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IRS Temporary Regulations (T.D. 9567) on HIRE Act Requirements On Reporting of Foreign Financial Assets for Taxable Years After March 18, 2010

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9567]

RIN 1545-BK17

Reporting of Specified Foreign Financial Assets

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 Dec. 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 30-day 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 §1.931-1(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 §1.6049-5(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 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 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 4(D) and 4(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. §1.6038D-6 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, JCX-4-10 (February 23, 2010)) (Technical Explanation) accompanying the HIRE Act. The Technical Explanation states that "[n]othing in this provision [section 511 of the HIRE Act enacting 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: