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[4830-01-p]

## DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9706]

RIN 1545-BJ69

Reporting of Specified Foreign Financial Assets

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations providing guidance relating to the provisions of the Hiring Incentives to Restore Employment (HIRE) Act that require specified foreign financial assets to be reported to the Internal Revenue Service for taxable years beginning after March 18, 2010. In particular, the final regulations provide guidance relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding specified foreign financial assets in which they have an interest. The final regulations affect individuals required to file Form 1040, "U.S. Individual Income Tax Return," or Form 1040-EZ, "Income Tax Return for Single and Joint Filers With No Dependents," and certain individuals required to file Form 1040-NR, "Nonresident Alien Income Tax Return," or Form 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents."

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §§1.6038D-1(b), 1.6038D-2(g), 1.6038D-3(e), 1.6038D-4(b), 1.6038D-5(g), 1.6038D-7(d), and 1.6038D-8(g).

FOR FURTHER INFORMATION CONTACT: Joseph S. Henderson or Michael Kaercher, (202) 317-6942 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

### **Paperwork Reduction Act**

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. The collection of information contained in these regulations has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The collection of information is satisfied by filing Form 8938, "Statement of Specified Foreign Financial Assets," OMB No. 1545-2195, with the respondent's income tax return.

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

### **Background**

On December 19, 2011, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published temporary regulations (TD 9567) (the "2011 temporary regulations") and a notice of

proposed rulemaking by cross-reference to the 2011 temporary regulations in the **Federal Register** addressing the reporting requirements under section 6038D (76 FR 78553, TD 9567, 2012-1 IRB 395); (76 FR 75894; REG-130302-10, 2012-1 IRB 412). The notice of proposed rulemaking also included Prop. Reg. §1.6038D-6, setting out the conditions under which a domestic entity will be considered a specified domestic entity and, therefore, required to report specified foreign financial assets in which it holds an interest. Corrections to the 2011 temporary regulations were published on February 21, 2012, in the **Federal Register** (77 FR 9845). Corrections to Prop. Reg. §1.6038D-6 were published in the **Federal Register** on February 21, 2012 (77 FR 9877) and February 22, 2012 (77 FR 10422).

The Treasury Department and the IRS received written comments on the 2011 temporary regulations and Prop. Reg. §1.6038D-6. All comments are available at [www.regulations.gov](http://www.regulations.gov) or upon request. Because no requests to speak were received, no public hearing was held. After consideration of the comments received, the Treasury Department and the IRS adopt the 2011 temporary regulations as final regulations with the modifications described herein. The Treasury Department and the IRS are not adopting Prop. Reg. §1.6038D-6 as a final regulation at this time. Prop. Reg. §1.6038D-6 (REG-144339-14) will be adopted as a final regulation at a later date.

## **Summary of Comments and Explanation of Revisions**

- I. Requirement to Report Specified Foreign Financial Assets (§1.6038D-2)
  - A. Individuals Required to Report (§1.6038D-2(a))

A number of comments were received requesting that additional categories of individuals be relieved of the requirement to report specified foreign financial assets under section 6038D.

1. Dual resident taxpayers

A comment recommended an exemption from the section 6038D reporting requirements be included for an individual who is a dual resident taxpayer and who, pursuant to a provision of a treaty that provides for resolution of conflicting claims of residence by the United States and the treaty partner, claims to be treated as a resident of the treaty partner. In such a case, a dual resident taxpayer may claim a treaty benefit as a resident of the treaty partner and will be taxed as a nonresident for U.S. tax purposes for the taxable year (or portion of the taxable year) that the individual is treated as a nonresident. The final rule adopts this recommendation for a dual resident taxpayer who determines his or her U.S. tax liability as if he or she were a nonresident alien and claims a treaty benefit as a nonresident of the United States as provided in §301.7701(b)-7 by timely filing a Form 1040NR, "Nonresident Alien Income Tax Return," (or such other appropriate form under that section) and attaching a Form 8833, "Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)." The Treasury Department and the IRS have concluded that reporting under section 6038D is closely associated with the determination of an individual's income tax liability. Because the taxpayer's filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify individuals in this category and take follow-up tax enforcement actions when considered

appropriate, reporting on Form 8938, "Statement of Specified Foreign Financial Assets," is not essential to effective IRS tax enforcement efforts relating to this category of U.S. residents.

2. Individuals resident in the United States under non-immigrant visas

A number of comments requested an exemption from the section 6038D reporting requirements for foreign executives and employees resident in the United States under non-immigrant H, L, or E visas. The final rule does not adopt this recommendation. Section 6038D is intended to provide the IRS with information concerning the specified foreign financial assets of U.S. taxpayers to aid the IRS in enforcing tax laws fairly and uniformly. Because all U.S. residents are taxable on worldwide income, excluding categories of residents from the scope of section 6038D reporting is not consistent with the purposes for which the provision was enacted. Individuals in the United States under non-immigrant visas often stay in the United States for years, making it difficult to justify treating them more favorably than other U.S. residents. For stays in the United States of a shorter duration, the Treasury Department and the IRS have determined that the distinctions drawn in the definition of a U.S. resident in §1.6038D-1(a)(3) (which cross-references section 7701(b)) best carry out the purposes of section 6038D.

3. Persons that do not owe U.S. tax for the taxable year

Another comment requested revising §1.6038D-2(a)(7) to exempt from the section 6038D reporting requirements specified persons that do not owe U.S. taxes for the taxable year. The final rule does not adopt this comment. As

provided in the 2011 temporary regulations, the final rule states that a specified person that does not have to file a tax return for the year does not have to file a Form 8938. See §1.6038D-2(a)(7)(i). If the law requires the filing of a tax return, however, information reported on a Form 8938 concerning the taxpayer's specified foreign financial assets is an important component of that return, even if no tax liability is shown. Requiring this filing will aid the IRS in devising effective enforcement programs with respect to such returns.

B. Applicable Reporting Thresholds (§1.6038D-2(a))

Several comments requested increases to the reporting thresholds provided in §1.6038D-2(a) for certain types of assets or for certain classes of individuals. Other comments recommended that the increased thresholds in the 2011 temporary regulations applicable to certain specified individuals living abroad be extended to additional categories of taxpayers.

1. Assets received in connection with the performance of personal services

Some comments requested increased reporting thresholds, or a complete exemption from reporting, for specified foreign financial assets received in connection with an individual's performance of personal services as an employee of a foreign employer. The concerns raised in these comment letters primarily relate to the difficulty of valuing these types of assets. However, the 2011 temporary regulations already broadly address valuation concerns relating to these assets by providing a simplified valuation rule for interests in foreign pension plans or foreign deferred compensation plans if the beneficiary does not know, or have reason to know based on readily accessible information, the value

of the interest. In such cases, the value of the individual's interest in the plan is limited to the value of the distributions received from the plan during the year for purposes of both calculating the applicable reporting thresholds and reporting the maximum value of the interest. See §1.6038D-5(f)(3).

These comments are further addressed by clarifying in the final rule that nonvested interests in property received in connection with the performance of personal services are not required to be reported. See section I.C.1 in this preamble, which describes this clarification incorporated in the final rule.

Because the Treasury Department and the IRS have determined that the concerns underlying these comments are best addressed by these rules and that the method of acquisition of a specified foreign financial asset should not determine an individual's section 6038D reporting obligations, the final rule does not adopt this request.

## 2. Employees seconded to the United States

Comments requested that higher reporting thresholds (or a reporting exemption) should apply in the case of certain employees seconded to the United States by foreign employers. For the reasons set forth in section I.A.2 (relating to individuals resident in the United States under non-immigrant visas) and in section I.B.3 (addressing U.S. residents who do not qualify for section 911 benefits), the final rule does not adopt this recommendation.

## 3. Non-citizen U.S. residents who do not qualify for section 911 benefits

A comment was received requesting that higher reporting thresholds apply in the case of a non-citizen resident of the United States who would qualify for

benefits under section 911(d)(1)(A) if he or she were a U.S. citizen. This request has not been adopted in the final rule for administrability reasons. The 2011 temporary regulations tie the increased reporting thresholds in §1.6038D-2(a) to an individual's status as a qualified individual under section 911(d)(1) in order to allow the IRS to use the taxpayer's filing of the return required to claim section 911 benefits (Form 2555, "Foreign Earned Income", or Form 2555-EZ, "Foreign Earned Income Exclusion") as a marker to indicate that higher reporting thresholds may apply to the taxpayer. The ability to easily identify taxpayers who may be eligible for the increased thresholds is essential to permit the IRS to target appropriate enforcement programs to taxpayers subject to different reporting thresholds in a cost effective manner.

C. Interest in a Specified Foreign Financial Asset (§1.6038D-2(b))

A number of comments requested that the final regulations clarify the reporting requirements with respect to certain interests in assets under §1.6038D-2(b). These clarifications have been incorporated in the final rule.

1. Nonvested property under section 83

A comment requested clarification regarding whether an individual is considered to have an interest in property transferred in connection with the performance of personal services during any period that the individual's interest in the property is not vested. The final rule in §1.6038D-2(b)(2) clarifies that a specified person that is transferred property in connection with the performance of personal services is first considered to have an interest in the property for purposes of section 6038D on the first date that the property is substantially



vested (within the meaning of §1.83-3(b)) or, in the case of property with respect to which a specified person makes a valid election under section 83(b), on the date of transfer of the property.

## 2. Assets held by a disregarded entity

A number of comments requested clarification of the section 6038D reporting requirements with respect to specified foreign financial assets held by an entity disregarded as an entity separate from its owner under §301.7701-2 of this chapter (a disregarded entity). In response to these requests, and consistent with instructions to Form 8938, the final rule provides in §1.6038D-2(b)(4)(iii) that a specified person that owns a foreign or domestic entity that is a disregarded entity is treated as having an interest in any specified foreign financial assets held by the disregarded entity. As a result, a specified person that owns a disregarded entity (whether domestic or foreign) that, in turn, owns specified foreign financial assets must include the value of those assets in determining whether the specified person meets the reporting thresholds in §1.6038D-2(a) and, if so, must report such assets on Form 8938.

## D. Jointly Owned Assets (§1.6038D-2(c))

A number of comments requested clarification of aspects of the rules in §1.6038D-2(c) and (d) relating to joint owners of a specified foreign financial asset. These comments have been adopted. Specifically, the final rule clarifies that each of the joint owners of a specified foreign financial asset who are not married to each other must include the full value of the asset (rather than only the value of the specified person's interest in the asset) in determining whether the

aggregate value of such specified individual's specified foreign financial assets exceeds the applicable reporting thresholds, and each joint owner must report the full value of the asset on his or her Form 8938. See §1.6038D-2(c)(1)(i) and (c)(1)(ii). In addition, the final rule clarifies that, in the case of joint owners who are married to each other and file separate returns, each joint owner of a specified foreign financial asset must report the full value of the asset (rather than only the value of the specified person's interest in the asset) on the individual's Form 8938, even if both spouses are specified individuals and only one-half of the value of the asset is considered in determining the applicable reporting thresholds under §1.6038D-2(c)(3)(i). See §1.6038D-2(d)(2).

## II. Specified Foreign Financial Assets (§1.6038D-3)

### A. Financial Account (§1.6038D-3(a))

#### 1. Retirement and pension accounts and certain non-retirement savings accounts

The definition of a financial account in the 2011 temporary regulations is based on the definition of a financial account for chapter 4 purposes, subject to an exception for certain retirement and pension accounts and non-retirement savings accounts that are financial accounts for section 6038D purposes but that are not treated as financial accounts for purposes of chapter 4. See §§1.6038D-1(a)(7), 1.1471-1(b)(49), and 1.1471-5(b). These final regulations modify the definition of a financial account for purposes of section 6038D in order to require consistent reporting under section 6038D with respect to retirement and pension accounts and certain non-retirement savings accounts regardless of whether the

account is maintained in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA. For financial accounts that are maintained by a foreign financial institution that is not located in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA, the definition of a financial account in the final rule continues to include the retirement and pension accounts and non-retirement savings accounts described in §1.1471-5(b)(2)(i), consistent with the section 6038D coordination rule in that section. See §1.1471-5(b)(2)(i)(D). For taxable years beginning after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, these final regulations also provide that retirement and pension accounts, non-retirement savings accounts, and accounts satisfying conditions similar to those described in §1.1471-5(b)(2)(i) and that are excluded from the definition of a financial account under an applicable Model 1 IGA or Model 2 IGA (as provided in §1.1471-5(b)(2)(vi)) are included in the definition of a financial account for purposes of section 6038D. The Treasury Department and the IRS intend to amend the chapter 4 regulations to add a section 6038D coordination rule to §1.1471-5(b)(2)(vi) providing that such accounts are included in the definition of a financial account for purposes of section 6038D.

## 2. Short-term accounts

One comment recommended the addition of an exception to the definition of a financial account for an account in which funds are held for less than 15 days, provided the income generated from the account does not exceed \$1,000. The final rule does not incorporate this comment. The 2011 temporary regulations already provide relief for many short-term accounts through a broad

exception to the definition of financial account for escrow accounts. See §§1.6038D-1(a)(7) and 1.1471-5(b)(2)(iv). This exception is administrable because these accounts are of a type that is distinguishable from other accounts. A broader exception for short-term accounts could significantly complicate IRS efforts to devise effective enforcement programs based on comprehensive account reporting under section 6038D.

3. Assets held in an account maintained by a foreign financial institution

Another comment requested clarification that specified foreign financial assets held in a financial account are excluded from the definition of specified foreign financial assets. The 2011 temporary regulations already provide that the foreign financial account itself, and not the assets held in such an account, must be reported for section 6038D purposes. See §1.6038D-3(a)(1). Accordingly, no change has been adopted in response to this comment.

4. Life insurance with a cash surrender value

A comment requested clarification of the section 6038D reporting requirements applicable to a life insurance policy with a cash surrender value. Because the definition of financial account for section 6038D purposes is based on the definition of a financial account for chapter 4 purposes, which includes these contracts, the 2011 temporary regulations already provide clear rules requiring a taxpayer to report these contracts on Form 8938. Accordingly, the final rule is not modified to further address this issue. See §§1.6038D-1(a)(7), 1.1471-5(b)(1)(iv), and 1.1471-5(b)(3)(vii).

5. Request for examples of foreign financial assets not to be reported

A number of comments requested examples of the types of financial assets that are not required to be reported under section 6038D. The Treasury Department and the IRS have not provided these examples in the final rule because the 2011 temporary regulations, as well as the relevant portions of the regulations under chapters 4 and 61, already include detailed rules to support taxpayer determinations as to whether an asset is a specified foreign financial asset that must be reported. For example, §1.6038D-3(d) includes examples of assets other than financial accounts that are included within the definition of specified foreign financial asset, and the rules in §1.6049-5(b)(5)(i) provide detail concerning which financial institutions are U.S. payors for purposes of determining that an account is maintained by such an institution and therefore is not required to be reported under section 6038D.

The Treasury Department and the IRS will continue to consider comments and whether additional guidance is warranted to address particular types of assets under section 6038D.

**B. Other Specified Foreign Financial Assets (§1.6038D-3(b))**

**1. Assets held for investment and not used in, or held for use in, the conduct of the taxpayer's trade or business**

A number of comment letters recommended changes to the approach set forth in the 2011 temporary regulations for determining whether an asset other than a financial account is held for investment (and therefore may be reportable under section 6038D) or is instead excepted from the definition of a specified

foreign financial asset because it is used in, or held for use in, the conduct of a trade or business under §1.6038D-3(b)(3), (b)(4), and (b)(5).

Several comments requested a bright line test for distinguishing between non-financial account assets subject to reporting and those not subject to reporting. For example, one such comment recommended looking to whether an asset was *acquired in* the taxpayer's trade or business rather than whether the asset was used in, or held for use in, the conduct of the taxpayer's trade or business. Another comment suggested providing that contracts issued in the ordinary course of *the issuer's* (rather than the taxpayer's) trade or business should not be reportable by the taxpayer. The final rule does not change the definition of a specified foreign financial asset as suggested in these comments. The Treasury Department and the IRS have determined that the reporting rule under the 2011 temporary regulations strikes an appropriate balance under section 6038D by focusing on whether an asset is held for investment. Distinguishing assets held for investment from assets with a close nexus to the taxpayer's trade or business is an inherently factual determination that is not susceptible to a bright line test. The Treasury Department and the IRS have concluded that the 2011 temporary regulations provide reasonable rules that will yield appropriate reporting results in a wide variety of fact patterns involving the taxpayer's trade or business.

Another comment requested a rule specifying that an asset inadvertently acquired as a result of a corporate reorganization or an in-kind asset distribution not be treated as held for investment, so long as the asset is held by the taxpayer

for only a short period of time. The Treasury Department and the IRS have concluded that this type of exception is not warranted because the general test set forth in the 2011 temporary regulations is fair, should be uniformly applied, and should not be unduly burdensome to apply under these fact patterns.

## 2. Certain hedging transactions

One comment recommended modifying §1.6038D-3(b) to provide that certain hedging transactions described in section 1221(a)(7) are not specified foreign financial assets. The final rule does not adopt the requested change. The Treasury Department and the IRS have concluded that taxpayers engaging in hedging transactions should determine whether such transactions are specified foreign financial assets by applying the same general test applied by other taxpayers, that is, by determining whether the hedging transaction is "used in, or held for use in, the conduct of a trade or business and not held for investment."

## 3. Employment contracts

Another comment requested that the final rule provide that employment contracts are not specified foreign financial assets. The comment did not, however, suggest a definition of an employment contract for this purpose. Moreover, the scope of property that could be covered by such a contract may vary widely among taxpayers depending on the industry and the location in which the taxpayer works. The Treasury Department and the IRS have determined that the trade or business test of §1.6038D-3(b)(3), (b)(4), and (b)(5) should apply broadly to a wide range of financial assets in order to achieve uniform reporting

results for taxpayers with aggregate specified foreign financial assets of similar value, and that a broad exclusion for employment contracts should not be provided. Accordingly, the final rule does not adopt this recommendation.

#### 4. Shares of foreign corporations traded on public stock exchange

Some comments recommended that the definition of a specified foreign financial asset exclude stock of a foreign corporation that is traded on a public stock exchange (whether or not the exchange is located in the United States). The Treasury Department and the IRS have concluded that it is not appropriate to exclude stock or securities issued by a person other than a U.S. person from section 6038D reporting. If such stock or securities are held in a financial account, the financial account would be reported for section 6038D purposes, and if such stock or securities are held directly by a specified person and not in a financial account, based on section 6038D(b)(2), it is appropriate to require reporting of such stock or securities for section 6038D purposes. Thus, this comment is not adopted.

#### 5. Interest in a social security, social insurance, or similar program

Several comments recommended amending §1.6038D-3(b) to specify that an interest in a social security, social insurance, or similar program of a foreign government is not considered a specified foreign financial asset. As a general matter, the definition of a specified foreign financial asset already excludes these interests because they are not assets described in §1.6038D-3(b)(1). In addition, the preamble to the 2011 temporary regulations and the instructions to Form 8938 already illustrate the application of this rule to these interests, stating that



“an interest in a social security, social insurance, or other similar program of a foreign government” is not a specified foreign financial asset. A chart comparing the Form 8938 reporting requirements to the FBAR reporting requirements, available at [www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements](http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements), also addresses these programs. Because the Treasury Department and the IRS already have addressed this issue, the final rule does not adopt the recommendation.

