

Internal Revenue Service, Treasury

§ 1.6038D-7

holder of a general power of appointment that is exercisable only on the death of the holder.

(d) *Excepted domestic entities.* An entity is not considered to be a specified domestic entity if the entity is—

(1) *Certain persons described in section 1473(3).* An entity, except for a trust that is exempt from tax under section 664(c), that is excepted from the definition of the term “specified United States person” under section 1473(3) and the regulations issued under that section;

(2) *Certain domestic trusts.* A trust described in section 7701(a)(30)(E) provided that the trustee of the trust—

(i) Has supervisory authority over or fiduciary obligations with regard to the specified foreign financial assets held by the trust;

(ii) Timely files (including any applicable extensions) annual returns and information returns on behalf of the trust; and

(iii) Is—

(A) A bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the National Credit Union Administration;

(B) A financial institution that is registered with and regulated or examined by the Securities and Exchange Commission; or

(C) A domestic corporation described in section 1473(3)(A) or (B), and the regulations issued with respect to those provisions.

(3) *Domestic trusts owned by one or more specified persons.* A trust described in section 7701(a)(30)(E) to the extent such trust or any portion thereof is treated as owned by one or more specified persons under sections 671 through 678 and the regulations issued under those sections.

(e) *Effective/applicability dates.* This section applies to taxable years beginning after December 31, 2015.

[T.D. 9752, 81 FR 8838, Feb. 23, 2016]

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

(a) *Elimination of duplicative reporting of assets—*(1) *In general.* A specified person is not required to report a specified

foreign financial asset on Form 8938, “Statement of Specified Foreign Financial Assets,” if the specified person—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Special rules for bona fide residents of a U.S. possession.* A specified individual who is a bona fide resident of a U.S. possession is not required to include the following specified foreign financial assets in the determination of the aggregate value of his or her specified foreign financial assets and, if required to file Form 8938 with the Internal Revenue Service, is not required to report the following specified foreign financial assets:

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

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

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

(4) An interest in an entity organized under the laws of the U.S. possession of

which the specified individual is a bona fide resident; and

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

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

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

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

[T.D. 9706, 79 FR 73831, Dec. 12, 2014]

§ 1.6038D-8 Penalties for failure to disclose.

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

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

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