

IRS Issues Temporary Regs on Reporting Foreign Financial Assets

Treasury Decision 9567

RIN 1545-BK17

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the provisions of the Hiring Incentives to Restore Employment (HIRE) Act that require foreign financial assets to be reported to the Internal Revenue Service for taxable years beginning after March 18, 2010. In particular, the temporary regulations provide guidance relating to the requirement that individuals attach a statement to their income tax return to provide required information regarding foreign financial assets in which they have an interest. The temporary regulations affect individuals required to file Form 1040, "U.S. Individual Income Tax Return," and certain individuals required to file Form 1040-NR, "Nonresident Alien Income Tax Return." The text of these temporary regulations also serves as the text of proposed regulations contained in a cross-reference notice of proposed rulemaking (REG-130302-10) published in the Proposed Rules section in this issue of the Federal Register.

DATES: Effective Date: These regulations are effective on December 19, 2011.

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

FOR FURTHER INFORMATION CONTACT: Joseph S. Henderson, (202) 622 3880 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public comment pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and pending receipt and evaluation of public comments, approved by the Office of Management and Budget under Control Number 1545-2195. Responses to this collection of Information are mandatory.

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 is satisfied by filing Form 8938, "Statement of Specified Foreign Financial Assets," OMB No. 1545-2195, with the respondent's income tax return.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the Federal Register.

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

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) for reporting specified foreign financial assets under section 6038D of the Internal Revenue Code (Code).

Section 6038D was enacted by section 511 of the HIRE Act. Section 6038D(a) requires an individual who holds any interest in a specified foreign financial asset during the taxable year to attach a statement to that individual's return of tax imposed by subtitle A of the Code to report the information identified in section 6038D(c), if the aggregate value of the specified foreign financial assets in which the individual holds an interest exceeds \$50,000 for the taxable year, or such higher dollar amount as the Secretary may prescribe.

Section 6038D(b) defines specified foreign financial assets. For purposes of section 6038D, a specified foreign financial asset is any financial account maintained by a foreign financial institution and, to the extent not held in an account at a financial institution: (i) any stock or security issued by any person other than a United States person; (ii) any financial instrument or contract held for investment that has an issuer or counterparty that is not a United States person; and (iii) any interest in a foreign entity.

Section 6038D(c) sets forth the information an individual must include on the statement reporting specified foreign financial assets. For a financial account, the name and address of the financial institution in which the account is maintained must be reported, as well as the account number. For any stock or security, the name and address of the non-U.S. issuer, as well as information necessary to identify the class or issue of which the stock or security is a part, must be reported. In the case of any other instrument, contract, or interest, the names and addresses of all issuers and counterparties must be reported, together with the information necessary to identify the instrument, contract, or interest. The maximum value of each specified foreign financial asset during the taxable year also must be reported.

An individual who fails to disclose the information required to be reported by section 6038D(c) is subject to a \$10,000 penalty under section 6038D(d)(1). Section 6038D(d)(2) provides that if the failure to comply continues for more than 90 days after the day on which the Secretary mails notice of the failure to the individual, the individual must pay an additional penalty of \$10,000 for each 30day period (or fraction thereof) during which the failure to disclose continues after the expiration of the 90-day period. This continuation penalty is not to exceed \$50,000 with respect to any such failure.

Under section 6038D(e), the aggregate value of any specified foreign financial assets in which an individual has an interest is presumed to exceed the reporting thresholds set forth in section 6038D(a) if the Secretary determines that the individual has an interest in one or more specified foreign financial assets and has not provided sufficient information to demonstrate the aggregate value of the assets. This presumption applies for purposes of assessing the penalties imposed under section 6038D.

Section 6038D(f) authorizes the Secretary to issue regulations or other guidance applying the provisions of section 6038D to any domestic entity as if the domestic entity were an individual, if the domestic

entity is formed or availed of for the purposes of holding, directly or indirectly, specified foreign financial assets.

Section 6038D(g) provides that no penalty will be imposed by section 6038D for any failure to report that is shown to be due to reasonable cause and not due to willful neglect. A foreign law restriction, whether civil or criminal, on disclosing the information required to be reported is not reasonable cause.

Section 6038D(h) authorizes the Secretary to issue regulations or other guidance as may be necessary or appropriate to carry out the purposes of section 6038D. This guidance may include appropriate exceptions from reporting for nonresident aliens, bona fide residents of U.S. possessions, and classes of assets identified by the Secretary, such as assets subject to duplicative reporting requirements. The term "U.S. possession" means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands, each of which is generally referred to as a U.S. territory in this explanation.