6. Financial assets issued by a person organized under the laws of a U.S. possession

The final rule clarifies that specified foreign financial assets include stock, securities, financial instruments, and contracts that are held for investment and not held in an account maintained by a financial institution and are issued by a person organized under the laws of a U.S. possession. See §1.6038D-3(b)(1). For special rules applicable to bona fide residents of the U.S. possessions, see §1.6038D-7(c).

C. Interest in a Foreign Trust or Foreign Estate (§1.6038D-3(c))

A number of comments expressed concern that the reason to know standard of knowledge to report an interest in a foreign trust or estate could result in compliance difficulties for specified individuals who are aware that they have a beneficial interest in a trust or estate but who have not received a distribution from the trust or estate and do not know the value of the interest. These comments recommended that the final rule provide that a beneficiary of a

foreign trust or estate should not be required to report the interest on Form 8938 for any year in which the beneficiary did not receive a distribution.

The Treasury Department and the IRS have concluded that the concerns expressed in these comments have already been addressed comprehensively in the 2011 temporary regulations, including by the adoption of simple valuation rules that substantially ease the reporting burdens of beneficiaries. In the case of a foreign trust, for a year in which the beneficiary does not know, or have reason to know based on readily accessible information, the fair market value of the beneficiary's interest and the beneficiary does not receive a distribution, the value of the beneficiary's interest in the trust, both for purposes of determining whether the beneficiary meets the reporting thresholds in §1.6038D-2(a) and, if so, for reporting the maximum value of that beneficial interest, is considered to be zero. See §1.6038D-5(f)(2). Similar rules apply with respect to a foreign estate. See §1.6038D-5(f)(3). Thus, a specified individual who is such a beneficiary of a foreign trust or estate but has not received a distribution generally is only required to report the beneficial interest if the beneficiary otherwise is required to file Form 8938. If a Form 8938 filing is required, the taxpayer's reporting burdens are minimal with respect to the beneficial interest. The Treasury Department and the IRS have determined that these rules achieve a reasonable and appropriate balance between the government's tax administration interests and the beneficiary's compliance burden.

#### D. Request for Comments on the Treatment of Virtual Currency

The Treasury Department and the IRS are considering the proper treatment of virtual currency under section 6038D and welcome comments on this topic.

III. Information Required to be Reported (§1.6038D-4)

A. Reporting With Respect to Stock or Other Securities of a Foreign Corporation

A comment requested clarification regarding whether to report on Form 8938 the foreign office address of a foreign corporation in which the taxpayer has an interest or the address of the U.S. payor reported on Form 1099 with respect to dividends paid by the foreign corporation. Because the rules set forth in the 2011 temporary regulations are clear, the final rule is not changed to reflect these comments. If stock of a foreign corporation is held by a taxpayer outside of a financial account, §1.6038D-4(a)(2) provides that the corporation's address must be reported. If stock of a foreign corporation is held through a financial account other than one maintained by a financial institution that is a U.S. payor, the financial account is reported, and §1.6038D-4(a)(1) provides that the address of the financial institution with which the account is maintained must be reported. However, if stock of a foreign corporation is held by a taxpayer in a financial account maintained by a financial institution that is a U.S. payor, §1.6038D-3(a)(3)(i) provides that neither the financial account nor the foreign stock held in that account must be reported on Form 8938.

B. Scope of Information Required to be Reported With Respect to an Asset

Another comment recommended that taxpayers not be required to report the items listed in §1.6038D-4(a)(6), (a)(7) and (a)(8) (that is, whether a financial

account was opened or closed during the year, the date on which a specified foreign financial asset (other than a financial account) was acquired or disposed of during the year, and details regarding income, gain, loss, deduction or credit items recognized during the year and where those items are reported by the taxpayer, respectively). This comment has not been adopted in the final rule. The Treasury Department and the IRS have determined that collection of this information is necessary for effective tax enforcement actions and is consistent with congressional intent in enacting section 6038D.

#### IV. Valuation Guidelines (§1.6038D-5)

The Treasury Department and the IRS received a number of comments requesting changes and clarifications to the applicable valuation guidelines under the regulations.

##### A. Asset With No Positive Value During the Year

Several comments requested that the final rule clarify the valuation and reporting rules applicable to specified foreign financial assets with no positive value during the year. Under §1.6038D-2(a)(5), a specified foreign financial asset is subject to reporting even if the asset does not have a positive value during the year, although reporting on Form 8938 is required only if the aggregate fair market value of a taxpayer's specified foreign financial assets exceeds the applicable reporting thresholds in §1.6038D-2(a). The final rule clarifies in §1.6038D-5(b)(3) that the maximum fair market value for a specified foreign financial asset with no positive value during the year is treated as zero.

The final rule also is revised to include in §1.6038D-2(a)(5) a cross-reference to the valuation rules in §1.6038D-5(b)(3).

#### B. Appraisals

One comment recommended revising §1.6038D-5 to provide that a specified person is not required to obtain an appraisal from a third party to establish a reasonable estimate of an asset's fair market value. For the reasons set forth in section IV.C. of this preamble (relating to a reasonable estimate of fair market value), the guidance provided with respect to the reasonable estimate standard adequately addresses this comment. In addition, the preamble to the 2011 temporary regulations and the instructions to Form 8938 already note that a taxpayer need not obtain a third-party appraisal to establish a reasonable estimate of a specified foreign financial asset's fair market value for purposes of section 6038D. Accordingly, the final rule does not adopt the requested change.

#### C. Reasonable Estimate of Fair Market Value

Several comments requested that the final rule clarify what constitutes a reasonable estimate of an asset's fair market value for purposes of reporting under section 6038D. Some comments also recommended including examples in the final rule addressing when a taxpayer would be considered to know, or have reason to know based on readily accessible information, that a valuation in a periodic account statement was not a reasonable estimate for purposes of reporting.

The final rule does not provide additional guidance on what constitutes a reasonable estimate of fair market value under section 6038D. The Treasury

Department and the IRS have concluded that the "reasonable estimate" standard is an appropriately flexible one that will result in helpful information for the IRS with respect to a wide range of assets, while not proving unduly burdensome for taxpayers. Further, valuation is an inherently factual inquiry, and it is not feasible to devise detailed rules that clearly describe outcomes that are appropriate for a broad range of factual situations. The 2011 temporary regulations and final rule incorporate valuation rules designed to reduce taxpayer reporting burdens in specific circumstances, such as the rule permitting reliance on periodic account statements from a financial institution to determine a financial account's fair market value (see §1.6038D-5(d)) and the rule permitting the use of a year-end value to determine a reasonable estimate of maximum value for certain specified foreign financial assets held outside of a financial account (see §1.6038D-5(f)(1)).

#### D. Hard-to-Value Assets

A comment requested that the final rule establish a presumptive standard to be applied to determine the fair market value of certain illiquid assets such as contractual rights and interests in non-publicly traded entities. The Treasury Department and the IRS recognize that the reporting burdens under section 6038D can be significant with respect to hard-to-value assets. However, the Treasury Department and the IRS have concluded that the requirement under the 2011 temporary regulations to make a reasonable estimate strikes an appropriate balance between the usefulness of the information reported on Form 8938 and the taxpayer burdens associated with complying with the standard. For

these reasons, the final rule does not adopt valuation presumptions for particular types of assets that are hard to value.

E. Interests in Pension Plans and Deferred Compensation Plans

Another comment recommended that the value of interests in pension plans and deferred compensation plans should not be considered to be readily ascertainable if the taxpayer has no current rights to withdraw plan assets without penalty. Adopting this recommendation would result in a taxpayer's interest in a pension or deferred compensation plan being valued at zero if the taxpayer has no right to withdraw, even if the taxpayer regularly receives statements providing the fair market value of the interest in the pension or deferred compensation plan. This result is not consistent with the purpose for requiring reporting of the maximum value of a specified foreign financial asset and is not adopted in the final rule.

F. Foreign Currency

The final rule adopts two modifications to the valuation rules relating to foreign currency. First, in response to a comment, the final rule states that a foreign currency conversion shown on a periodic financial account statement is among the aspects of the statement that a taxpayer may rely upon to the extent provided in §1.6038D-5(d). Second, §1.6038D-5(c) of the 2011 temporary regulations provides that, except as otherwise provided, a specified person must use the foreign currency exchange rate issued by the U.S. Treasury Department's Financial Management Service for purposes of section 6038D.

The final rule is updated to reflect the fact that foreign currency exchange rates are now issued by the Treasury Department's Bureau of the Fiscal Service.

V. Exceptions from the Reporting of Certain Assets Under Section 6038D (§1.6038D-6)

A. General Alternatives to Reporting on Form 8938

Several comments recommended that the Treasury Department and the IRS adopt an alternative approach to Form 8938 reporting. One comment suggested consolidating all foreign asset reporting for U.S. tax purposes on one form and eliminating Form 8938. Another comment recommended a revision to Schedule B of Form 1040 to permit specified individuals to indicate on that schedule that all of their specified foreign financial assets were reported on the IRS forms specified in §1.6038D-7(a) such that no Form 8938 is required.

The final rule does not adopt these recommendations. The Treasury Department and the IRS have determined that consolidating a taxpayer's information concerning his or her specified foreign financial assets on Form 8938 best carries out the purposes of section 6038D by making the information readily accessible for use in IRS enforcement programs. In addition, using Form 8938 avoids the need to incur costs disproportionate to expected benefits from revising existing IRS forms, IT systems, submission processing, and enforcement programs.

