bequests made to that foreign trust. See paragraph (d) of this section regarding a foreign trust's election to be treated as a domestic trust for purposes of section 2801.

(b) *Distribution defined.* For purposes of determining whether a U.S. recipient has received a distribution from a non-electing foreign trust, the term *distribution* means any direct, indirect, or constructive transfer from a non-electing foreign trust, including a transfer to the extent made for less than full and adequate consideration in money or money's worth. Although section 643(i) of the Code does not apply for the purpose of defining a distribution under this section, certain loans from or uncompensated use of property held by a non-electing foreign trust nevertheless may satisfy the definition of a distribution under this paragraph if the loan or use of trust property would be a gift as defined for purposes of chapter 12 of subtitle B. For purposes of determining whether a U.S. recipient has received a distribution from a non-electing foreign trust, the term *distribution* also includes each distribution from a non-electing foreign trust pursuant to the exercise, release, or lapse (without regard to the exception in section 2041(b)(2) or 2514(e) of the Code) of a power of appointment, whether or not such power is a general power of appointment. In addition, the term *distribution* also includes the domestication of a foreign trust, and any sale, encumbering, monetization, or other disposition by the U.S. recipient of the recipient's interest in the trust to the extent of that disposition. See § 28.2801-4(a)(2)(iv). The determination of whether a U.S. recipient has received a distribution is made without regard to whether any portion of the non-electing foreign trust is treated as owned by the U.S. recipient or any other person under subpart E of part I, subchapter J, chapter 1 of the Code (pertaining to grantors and others

treated as substantial owners), and without regard to whether the U.S. recipient of the transfer is designated as a beneficiary by the terms of the trust. A U.S. recipient receiving a distribution for purposes of this section must determine whether the information reporting requirements of section 6048(c) apply. See § 28.2801-6(c)(2).

(c) *Amount of distribution attributable to covered gift or covered bequest*—(1) *Section 2801 ratio*—(i) *In general.* A foreign trust may have received covered gifts and covered bequests as well as contributions that were not covered gifts or covered bequests. Under such circumstances, the fair market value of the foreign trust at any time consists, in part, of a portion of the trust attributable to the covered gifts and covered bequests it has received (covered portion) and in part of a portion of the trust attributable to other contributions (non-covered portion). The covered portion of the trust includes the ratable portion of appreciation and income that has accrued on the foreign trust's assets from the date of the contribution of the covered gifts and covered bequests to the foreign trust. For purposes of section 2801, the amount of each distribution from the foreign trust, whether made from the income or principal of the trust, that is considered attributable to the foreign trust's covered gifts and covered bequests is determined on a proportional basis, by

reference to the section 2801 ratio (as described in paragraph (c)(1)(ii) of this section), and not by the identification or tracing of particular trust assets. Specifically, this portion of each distribution is determined by multiplying the distributed amount by the percentage of the trust that consists of its covered portion immediately prior to that distribution (section 2801 ratio). Thus, for example, the section 2801 ratio of a foreign trust whose assets are comprised exclusively of covered gifts or covered bequests and the income and appreciation thereon, would be one and the full amount of each distribution from that foreign trust to a U.S. citizen or resident would be attributable to the foreign trust's covered gifts and covered bequests and subject to the imposition of section 2801 tax. Because the non-electing foreign trust itself is not taxed on its receipt of covered gifts and covered bequests, the trust is not entitled to an annual exclusion pursuant to section 2801(c); that exclusion is available only in computing the section 2801 tax payable by the U.S. recipient filing a Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*.

(ii) *Computation.* The section 2801 ratio, which must be redetermined after each contribution to the foreign trust, is computed by using the following fraction:

$$\text{Section 2801 ratio} = \frac{(X+Y)}{Z}$$

Where,

X = The value of the trust attributable to covered gifts and covered bequests, if any, immediately before the contribution (pre-contribution value); this value is determined by multiplying the fair market value of the trust assets immediately prior to the contribution by the section 2801 ratio in effect immediately prior to the current contribution. This amount will be zero for all years prior to the year in which the foreign trust receives its first covered gift or covered bequest;

Y = The portion, if any, of the fair market value of the current contribution that

constitutes a covered gift or covered bequest; and

Z = The fair market value of the trust immediately after the current contribution. See paragraph (e)(1) of this section (*Example 1*), for an illustration of this computation.

(2) *Effect of reported transfer and tax payment.* With regard to the value of property on which a section 2801 tax has been timely paid, even though that property thereafter remains in a non-electing foreign trust, that value no longer is considered to be, or to be attributable to, a covered gift or covered

bequest to that foreign trust for purposes of the computation described in paragraph (c)(1)(ii) of this section. For purposes of the prior sentence, a section 2801 tax is deemed to have been timely paid on amounts for which no section 2801 tax was due, provided those amounts were reported as a covered gift or covered bequest on a timely filed Form 708 or the total covered gifts and covered bequests received in a calendar year do not exceed the section 2801(c) amount. An amount for which no section 2801 tax was due refers to the amount of a covered gift or covered bequest received by an electing foreign trust not in excess of the section 2801(c) amount. See § 28.2801-5(e) (*Example 4*).

(3) *Inadequate information to calculate section 2801 ratio.* A U.S. citizen or resident receiving a distribution from a non-electing foreign trust must proceed upon the assumption that the distribution is attributable to a covered gift or covered bequest to the extent the trustee of the foreign trust does not have sufficient books and records to calculate the section 2801 ratio or the taxpayer is unable to obtain the necessary information regarding the foreign trust to calculate the section 2801 ratio. The assumption is rebuttable to the extent the taxpayer can supply information sufficient to persuade the Internal Revenue Service (IRS) that the distribution is not entirely attributable to covered gifts and covered bequests.

(d) *Foreign trust treated as domestic trust—(1) Election required.* To be considered an electing foreign trust, so that the foreign trust is treated as a domestic trust solely for purposes of the section 2801 tax, a valid election is required.

(2) *Effect of election—(i)* A valid election subjects the electing foreign trust to the section 2801 tax on all covered gifts and covered bequests received by the foreign trust during that calendar year, the portion of the trust attributable to covered gifts and covered bequests received by the trust in prior years, as determined in paragraph (d)(3)(iii) of this section, and all covered gifts and covered bequests received by the foreign trust during calendar years subsequent to the first

year in which the election is effective, unless and until the election is terminated. To the extent that covered gifts and covered bequests are subject to the section 2801 tax under the prior sentence, those trust receipts are no longer treated as a covered gift or covered bequest for purposes of determining the portion of the trust attributable to covered gifts and covered bequests. Therefore, upon making a valid election, the foreign trust's section 2801 ratio described in paragraph (c)(1)(ii) of this section will be zero until the effective date of any termination of the election and the subsequent receipt of any covered gift or covered bequest, and a distribution made from the foreign trust while this election is in effect is not taxable under section 2801 to the U.S. recipient.

(ii) This election has no effect on any distribution from the foreign trust that was made to a U.S. recipient in a calendar year prior to the calendar year for which the election is made. Thus, even after a valid election is made, a distribution to a U.S. recipient in a calendar year prior to the calendar year for which the election is made that was attributable to one or more covered gifts or covered bequests continues to be a distribution attributable to one or more covered gifts or covered bequests and the section 2801 ratio in place at the time of the distribution continues to apply to that distribution. Furthermore, an election under this section does not relieve the U.S. recipient from the information reporting requirements of section 6048(c). See § 28.2801-6(c)(2).

(3) *Time and manner of making the election—(i) When to make the election.* The election is made on a timely filed Form 708 for the calendar year for which the foreign trust seeks to subject itself to the section 2801 tax as described in paragraph (d)(2)(i) of this section. The election may be made for a calendar year whether or not the foreign trust received a covered gift or covered bequest during that calendar year. See § 28.6071-1.

(ii) *Requirements for a valid election.* To make a valid election to be treated as a domestic trust for purposes of section 2801, the foreign trust must timely

file a Form 708 and must, on such form—

(A) Make the election, timely pay the section 2801 tax, if any, as determined under paragraph (d)(3)(iii) of this section, and include a computation illustrating how the trustee of the foreign trust calculated both the section 2801 ratio described in paragraph (c)(1)(ii) of this section and the section 2801 tax;

(B) Designate and authorize a U.S. agent as provided in paragraph (d)(3)(iv) of this section;

(C) Agree to timely file Form 708 to report each covered gift and bequest made to the trust in accordance with § 28.2801-5(d)(4);

(D) Identify the amount and year of all prior distributions attributable to covered gifts and covered bequests made to a U.S. recipient, and provide the name, address, and taxpayer identification number of each U.S. recipient;

(E) Provide a copy of the governing instrument of the trust and provide the name, address, and taxpayer identification number of each permissible distributee described in paragraph (d)(3)(ii)(F) of this section; and

(F) Affirm under penalties of perjury that each permissible distributee was notified that the trustee is making (or has made) the election, effective as of January 1 of the calendar year for which the Form 708 on which the election is made is filed. For this purpose, a permissible distributee is any U.S. citizen or resident who:

(1) Currently may or must receive distributions from the trust, whether of income or principal;

(2) May withdraw income or principal from the trust during that year or in a future year, regardless of whether the right arises or lapses upon the occurrence of a future event; and

(3) Would be described in either or both of paragraphs (d)(3)(ii)(F)(1) and (2) of this section upon an immediate termination of either the trust or the interest of any person described in either or both of paragraphs (d)(3)(ii)(F)(1) and (2) of this section.

(iii) *Section 2801 tax payable with the election.* To make a valid election to be treated as a domestic trust for purposes of section 2801, the electing foreign trust must timely pay the section 2801 tax on all covered gifts and cov-

ered bequests received by the electing foreign trust in the calendar year for which the Form 708 is being filed. In some cases, an electing foreign trust may have received covered gifts or covered bequests in prior calendar years during which no such election was in effect. In those cases, the trustee must also, at the same time, report and pay the tax on the fair market value, determined as of the last day of the calendar year immediately preceding the year for which the Form 708 is being filed, of the portion of the trust attributable to covered gifts and covered bequests received by such trust in prior calendar years (except as provided in paragraph (d)(6)(iii) of this section with regard to an imperfect election). That portion is determined by multiplying the fair market value of the trust, as of the December 31 immediately preceding the year for which the election is made, by the section 2801 ratio in effect on that date, as calculated under paragraph (c)(1)(ii) of this section. The trustee must proceed upon the assumption that the corpus and undistributed income are attributable to covered gifts and covered bequests to the extent the trustee does not have sufficient books and records to determine what amount of the corpus and undistributed income is attributable to prior covered gifts and covered bequests. The assumption is rebuttable by the taxpayer's furnishing information sufficient to persuade the IRS that corpus and undistributed income is not attributable to prior covered gifts or covered bequests. See paragraph (c)(3) of this section.

(iv) *Designation of U.S. agent—(A) In general.* The trustee of an electing foreign trust must designate and authorize a U.S. person, as defined in section 7701(a)(30) of the Code, to act as an agent for the trust for purposes of section 2801. The designation and authorization are made on a duly filed Form 2848, *Power of Attorney and Declaration of Representative*, or as may be directed otherwise in IRS forms or publications. By designating a U.S. agent, the trustee of the trust agrees to provide the agent with all information necessary to comply with any information request or summons issued by the Secretary of the Treasury or her delegate

(Secretary) that is relevant to the collection or determination of tax under section 2801. Such information may include, without limitation, copies of the books and records of the trust, financial statements, and appraisals of trust property.

(B) *Role of designated agent.* Acting as an agent for an electing foreign trust for purposes of section 2801 includes serving as the trust's agent for purposes of section 7602 of the Code (*Examination of books and witnesses*), section 7603 of the Code (*Service of summons*), and section 7604 of the Code (*Enforcement of summons*) with respect to—

(1) Any request by the Secretary to examine records or produce testimony related to the proper identification or treatment of covered gifts or covered bequests contributed to the foreign trust and distributions of such contributions and the income therefrom; and

(2) Any summons by the Secretary for records or testimony related to the proper identification or treatment of covered gifts or covered bequests contributed to the foreign trust and distributions of such contributions and the income therefrom.

(C) *Effect of appointment of agent.* An electing foreign trust that appoints such an agent is not considered to have an office or a permanent establishment in the United States, or to be engaged in a trade or business in the United States, solely because of the agent's activities as an agent pursuant to this section.