Section 6038D is effective for taxable years beginning after March 18, 2010 (the date of enactment of the HIRE Act). Notice 2011-55, 2011-29 IRB 53 (July 18, 2011), provides that an individual that has a taxable year that begins after March 18, 2010, and is required to attach a statement of specified foreign financial assets to an annual return to be filed prior to the issuance of Form 8938, "Statement of Specified Foreign Financial Assets," is to satisfy his or her obligation under section 6038D for such taxable year by attaching Form 8938 for such taxable year to his or her next annual return required to be filed after the issuance of Form 8938. See § 601.601(d)(2)(ii)(b) of this chapter.

Explanation of Provisions

1. Requirement to Report Specified Foreign Financial Assets

Section 1.6038D-1T sets forth the definitions of certain terms for purposes of section 6038D and the regulations . Section 1.6038D-2T provides rules for determining if a specified individual (as defined in § 1.6038D-1T(a)(2)) or a specified domestic entity (collectively referred to as a specified person) must file a Form 8938 with the specified person's annual return (as defined in § 1.6038D-1T(a)(11)).

For purposes of section 6038D, a specified person's annual return includes 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 . For example, a partnership that is a specified domestic entity is required to attach Form 8938 to its Form 1065, "U.S. Return of Partnership Income," for the taxable year.

A specified person must file Form 8938 if the person has an interest in one or more specified foreign financial assets and those assets have an aggregate fair market value exceeding either \$50,000 on the last day of the taxable year or \$75,000 at any time during the taxable year. Married specified individuals filing a joint annual return are not required to file Form 8938 unless the aggregate value of all of the specified foreign financial assets in which either spouse has an interest exceeds \$100,000 on the last day of the taxable year or \$150,000 at any time during the taxable year.

An individual residing outside the United States can reasonably be expected to have a greater amount of specified foreign financial assets for reasons unrelated to the policies underlying section 6038D.

Accordingly, the regulations increase the reporting threshold of section 6038D(a) in the case of a specified individual who is a qualified individual under section 911(d)(1). The regulations provide that such a specified individual is not required to file Form 8938 unless the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds \$200,000 on the last day of the taxable year or \$300,000 at any time during the taxable year. If married specified individuals file a joint annual return and either spouse is a qualified individual under section 911(d)(1), the regulations provide that they are not required to file Form 8938 unless the aggregate value of all of the specified foreign financial assets in which either spouse has an interest exceeds \$400,000 on the last day of the taxable year or \$600,000 at any time during the taxable year.

As discussed in section 6 of this explanation, certain specified foreign financial assets are excepted from the reporting obligations imposed under section 6038D. Assets reported by a specified person on certain other forms timely filed with the Internal Revenue Service are not required to be separately identified on Form 8938, but if a specified person is required to file Form 8938, the number of such other forms filed with the Internal Revenue Service must be reported on Form 8938. In addition, the value of specified foreign financial assets that qualify for this exception is included for purposes of determining whether the aggregate value of specified foreign financial assets in which a specified individual has an interest exceeds the applicable reporting threshold.

Another category of assets excepted from reporting are assets considered owned by a specified person that is treated as the owner of certain trusts. Additionally, certain assets held by a specified individual who is a bona fide resident of a U.S. territory are also excepted from reporting. Specified foreign financial assets that qualify for either of these two exceptions are not included for purposes of determining whether the aggregate value of specified foreign financial assets in which a specified person has an interest exceeds the applicable reporting threshold.

The Form 8938 reporting period is the taxable year for a specified individual who is a U.S. citizen, a resident alien, or a bona fide resident of a U.S. territory for the entire taxable year. The Form 8938 reporting period for a specified domestic entity is the entity's taxable year. The Form 8938 reporting period for a specified individual who is a U.S. citizen or resident alien for less than the entire taxable year is the portion of the taxable year for which the specified individual is a U.S. citizen or resident alien. The Form 8938 reporting period for a specified individual who is bona fide resident of Puerto Rico for less than the entire taxable year under § 1.937-1(f)(2)(ii) is the portion of the taxable year for which the specified individual is a U.S. citizen.

A specified person is not required to file Form 8938 for any taxable year for which the specified person is not required to file an annual return (for example, a Form 1040, "U.S. Individual Income Tax Return," Form 1041, "U.S. Income Tax Return for Estates and Trusts," Form 1120, "U.S. Corporation Income Tax Return," Form 1120-S, "U.S. Income Tax Return for an S Corporation," or Form 1065, "U.S. Return of Partnership Income") with the Internal Revenue Service.

If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated return, the Form 8938 of the specified domestic entity must be filed with the consolidated federal income tax return of the affiliated group.

A. Individuals required to file Form 8938, "Statement of Specified Foreign Financial Assets"

For section 6038D purposes, a specified individual is a U.S. citizen, a resident alien of the United States (as determined under section 7701(b) and §§ 301.7701(b)-1 through 301.7701(b)-9 of this chapter), or a nonresident alien who has elected under section 6013(g) or (h) to be taxed as a U.S. resident. A resident alien who elects to be taxed as a resident of a foreign country pursuant to a U.S. income tax treaty's residency tie-breaker rules is a specified individual for purposes of section 6038D and the regulations.