B. Form 8858, "Information Return of U.S. Persons With Respect to Foreign Disregarded Entities"



Several comments recommended revising §1.6038D-7(a) to add Form 8858, "Information Return of U.S. Persons With Respect to Foreign Disregarded Entities." However, the Treasury Department and the IRS do not regard the information furnished on Form 8858 concerning specified foreign financial assets held by a disregarded entity as sufficiently detailed to consider reporting on Form 8938 duplicative of reporting on Form 8858. Thus, the final rule does not adopt this recommendation.

C. Form 8854, "Initial and Annual Expatriation Statement"

Several comments recommended adding Form 8854, "Initial and Annual Expatriation Statement," to the list of forms in §1.6038D-7(a) intended to relieve duplicative reporting. However, after considering the nature of the information collected on Form 8854, the Treasury Department and the IRS have concluded that requiring Form 8938 would not duplicate the information currently being reported on Form 8854. Further, filing of Form 8938 is expected to substantially enhance IRS compliance programs with respect to Form 8854 filers. Thus, the final rule does not adopt this recommendation.

D. Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans"

Rev. Proc. 2014-55, 2014-44 IRB 753, obsoletes Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans," on a prospective basis. Thus, the final rule is modified to describe the taxable years for which the taxpayer's reporting of an asset on Form 8891 will

relieve the taxpayer of reporting that asset on Form 8938 (that is, taxable years beginning after March 18, 2010, and ending on or before December 31, 2013).

E. Joint Filers of Forms Listed in §1.6038D-7(a)

A comment requested clarification that a specified person included as part of a jointly filed Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," pursuant to §1.6038-2(j) or as a joint filer of Form 8865, "Return of U.S. Persons With Respect to Certain Foreign Partnerships," pursuant to §1.6038-3(c) and who notifies the IRS as required by §1.6038-2(i) and §1.6038-3(c) will be considered to have filed such forms for purposes of §1.6038D-7(a). Because a joint filer of Form 5471 or Form 8865 fully meets the reporting requirements for such forms, reporting on the Form 8938 would be duplicative. Thus, the final rule adopts this clarification in §1.6038D-7(a)(3).

F. Interests in Certain Foreign Trusts

A number of comments recommended revisions to the section 6038D reporting requirements for specified persons with an interest in a foreign trust.

One comment recommended that a foreign trustee of a foreign trust with a U.S. owner who is required to file Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," be permitted to satisfy the section 6038D reporting requirements for all trust beneficiaries by filing Form 3520-A so as to consolidate all foreign trust filings in one place. Another comment recommended that a foreign trustee of a foreign trust be permitted to satisfy the Form 8938 filing requirements on behalf of the trust's beneficiaries. Another comment recommended that trust beneficiaries should be excused from filing Form 8938 if

a specified person files a Form 8938 as the owner of the trust and discloses the specified foreign financial assets of the foreign trust.

The final rule does not adopt these recommendations to allow a beneficiary's Form 8938 filing responsibilities to be satisfied by the trustee of the trust or to relieve the beneficiary's reporting obligation in the case of a specified person filing Form 8938 as the owner of the trust. The IRS can best use the information reported on the Form 8938 to enforce tax compliance when it is provided in connection with the filing of an annual return by the taxpayer who is the beneficial owner of the interest in the foreign trust. Thus, the final rule continues to provide that a beneficiary of a trust must file Form 8938 with his or her annual return when there is a section 6038D filing requirement.

#### G. Reporting on Both FinCEN Form 114 and Form 8938

A number of comments recommended that a foreign account reported on FinCEN Form 114, "Report of Foreign Bank and Financial Accounts," (formerly Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts") (an FBAR), should not be required to be reported on Form 8938. The final rule does not adopt this recommendation.

Congress enacted both the Title 31 and the Title 26 provisions regarding the reporting requirements of the FBAR and Form 8938. Reporting on the FBAR is required for law enforcement purposes under the Bank Secrecy Act, as well as for purposes of tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These different policies are reflected in the different categories of persons required to file Form 8938 and

the FBAR, the different filing thresholds for Form 8938 and FBAR reporting, and the different assets (and accompanying information) required to be reported on each form. Although certain information may be reported on both Form 8938 and the FBAR, the information required by the forms is not identical in all cases, and reflects the different rules, key definitions (for example, “financial account”), and reporting requirements applicable to Form 8938 and FBAR reporting.

These differing policy considerations were recognized by Congress during the passage of the HIRE Act (Public Law 111-147 (124 Stat. 71)) and the enactment of Section 6038D. Congress’s intention to retain FBAR reporting requirements, notwithstanding the enactment of section 6038D, was specifically noted in the Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the “Hiring Incentives To Restore Employment Act,” Under Consideration by the Senate (Staff of the Joint Committee on Taxation, JCX-4-10 (February 23, 2010)) (Technical Explanation) accompanying the HIRE Act. The Technical Explanation states that “[n]othing in this provision [section 511 of the HIRE Act enacting new section 6038D] is intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by this provision.” (Technical Explanation at p. 60) Against this background, reporting on the Form 8938 and on the FBAR is not duplicative and both forms must be filed, if required. The IRS website provides additional guidance comparing the requirements of both forms (<http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>).

## VI. Penalties

A. Reasonable Cause for Failure to Report

Several comments requested that the final rule provide additional guidance concerning the reasonable cause standard for relief from the section 6038D penalty set forth in section 6038D(g) and §1.6038D-8(e). For example, one comment recommended that the final rule provide objective examples of when a taxpayer would be considered to have reasonable cause for failing to report under section 6038D. Another comment requested that the final rule state that a specified person's failure to file Form 8938 would be considered due to reasonable cause and not subject to penalty if all of that person's specified foreign financial assets were reflected on timely and properly filed forms described in §1.6038D-7(a)(i). Another comment recommended that the final rule provide a presumption that reasonable cause exists with respect to all Form 8938 filing errors in the first year a taxpayer is required to file Form 8938. Yet another comment recommended that a specified person with a continuing failure to report for purposes of the section 6038D(d)(2) "add on" component of the penalty should no longer be subject to penalty once a specified person has requested the information necessary to complete Form 8938, provided the specified person furnishes the IRS with proof of the requests to obtain that information.

The final rule does not adopt these recommendations because the Treasury Department and the IRS have determined that the appropriate standards for determining whether the reasonable cause exception to the penalty applies in a particular case are the general standards set out in the Internal

Revenue Manual (IRM) addressing the approach that IRS employees must take whenever considering the application of a civil penalty and whether a reasonable cause exception applies. The general reasonable cause standards are set out in the IRS's "Penalty Handbook," which is included in the IRM at section 20.1. The Penalty Handbook sets forth general policy and procedural requirements for assessing and abating penalties, as well as the criteria for relief from certain penalties. For example, IRM 20.1.1.2.2 discusses the need to have a fair and consistent approach to penalty administration. Section 20.1.1.3.2 of the IRM discusses reasonable cause and what constitutes reasonable cause. Consistent with §1.6038D-8(e)(3), the Penalty Handbook states that all of the facts and circumstances must be considered to determine whether or not there is reasonable cause for penalty relief in a particular case.

**B. Section 6038D Penalty and Other Potentially Applicable Civil Penalties**

Other comments requested the final rule modify the penalty amount and its application in the context of other potentially applicable civil penalties. One comment recommended that the final rule provide a range of penalties corresponding to the range of reporting errors as opposed to the \$10,000 penalty amount of section 6038D(d). Another comment requested that the final rule provide that a specified person's failure to report a specified foreign financial asset on Form 8938 would not be penalized under section 6038D if the specified person was also being penalized for failing to report the asset on a separate IRS form (for example, Form 5471).

The final rule does not adopt these recommendations. The general penalty administration rules set forth in the IRM apply in the context of the section 6038D penalty and its interaction with other potentially applicable penalties. In addition, section 6038D provides a specific dollar amount of penalty and does not permit selection of a penalty amount from a range of permissible penalty amounts based on taxpayer-specific considerations.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13653. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Drafting Information**

The principal author of these regulations is Joseph S. Henderson, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entries for §§1.6038D-0T, 1.6038D-1T, 1.6038D-2T, 1.6038D-3T, 1.6038D-4T, 1.6038D-5T, 1.6038D-7T, and 1.6038D-8T and adding entries for §§1.6038D-0, 1.6038D-1, 1.6038D-2, 1.6038D-3, 1.6038D-4, 1.6038D-5, 1.6038D-7, and 1.6038D-8 in numerical order to read as follows:

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

Section 1.6038D-0 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-1 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-2 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-3 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-4 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-5 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-7 also issued under 26 U.S.C. 6038D.  
Section 1.6038D-8 also issued under 26 U.S.C. 6038D.

\* \* \* \* \*

Par. 2. Section 1.6038D-0 is added to read as follows:

#### §1.6038D-0 Outline of regulation provisions.

This section lists the table of contents for §§1.6038D-1 through 1.6038D-8.

#### §1.6038D-1 Reporting with respect to specified foreign financial assets, definition of terms.

- (a) In general.
  - (1) Specified person.
  - (2) Specified individual.
  - (3) Resident alien.
  - (4) Bona fide resident of a U.S. possession.
  - (5) U.S. possession.



- (6) Specified foreign financial asset.
- (7) Financial account.
- (8) Financial institution.
- (9) Foreign financial institution.
- (10) Foreign entity.
- (11) Annual return.
- (12) Specified domestic entity. [Reserved]
- (13) Model 1 IGA and Model 2 IGA.
- (b) Effective/applicability dates.
  - (1) In general.
  - (2) Financial accounts.

§1.6038D-2 Requirement to report specified foreign financial assets.

- (a) Reporting requirement.
  - (1) In general.
  - (2) Special rule for married specified individuals filing a joint annual return.
  - (3) Special rule for certain specified individuals living abroad.
  - (4) Special rule for married specified individuals filing a joint annual return and living abroad.
  - (5) Assets with no positive value.
  - (6) Aggregate value calculation in case of specified foreign financial asset excluded from reporting.
  - (7) Form 8938 filed with annual return.
    - (i) General rule.
    - (ii) Consolidated returns.
  - (8) Reporting required regardless of tax result.
  - (9) Reporting period.
  - (10) Successor forms.
- (b) Interest in a specified foreign financial asset.
  - (1) In general.
  - (2) Property transferred in connection with the performance of services.
  - (3) Special rule for parent making an election under section 1(g)(7).
  - (4) Entities.
    - (i) In general.
    - (ii) Specified foreign financial assets held by certain trusts.
    - (iii) Specified foreign financial assets held by a disregarded entity.
    - (iv) Interest in a foreign trust or foreign estate.
- (c) Special rules for joint interests.
  - (1) In general.
    - (i) Determining aggregate value of assets.
    - (ii) Reporting maximum value.
      - (2) Aggregate asset value for married specified individuals filing a joint annual return.
      - (3) Aggregate asset value for married specified individuals filing a separate annual return.

- (i) Both spouses are specified individuals.
- (ii) One spouse is not a specified individual.
- (d) Annual return filed by a married specified individual.
  - (1) Joint annual return.
  - (2) Separate annual return.
- (e) Special rules for dual resident taxpayers.
  - (1) In general.
  - (2) Dual resident taxpayer filing as a nonresident alien at end of taxable year.
  - (3) Dual resident taxpayer filing as a resident alien at end of taxable year.
- (f) Example.
  - (1) Facts.
  - (2) Filing requirement.
- (i) Married specified individuals filing separate annual returns.
- (ii) Married specified individuals filing a joint annual return.
- (g) Effective/applicability dates.

§1.6038D-3 Specified foreign financial assets.

- (a) Financial accounts.
  - (1) In general.
  - (2) Financial account in a U.S. possession.
  - (3) Excepted financial accounts.
    - (i) Accounts maintained by U.S. payors.
    - (ii) Mark-to-market election under section 475.
  - (b) Other specified foreign financial assets.
    - (1) In general.
    - (2) Mark-to-market election under section 475.
    - (3) Held for investment.
    - (4) Trade-or-business test.
    - (5) Direct relationship between holding an asset and a trade or business.
      - (i) In general.
      - (ii) Presumption of direct relationship.
  - (c) Special rule for interests in foreign trusts and foreign estates.
  - (d) Examples.
  - (e) Effective/applicability dates.

§1.6038D-4 Information required to be reported.

- (a) Required information.
- (b) Effective/applicability dates.

§1.6038D-5 Valuation guidelines.

- (a) Fair market value.
- (b) Valuation of assets.
  - (1) Maximum value.

- (2) U.S. dollars.
- (3) Asset with no positive value.
- (c) Foreign currency conversion.
- (1) In general.
- (2) Other publicly available exchange rate.
- (3) Currency exchange rate.
- (4) Determination date.
- (d) Financial accounts.
- (e) Asset held in a financial account.
- (f) Other specified foreign financial assets.
- (1) General rule.
- (2) Interests in trusts that are specified foreign financial assets.
- (i) Maximum value.
- (ii) Reporting threshold.
- (3) Interests in estates, pension plans, and deferred compensation plans.
- (i) Maximum value.
- (ii) Reporting threshold.
- (g) Effective/applicability dates.

§1.6038D-6 Specified domestic entities. [Reserved]

§1.6038D-7 Exceptions from the reporting of certain assets under section 6038D.

- (a) Elimination of duplicative reporting of assets.
- (1) In general.
- (2) Foreign grantor trusts.
- (3) Joint Form 5471 or Form 8865 filing.
- (b) Owner of certain trusts.
- (c) Special rules for bona fide residents of a U.S. possession.
- (d) Effective/applicability dates.

§1.6038D-8 Penalties for failure to disclose.

- (a) In general.
- (b) Married specified individuals filing a joint annual return.
- (c) Increase in penalty.
- (d) Presumption of aggregate value.
- (e) Reasonable cause exception.
- (1) In general.
- (2) Affirmative showing required.
- (3) Facts and circumstances taken into account.
- (f) Penalties for underpayments attributable to undisclosed foreign financial assets.
- (1) Accuracy related penalty.
- (2) Criminal penalties.

(g) Effective/applicability dates.

**§1.6038D-0T [Removed]**

Par. 3. Section 1.6038D-0T is removed.

Par. 4. Section 1.6038D-1 is added to read as follows:

§1.6038D-1 Reporting with respect to specified foreign financial assets, definition of terms.

(a) In general. The following definitions apply for purposes of section 6038D and the regulations --

(1) Specified person. The term specified person means a specified individual or a specified domestic entity.

(2) Specified individual. The term specified individual means an individual who is a --

(i) U.S. citizen;

(ii) Resident alien of the United States for any portion of the taxable year;

(iii) Nonresident alien for whom an election under section 6013(g) or (h) is in effect; or

(iv) Nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession (as defined in §1.931-1(c)(1)).

(3) Resident alien. The term resident alien has the meaning set forth in section 7701(b) and §§301.7701(b)-1 through 301.7701(b)-9 of this chapter.

(4) Bona fide resident of a U.S. possession. The term bona fide resident of a U.S. possession means an individual who is a “bona fide resident” under section 937(a) and §1.937-1.

(5) U.S. possession. The term U.S. possession means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands.

(6) Specified foreign financial asset. The term specified foreign financial asset has the meaning set forth in §1.6038D-3.

(7) Financial account. The term financial account has the meaning set forth in §1.1471-5(b), provided, however, that the exclusions of retirement and pension accounts and non-retirement savings accounts under §1.1471-5(b)(2)(i) and retirement and pension accounts, non-retirement savings accounts, and accounts satisfying similar conditions in an applicable Model 1 IGA or Model 2 IGA under §1.1471-5(b)(2)(vi) shall not apply (see the section 6038D coordination rule in §1.1471-5(b)(2)(i)(D)). See §1.6038D-3(a)(2) relating to financial accounts maintained by a financial institution that is organized under the laws of a U.S. possession.

(8) Financial institution. The term financial institution has the meaning set forth in section 1471(d)(5) and the regulations thereunder.

(9) Foreign financial institution. The term foreign financial institution has the meaning set forth in §1.1471-5(d).

(10) Foreign entity. The term foreign entity has the meaning set forth in §1.1473-1(e).

(11) Annual return. The term annual return means an annual federal income tax return of a specified individual or an annual federal income tax return or information return of a specified domestic entity filed with the Internal Revenue Service under section 876, 6011, 6012, 6013, 6031, or 6037, and the regulations.

(12) Specified domestic entity. [Reserved].

(13) Model 1 IGA and Model 2 IGA. The terms Model 1 IGA and Model 2 IGA have the meanings set forth in §1.1471-1(b)(78) and (79), respectively.

(b) Effective/applicability dates—(1) In general. Except as otherwise provided in this paragraph (b), this section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(2) Financial accounts. For purposes of applying the financial account definition in §1.6038D-1(a)(7), the treatment under §1.1471-5(b)(2)(vi) of retirement and pension accounts, non-retirement savings accounts, and accounts satisfying similar conditions in an applicable Model 1 IGA or Model 2 IGA (see §1.1471-1(b)(78) and (79)) as financial accounts for purposes of the reporting required under section 6038D and §1.6038D-2(a) shall apply to taxable years beginning after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

#### **§1.6038D-1T [Removed]**

Par. 5. Section 1.6038D-1T is removed.

Par. 6. Section 1.6038D-2 is added to read as follows:

#### **§1.6038D-2 Requirement to report specified foreign financial assets.**

(a) Reporting requirement—(1) In general. Except as otherwise provided, a specified person that has any interest in a specified foreign financial asset during the taxable year must attach Form 8938, “Statement of Specified Foreign Financial Assets,” to that specified person’s annual return for the taxable year to

report the information required by section 6038D and §1.6038D-4 if the aggregate value of all such assets exceeds--

- (i) \$50,000 on the last day of the taxable year; or
- (ii) \$75,000 at any time during the taxable year.

(2) Special rule for married specified individuals filing a joint annual return.

Except as provided in paragraph (a)(4) of this section, married specified individuals who file a joint annual return for the taxable year must attach a single Form 8938 to their joint annual return for the taxable year to report the information required by section 6038D and §1.6038D-4 if the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds--

- (i) \$100,000 on the last day of the taxable year; or
- (ii) \$150,000 at any time during the taxable year.

(3) Special rule for certain specified individuals living abroad. Except as provided in paragraph (a)(4) of this section, a specified individual who is a qualified individual under section 911(d)(1) for the taxable year must attach a Form 8938 to his or her annual return for the taxable year to report the information required by section 6038D and §1.6038D-4 if the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds--

- (i) \$200,000 on the last day of the taxable year; or
- (ii) \$300,000 at any time during the taxable year.

(4) Special rule for married specified individuals filing a joint annual return and living abroad. A specified individual who is a qualified individual under section 911(d)(1) for the taxable year and the qualified individual's spouse who file a joint annual return for the taxable year must attach a single Form 8938 to their return for the taxable year to report the information required by section 6038D and §1.6038D-4 if the aggregate value of the all of the specified foreign financial assets in which either married individual has an interest exceeds--

(i) \$400,000 on the last day of the taxable year; or

(ii) \$600,000 at any time during the taxable year.