(4) *Filing requirement.* The trustee of an electing foreign trust must timely file a Form 708 to report and pay the section 2801 tax on all covered gifts and covered bequests received by the trust during the calendar year. *See* § 28.6071-1. Nevertheless, the trustee of an electing foreign trust is not required to file Form 708 for a calendar year in which either the trust received no covered gifts or covered bequests, or the total fair market value of all covered gifts and covered bequests received by the electing foreign trust during that calendar year is less than or equal to the section 2801(c) amount.

(5) *Duration of status as electing foreign trust—(i) In general.* A valid elec-

tion (one that meets all of the requirements of paragraph (d)(3) of this section) is effective as of January 1 of the calendar year for which the Form 708 on which the election is made is filed. The election, once made, applies for all calendar years until the election is terminated as described in paragraph (d)(5)(ii) of this section.

(ii) *Termination—(A) Manner of termination.* An election to be treated as a domestic trust for purposes of section 2801 is terminated by—

(1) A failure of the foreign trust to timely file a required Form 708 and timely pay the section 2801 tax, as required by paragraph (d)(4) of this section;

(2) A failure of the foreign trust to enter into a closing agreement and to timely pay any additional amount of section 2801 tax (in accordance with the requirements of paragraph (d)(6)(i) of this section) with respect to recalculations described in paragraph (d)(6) of this section (a termination that also results in the conversion of the trust's election to an imperfect election); or

(3) An affirmative revocation of the election made in accordance with the instructions for Form 708.

(B) *Effective date of termination.* The effective date of the termination of an election to be treated as a domestic trust for purposes of section 2801 is as follows:

(1) For a termination described in paragraph (d)(5)(ii)(A)(1) of this section, the termination is effective as of the first day of the calendar year for which the Form 708 was required under paragraph (d)(4) of this section.

(2) For a termination described in paragraph (d)(5)(ii)(A)(2) of this section, the termination is effective as of the first day of the calendar year for which the Form 708 was filed with respect to which the additional amount of section 2801 tax is claimed to be due by the IRS.

(3) For a termination described in paragraph (d)(5)(ii)(A)(3) of this section, the termination is effective as of the first day of the calendar year for which a Form 708 was filed to affirmatively revoke the election.

(C) *Notice requirements upon termination.* In the case of a termination of the election, the trustee should notify

promptly each permissible distributee of the trust, as defined in paragraph (d)(3)(ii)(F) of this section and determined as of the effective date of the termination of the election, that the foreign trust's election was terminated (or terminated and converted to an imperfect election) and the effective date of the termination, and that each U.S. recipient of a distribution made from the foreign trust on or after the effective date of that termination is subject to the section 2801 tax on the portion of each such distribution that is attributable to covered gifts and covered bequests. See paragraph (d)(6)(iii)(B) of this section for an additional notification requirement in the case of an imperfect election.

(iii) *Subsequent elections.* If a foreign trust's election is terminated under paragraph (d)(5)(ii) of this section, the foreign trust is not prohibited from making another election in a future year, subject to the requirements of paragraph (d)(3) of this section.

(6) *Dispute as to amount of section 2801 tax owed by electing foreign trust—(i) Procedure.* If the IRS disputes the value of a covered gift or covered bequest, or otherwise challenges the computation of the section 2801 tax, that is reported on the electing foreign trust's timely filed Form 708 for any calendar year, the IRS will issue a letter (but not a notice of deficiency as defined in section 6212 of the Code) to the trustee of the trust and the appointed U.S. agent that details the disputed information and the proper amount of section 2801 tax as recalculated. The trustee of the foreign trust must pay the additional amount of section 2801 tax including interest and penalties, if any, on or before the due date specified in the letter (or other date agreed to by the IRS) and enter into a closing agreement with the IRS as described in section 7121 to maintain its election.

(ii) *Effect of compliance.* If the trustee of the foreign trust complies with the requirements of paragraph (d)(6)(i) of this section, then the foreign trust's election to be treated as a domestic trust under paragraph (d) of this section remains in effect. In the absence of fraud, malfeasance, or misrepresentation of a material fact, any value determined in the closing agreement will

be deemed to be final and binding on both the IRS and the foreign trust. Subsequently, the IRS will not challenge the amount of section 2801 tax due from either the foreign trust or any of its distributees who are U.S. citizens or residents for the year for which that Form 708 was filed by the foreign trust, except with respect to any covered gifts or covered bequests not reported on that return. In addition, neither the foreign trust nor any of its distributees will be able to file a claim for refund with respect to section 2801 tax paid by the foreign trust on the covered gifts and covered bequests reported on that Form 708.

(iii) *Effect of failing to comply (imperfect election)—(A) In general.* If the foreign trust fails to enter into the closing agreement and to timely pay any of the additional amount of section 2801 tax (with interest and penalties, if any) determined to be due by the IRS in accordance with the procedure in paragraph (d)(6)(i) of this section, then the foreign trust's valid election is terminated and is converted to an imperfect election. The conversion to an imperfect election is retroactive to the first day of the calendar year (subject year) for which the Form 708 was filed with respect to which the additional amount of section 2801 tax is claimed to be due by the IRS. The trust will be a non-electing foreign trust for the subject year and for each subsequent year until another valid election (if any) is made by the trust. However, the value the foreign trust reported on the Form 708 for the subject year and each other year during the interim period described in paragraph (d)(6)(iii)(D) of this section, and on which the trust paid the section 2801 tax, is no longer considered to be attributable to covered gifts or covered bequests when computing the section 2801 ratio (described in paragraph (c)(1)(ii) of this section) that will be applicable to distributions made by the foreign trust to U.S. recipients during the subject year and thereafter until the effective date of any subsequent election meeting the requirements of paragraph (d)(3) of this section. The U.S. recipients of distributions from the foreign trust, however, should take into consideration the additional value determined by the IRS,

on which the foreign trust did not timely pay the section 2801 tax, when computing the section 2801 ratio to be applied to a distribution from the trust. See paragraph (c) of this section. Any disagreement with regard to that additional value will be an issue to be resolved as part of the review of that U.S. recipient's own Form 708 reporting a distribution.