In addition, certain nonresident aliens who are treated as residents under other sections of the Code are specified individuals for the purposes of section 6038D and the regulations. Under section 876 and § 1.876-1, nonresident alien individuals of the United States under section 7701(b) who are bona fide residents of Puerto Rico or a section 931 possession (as defined in § 1.9311(c)(1)) are subject to tax under sections 1 and 55 in generally the same manner as a U.S. resident. Therefore, the rules under section 6038D apply to a nonresident alien who is a bona fide resident of Puerto Rico or American Samoa in the same manner as they apply to a U.S. citizen or resident.

As noted in this preamble, a specified person is not required to file Form 8938 if the specified person is not required to file an annual return with the Internal Revenue Service. With respect to bona fide residents of U.S. territories, this rule means that a bona fide resident of a U.S. territory has a filing requirement under section 6038D and the regulations only if he or she is required to file a federal income tax return for the taxable year. In general, bona fide residents of the U.S. Virgin Islands and U.S. territories to which section 935 applies (currently, Guam and the Northern Mariana Islands) are not required to file a federal income tax return provided they correctly report and pay tax on their worldwide income to their U.S. territory taxing authority. Bona fide residents of Puerto Rico or a section 931 possession (currently, American Samoa) generally are required to file a federal income tax return with the Internal Revenue Service only if they have income from sources without the relevant U.S. territory, because sections 931(a) and 933 generally exclude from gross income any income derived from sources within the relevant U.S. territory. Section 6038D and these regulations generally require only bona fide residents of Puerto Rico or a section 931 possession that are required to file a federal income tax return with the Internal Revenue Service to file a Form 8938 with the Internal Revenue Service.

B. Interest in a specified foreign financial asset

For section 6038D purposes, a specified person is generally considered to have 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 asset are or would be required to be reported, included, or otherwise reflected on the specified person's annual return filed with the Internal Revenue Service (even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the asset for a particular taxable year).

For purposes of section 6038D and the regulations, a parent that makes an election under section 1(g)(7) to include certain unearned income of a child in the parent's gross income required to be reported for the taxable year has an interest in any specified foreign financial asset held by the child.

A specified person that is the owner of an entity disregarded as an entity separate from its owner (as provided in § 301.7701-2(c)(2)(i) of this chapter) (disregarded entity) is treated as having an interest in any specified foreign financial assets held by the disregarded entity. A specified person that is treated as the owner of a trust or any portion of a trust under sections 671 through 679 is treated as having an interest in any specified foreign financial assets held by the trust or by the portion of the trust that the

specified person owns, except as described in section 6(B) of this explanation. A specified person is not treated as having an interest in any specified foreign financial assets held by a partnership, corporation, trust (except as described in this explanation), or estate solely as a result of the specified person's status as a partner, shareholder, or beneficiary.

C. Jointly owned assets

A joint interest in a specified foreign financial asset is subject to reporting under section 6038D and § 1.6038D-2T(a) by each specified person that is a joint owner of the asset. In general, each joint owner includes the full value of the jointly owned asset for purposes of determining whether the aggregate value of all specified foreign financial assets in which the joint owner has an interest exceeds the reporting thresholds set forth in § 1.6038D-2T(a).

1. Married individuals filing jointly

Married specified individuals who file a joint annual return for the taxable year must fulfill their reporting requirements under section 6038D and § 1.6038D-2T(a) by filing a single Form 8938 that reports all of the specified foreign financial assets in which either married specified individual has an interest. A specified foreign financial asset that is jointly owned by married specified individuals or a specified foreign financial asset held by a child for which the married specified individuals have made an election under section 1(g)(7) is reported once on the single Form 8938. Married specified individuals who file a joint annual return include the value of a specified foreign financial asset that they jointly own together or a specified foreign financial asset held by a child for which they have made an election under section 1(g)(7) 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 appropriate reporting threshold set forth in § 1.6038D-2T(a).

2. Married individuals filing separately

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-2T(a) by filing a separate Form 8938 that reports all of the specified foreign financial assets in which the married specified individual has an interest, including assets jointly owned with the married specified individual's spouse. A married specified individual that files a separate annual return and whose spouse is a specified person includes only 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 appropriate reporting threshold set forth in § 1.6038D-2T(a).

2. Specified Foreign Financial Assets

For purposes of section 6038D, specified foreign financial assets include financial accounts maintained by foreign financial institutions, as well as certain other foreign financial assets or instruments. An asset or instrument may be a specified foreign financial asset subject to reporting under section 6038D and the regulations even if the asset or instrument does not have a positive value.

A. Financial account maintained by a foreign financial institution

For purposes of section 6038D, a financial account is defined by reference to section 1471(d)(2) and the regulations .

A foreign financial institution is defined by reference to section 1471(d)(4). For this purpose, a foreign financial institution is a financial institution (as determined under section 1471(d)(5)) that is a foreign entity (as determined under section 1473(5)). Under section 1471(d)(5), a financial institution is any entity that --

- (1) Accepts deposits in the ordinary course of a banking or similar business;
- (2) Holds financial assets for the account of others as a substantial portion of its business; or
- (3) Is engaged, or holds itself out as being engaged, primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

Notwithstanding that a financial institution organized under the laws of a U.S. territory is not generally a foreign financial institution for purposes of section 1471(d)(4), for purposes of section 6038D and the regulations , a specified foreign financial asset includes a financial account maintained by a financial institution organized under the laws of a U.S. territory. Accordingly, such an account must be reported, except when owned by a bona fide resident of the relevant U.S. territory.

A financial account maintained by a U.S. payor as defined in § 1.60495(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 thereunder. For example, a specified person is not required to report a financial account maintained by a U.S. branch of a foreign financial institution described in § 1.1441-1(b)(2)(iv).

An asset held in a financial account maintained by a foreign financial institution is not required to be reported on Form 8938 separately from the reported financial account in which the asset is held. The value of an asset held in a financial account maintained by a foreign financial institution is included in determining the maximum value of that account.

B. Other specified foreign financial assets

Under § 1.6038D-3T(b), specified foreign financial assets also include certain assets that are held outside of a financial account maintained by a financial institution. Specifically, a specified foreign financial asset includes any asset that is held for investment and is described in one or more of the following three categories: stock or securities issued by a person other than a U.S. person; a financial instrument or contract issued by a person other than a U.S. person or that has a counterparty that is a person other than a U.S. person; and any interest in a foreign entity. For these purposes, a U.S. person is defined under section 7701(a)(30). Whether an entity is a foreign entity is determined under section 1473(5). These three categories are broad and overlap in certain cases such that an asset not held in a financial account may be within more than one of the statutory categories of section 6038D(b)(2). For example,

stock issued by a foreign corporation is stock that is issued by a person other than a U.S. person, and is also an interest in a foreign entity.

An asset not held in an account maintained by a financial institution is held for investment for purposes of section 6038D and the regulations if the asset is not used or held for use in the specified person's trade or business. For purposes of determining whether an asset is used or held for use in the specified person's trade or business, the regulations apply principles based on the asset-use test of § 1.864-4(c)(2), with certain modifications. The regulations provide that stock is never considered to be used or held for use in a trade or business in applying the trade or business exception. The Department of the Treasury and the Internal Revenue Service believe this rule is appropriate given the broad exception for section 475 mark-to-market accounting discussed in section 2(D) of this explanation, and the exception from reporting for stock held in a financial account maintained by a foreign financial institution (provided the financial account is reported on Form 8938). The Department of the Treasury and the Internal Revenue Service request comments that concern the treatment of stock under these regulations and, more generally, what refinements, if any, to the regulation's trade or business standard would facilitate the implementation of the trade or business reporting exception.

C. Special rule for foreign estates and foreign trusts

A beneficial interest in a foreign trust or a foreign estate is not a specified foreign financial asset of a specified person unless the specified 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 is deemed for this purpose to be actual knowledge of the interest.

D. Assets not subject to reporting under section 6038D

The following assets are not specified foreign financial assets --

- (1) An asset for which a specified person uses mark-to-market accounting under section 475;
- (2) A financial account maintained by a foreign financial institution for which the specified person uses mark-to-market accounting under section 475 for all of the holdings in the account; and
- (3) An interest in a social security, social insurance, or other similar program of a foreign government.

3. Required Information

A specified person required to report on Form 8938 must provide the following information with regard to each specified foreign financial asset:

- (A) In the case of a financial account maintained by a foreign financial institution, the name and address of the foreign financial institution and the account number of the account;
- (B) In the case of stock or a security, the name and address of the issuer, and information that identifies the class or issue of which the stock or security is a part;

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

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

(E) 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;

(F) In the case of a financial account that is a depository or custodial account under section 1471(d)(2), whether such financial account was opened or closed during the taxable year;

(G) The date, if any, on which the specified foreign financial asset, other than a financial account that is a depository or custodial account under section 1471(d)(2), was either acquired or disposed of (or both) during the taxable year;

(H) 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;

(I) The foreign currency exchange rate and, if the source of such rate is other than as described in § 1.6038D-5T(d)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value; and

(J) For a specified foreign financial asset excepted from reporting on Form 8938 under § 1.6038D-7T(a), the specified person must report the number of each type of form on which the asset is reported directly (for example, Form 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts," Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," Form 5471, "Information Return of U.S. Persons With Respect To Certain Foreign Corporations," Form 8621, "Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund," Form 8865, "Return of U.S. Persons With Respect To Certain Foreign Partnerships," or Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.")

4. Valuation Guidelines

The value of a specified foreign financial asset must be determined both for purposes of determining if the aggregate value of the specified foreign financial assets in which a specified person holds an interest exceeds the reporting thresholds set forth in § 1.6038D-2T(a) and for purposes of reporting the maximum value of a specified foreign financial asset on Form 8938 as required by § 1.6038D-4T(a)(5). Under § 1.6038D-5T, the value of a specified foreign financial asset for both of these purposes generally is the asset's fair market value. The maximum value of a specified foreign financial asset is the asset's highest fair market value during the taxable year, except as otherwise provided in § 1.6038D-5T, and must be reported on Form 8938 in U.S. dollars. If the maximum value of a specified foreign financial asset is less than zero, the value of the specified foreign financial asset is treated as zero for the 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 required to be reported on Form 8938.

A. Foreign currency conversion

If a specified foreign financial asset is denominated in a foreign currency, the value of the asset for purposes of determining both the aggregate value of specified foreign financial assets in which a specified person holds an interest and the maximum value of the specified foreign financial asset is first determined in the foreign currency prior to conversion into U.S. dollars (that is, independently of exchange rate fluctuations during the year). The asset's foreign currency value is then converted into U.S. dollars at the taxable year-end spot rate for converting the foreign currency into U.S. dollars (that is, the rate to purchase U.S. dollars). The U.S. Treasury Department's Financial Management Service foreign currency exchange rate is to be used to convert the value of a specified foreign financial asset into U.S. dollars. If no U.S. Treasury Department Financial Management Service foreign currency exchange rate is available, another publicly available foreign currency exchange rate may be used to determine an asset's maximum value, but the use of such rate must be disclosed on Form 8938.

B. Valuing financial accounts

The maximum value of a financial account means a reasonable estimate of the maximum value of the holdings of the financial account at any time during the taxable year. Periodic account statements provided at least annually may be relied upon for reporting a financial account's maximum value absent 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.

C. Valuing other specified foreign financial assets

Except as described in sections 5(D) and 5(E) of this explanation, for purposes of determining the maximum value of a specified foreign financial asset other than a financial account maintained with a foreign financial institution, a specified person may treat the asset's fair market value on the last day during the taxable year on which the specified person has an interest in the asset as the maximum value of the asset. The specified person may not use this valuation approach if the specified person has actual knowledge or reason to know based on readily accessible information that the fair market value determined as of such date does not reflect a reasonable estimate of the maximum value of the asset during the year (for example, because there is a reason to know that the asset's value declined significantly during the year).

A specified person may determine the fair market value of a specified foreign financial asset based on information publicly available from reliable financial information sources or from other verifiable sources. Even if there is no information from reliable financial information sources regarding the fair market value of a reported asset, the regulations do not require a specified person to obtain an appraisal by a third party in order to reasonably estimate the asset's fair market value.

D. Special valuation rules for interests in foreign trusts

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 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, plus the value 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.

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.

E. Special valuation rule for interests in foreign estates, pension plans, and deferred compensation plans

The maximum value of a specified person's interest in a foreign estate, foreign pension plan, or a 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.

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.

F. Jointly owned assets

Except for certain married specified individuals who jointly own a specified foreign financial asset with a spouse, a specified person that jointly owns a specified foreign financial asset must use the value of the entire asset, and not the value of the specified person's separate interest, for purposes of determining whether the reporting thresholds set forth in § 1.6038D-2T(a) are exceeded. A specified person, including a married specified individual, that jointly owns a specified foreign financial asset must report the maximum value of the entire asset during the portion of the taxable year that the specified person has an interest in the asset. Married specified individuals that jointly own a specified foreign financial asset and that file a joint annual income return tax are only required to report the asset once on the single Form 8938 filed with their return.

5. Application to Entities Formed or Availed of for Purposes of Holding, Directly or Indirectly, Specified Foreign Financial Assets

The notice of proposed rulemaking accompanying these regulations (REG-130302-10) includes Prop. Reg. § 1.6038D-6, which applies section 6038D to certain domestic entities that are formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets. The Department of the Treasury and the Internal Revenue Service anticipate that Prop. Reg. § 1.6038D6 will be issued as a final

regulation during 2012 and will apply to taxable years beginning after December 31, 2011. Until Prop. Reg. § 1.6038D-6 is issued as a final regulation, no domestic entity is required to file Form 8938 to report specified foreign financial assets with its annual return.