(5) Assets with no positive value. A specified foreign financial asset is subject to reporting even if the specified foreign financial asset does not have a positive value. See §1.6038D-5(b)(3) to determine the maximum value of a specified foreign financial asset that does not have a positive value during the taxable year.

(6) Aggregate value calculation in case of specified foreign financial asset excluded from reporting. The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting on Form 8938 pursuant to §1.6038D-7(a) (concerning certain assets reported on another form) is included for purposes of determining the aggregate value of specified foreign financial assets. The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting under §1.6038D-7(b) (concerning assets held by certain domestic trusts) or §1.6038D-7(c) (concerning certain assets owned by a bona fide



resident of a U.S. possession) is excluded for purposes of determining the aggregate value of specified foreign financial assets.

(7) Form 8938 filed with annual return--(i) General rule. A specified person, including a specified individual who is a bona fide resident of a U.S. possession, is not required to file Form 8938 with respect to a taxable year if the specified person is not required to file an annual return with the Internal Revenue Service with respect to such taxable year.

(ii) Consolidated returns. If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated income tax return, the Form 8938 of the specified domestic entity must be filed with the affiliated group's annual return.

(8) Reporting required regardless of tax result. The Form 8938 required by section 6038D and this section must be furnished by a specified person even if none of the specified foreign financial assets that must be reported affect the specified person's tax liability under the Internal Revenue Code for the taxable year.

(9) Reporting period. The reporting period covered by Form 8938 is the specified person's taxable year, except the reporting period for a specified person that is a specified individual for less than an entire taxable year is the portion of the taxable year that the specified person is a specified individual.

(10) Successor forms. References to Form 8938 include any successor form.

(b) Interest in a specified foreign financial asset--(1) In general. A specified person has an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the specified foreign financial asset are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return. A specified person has an interest in a specified foreign financial asset even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the specified foreign financial asset for the taxable year.

(2) Property transferred in connection with the performance of services. A specified person that is transferred property in connection with the performance of personal services is first considered to have an interest in the property for purposes of section 6038D on the first date that the property is substantially vested (within the meaning of §1.83-3(b)) or, in the case of property with respect to which a specified person makes a valid election under section 83(b), on the date of transfer of the property.

(3) Special rule for parent making election under section 1(g)(7). A parent who makes an election under section 1(g)(7) to include certain unearned income of a child in the parent's gross income has an interest in any specified foreign financial asset held by the child for the purposes of section 6038D and the regulations.

(4) Entities--(i) In general. Except as provided in this paragraph (b)(4), a specified person is not treated as having an interest in any specified foreign

financial assets held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity.

(ii) Specified foreign financial assets held by certain trusts. A specified person that is treated as the owner of a trust or any portion of a trust under sections 671 through 679, other than a domestic liquidating trust under §301.7701-4(d) of this chapter created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 et seq.) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 et seq.) of the Bankruptcy Code, or a domestic widely held fixed investment trust under §1.671-5, is treated as having an interest in any specified foreign financial assets held by the trust or the portion of the trust.

(iii) Specified foreign financial assets held by a disregarded entity. A specified person that owns a foreign or domestic entity that is disregarded as an entity separate from its owner as described in §301.7701-2 of this chapter (a disregarded entity) is treated as having an interest in any specified foreign financial assets held by the disregarded entity.

(iv) Interest in a foreign trust or foreign estate. See §1.6038D-3(c) to determine whether an interest in a foreign trust or foreign estate is a specified foreign financial asset. See §1.6038D-5(f) to determine the maximum value of an interest in a foreign trust or foreign estate.

(c) Special rules for joint interests--(1) In general--(i) Determining aggregate value of assets. Except as otherwise provided in this paragraph (c),

each specified person that is a joint owner of a specified foreign financial asset (whether with a spouse or other person) must include the entire value of the specified foreign financial asset (and not the value of the specified person's interest) for purposes of determining whether the aggregate value of the specified person's specified foreign financial assets exceeds the reporting thresholds set forth in §1.6038D-2(a).

(ii) Reporting maximum value. Except as provided in paragraph (d) of this section, a specified person that is a joint owner of a specified foreign financial asset must report the entire value of each jointly owned specified foreign financial asset on Form 8938.

(2) Aggregate asset value for married specified individuals filing a joint annual return. Married specified individuals who file a joint annual return must include the value of each specified foreign financial asset that they jointly own or in which both have an interest under paragraph (b)(1) of this section only once in determining whether the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds the reporting thresholds set forth in §1.6038D-2(a).

(3) Aggregate asset value for married specified individual filing a separate annual return--(i) Both spouses are specified individuals. If a married specified individual files a separate annual return and his or her spouse is a specified individual, the married specified individual must include one-half of the value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual

has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in §1.6038D-2(a).

(ii) One spouse is not a specified individual. If a married specified individual files a separate annual return and his or her spouse is not a specified individual, the married specified individual must include the entire value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in §1.6038D-2(a).

(d) Annual return filed by a married specified individual--(1) Joint annual return. Married specified individuals who file a joint annual return must file a single Form 8938 to fulfill their reporting requirements under section 6038D and §1.6038D-2(a). The single Form 8938 must report all of the specified foreign financial assets in which either married specified individual has an interest. If both married specified individuals jointly own a specified foreign financial asset or if they have an interest in a specified foreign financial asset under paragraph (b)(1) of this section, the asset must be reported only once on the single Form 8938 filed for the taxable year.

(2) Separate annual return. A married specified individual who files a separate annual return for the taxable year must fulfill the reporting requirements under section 6038D and §1.6038D-2(a) by filing a separate Form 8938 with his or her return that reports all of the specified foreign financial assets in which the married specified individual has an interest, including each of the assets jointly

owned with the married specified individual's spouse or with another person. If both of the spouses are specified individuals, each specified individual must report the entire value of each specified foreign financial asset that the spouses jointly own on Form 8938, not the value taken into account under paragraph (c)(3)(i) of this section for purposes of applying the applicable reporting thresholds.

(e) Special rules for dual resident taxpayers--(1) In general. Subject to the provisions of paragraphs (e)(2) and (3) of this section, a specified individual is not required to report specified foreign financial assets on Form 8938 for a taxable year or any portion of a taxable year that the individual is a dual resident taxpayer (within the meaning of §301.7701(b)-7(a)(1) of this chapter) who is treated as a nonresident alien pursuant to §301.7701(b)-7 of this chapter for purposes of computing his or her U.S. tax liability with respect to the portion of the taxable year the individual is considered a dual resident taxpayer.

(2) Dual resident taxpayer filing as a nonresident alien at end of taxable year. If a specified individual to whom this paragraph (e) applies computes his or her U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of §301.7701(b)-7(b) and (c) of this chapter and, in particular, such individual timely files with the Internal Revenue Service Form 1040NR, "U.S. Nonresident Alien Income Tax Return," or Form 1040NR-EZ, "U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents," as applicable, and attaches thereto Form 8833, "Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)," such individual will

not be required to report specified foreign financial assets on Form 8938 with respect to the portion of the taxable year covered by Form 1040NR (or Form 1040NR-EZ).

(3) Dual resident taxpayer filing as resident alien at end of taxable year. If a specified individual to whom this paragraph (e) applies computes his or her U.S. income tax liability as a resident alien on the last day of the taxable year and complies with the filing requirements of §1.6012-1(b)(2)(ii)(a) and, in particular, such individual timely files with the Internal Revenue Service Form 1040, "U.S. Individual Income Tax Return," or Form 1040EZ, "Income Tax Return for Single and Joint Filers With No Dependents," as applicable, and attaches a properly completed Form 8833 to the schedule required by §1.6012-1(b)(2)(ii)(a), such individual will not be required to report specified foreign financial assets on Form 8938 with respect to the portion of the individual's taxable year reflected on the schedule to such Form 1040 or Form 1040EZ required by §1.6012-1(b)(2)(ii)(a).

(f) Example. The following example illustrates the application of paragraph (c) of this section:

Example. (1) Facts. Two married specified individuals, H and W, jointly own a specified foreign financial asset with a value of \$90,000 at all times during the taxable year. H separately has an interest in a specified foreign financial asset with a value of \$10,000 at all times during the taxable year. W separately has an interest in a specified foreign financial asset with a value of \$1,000 at all times during the taxable year.

(2) Filing requirement--(i) Married specified individuals filing separate annual returns. If H and W file separate annual returns, the aggregate value of the specified foreign financial assets in which H has an interest at the end of the taxable year is \$55,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of H's separately owned specified foreign financial asset, \$10,000. The aggregate value of the specified foreign financial assets in which W has an interest at the end of the taxable year is \$46,000, comprising

one-half of the value of the jointly owned asset, \$45,000, and the value of W's separately owned specified foreign financial asset, \$1,000. H must file Form 8938 with his annual return for the taxable year because the aggregate value of the specified foreign financial assets in which H has an interest exceeds the applicable reporting threshold (\$50,000) set forth in §1.6038D-2(a)(1). H must report the maximum value of the entire jointly owned asset, \$90,000, and the maximum value of the separately owned asset, \$10,000. See §1.6038D-5(b) regarding the maximum value of a jointly owned specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. The aggregate value of the specified foreign financial assets in which W has an interest, \$46,000, does not exceed the applicable reporting threshold set forth in §1.6038D-2(a)(1). W is not required to file Form 8938 with her separate annual return.

(ii) Married specified individuals filing a joint annual return. If H and W file a joint annual return, they must file a single Form 8938 with their joint annual return for the taxable year because the aggregate value of all of the specified foreign financial assets in which either H or W have an interest (\$90,000 (included only once), \$10,000, and \$1000, or \$101,000) exceeds the applicable reporting threshold (\$100,000) set forth in §1.6038D-2(a)(2). The single Form 8938 must report the maximum value of the jointly owned specified foreign financial asset, \$90,000, and the maximum value of the specified foreign financial assets separately owned by H and W, \$10,000 and \$1,000, respectively.

