

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

- (i) U.S. citizen;
- (ii) Resident alien of the United States for any portion of the taxable year;
- (iii) Nonresident alien for whom an election under section 6013(g) or (h) is in effect; or
- (iv) Nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession (as defined in § 1.931-1(c)(1)).

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

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

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

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

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

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

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

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

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

(12) *Specified domestic entity.* The term *specified domestic entity* has the meaning set forth in § 1.6038D-6.

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

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

(2) *Financial accounts.* For purposes of applying the financial account definition in § 1.6038D-1(a)(7), the treatment under § 1.1471-5(b)(2)(vi) of retirement and pension accounts, non-retirement savings accounts, and accounts satisfying similar conditions in an applicable Model 1 IGA or Model 2 IGA (see § 1.1471-1(b)(78) and (79)) as financial accounts for purposes of the reporting required under section 6038D and § 1.6038D-2(a) shall apply to taxable years beginning after December 12, 2014.

[T.D. 9706, 79 FR 73825, Dec. 12, 2014, as amended by T.D. 9752, 81 FR 8838, Feb. 23, 2016]

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

(a) *Reporting requirement*—(1) *In general.* Except as otherwise provided, a specified person that has any interest in a specified foreign financial asset during the taxable year must attach Form 8938, “Statement of Specified Foreign Financial Assets,” to that specified person’s annual return for the taxable year to report the information required by section 6038D and § 1.6038D-4 if the aggregate value of all such assets exceeds—

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

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

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

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

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

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

- (i) \$400,000 on the last day of the taxable year; or
- (ii) \$600,000 at any time during the taxable year.

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

specified foreign financial asset that does not have a positive value during the taxable year.

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

(ii) *Specified domestic entity.* The value of any specified foreign financial asset in which a specified domestic entity has an interest and that is excluded from reporting on Form 8938 pursuant to § 1.6038D-7(a) (concerning certain assets reported on another form) is excluded for purposes of determining the aggregate value of specified foreign financial assets. For purposes of determining the aggregate value of specified foreign financial assets, a specified domestic entity that is a corporation or partnership and that has an interest in any specified foreign financial asset is treated as owning all the specified foreign financial assets (excluding specified foreign financial assets excluded from reporting on Form 8938 pursuant to § 1.6038D-7(a)) held by all domestic corporations and domestic partnerships that are closely held by the same specified individual as determined under § 1.6038D-6(b)(2).

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

Service with respect to such taxable year.

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

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

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

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

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

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

83(b), on the date of transfer of the property.

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

(4) *Entities—(i) In general.* Except as provided in this paragraph (b)(4), a specified person is not treated as having an interest in any specified foreign financial assets held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity.

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

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

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

(c) *Special rules for joint interests—(1) In general—(i) Determining aggregate value of assets.* Except as otherwise provided in this paragraph (c), each specified person that is a joint owner of a

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

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

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

(3) *Aggregate asset value for married specified individual filing a separate annual return—(i) Both spouses are specified individuals.* If a married specified individual files a separate annual return and his or her spouse is a specified individual, the married specified individual must include one-half of the value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in § 1.6038D-2(a).

(ii) *One spouse is not a specified individual.* If a married specified individual files a separate annual return and his or her spouse is not a specified individual, the married specified individual must include the entire value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified

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

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

(2) *Separate annual return.* A married specified individual who files a separate annual return for the taxable year must fulfill the reporting requirements under section 6038D and § 1.6038D-2(a) by filing a separate Form 8938 with his or her return that reports all of the specified foreign financial assets in which the married specified individual has an interest, including each of the assets jointly owned with the married specified individual's spouse or with another person. If both of the spouses are specified individuals, each specified individual must report the entire value of each specified foreign financial asset that the spouses jointly own on Form 8938, not the value taken into account under paragraph (c)(3)(i) of this section for purposes of applying the applicable reporting thresholds.

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

(2) *Dual resident taxpayer filing as a nonresident alien at end of taxable year.* If a specified individual to whom this paragraph (e) applies computes his or her U.S. income tax liability as a nonresident alien on the last day of the taxable year and complies with the filing requirements of §301.7701(b)-7(b) and (c) of this chapter and, in particular, such individual timely files with the Internal Revenue Service Form 1040NR, “U.S. Nonresident Alien Income Tax Return,” or Form 1040NR-EZ, “U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents,” as applicable, and attaches thereto Form 8833, “Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b),” such individual will not be required to report specified foreign financial assets on Form 8938 with respect to the portion of the taxable year covered by Form 1040NR (or Form 1040NR-EZ).

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

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

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

(2) *Filing requirement—(i) Married specified individuals filing separate annual returns.* If H and W file separate annual returns, the aggregate value of the specified foreign financial assets in which H has an interest at the end of the taxable year is \$55,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of H’s separately owned specified foreign financial asset, \$10,000. The aggregate value of the specified foreign financial assets in which W has an interest at the end of the taxable year is \$46,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of W’s separately owned specified foreign financial asset, \$1,000. H must file Form 8938 with his annual return for the taxable year because the aggregate value of the specified foreign financial assets in which H has an interest exceeds the applicable reporting threshold (\$50,000) set forth in §1.6038D-2(a)(1). H must report the maximum value of the entire jointly owned asset, \$90,000, and the maximum value of the separately owned asset, \$10,000. See §1.6038D-5(b) regarding the maximum value of a jointly owned specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. The aggregate value of the specified foreign financial assets in which W has an interest, \$46,000, does not exceed the applicable reporting threshold set forth in §1.6038D-2(a)(1). W is not required to file Form 8938 with her separate annual return.

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

(g) *Effective/applicability dates.* This section, with the exception of §1.6038D-2(a)(6)(ii), applies to taxable years ending after December 19, 2011. Section 1.6038D-2(a)(6)(ii) applies to taxable years beginning after December 31, 2015. Taxpayers may elect to apply the rules of this section, with the exception of §1.6038D-2(a)(6)(ii), to taxable

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years ending on or prior to December 19, 2011.

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§ 1.6038D-3 Specified foreign financial assets.

(a) *Financial accounts*—(1) *In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any financial account maintained by a foreign financial institution. An asset held in a financial account maintained by a foreign financial institution is not required to be separately reported on Form 8938, “Statement of Specified Foreign Financial Assets.”

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

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

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

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

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

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

by a person organized under the laws of a U.S. possession); and

(iii) An interest in a foreign entity.

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

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

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

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

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

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

(5) *Direct relationship between holding an asset and a trade or business*—(i) *In general.* In determining whether an asset is held in a direct relationship to the conduct of a trade or business by a specified person, principal consideration will be given to whether the asset is needed in the trade or business of the specified person. An asset shall be considered needed in the trade or business, for this purpose, only if the asset is held to meet the present needs of that trade or business and not its anticipated future needs. An asset shall be considered as needed in the trade or business if, for example, the asset is held to meet the operating expenses of the trade or business. Conversely, an asset shall be considered as not needed in the trade or business if, for example, the asset is held for the purpose of providing for future diversification into a new trade or business, future plant replacement, or future business contingencies. Stock is never considered used or held for use in a trade or business for purposes of applying this test.