(B) *Notice to permissible distributees.* If the trustee of the foreign trust fails to enter into the closing agreement and to remit, by the due date specified or otherwise agreed to by the IRS, the additional section 2801 tax, including all interest and penalties, in accordance with the procedure in paragraph (d)(6)(i) of this section, the trustee should notify promptly each permissible distributee, as defined in paragraph (d)(3)(ii)(F) of this section:

(1) That the foreign trust's election was terminated and the effective date of the termination (see paragraph (d)(5)(ii)(B)(2) of this section);

(2) Of the amount of additional value on which the foreign trust did not timely pay the section 2801 tax as determined or otherwise agreed to by the IRS, which value the IRS thus deems to be attributable to covered gifts and covered bequests; and

(3) That each U.S. recipient of a distribution made from the foreign trust on or after that termination date is subject to the section 2801 tax on the portion of each such distribution attributable to covered gifts and covered bequests.

(C) *Reasonable cause.* If a U.S. recipient received a distribution from the foreign trust on or after January 1 of the year for which the election was terminated and the election became an imperfect election, provided the U.S. recipient files a Form 708 and pays the section 2801 tax within a reasonable period of time after being notified by the trustee of the foreign trust or otherwise becoming aware that a valid election was not in effect when the distribution was made, the U.S. recipient's failure to timely file and pay are due to reasonable cause and not willful neglect for purposes of section 6651. For this purpose, a reasonable period of time is not more than six months after the U.S. recipient is notified by the

trustee or otherwise becomes aware that a valid election is not in effect.

(D) *Interim period.* If a foreign trust's valid election is terminated and becomes an imperfect election, there is a period of time (interim period) that begins on the effective date of the termination of the election (see paragraph (d)(5)(ii)(B) of this section) during which both the foreign trust and its U.S. beneficiaries are likely to continue to comply with section 2801 as it applies to an electing foreign trust with a valid election in place. The interim period ends on the earlier of December 31 of the calendar year during which the additional amount of section 2801 tax was due to be paid, as described in paragraph (d)(6)(i) of this section, or the effective date of a subsequent valid election to be treated as a domestic trust for purposes of section 2801. As described in paragraph (d)(6)(iii)(A) of this section regarding imperfect elections, the value of the covered gifts and covered bequests received by the foreign trust during this interim period, which the foreign trust has reported on one or more filed Forms 708 and on which the foreign trust has paid the section 2801 tax, is no longer considered to be attributable to covered gifts and covered bequests for purposes of computing the section 2801 ratio described in paragraph (c)(1)(ii) of this section as it applies to distributions made by non-electing foreign trusts to their U.S. beneficiaries. In addition, each distribution made by the foreign trust to a U.S. citizen or resident during this interim period must be reported on that U.S. recipient's Form 708 by applying the section 2801 ratio to that distribution. If, once the interim period has ended, the foreign trust has no election in place, the rules of section 2801(e)(4)(B)(i) will apply until the foreign trust subsequently (if ever) makes another valid election to be treated as a domestic trust for purposes of section 2801.

(7) *No overpayment caused solely by virtue of defect in election.* Any remittance of section 2801 tax made by an electing foreign trust does not become an overpayment solely by virtue of a defect in the election. Instead, if at some subsequent time the IRS determines that the election was not in fact a valid

election, then the election shall be considered valid only with respect to the value of the covered gifts or covered bequests on which the section 2801 tax was paid by the foreign trust and such value on which the section 2801 tax has been paid is no longer treated as attributable to a covered gift or covered bequest for purposes of determining the portion of the foreign trust attributable to covered gifts and covered bequests. See paragraphs (d)(2)(i) and (6)(iii) of this section.

(e) *Examples.* The provisions of this section are illustrated by the following examples.

(1) *Example 1: Computation of section 2801 ratio.* A and B each contribute \$100,000 to a new foreign trust. A (but not B) is a covered expatriate and A's contribution is a covered gift. The trustee of the trust does not make a valid election to have the trust treated as a domestic trust for purposes of section 2801. The section 2801 ratio immediately after these two contributions is 0.50, computed as follows: the pre-contribution value of the trust (\$0) multiplied by the pre-contribution section 2801 ratio (0), plus the current covered gift (\$100,000), divided by the post-contribution fair market value of the trust (\$200,000). See § 28.2801-5(c). Therefore, 50 percent of each distribution from the trust to a U.S. recipient is subject to the section 2801 tax until the next contribution is made to the trust. If the trustee distributes \$40,000 to C, a U.S. citizen, before the trust receives any other contributions, then \$20,000 ($\$40,000 \times 0.5$) is a covered gift to C.

(2) *Example 2: Distribution to spouse.* In Year 1, A contributes \$300,000 to a foreign trust. A is a covered expatriate, B, A's U.S. citizen spouse, and A's issue may receive discretionary distributions of income and principal. The transfer would not have qualified for the gift tax marital deduction if A had been a U.S. citizen or resident at the time of the gift; therefore, A's contribution is a covered gift. See sections 2801(e)(3) and 2523. No one pays foreign gift taxes on A's contribution. The trustee of the trust does not make a valid election to have the trust treated as a domestic trust for purposes of section 2801. The section 2801 ratio immediately after A's contribution is one.

The highest gift tax rate is 40 percent, and the section 2801(c) amount is \$17,000. The trustee distributes \$200,000 to B in Year 1. The entire amount is a covered gift to B. See section 28.2801-3(c)(5). This is the only covered gift B receives in Year 1. B receives no covered bequests in Year 1. B's section 2801 tax for Year 1 is computed by multiplying B's net covered gift by 40 percent. B's net covered gift for Year 1 is \$183,000, which is determined by reducing B's covered gift received during Year 1 by the section 2801(c) amount. B's section 2801 tax liability for Year 1 is \$73,200 ($\$183,000 \times 0.4$).

(3) *Example 3: Computation of section 2801 ratio when multiple contributions are made to foreign trust.* (i) In 2005, A, a U.S. citizen, established and funded an irrevocable foreign trust with \$200,000. On January 1 of each of the following three years (2006 through 2008), A contributed an additional \$100,000 to the foreign trust. A reported A's contributions to the foreign trust as completed gifts on timely filed Forms 709, for calendar years 2005 through 2008. None of these contributions is a covered gift because the gifts predated the effective date of section 2801. On August 8, 2008, a date after the effective date of section 2801 (June 17, 2008), A expatriated and became a covered expatriate. On January 1 of a year after 2008 (Year X), A makes an additional \$100,000 contribution to the trust. The aggregate \$600,000 contributed to the trust by A, both before and after expatriation, are the only contributions to the trust. The trustee of the foreign trust does not make a valid election to have the trust treated as a domestic trust for purposes of section 2801. Each year, the trustee of the foreign trust provides beneficiary B, a U.S. citizen, with an accounting of the trust showing each receipt and disbursement of the trust during that year, including the date and amount of each contribution by A.

(ii) The fair market value of the trust was \$610,000 immediately prior to A's contribution to the trust on January 1, Year X. Therefore, upon the Year X contribution of A's first and only covered gift, the portion of the trust attributable to covered gifts and covered bequests (covered portion) changed from zero to 0.14 ([section 2801 ratio of

0 × \$610,000 fair market value pre-contribution) plus the \$100,000 covered gift] \$710,000 fair market value post-contribution). See paragraph (c) of this section.

(iii) In February of Year X, B received a distribution of \$225,000 from the foreign trust. Although A contributed a total of \$600,000 to the foreign trust, only \$100,000 of that total was a covered gift, being the only contribution made by A both after the enactment of section 2801 and after A's expatriation. Under paragraph (c) of this section, the portion of the \$225,000 distribution from the foreign trust attributable to a covered gift is \$31,500 ($\$225,000 \times 0.14$ (section 2801 ratio)) because the distribution is made proportionally from the covered and non-covered portions of the trust. See paragraph (c)(1) of this section. Accordingly, B received a covered gift of \$31,500.

(iv) Pursuant to the terms of the foreign trust, the trust made a terminating distribution on August 5, Year X, when B turned 35, and B received the balance of the appreciated trust, \$505,000. The portion of this distribution attributable to covered gifts and covered bequests is \$70,700 ($\$505,000 \times 0.14$). Therefore, B has received covered gifts from the foreign trust during Year X in the total amount of \$102,200 ($\$31,500 + \$70,700$).

(4) *Example 4: Termination of election.*

(i) In Year 1, A contributes \$200,000 and B contributes \$100,000 to Trust, a foreign trust. A and B are covered expatriates. A's and B's contributions are covered gifts. No one pays foreign gift taxes on A's and B's contributions. The trustee of Trust makes a valid election to have Trust treated as a domestic trust for purposes of section 2801. The highest gift tax rate is 40 percent, and the section 2801(c) amount is \$17,000. The section 2801 tax for Year 1 is computed by multiplying the net covered gifts and covered bequests by 40 percent. The net covered gifts and covered bequests for Year 1 total \$283,000, determined by reducing the covered gifts and covered bequests received by Trust during Year 1, \$300,000, by the section 2801(c) amount, \$17,000. Trust's 2801 tax liability for Year 1 is \$113,200 ($\$283,000 \times 0.4$). Any distributions made to U.S. re-

cipients before the trust receives another contribution have a section 2801 ratio of zero and are not subject to the section 2801 tax. See paragraph (d)(2)(i) of this section.

(ii) In Year 2, A contributes \$100,000 to Trust, all of which is a covered gift. The trustee of Trust fails to timely file a Form 708 for Year 2 and timely pay the section 2801 tax. The fair market value of Trust was \$400,000 immediately prior to A's contribution. The section 2801 ratio immediately after A's contribution is 0.20, computed as follows: the pre-contribution value of Trust (\$400,000) multiplied by the section 2801 ratio in effect immediately prior to the Year 2 contribution (0), plus the fair market value of the Year 2 contribution that constitutes a covered gift (\$100,000), divided by the fair market value of Trust after the Year 2 contribution (\$500,000). See paragraph (c)(1) and (2) of this section. If the trustee distributes \$40,000 to C, a U.S. citizen, after the contribution in Year 2, then \$8,000 ($\$40,000 \times 0.20$) is a covered gift to C. In Year 2, C also receives a covered gift of \$50,000 directly from B. No one pays foreign gift taxes on B's covered gift. C receives no covered bequests in Year 2. C's section 2801 tax for Year 2 is computed by multiplying C's net covered gifts and covered bequests by 40 percent. C's net covered gifts and covered bequests for Year 2 total \$41,000, determined by reducing the covered gifts and covered bequests received by C during Year 2, \$58,000 ($\$8,000 + \$50,000$), by the section 2801(c) amount, \$17,000. C's section 2801 tax liability for Year 2 is \$16,400 ($\$41,000 \times 0.4$).

(5) *Example 5: Imperfect election of foreign trust.*

(i) In Year 1, CE, a covered expatriate, gives a 20 percent limited partnership interest in a closely held business to a foreign trust created for the benefit of CE's child, A, who is a U.S. citizen. The limited partnership interest is a covered gift. The trustee of the foreign trust makes a valid election to have the trust treated as a domestic trust for purposes of section 2801, trustee timely files a Form 708, reports the fair market value of the covered gift as \$500,000, and timely pays the section 2801 tax on the reported fair market value of the covered

gift. Later in Year 1, the trust makes a \$100,000 distribution to A.

(ii) In Year 2, CE contributes \$200,000 in cash to the foreign trust. The cash is a covered gift. The trustee of the foreign trust timely files a Form 708 reporting the transfer and pays the section 2801 tax. The trust does not make a distribution to any beneficiary during Year 2. In Year 3, the IRS disputes the reported value of the partnership interest transferred in Year 1 and determines that the proper valuation on the date of the gift was \$800,000. In Year 3, the IRS issues a letter to the trustee of the foreign trust detailing its finding of the increased valuation and of the resulting additional section 2801 tax including accrued interest, if any, due on or before a later date in Year 3 specified in the letter. The foreign trust fails to pay the additional section 2801 tax liability on or before that due date.

(iii) Under paragraph (d)(6)(iii) of this section, the foreign trust's election for Year 1 is terminated and converted into an imperfect election as of January 1 of Year 1. In computing the foreign trust's section 2801 ratio for Year 1, the \$500,000 of value on which the section 2801 tax was timely paid is no longer considered to be attributable to a covered gift. See paragraph (d)(6)(iii) of this section. When the trustee advises A of the letter from the IRS, A must file a late Form 708 reporting the portion of the Year 1 distribution attributable to covered gifts and covered bequests. Although A may owe section 2801 tax and interest, A will not owe any penalties under section 6651 as long as A files the Form 708 and pays the tax within six months after A receives notice of the termination of the election from the trustee of the foreign trust or otherwise becomes aware of the termination of the election. See paragraph (d)(6)(iii)(C) of this section.

