

§ 1.6038D-3

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

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

(g) *Effective/applicability dates.* This section, 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 years ending on or prior to December 19, 2011.

[T.D. 9706, 79 FR 73826, Dec. 12, 2014, as amended by T.D. 9752, 81 FR 8838, Feb. 23, 2016]

26 CFR Ch. I (4-1-24 Edition)

§ 1.6038D-3 Specified foreign financial assets.

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

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

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

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

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

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

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

(iii) An interest in a foreign entity.

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

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

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

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

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

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

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

(ii) *Presumption of direct relationship.* An asset will be treated as held in a direct relationship to the conduct of a

trade or business of a specified person if—

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

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

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

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

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

(1) Stock issued by a foreign corporation;

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

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

(4) An interest in a foreign trust;

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

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

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

[T.D. 9706, 79 FR 73828, Dec. 12, 2014]