

# The New FATCA Information Reporting Requirement Under Code Sec. 6038D and the Temporary and Proposed Regulations—A Comparison to the FBAR

*By Dean Marsan*

In this article, Dean Marsan examines the new FATCA information reporting requirement under Code Sec. 6038D and compares this reporting to FBAR reporting.

The greatest enemy of knowledge is not ignorance, it is the illusion of knowledge.

—Stephen Hawking

## Background of FATCA

According to one recent statement by an IRS official, “Americans now have \$1 trillion—trillion with a ‘t’—in assets offshore and illegally evade \$40 to \$70 billion in U.S. taxes each year [through] offshore tax dodges.”<sup>1</sup> Another estimate put the tax gap at an estimated \$100 billion in tax revenues each year as a result of offshore tax abuses, primarily from the use by U.S. taxpayers or their controlled foreign entities of concealed and undeclared accounts.<sup>2</sup> It is not surprising that the government in order to eliminate this tax gap in the face of a large budget deficit, ratcheted up its pressure on taxpayers who have structured their

activities, in many cases with the active help and assistance of promoters and facilitators, to avoid filing FBARs and reporting their taxable income from these offshore accounts.

On March 18, 2010, the Hiring Incentives to Restore Employment Act<sup>3</sup> (“HIRE Act”) was signed into law and added an entirely new U.S. withholding and information reporting tax regime, commonly known as “FATCA.”<sup>4</sup> The stated purpose of the new law is to clamp down on tax evasion and improve taxpayer compliance by giving the IRS new administrative tools to detect, deter and discourage offshore tax abuses.<sup>5</sup> The Congressional sponsors’ joint statement for a predecessor bill said: “[FATCA] will force foreign financial institutions, foreign trusts, and foreign corporations to provide information about their U.S. account holders, grantors, and owners, respectively.”<sup>6</sup> The new law does not directly focus on tax evasion and does not amend either the criminal or civil penalties for tax evasion, nor change the penalties for aiding and abetting for understatements of tax or tax evasion (but does change the statute of limitations from three years to six years for assessments of tax).

Importantly, the law not only imposes significant new reporting and disclosure obligations on foreign

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financial institutions (FFIs) and nonfinancial foreign entities (NFFEs), which will be enforced through a new withholding tax regime and substantial penalties; it also imposes on U.S. individuals, as well as certain domestic entities, significant new responsibilities with respect to reporting information on specified foreign financial assets, as provided in new Code Sec. 6038D.

Code Sec. 6038D is effective for tax years starting after March 18, 2010,<sup>7</sup> which for most individual taxpayers will be their 2011 tax returns filed during their 2012 filing season. In December 2011, the IRS released Form 8938 and the related instructions. On December 14, 2011, the IRS released temporary regulations relating to reporting of specified foreign financial assets under Code Sec. 6038D<sup>8</sup> effective for tax years ending after December 19, 2011, the date of the publication in the Federal Register. Accordingly, they apply to the current reporting season for most individual taxpayers. On the same date, the IRS released proposed regulations<sup>9</sup> relating to specified domestic entities, which will apply to tax years beginning after December 31, 2011. There is no Form 8938 reporting for domestic entities at this time.<sup>10</sup>

## Scope of Article

This article will focus on the new reporting responsibilities under Code Sec. 6038D<sup>11</sup> and the temporary and proposed regulations, which now impose new broad-based information reporting on individuals who are U.S. citizens or resident aliens. More specifically, this article will compare the current FBAR reporting requirements to the new Form 8938, *Statement of Specified Foreign Financial Assets*, required to be filed as part of an income tax return if certain filing thresholds are met. For a tabular comparison of Form 8938 and the FBAR Form TD F 90-22.1 See Exhibit I. While FBAR reporting based upon the Bank Secrecy Act<sup>12</sup> has in recent years become a powerful device used by the IRS and the Department of Justice to unearth hidden offshore assets and to identify offshore tax evasion by taxpayers, the new Form 8938 for reporting certain foreign financial assets under Code Sec.

6038D can be expected to provide even a stronger enforcement tool to help to ferret out offshore tax evasion by Americans. This article does not address the proposed regulations dealing with specified domestic entities.

