

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

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

(ii) *Presumption of direct relationship.* An asset will be treated as held in a direct relationship to the conduct of a trade or business of a specified person if—

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

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

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

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

stitutes actual knowledge for this purpose.

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

(1) Stock issued by a foreign corporation;

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

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

(4) An interest in a foreign trust;

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

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

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

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

[T.D. 9567, 76 FR 78562, Dec. 19, 2011]

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

(a) *Required information.* The following information must be reported on Form 8938, “Statement of Specified Foreign Financial Assets,” with respect to each specified foreign financial asset:

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

(2) In the case of stock or a security, the name and address of the issuer, and information that identifies the class or issue of which the stock or security is a part;

(3) In the case of a financial instrument or contract, information that identifies the financial instrument or

## § 1.6038D-5T

## 26 CFR Ch. I (4-1-12 Edition)

contract, including the names and addresses of all issuers and counterparties;

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

(5) The maximum value of the specified foreign financial asset during the portion of the taxable year in which the specified person has an interest in the asset;

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

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

(8) The amount of any income, gain, loss, deduction, or credit recognized for the taxable year with respect to the reported specified foreign financial asset, and the schedule, form, or return filed with the Internal Revenue Service on which the income, gain, loss, deduction, or credit, if any, is reported or included by the specified person;

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

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

Canadian Registered Retirement Plans," or such other form under Title 26 of the United States Code identified by the Secretary under § 1.6038D-7T(a), timely filed with the Internal Revenue Service on which excepted foreign financial assets are reported or reflected for the taxable year.

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

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

[T.D. 9567, 76 FR 78563, Dec. 19, 2011, as amended at 77 FR 9845, Feb. 21, 2012]

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

(a) *Fair market value.* Except as provided in paragraphs (c) and (e) of this section, the value of a specified foreign financial asset for purposes of determining the aggregate value of specified foreign financial assets held by a specified person and the maximum value of a specified foreign financial asset required to be reported on Form 8938, "Statement of Specified Foreign Financial Assets," is the asset's fair market value.

(b) *Valuation of assets—(1) Maximum Value.* Except as provided in this section, the maximum value of a specified foreign financial asset means a reasonable estimate of the asset's maximum fair market value during the taxable year.

(2) *U.S. dollars.* For purpose of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset, the value of a specified foreign financial asset denominated in a foreign currency during the taxable year must be determined in the foreign currency and then converted to U.S. dollars.

(3) *Asset with no positive value.* If the maximum fair market value of a specified foreign financial asset is less than zero, its value is treated as zero for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an