(iv) When A files a Form 708 to report the Year 1 distribution, the IRS will verify whether A treated the \$300,000 undervaluation claimed by the IRS as a covered gift in computing the section 2801 ratio. As with any other item reported on that return, A has the burden to prove the value of the covered gift to the foreign trust, and the IRS may challenge that value. If A treats the

\$300,000 as a covered gift to the trust, under paragraph (c)(1)(ii) of this section, the section 2801 ratio after the Year 1 contribution is $0.375 (\$0 + (\$300,000)/\$800,000)$. Thus, 37.5 percent of all distributions made to A from the foreign trust during Year 1 are subject to the section 2801 tax (plus interest from the due date of the tax as if reported on a Form 708 that was timely filed as to Year 1).

(v) Although the foreign trust timely filed the Form 708 for Year 2 and timely paid the section 2801 tax shown on that return, and although the foreign trust's election had not yet been terminated and converted into an imperfect election during Year 2, the foreign trust nevertheless did not have a valid election for Year 2 because the trust did not timely pay the section 2801 tax on all covered gifts and covered bequests received in prior years as required in paragraph (d)(3) of this section, specifically, the tax on the additional \$300,000 of value of the Year 1 transfer. However, under paragraph (d)(6)(iii)(D) of this section, because the foreign trust timely filed the Form 708 and paid the section 2801 tax on the Year 2 covered gift of \$200,000, the \$200,000 amount is no longer considered a covered gift for purposes of computing the section 2801 ratio after that contribution.

(6) *Example 6: Subsequent election after termination of election.* The facts are the same as in paragraph (e)(5) of this section (*Example 5*). In Year 3, the foreign trust does not receive a covered gift or covered bequest. However, the trustee decides that making another election to be treated as a domestic trust would be in the best interests of the trust's beneficiaries. Accordingly, by the due date for the Form 708 for Year 3, the trustee timely files the return and pays the section 2801 tax on the portion of the trust attributable to covered gifts and covered bequests. See paragraph (d)(5)(iii) of this section. The trustee calculates the portion of the trust attributable to covered gifts and covered bequests received by the trust in prior calendar years by multiplying the fair market value of the trust on December 31, Year 2, by the section 2801 ratio in effect on that date. See paragraph (d)(3)(iii) of this section. The foreign

trust is an electing foreign trust in Year 3.

(f) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.2801-6 Special rules and cross-references.

(a) *Determination of basis.* For purposes of determining the U.S. recipient's basis in property received as a covered gift or covered bequest, see sections 1015 and 1014 of the Code, respectively. However, the basis adjustment provided in section 1015(d) does not apply to increase the basis in a covered gift to reflect the tax paid under this section.

(b) *Generation-skipping transfer tax.* Transfers made by a nonresident not a citizen of the United States (NRNC transferor) are subject to generation-skipping transfer (GST) tax only to the extent those transfers are subject to Federal estate or gift tax as described in § 26.2652-1(a)(2) of this chapter. In applying this rule, taxable distributions and taxable terminations are subject to the GST tax only to the extent the NRNC transferor's contributions to the trust, as defined in § 26.2652-1(b)(1) of this chapter, were subject to Federal estate or gift tax as described in § 26.2652-1(a)(2) of this chapter. See § 26.2663-2 of this chapter. A transfer is subject to Federal estate or gift tax, regardless of whether a Federal estate or gift tax return reporting the transfer is timely filed and regardless of whether chapter 15 of the Code applies because of a covered expatriate's failure to timely file an estate or gift tax return.

(c) *Information returns—(1) Gifts and bequests.* Pursuant to section 6039F of the Code and any corresponding regulations and Form 3520, Part IV, each U.S. person who treats an amount received from a foreign person (other than through a foreign trust) as a gift or bequest (whether or not a covered gift or covered bequest) must report such gift or bequest on Part IV of Form 3520 if the value of the total of such gifts and bequests exceeds a certain threshold. For purposes of this provision, a U.S. person is as defined in section 7701(a)(30) of the Code and includes a

U.S. resident within the meaning of section 7701(b)(1)(A) of the Code.

(2) *Foreign trust distributions.* Pursuant to section 6048(c) of the Code and the corresponding regulations, and to the extent provided in Notice 97-34 and Part III of Form 3520 and its Instructions, a U.S. person must report each distribution received during the taxable year from a foreign trust on Part III of Form 3520. Under section 6677(a) of the Code, a penalty of the greater of \$10,000 or 35 percent of the gross value of the distribution may be imposed on a U.S. person who fails to timely report the distribution. For purposes of this provision, the term *U.S. person* is as defined in section 7701(a)(30) and includes both U.S. citizens and U.S. residents within the meaning of section 7701(b)(1)(A).

(3) *Penalties and use of information.* The filing of Form 706, Form 706-NA, Form 706-QDT, Form 708, Form 709, or Form 709-NA, or any successor form, does not relieve a U.S. citizen or resident who is required to file Form 3520 from any penalties imposed under section 6677(a) for failure to comply with section 6048(c), or from any penalties imposed under section 6039F(c) of the Code for failure to comply with section 6039F(a). Pursuant to section 6039F(c)(1)(A), the Secretary of the Treasury or her delegate may determine the tax consequences of the receipt of a purported foreign gift or bequest.

(d) *Application of penalties—(1) Accuracy-related penalties on underpayments.* The section 6662 accuracy-related penalty may be imposed upon any underpayment of tax attributable to—

(i) A substantial valuation understatement under section 6662(g) of a covered gift or covered bequest; or

(ii) A gross valuation misstatement under section 6662(h) of a covered gift or covered bequest.

(2) *Penalty for substantial and gross valuation misstatements attributable to incorrect appraisals.* The section 6695A penalty for substantial and gross valuation misstatements attributable to incorrect appraisals may be imposed upon any person who prepares an appraisal of the value of a covered gift or covered bequest.

Internal Revenue Service, Treasury

§ 28.6001-1

(3) *Penalty for failure to file a return and to pay tax.* See section 6651 for the application of a penalty for the failure to file Form 708, or the failure to pay the section 2801 tax.

(e) *Applicability date.* This section applies on and after January 14, 2025.