(g) Effective/applicability dates. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

### **§1.6038D-2T [Removed]**

Par. 7. Section 1.6038D-2T is removed.

Par. 8. Section 1.6038D-3 is added to read as follows:

#### §1.6038D-3 Specified foreign financial assets.

(a) Financial accounts--(1) In general. Except as otherwise provided in this section, a specified foreign financial asset includes any financial account maintained by a foreign financial institution. An asset held in a financial account



maintained by a foreign financial institution is not required to be separately reported on Form 8938, "Statement of Specified Foreign Financial Assets."

(2) Financial account in a U.S. possession. A specified foreign financial asset includes a financial account maintained by a financial institution that is organized under the laws of a U.S. possession.

(3) Excepted financial accounts--(i) Accounts maintained by U.S. payors. A financial account maintained by a U.S. payor as defined in §1.6049-5(c)(5)(i) (including assets held in such an account) is not a specified foreign financial asset for purposes of section 6038D and the regulations.

(ii) Mark-to-market election under section 475. A financial account is not a specified foreign financial asset if the rules of section 475(a) apply to all of the holdings in the account or an election under section 475(e) or (f) is made with respect to all of the holdings in the account.

(b) Other specified foreign financial assets--(1) In general. Except as otherwise provided in this section, a specified foreign financial asset includes any of the following assets that are not financial accounts and that are held for investment and not held in an account maintained by a financial institution--

(i) Stock or securities issued by a person other than a United States person (including stock or securities issued by a person organized under the laws of a U.S. possession);

(ii) A financial instrument or contract that has an issuer or counterparty which is other than a United States person (including a financial instrument or contract issued by a person organized under the laws of a U.S. possession); and

(iii) An interest in a foreign entity.

(2) Mark-to-market election under section 475. An asset is not a specified foreign financial asset if the rules of section 475(a) apply to the asset or an election under section 475(e) or (f) is made with respect to the asset.

(3) Held for investment. An asset is held for investment for purposes of section 6038D and the regulations if that asset is not used in, or held for use in, the conduct of a trade or business of a specified person.

(4) Trade-or-business test. For purposes of section 6038D and the regulations, an asset is used in, or held for use in, the conduct of a trade or business and not held for investment if the asset is--

(i) Held for the principal purpose of promoting the present conduct of the trade or business;

(ii) Acquired and held in the ordinary course of the trade or business, as, for example, in the case of an account or note receivable arising from that trade or business; or

(iii) Otherwise held in a direct relationship to the trade or business as determined under paragraph (b)(5) of this section.

(5) Direct relationship between holding an asset and a trade or business--

(i) In general. In determining whether an asset is held in a direct relationship to the conduct of a trade or business by a specified person, principal consideration will be given to whether the asset is needed in the trade or business of the specified person. An asset shall be considered needed in the trade or business, for this purpose, only if the asset is held to meet the present needs of that trade

or business and not its anticipated future needs. An asset shall be considered as needed in the trade or business if, for example, the asset is held to meet the operating expenses of the trade or business. Conversely, an asset shall be considered as not needed in the trade or business if, for example, the asset is held for the purpose of providing for future diversification into a new trade or business, future plant replacement, or future business contingencies. Stock is never considered used or held for use in a trade or business for purposes of applying this test.

(ii) Presumption of direct relationship. An asset will be treated as held in a direct relationship to the conduct of a trade or business of a specified person if--

(A) The asset was acquired with funds generated by the trade or business of the specified person or the affiliated group of the specified person, if any;

(B) The income from the asset is retained or reinvested in the trade or business; and

(C) Personnel who are actively involved in the conduct of the trade or business exercise significant management and control over the investment of such asset.

(c) Special rule for interests in foreign trusts and foreign estates. An interest in a foreign trust or a foreign estate is not a specified foreign financial asset of a specified person unless the person knows, or has reason to know based on readily accessible information, of the interest. Receipt of a distribution

from the foreign trust or foreign estate constitutes actual knowledge for this purpose.

(d) Examples. Examples of assets other than financial accounts that may be considered other specified foreign financial assets include, but are not limited to--

(1) Stock issued by a foreign corporation;

(2) A capital or profits interest in a foreign partnership;

(3) A note, bond, debenture, or other form of indebtedness issued by a foreign person;

(4) An interest in a foreign trust;

(5) An interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty; and

(6) Any option or other derivative instrument with respect to any of the items listed as examples in this paragraph or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer.

(e) Effective/applicability dates. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### **§1.6038D-3T [Removed]**

Par. 9. Section 1.6038D-3T is removed.

Par. 10. Section 1.6038D-4 is added to read as follows:

§1.6038D-4 Information required to be reported.

(a) Required information. The following information must be reported on Form 8938, "Statement of Specified Foreign Financial Assets," with respect to each specified foreign financial asset:

(1) In the case of a financial account, the name and address of the foreign financial institution with which the account is maintained and the account number of the financial account;

(2) In the case of stock or securities, the name and address of the issuer, and information that identifies the class or issue of which the stock or security is a part;

(3) In the case of a financial instrument or contract, information that identifies the financial instrument or contract, including the names and addresses of all issuers and counterparties;

(4) In the case of an interest in a foreign entity, information that identifies the interest, including the name and address of the foreign entity in which the interest is held;

(5) The maximum value of the specified foreign financial asset during the portion of the taxable year in which the specified person has an interest in the asset;

(6) In the case of a financial account that is a depository account as defined in §1.1471-5(b)(3)(i) or a custodial account as defined in §1.1471-5(b)(3)(ii), whether the account was opened or closed during the taxable year;

(7) The date, if any, on which the specified foreign financial asset, other than a financial account that is a depository account as defined in §1.1471-

5(b)(3)(i) or a custodial account as defined in §1.1471-5(b)(3)(ii), was either acquired or disposed of (or both) during the taxable year;

(8) The amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset, and the schedule, form, or return filed with the Internal Revenue Service on which the income, gain, loss, deduction, or credit, if any, is reported or included by the specified person;

(9) The foreign currency in which the account is maintained or the asset is denominated, the foreign currency exchange rate and, if the source of such rate is other than as described in §1.6038D-5(c)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value;

(10) For any specified foreign financial asset excepted from reporting on Form 8938 under §1.6038D-7(a), the specified person must report the number of Forms 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts," Forms 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," Forms 5471, "Information Return of U.S. Persons With Respect To Certain Foreign Corporations," Forms 8621, "Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund," Forms 8865, "Return of U.S. Persons With Respect To Certain Foreign Partnerships," and, solely for taxable years beginning after March 18, 2010, and ending on or before December 31, 2013, Forms 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans," or such

other form under Title 26 of the United States Code identified by the Secretary under §1.6038D-7(a), timely filed with the Internal Revenue Service on which excepted foreign financial assets are reported or reflected for the taxable year; and

(11) Such other information as may be required by Form 8938 or its instructions or other guidance.

(b) Effective/applicability dates. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

#### **§1.6038D-4T [Removed]**

Par. 11. Section 1.6038D-4T is removed.

Par. 12. Section 1.6038D-5 is added to read as follows:

#### §1.6038D-5 Valuation guidelines.

(a) Fair market value. Except as provided in paragraphs (c) and (e) of this section, the value of a specified foreign financial asset for purposes of determining the aggregate value of specified foreign financial assets held by a specified person and the maximum value of a specified foreign financial asset required to be reported on Form 8938, "Statement of Specified Foreign Financial Assets," is the asset's fair market value.

(b) Valuation of assets--(1) Maximum value. Except as provided in this section, the maximum value of a specified foreign financial asset means a

reasonable estimate of the asset's maximum fair market value during the taxable year.

(2) U.S. dollars. For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset, the value of a specified foreign financial asset denominated in a foreign currency during the taxable year must be determined in the foreign currency and then converted to U.S. dollars.

(3) Asset with no positive value. If the maximum fair market value of a specified foreign financial asset is zero or less than zero, then the asset's value is treated as zero for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, and the maximum value of the specified foreign financial asset is zero for purposes of reporting under §1.6038D-4(a)(5).

(c) Foreign currency conversion--(1) In general. Except as provided in paragraphs (c)(2) and (d) of this section, the U.S. Treasury Department's Bureau of the Fiscal Service foreign currency exchange rate is to be used to convert the value of a specified foreign financial asset into U.S. dollars for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset.

(2) Other publicly available exchange rate. If no U.S. Treasury Department Bureau of the Fiscal Service foreign currency exchange rate is



available for a particular currency, another publicly available foreign currency exchange rate may be used to convert the value of a specified foreign financial asset into U.S. dollars. In such case, the source of the foreign currency exchange rate must be disclosed on Form 8938.

(3) Currency exchange rate. In converting the currency of a foreign country, the foreign currency exchange rate applicable for converting the currency into U.S. dollars (that is, to purchase U.S. dollars) must be used.

(4) Determination date. In converting the currency of a foreign country into U.S. dollars for purposes of determining the maximum value of a specified foreign financial asset and determining the aggregate value of specified foreign financial assets in which a specified person has an interest, the applicable foreign currency exchange rate is the rate on the last day of the taxable year of the specified person, even if the specified person sold or otherwise disposed of a specified foreign financial asset prior to the last day of such year.

(d) Financial accounts. A specified person may rely upon periodic account statements that are provided at least annually by or on behalf of a financial institution maintaining an account, including the foreign currency conversion reflected in those statements, to determine the financial account's maximum value unless the specified person has actual knowledge, or reason to know based on readily accessible information, that the statements do not reflect a reasonable estimate of the maximum account value during the taxable year.