6. Exceptions from the Application of Section 6038D

A. Duplicative reporting of assets

A specified person required to file Form 8938 with the Internal Revenue Service is not required to report a specified foreign financial asset on Form 8938 if the asset is reported or reflected on a Form 3520 (in the case of a specified person who is the beneficiary of a foreign trust), Form 5471, Form 8621, Form 8865, or Form 8891 timely filed with the Internal Revenue Service by the specified person for the taxable year, and the Form 8938 indicates the filing of the form on which the asset is reported.

A specified person required to file Form 8938 that is treated as an owner of a foreign trust or any portion of such a trust under sections 671 through 679 is not required to report any specified foreign financial asset held by the trust on Form 8938 provided the specified person reports the trust on a Form 3520 timely filed with the Internal Revenue Service for the taxable year, the trust timely files Form 3520-A with the Internal Revenue Service for the taxable year, and the Form 8938 filed by the specified person for the taxable year indicates the filing of the Form 3520 and the Form 3520-A.

B. Owner of certain trusts

A specified person that is treated as an owner of a domestic liquidating trust described in § 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, a domestic widely held fixed investment trust under § 1.671-5, or any portion of such a trust under sections 671 through 679 is not required to file Form 8938 to report any specified foreign financial asset held by the trust.

C. Certain specified foreign financial assets held by a bona fide resident of a U.S. territory

As described in section 1(A) of this explanation, bona fide residents of the U.S. Virgin Islands and U.S. territories to which section 935 applies (currently, Guam and the Northern Mariana Islands) generally are not required to file a federal income tax return and, therefore, generally would not be required to file a Form 8938 with the Internal Revenue Service. By contrast, certain bona fide residents of Puerto Rico or a section 931 possession as defined in § 1.931-1(c)(1) (currently, American Samoa) who have income from sources outside their U.S. territory of residence may be required to file a federal income tax return; thus, the reporting requirements of section 6038D and the regulations may apply to such persons.

No reporting is required by a bona fide resident of a U.S. territory with respect to certain specified foreign financial assets that have certain connections to the U.S. territory of which the individual is a bona fide resident. Reporting is not required with respect to a financial account maintained by a financial institution organized under the laws of the U.S. territory of which the specified person is a bona fide resident. Reporting also is not required with respect to a financial account maintained by a branch of a financial institution not organized under the laws of the U.S. territory of which the specified person

is a bona fide resident, if the branch is subject to the same income tax and information reporting requirements applicable to a financial institution organized under the laws of the U.S. territory.

Reporting is also not required with respect to stock or securities or any other interest in an entity organized under the laws of the U.S. territory of which the specified person is a bona fide resident. Similarly, reporting is not required with respect to a financial instrument or contract held for investment if the issuer or counterparty is: (i) an entity organized under the laws of the U.S. territory of which the specified person is a bona fide resident; or (ii) a bona fide resident of the U.S. territory of which the specified person is a bona fide resident.

These reporting exceptions for certain U.S. territory-connected assets do not apply to assets held by a U.S. citizen or resident who is not a bona fide resident of any U.S. territory or an individual who is a bona fide resident of a U.S. territory other than the one to which the assets are connected.

D. Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts" (FBAR)

Reporting on Form TD F 90-22.1 is required under Title 31 (31 U.S.C. 5314) for other law enforcement purposes in addition to tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These 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 during the passage of the HIRE Act and the enactment of section 6038D, and the intention to retain FBAR reporting 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 Comm. on Taxation, JCX4-10 (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 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 Form 8938 and the FBAR is not duplicative and both forms must be filed, if required.

7. Penalties for Failure to Disclose

A. In general

If a specified person fails to file a Form 8938 that includes the information required by section 6038D(c) and § 1.6038D-4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D-2T, a penalty of \$10,000 will apply to that specified person under section 6038D(d) and § 1.6038D-8T. If any such failure 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 subject to 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 (or continuation) penalty is limited to a maximum of \$50,000 for each such failure.

Married specified individuals who file a joint annual return and fail to file a required Form 8938, "Statement of Specified Foreign Financial Assets," that includes the information required by section 6038D(c) and § 1.6038D-4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D-2T are subject to penalties under section 6038D(d) and § 1.6038D-8T as if the married specified individuals are a single specified person. The liability of married specified individuals who file a joint annual return with respect to penalties under this section is joint and several.

B. Presumption of aggregate value

For the purpose of assessing the penalties for failure to disclose, 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 has not provided sufficient information to demonstrate the aggregate value of the assets upon request by the Secretary, then the aggregate value of the assets is treated as being in excess of the applicable reporting threshold set forth in § 1.6038D-2T(a).

C. Reasonable cause exception

If a specified person shows that the failure to report the information required under section 6038D and § 1.6038D-4T is due to reasonable cause and not due to willful neglect, no penalty will be imposed under section 6038D(d) or § 1.6038D-8T. To show that the failure to report is due to reasonable cause and not due to willful neglect, the specified person must make an affirmative showing of all the facts alleged as reasonable cause for the failure to report.

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. For this purpose, 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.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. 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. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section in this issue of the Federal Register. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their 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 Internal Revenue Service and the Treasury Department participated in the development of the regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

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 adding entries in numerical order to read as follows:

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

Section 1.6038D-0T also issued under 26 U.S.C. 6038D.

Section 1.6038D-1T also issued under 26 U.S.C. 6038D.

Section 1.6038D-2T also issued under 26 U.S.C. 6038D.

Section 1.6038D-3T also issued under 26 U.S.C. 6038D.

Section 1.6038D-4T also issued under 26 U.S.C. 6038D.

Section 1.6038D-5T also issued under 26 U.S.C. 6038D.

Section 1.6038D-7T also issued under 26 U.S.C. 6038D.

Section 1.6038D-8T also issued under 26 U.S.C. 6038D.* * *

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

§ 1.6038D-0T Outline of regulation provisions (temporary).

This section lists the table of contents for §§ 1.6038D-1T through 1.6038D8T.

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

(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]

(b) Effective/applicability dates.

(c) Expiration date.

§ 1.6038D-2T Requirement to report specified foreign financial assets (temporary).

(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 qualified individuals filing a joint annual return.
- (5) Assets with no positive value.
- (6) Excepted assets.
- (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) Special rule for parent making an election under section 1(g)(7).
- (3) Entities.

(c) Special rules for joint interests.

- (1) Aggregate value of assets.
 - (i) Specified persons.
 - (ii) Married specified individuals.
- (2) Annual return filed by married specified individual.
 - (i) Joint annual return.
 - (ii) Separate annual return.

(d) Example.

- (1) Facts.
- (2) Filing requirement.
 - (i) Married specified individuals filing separate annual returns.
 - (ii) Married specified individuals filing a joint annual return.

(e) Effective/applicability dates.

(f) Expiration date.

§ 1.6038D-3T Specified foreign financial assets (temporary).

- (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.
- (f) Expiration date.

§ 1.6038D-4T Information required to be reported (temporary).

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

§ 1.6038D-5T Valuation guidelines (temporary).

- (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.

(h) Expiration date.

§ 1.6038D-6T Specified domestic entities (temporary). [Reserved]

§ 1.6038D-7T Exceptions from the reporting of certain assets under Section 6038D (temporary).

(a) Elimination of duplicative reporting of assets.

(1) In general.

(2) Foreign grantor trusts.

(b) Owner of certain trusts.

(c) Bona fide resident of a U.S. possession.

(d) Effective/applicability dates.

(e) Expiration date.

§ 1.6038D-8T Penalties for failure to disclose (temporary).

(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.

(h) Expiration date.

Par. 3. Section 1.6038D-1T is added to read as follows:

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

(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-3T.

(7) Financial account. The term financial account has the meaning set forth in section 1471(d)(2) and the regulations.

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

(9) Foreign financial institution. The term foreign financial institution has the meaning set forth in section 1471(d)(4) and the regulations .

(10) Foreign entity. The term foreign entity has the meaning set forth in section 1473(5) and the regulations .

(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].

(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.

(c) Expiration date. The applicability of this section expires December 12, 2014.

Par. 4. Section 1.6038D-2T is added to read as follows:

§ 1.6038D-2T Requirement to report specified foreign financial assets (temporary).

(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-4T 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)(1)(4) of this section, married specified individuals that file a joint annual return for the taxable year must attach a single Form 8938 to their joint annual return to report the information required by section 6038D and § 1.6038D-4T 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)(1)(4) of this section, a specified individual who is a qualified individual under section 911(d)(1) for the taxable

year is required to attach a Form 8938 to the specified individual's annual return and report the information required by section 6038D and § 1.6038D-4T 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 qualified individuals filing a joint annual return. A qualified individual under section 911(d)(1) and the qualified individual's spouse who file a joint annual return must attach Form 8938 to their joint annual return to report the information required by section 6038D and § 1.6038D-4T 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-5T(b) for reporting the maximum value of a specified foreign financial asset, including a specified foreign financial asset that does not have a positive value during the taxable year.

(6) Excepted assets. 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-7T(a) 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-7T(b) or (c) 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 who 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) Special rule for parent making election under section 1(g)(7). A parent that 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.

(3) Entities. Except as provided in this paragraph, 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. 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. See § 1.6038D-3T(c) to determine whether an interest in a foreign trust or an interest in a foreign estate is a specified foreign financial asset. See § 1.6038D-5T(g) for rules to determine the maximum value of an interest in a foreign trust or estate.

