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Reg. Section 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 30-day period (or fraction thereof) during which the failure continues after the 90-day period has expired. The additional penalty imposed by section 6038D(d)(2) and this paragraph (c) is limited to a maximum of \$50,000 for each such failure.

(d) Presumption of aggregate value. For the purpose of assessing penalties imposed under section 6038D(d), 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 does not provide sufficient information to demonstrate the aggregate value of the assets upon request by the Commissioner or his delegate, then the aggregate value of the assets is treated as being in excess of the applicable reporting threshold set forth in §1.6038D-2(a).

(e) Reasonable cause exception.

(1) In general. If the failure to report the information required in section 6038D(c) and §1.6038D-4 is shown to be due to reasonable cause and not due to willful neglect, no penalty will be imposed under section 6038D(d) or this section.

(2) Affirmative showing required. In order to show that the failure to report the information required in section 6038D(c) and § 1.6038D-4 is due to reasonable cause and not due to willful neglect for purposes of section 6038D(g) and this section, the specified person must make an affirmative showing of all the facts alleged as reasonable cause for the failure to disclose.

(3) Facts and circumstances taken into account. 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. 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.

(f) Penalties for underpayments attributable to undisclosed foreign financial assets.

(1) Accuracy-related penalty. For application of the accuracy-related penalty in the case of any portion of an underpayment attributable to any undisclosed foreign financial asset understatement, see section 6662(j).

(2) Criminal penalties. In addition to other penalties, failure to comply with the reporting requirements of section 6038D and the regulations, or any underpayment related to such failure, may result in criminal penalties under sections 7201, 7203, 7206, et seq., or other provisions of Federal law.

(g) 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.