(e) Asset held in a financial account. The value of an asset held in a financial account maintained by a foreign financial institution is included in determining the value of that financial account for purposes of §1.6038D-5(a).

(f) Other specified foreign financial assets--(1) General rule. Except as provided in paragraphs (f)(2) and (3) of this section, for specified foreign financial assets that are not financial accounts and that are held for investment and not held in an account maintained by a financial institution, a specified person may use the value of the asset as of the last day of the taxable year on which the specified person has an interest in the asset as the maximum value of that asset, unless the specified person has actual knowledge, or reason to know based on readily accessible information, that the value does not reflect a reasonable estimate of the maximum value of the asset during the taxable year.

(2) Interests in trusts that are specified foreign financial assets--(i) Maximum value. If a specified person is a beneficiary of a foreign trust, the maximum value of the specified person's interest in the trust is the sum of—

(A) The fair market value, determined as of the last day of the taxable year, of all of the currency or other property distributed from the foreign trust during the taxable year to the specified person as a beneficiary; and

(B) The value, determined as of the last day of the taxable year, of the specified person's right as a beneficiary to receive mandatory distributions from the foreign trust as determined under section 7520.

(ii) Reporting threshold. For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if

the specified person does not know, or have reason to know based on readily accessible information, the fair market value of the person's interest in a foreign trust during the taxable year, the value to be included in determining the aggregate value of the specified foreign financial assets is the maximum value of the specified person's interest in the foreign trust under paragraph (f)(2)(i) of this section.

(3) Interests in estates, pension plans, and deferred compensation plans--(i) Maximum value. The maximum value of a specified person's interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan is the fair market value, determined as of the last day of the taxable year, of the specified person's beneficial interest in the assets of the foreign estate, foreign pension plan, or foreign deferred compensation plan. If the specified person does not know, or have reason to know based on readily accessible information, such fair market value, the maximum value to be reported is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(ii) Reporting threshold. For purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest, if the specified person does not know, or have reason to know based on readily accessible information, the fair market value of the person's interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan during the taxable year, the value to be included in determining the aggregate value of the

specified foreign financial assets is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(g) Effective/applicability dates. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

**§1.6038D-5T [Removed]**

Par. 13. Section 1.6038D-5T is removed.

Par. 14. Section 1.6038D-6 is added to read as follows:

§1.6038D-6 Specified domestic entities. [Reserved]

**§1.6038D-6T [Removed]**

Par. 15. Section 1.6038D-6T is removed.

Par. 16. Section 1.6038D-7 is added to read as follows:

§1.6038D-7 Exceptions from the reporting of certain assets under section 6038D.

(a) Elimination of duplicative reporting of assets--(1) In general. A specified person is not required to report a specified foreign financial asset on Form 8938, "Statement of Specified Foreign Financial Assets," if the specified person--

(i) Reports the asset on at least one of the following forms timely filed with the Internal Revenue Service for the taxable year--

(A) Form 3520, “Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts” (in the case of a specified person that is the beneficiary of a foreign trust);

(B) Form 5471, “Information Return of U.S. Persons With Respect To Certain Foreign Corporations”;

(C) Form 8621, “Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund”;

(D) Form 8865, “Return of U.S. Persons With Respect To Certain Foreign Partnerships”;

(E) For taxable years beginning after March 18, 2010, and ending on or before December 31, 2013, Form 8891, “U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans”; or

(F) Any other form under Title 26 of the United States Code timely filed with the Internal Revenue Service and identified for this purpose by the Secretary in regulations or other guidance; and

(ii) Reports on Form 8938 the filing of the form on which the asset is reported.

(2) Foreign grantor trusts. A specified person that is treated as an owner of a foreign trust or any portion of a foreign trust under sections 671 through 679 is not required to report any specified foreign financial assets held by the foreign trust on Form 8938, provided--

(i) The specified person reports the trust on a Form 3520 timely filed with the Internal Revenue Service for the taxable year;

(ii) The trust timely files Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," with the Internal Revenue Service for the taxable year; and

(iii) The Form 8938 filed by the specified person for the taxable year reports the filing of the Form 3520 and Form 3520-A.

(3) Joint Form 5471 or Form 8865 filing. A specified person that is included as part of a joint Form 5471 filing pursuant to §1.6038-2(j) or a joint Form 8865 filing pursuant to §1.6038-3(c) and who notifies the Internal Revenue Service as required by §1.6038-2(i) or §1.6038D-(3)(c) will be considered to have filed a Form 5471 or Form 8865 for purposes of paragraph (a)(1) of this section.

(b) Owner of certain trusts. A specified person that is treated as an owner of any portion of a domestic trust under sections 671 through 678 is not required to file Form 8938 to report any specified foreign financial asset held by the trust if the trust is--

(1) A widely-held fixed investment trust under §1.671-5; or

(2) A liquidating trust within the meaning of §301.7701-4(d) of this chapter that is created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 et seq.) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 et seq.) of the Bankruptcy Code.

(c) Special rules for bona fide residents of a U.S. possession. A specified individual who is a bona fide resident of a U.S. possession is not required to include the following specified foreign financial assets in the determination of the aggregate value of his or her specified foreign financial assets and, if required to

file Form 8938 with the Internal Revenue Service, is not required to report the following specified foreign financial assets:

(1) A financial account maintained by a financial institution organized under the laws of the U.S. possession of which the specified individual is a bona fide resident;

(2) A financial account maintained by a branch of a financial institution not organized under the laws of the U.S. possession of which the specified individual is a bona fide resident, if the branch is subject to the same tax and information reporting requirements applicable to a financial institution organized under the laws of the U.S. possession;

(3) Stock or securities issued by an entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident;

(4) An interest in an entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident; and

(5) A financial instrument or contract held for investment, provided each issuer or counterparty that is not a United States person is--

(i) An entity organized under the laws of the U.S. possession of which the specified individual is a bona fide resident; or

(ii) A bona fide resident of the U.S. possession of which the specified individual is a bona fide resident.

(d) Effective/applicability dates. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

**§1.6038D-7T [Removed]**

Par. 17. Section 1.6038D-7T is removed.

Par. 18. Section 1.6038D-8 is added to read as follows:

§1.6038D-8 Penalties for failure to disclose.

(a) In general. If a specified person fails to file a Form 8938, "Statement of Specified Foreign Financial Assets," that includes the information required by section 6038D(c) and §1.6038D-4 with respect to any taxable year at the time and in the manner described in section 6038D(a) and §1.6038D-2, a penalty of \$10,000 will apply to that specified person.

(b) Married specified individuals filing a joint annual return. Married specified individuals who file a joint annual return and fail to file a required Form 8938 that includes the information required by section 6038D(c) and §1.6038D-4 with respect to any taxable year at the time and in the manner described in section 6038D(a) and §1.6038D-2 are subject to penalties under this section as if the married specified individuals are a single specified individual. The liability of married specified individuals who file a joint annual return with respect to any penalties under this section is joint and several.

(c) Increase in penalty. If any failure to comply with the applicable reporting requirement of section 6038D and the regulations continues for more than 90 days after the day on which the Commissioner or his delegate mails a notice of the failure to the specified person required to file the Form 8938, the specified person is required to pay an additional penalty of \$10,000 for each 30-



day period (or fraction thereof) during which the failure continues after the 90-day period has expired. The additional penalty imposed by section 6038D(d)(2) and this paragraph (c) is limited to a maximum of \$50,000 for each such failure.

(d) Presumption of aggregate value. For the purpose of assessing penalties imposed under section 6038D(d), if the Commissioner or his delegate determines that a specified person has an interest in one or more specified foreign financial assets and the specified person does not provide sufficient information to demonstrate the aggregate value of the assets upon request by the Commissioner or his delegate, then the aggregate value of the assets is treated as being in excess of the applicable reporting threshold set forth in §1.6038D-2(a).

(e) Reasonable cause exception--(1) In general. If the failure to report the information required in section 6038D(c) and §1.6038D-4 is shown to be due to reasonable cause and not due to willful neglect, no penalty will be imposed under section 6038D(d) or this section.

(2) Affirmative showing required. In order to show that the failure to report the information required in section 6038D(c) and §1.6038D-4 is due to reasonable cause and not due to willful neglect for purposes of section 6038D(g) and this section, the specified person must make an affirmative showing of all the facts alleged as reasonable cause for the failure to disclose.

(3) Facts and circumstances taken into account. The determination of whether a failure to disclose a specified foreign financial asset on Form 8938 was due to reasonable cause and not due to willful neglect is made on a case-by-

case basis, taking into account all pertinent facts and circumstances. The fact that a foreign jurisdiction would impose a civil or criminal penalty on the specified person (or any other person) for disclosing the required information is not reasonable cause.

(f) Penalties for underpayments attributable to undisclosed foreign financial assets--(1) Accuracy-related penalty. For application of the accuracy-related penalty in the case of any portion of an underpayment attributable to any undisclosed foreign financial asset understatement, see section 6662(j).

(2) Criminal penalties. In addition to other penalties, failure to comply with the reporting requirements of section 6038D and the regulations, or any underpayment related to such failure, may result in criminal penalties under sections 7201, 7203, 7206, et seq., or other provisions of Federal law.

(g) Effective/applicability dates. This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

**§1.6038D-8T [Removed]**

Par. 19. Section 1.6038D-8T is removed.

John Dalrymple,  
Deputy Commissioner for Services and Enforcement.

Approved: December 4, 2014.

Mark J. Mazur,  
Assistant Secretary of the Treasury (Tax Policy).

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