(c) Special rules for joint interests -- (1) Aggregate value of assets -- (i) Specified persons. Except in the case of a specified person described in paragraph (c)(1)(ii) of this section, each specified person that is a joint owner of a specified foreign financial asset 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-2T(a).

(ii) Married specified individuals. Married specified individuals who file a joint annual return must include the value of a specified foreign financial asset that they jointly own or in which they have an interest under paragraph (b)(2) 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-2T(a). If a married specified individual files a separate annual return and his or her spouse is a specified individual, the married specified individual includes 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-2T(a).

(2) Annual return filed by a married specified individual -- (i) Joint annual return. Married specified individuals that file a joint annual return must file a single Form 8938 to fulfill their reporting requirements under section 6038D and § 1.6038D-2T(a). The single Form 8938 must report all of the

specified foreign financial assets in which either married specified individual has an interest. If the 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)(2) of this section, the asset must be reported only once on the single Form 8938 filed for the taxable year.

(ii) 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-2T(a) by filing a separate Form 8938 that reports all of the specified foreign financial assets in which the married specified individual has an interest, including assets jointly owned with the married specified individual's spouse.

(d) 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 a separate annual return. 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-2T(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-4T(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-2T(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 and W have an interest (\$90,000 (included only once), \$10,000, and \$1,000, or \$101,000) exceeds the applicable reporting threshold (\$100,000) set forth in § 1.6038D-2T(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.

(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.

(f) Expiration date. The applicability of this section expires December 12, 2014.

Par. 5. Section 1.6038D-3T is added to read as follows:

§ 1.6038D-3T Specified foreign financial assets (temporary).

(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 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;

(ii) A financial instrument or contract that has an issuer or counterparty which is other than a United States person; 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 a trade or business;

(ii) Acquired and held in the ordinary course of a 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 a 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.

(f) Expiration date. The applicability of this section expires December 12, 2014.

Par. 6. Section 1.6038D-4T is added to read as follows:

§ 1.6038D-4T Information required to be reported (temporary).

(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 maintained by a foreign financial institution, the name and address of the foreign financial institution and the account number of the account;

(2) In the case of stock or a security, 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 entity;

(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 or custodial account under section 1471(d)(2), 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 or custodial account under section 1471(d)(2), 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 exchange rate and, if the source of such rate is other than as described in § 1.6038D-5T(d)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value; and

(10) For any specified foreign financial asset excepted from reporting on Form 8938 under § 1.6038D-7T(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," 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-7T(a), timely filed with the Internal Revenue Service on which excepted foreign financial assets are reported or reflected for the taxable year.

(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.

(c) Expiration date. The applicability of this section expires December 12, 2014.

Par. 7. Section 1.6038D-5T is added to read as follows:

§ 1.6038D-5T Valuation guidelines (temporary).

(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 purpose 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 less than zero, its 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 determining the maximum value of the specified foreign financial asset,

(c) Foreign currency conversion -- (1) In general. Except as provided in paragraph (d)(2) of this section, the U.S. Treasury Department's Financial Management 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 Financial Management 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 provided at least annually to determine a 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-5T(a).

(f) Other specified foreign financial assets -- (1) General rule. Except as provided in paragraphs (f)(2) and (f)(3) of this section, for specified foreign financial assets that are not held in a financial account maintained by a foreign 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.

(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 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 a 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.

(h) Expiration date. The applicability of this section expires December 12, 2014.

Par. 8. Section 1.6038D-6T is added to read as follows:

§ 1.6038D-6T Specified domestic entities (temporary). [Reserved]

Par. 9. Section 1.6038D-7T is added to read as follows:

§ 1.6038D-7T Exceptions from the reporting of certain assets under Section 6038D (temporary).

(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 who 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 a Qualified Electing Fund";

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

(E) 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.

(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 679 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) Bona fide resident of a U.S. possession. A specified individual who is a bona fide resident of a U.S. possession and who is 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.

(e) Expiration date. The applicability of this section expires December 12, 2014.

Par. 10. Section 1.6038D-8T is added to read as follows:

§ 1.6038D-8T Penalties for failure to disclose (temporary).

(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-4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D-2T, 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, "Statement of Specified Foreign Financial Assets," that includes the information required by section 6038D(c) and § 1.6038D-4T with respect to any taxable year at the time and in the manner described in section 6038D(a) and § 1.6038D-2T are subject to penalties under this section as if the married specified individuals are a single specified person. 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 30day 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-2T(a).

(e) Reasonable cause exception -- (1) In general. If the failure to report the information required in section 6038D(c) and § 1.6038D-4T 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 disclose 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.

(h) Expiration date. The applicability of this section expires December 12, 2014.

Steven T. Miller
Deputy Commissioner for Services
and Enforcement.

Approved: November 30, 2011
Emily S. McMahon
Acting Assistant Secretary of the
Treasury (Tax Policy)