§ 28.2801-7 Determining responsibility under section 2801.

(a) *Responsibility of U.S. citizens or residents receiving gifts or bequests from expatriates.* It is the responsibility of the taxpayer (in this case, the U.S. citizen or resident receiving a gift or bequest from an expatriate or a distribution from a foreign trust funded at least in part by an expatriate) to ascertain the taxpayer's obligations under section 2801 of the Code, which includes making the determination of whether the transferor is a covered expatriate and whether the transfer is a covered gift or covered bequest.

(b) *Disclosure of return and return information—(1) In general.* In certain circumstances, the Internal Revenue Service (IRS) may be permitted, upon request of a U.S. citizen or resident in receipt of a gift or bequest from an expatriate, to disclose to the U.S. citizen or resident return or return information of the donor or decedent expatriate that may assist the U.S. citizen or resident in determining whether the donor or decedent was a covered expatriate and whether the transfer was a covered gift or covered bequest. See section 6103 of the Code. The U.S. citizen or resident may not rely upon this information, however, if the U.S. citizen or resident knows, or has reason to know, that the information received from the IRS is incorrect or incomplete. The circumstances under which such information may be disclosed to a U.S. citizen or resident, the process for authorizing disclosures, and the procedures for requesting such information from the IRS, will be as provided by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter).

(2) *Rebuttable presumption.* Unless a living donor expatriate authorizes the disclosure of the donor expatriate's relevant return or return information to the U.S. citizen or resident receiving the gift, there is a rebuttable presump-

tion that the donor is a covered expatriate and that the gift is a covered gift.

(c) *Protective return.* A taxpayer who reasonably concludes that a gift or bequest is not subject to section 2801 may file a protective Form 708 to start the period of limitations for the assessment of any section 2801 tax. See § 28.6011-1(b) that provides safe harbor procedures for filing a protective Form 708.

(d) *Applicability date.* This section applies on and after January 14, 2025.

§ 28.6001-1 Records required to be kept.

(a) *In general.* Every U.S. recipient (as defined in § 28.2801-2(e)) subject to taxation under chapter 15 of subtitle B must keep, for the purpose of determining the total amount of covered gifts and covered bequests, such permanent books of account or records as are necessary to establish the amount of that person's aggregate covered gifts and covered bequests, and the other information required to be shown on Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, or any successor form. All documents and vouchers used in preparing Form 708 must be retained by the person required to file the return so as to be available for inspection so long as the contents thereof may become material in the administration of any internal revenue law.

(b) *Supplemental information.* The U.S. recipient, as defined in § 28.2801-2(e), must furnish such supplemental information as may be deemed necessary by the Internal Revenue Service (IRS) to allow the IRS to determine the correct amount of tax. Therefore, the U.S. recipient must furnish, upon request, copies of all documents relating to the covered gift or covered bequest, appraisals of any items included in the aggregate amount of covered gifts and covered bequests, copies of balance sheets and other financial statements obtainable by that person relating to the value of stock or other property constituting the covered gift or covered bequest, and any other information obtainable by that person that may be necessary in the determination of the tax. See section 2801 of the Code

and the corresponding regulations. For every policy of life insurance listed on the return, the U.S. recipient must procure a statement from the insurance company on Form 712, *Life Insurance Statement*, or any successor form, and file it with the IRS office where the return is filed. If specifically requested by the IRS, the insurance company must file this statement directly with the IRS.

(c) *Applicability date.* This section applies on and after January 14, 2025.

§ 28.6011-1 Returns.

(a) *Return required.* The return of any section 2801 tax imposed by chapter 15 of subtitle B of the Internal Revenue Code (Code) must be made on Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, in accordance with the instructions applicable to the form (or on such other form as may be provided in future guidance or instructions). With respect to each covered gift and covered bequest received during the calendar year, the U.S. recipient as defined in § 28.2801-2(e) must include on Form 708 the information set forth in § 25.6019-4 of this chapter. The U.S. recipient must file Form 708 for each calendar year in which the U.S. recipient receives a covered gift or covered bequest. The U.S. recipient who receives the covered gift or covered bequest during the calendar year is the person required to file the return. A U.S. recipient is not required to file such form, however, for a calendar year in which the total fair market value of all covered gifts and covered bequests received by that person during that calendar year is less than or equal to the section 2801(c) amount (as defined in § 28.2801-2(1)).

(b) *Protective return safe harbor.* A U.S. citizen or resident (as defined in § 28.2801-2(b)) who receives a gift or bequest from an expatriate and reasonably concludes that the gift or bequest is not a covered gift or a covered bequest from a covered expatriate may file a protective Form 708 to start the running of the period of limitations for assessment of tax. Under the safe harbor procedure of this paragraph (b), a Form 708 will start the running of the period of limitations for assessment of

tax if the return includes all of the information otherwise required on Form 708, along with an affidavit, signed under penalties of perjury, setting forth the information on which the U.S. citizen or resident has relied in concluding that the donor or decedent, as the case may be, was not a covered expatriate, or that the transfer was not a covered gift or a covered bequest, as well as that person's efforts to obtain other information that might be relevant to these determinations. For purposes of this safe harbor, if the U.S. citizen or resident has obtained, and is permitted to rely on, information from the Internal Revenue Service (IRS) (as described in § 28.2801-7(b)(1)), the U.S. citizen or resident must attach a copy of such information to the protective return. For purposes of this safe harbor, the U.S. citizen or resident also must attach a copy of a completed Part III of Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, for all trust distributions, or Part IV of Form 3520 for all gifts and bequests, if applicable.

(c) *Applicability date.* This section applies on and after January 14, 2025.

§ 28.6060-1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs one or more signing tax return preparers to prepare a return or claim for refund of section 2801 tax, other than for that person, at any time during a return period, must satisfy the record-keeping and inspection requirements in the manner stated in § 1.6060-1 of this chapter.

(b) *Applicability date.* This section applies with regard to returns and claims for refund filed on or after January 14, 2025.

§ 28.6071-1 Time for filing returns.

(a) *In general—(1) Due Date.* A U.S. recipient, as defined in § 28.2801-2(e), must file Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, or any substitute or successor form specified in guidance or instructions, on or before the fifteenth day of the eighteenth calendar month following the close of the calendar year in which the covered gift or

covered bequest was received. Notwithstanding the preceding sentence, the due date for a Form 708 reporting a covered bequest that is not received on the decedent's date of death under § 28.2801-4(d)(3) is the later of—

(i) The fifteenth day of the eighteenth calendar month following the close of the calendar year in which the covered expatriate died; or

(ii) The fifteenth day of the sixth month of the calendar year following the close of the calendar year in which the covered bequest was received.

(2) If a U.S. recipient receives multiple covered gifts and covered bequests during the same calendar year, the rule in paragraph (a)(1) of this section may result in different due dates and the filing of multiple returns reporting the different transfers received during the same calendar year.

(b) *Migrated foreign trust.* The due date for a Form 708 for the year in which a foreign trust becomes a domestic trust is the fifteenth day of the sixth month of the calendar year following the close of the calendar year in which the foreign trust becomes a domestic trust.

(c) *Certain returns by foreign trusts with election under § 28.2801-5(d) for calendar year in which no covered gift or covered bequest received.* A foreign trust making an election to be treated as a domestic trust for purposes of section 2801 under § 28.2801-5(d) (electing foreign trust) for a calendar year in which the foreign trust received no covered gifts or covered bequests must file a Form 708 on or before the fifteenth day of the sixth month of the calendar year following the close of the calendar year for which the election is made.

(d) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.6081-1 Extension of time for filing returns reporting gifts and bequests from covered expatriates.

(a) *In general.* A U.S. recipient as defined in § 28.2801-2(e) may request an extension of time to file a Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, by filing an appropriate form for extension as specified by guidance or

instructions. A U.S. recipient must include on the form for extension an estimate of the amount of section 2801 tax liability and must file the form for extension with the Internal Revenue Service in the manner designated in the instructions issued with respect to such form.

(b) *Automatic extension.* A U.S. recipient as defined in § 28.2801-2(e) will be allowed an automatic six-month extension of time beyond the date prescribed in § 28.6071-1 to file Form 708 if the form for extension is filed on or before the due date for filing Form 708 in accordance with the procedures under paragraph (a) of this section.

(c) *No extension of time for the payment of tax.* An automatic extension of time for filing a return granted under paragraph (b) of this section will not extend the time for payment of any tax due with such return.

(d) *Penalties.* See section 6651 of the Code regarding penalties for failure to file the required tax return or failure to pay the amount shown as tax on the return.

(e) *Applicability date.* This section applies on and after January 14, 2025.

§ 28.6091-1 Place for filing returns.

(a) *In general.* A U.S. recipient, as defined in § 28.2801-2(e), must file Form 708, *United States Return of Tax for Gifts and Bequests Received from Covered Expatriates*, with the Internal Revenue Service in the manner prescribed by the instructions issued with respect to that form.

(b) *Applicability date.* This section applies on and after January 14, 2025.

§ 28.6101-1 Period covered by returns.

See § 28.6011-1 for the rules relating to the period covered by the return.

§ 28.6107-1 Tax return preparer must furnish copy of return or claim for refund to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of any section 2801 tax must furnish a completed copy of the return or claim for refund to the taxpayer and retain a completed copy or record in the manner stated in § 1.6107-1 of this chapter.

§ 28.6109-1

(b) *Applicability date.* This section applies to returns and claims for refund filed on or after January 14, 2025.

§ 28.6109-1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each tax return or claim for refund of the section 2801 tax prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695-1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109-2 of this chapter.

(b) *Applicability date.* This section applies to returns and claims for refund filed on or after January 14, 2025.

§ 28.6151-1 Time and place for paying tax shown on returns.

(a) *In general.* The section 2801 tax shown on the return must be paid at the time prescribed in § 28.6071-1 for filing the return, and in the manner prescribed in § 28.6091-1 for filing the return.

(b) *Applicability date.* This section applies to covered gifts or covered bequests received on or after January 1, 2025.

§ 28.6694-1 Section 6694 penalties applicable to return preparer.

(a) *In general.* For general rules regarding penalties under section 6694 of the Code applicable to preparers of returns or claims for refund of the section 2801 tax, see § 1.6694-1 of this chapter.

(b) *Applicability date.* This section applies with regard to returns and claims for refund filed, and advice provided, on or after January 14, 2025.

§ 28.6694-2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of any section 2801 tax is subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694-2 of this chapter.

(b) *Applicability date.* This section applies to returns and claims for refund filed, and advice provided, on or after January 14, 2025.

26 CFR Ch. I (4-1-25 Edition)

§ 28.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of any section 2801 tax is subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694-3 of this chapter.

(b) *Applicability date.* This section applies to returns and claims for refund filed, and advice provided, on or after January 14, 2025.

§ 28.6694-4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of the period of collection when a tax return preparer who prepared a return or claim for refund of the section 2801 tax pays 15 percent of a penalty for understatement of taxpayer's liability, and for procedural matters relating to the investigation, assessment, and collection of the penalties under section 6694(a) and (b) of the Code, the rules under § 1.6694-4 of this chapter apply.

(b) *Applicability date.* This section applies to returns and claims for refund filed, and advice provided, on or after January 14, 2025.

§ 28.6695-1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of any section 2801 tax is subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b), failure to furnish an identification number under section 6695(c), failure to retain a copy or list under section 6695(d), failure to file a correct information return under section 6695(e), and negotiation of a check under section 6695(f), in the manner stated in § 1.6695-1 of this chapter.

(b) *Applicability date.* This section applies to returns and claims for refund filed on or after January 14, 2025.

Internal Revenue Service, Treasury

§ 28.7701-1

§ 28.6696-1 Claims for credit or refund by tax return preparers and appraisers.

(a) *In general.* With respect to claims for credit or refund by a tax return preparer who prepared a return or claim for refund for any section 2801 tax, or by an appraiser that prepared an appraisal in connection with such a return or claim for refund under section 6695A of the Code, the rules under § 1.6696-1 of this chapter will apply.

(b) *Applicability date.* This section applies to returns and claims for refund

filed, appraisals, and advice provided, on or after January 14, 2025.

§ 28.7701-1 Tax return preparer.

(a) *In general.* For the definition of the term *tax return preparer*, see § 301.7701-15 of this chapter.

(b) *Applicability date.* This section applies to returns and claims for refund filed, and advice provided, on or after January 14, 2025.

PART 29 [RESERVED]