## I. Comparison of Form 6038D Reporting and FBAR Reporting—In General

### Form 6038D Reporting—In General

Under the HIRE Act, if an individual (or certain domestic entities) holds any interest in a “specified foreign financial asset,” or “SFFA,” he or she will be required to attach to his or her tax return an annual disclosure statement or Form 8938 declaring the asset and certain other “6038D required information,” if the aggregate value of all such assets exceeds \$50,000 (or any higher amount prescribed by the IRS)<sup>13</sup> at any time during the tax year. A Form 8938 must be filed even

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if none of the specified foreign financial assets or SFFAs that must be reported affect the tax liability for the tax year.<sup>14</sup>

The new tax return reporting requirements under Code Sec. 6038D are not intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by the HIRE Act. The Secretary was directed to prescribe guidance to carry out the purposes of this provision and to provide appropriate exceptions from its application for classes of assets that would be duplicative of other disclosures, for nonresident aliens and for *bona fide* residents of U.S. possessions.<sup>15</sup>

### FBAR Reporting—In General

A U.S. person who transfers assets to and hold interests in foreign bank accounts or foreign entities may also be subject to self-reporting requirements under the Bank Secrecy Act it Title 31 of the U.S. Code. Under current law, Treasury Department Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts* (“FBAR”), must be filed by June 30 of the year following the year in which the \$10,000 filing threshold is met.<sup>16</sup>

## Review of Form 8938 and Matching of Financial Account Information

According to representatives from the IRS at a recent EEI Conference held in Washington D.C. in October, 2011, the IRS will match the information provided by foreign financial institutions (FFIs)<sup>17</sup> to the information reported by filers of the new Form 8938 on their income tax returns for purpose of determining if there is tax avoidance or fraud by Americans or their foreign entities and the financial sponsors of such entities or accounts. These representatives also suggested that the requirement to have this financial information come from multiple sources will create built-in checks against nonreporting or omissions of the required financial information by taxpayers and the foreign entities in which they have accounts. In addition, it should be noted the IRS will continue to pursue information obtained under tax information exchange agreements signed with many jurisdictions,<sup>18</sup> exchange of information provisions in mutual legal assistance treaties, John Doe summons and subpoenas, whistleblowers and offshore voluntary compliance initiatives.<sup>19</sup> It will likely also compare the information from these sources with the information from individual reporting on the new Form 8938 and the information from FBARs.

More specifically, each financial account maintained by a FFI which is required to be reported on a Form 8938 by an individual taxpayer (and certain domestic entities) can be matched by the IRS against each U.S. account reported by the FFI for such taxpayer. If the FFI reports a U.S. account which is not properly cross-referenced and identified under a computer matching program against such taxpayer's reported financial accounts on his or her Form 8938 and it is not otherwise exempt from reporting, presumably a follow-up inquiry will be made by the IRS to the taxpayer asking why such information was omitted from the Form 8938; and the omission may result in an examination of the taxpayer's income tax returns for his or her open tax years. The financial account information reported on Form 8938 and the U.S. account information reported by an FFI include, among other items, the maximum value of the financial account during the tax year. See *What Information Is Required to Be Reported on Form 8938?* The IRS can use this information during an audit examination to impute the estimated income from such financial account for the taxable year that a taxpayer should have reported on his or her tax re-

turn, and also verify this amount against the income and other taxpayer information provided to the IRS under exchange of information provisions of U.S. tax treaties and other sources.

### Noncompliance by FFIs

In addition, the IRS can use the information provided by Form 8938 to ascertain if the FFI is compliant with its FFI agreement and to determine if the U.S. account information has been properly determined, validated and reported to the IRS. For example, if a financial account has been reported on Form 8938 (or identified by means of exchange of information provisions of U.S. tax treaties or other sources), but not reported by the FFI as a U.S. account, a follow-up inquiry will likely be made by the IRS to the FFI requesting an explanation of why such account was not identified as a U.S. account, whether the account holder was classified by the FFI as a recalcitrant account holder or exempt from reporting, and whether the FFI withheld on any passthru payments to made to such recalcitrant account holder.

### Filing Criteria—Form 8938

A specified individual that owns specified foreign financial assets must file a Form 8938 if the total value of those assets exceeds an applicable reporting threshold for tax years beginning after March 18, 2010. Thus, in order to determine whether a Form 8938 is required, all of the following must apply: (1) the filer must be a "specified individual"<sup>20</sup>; (2) the filer must own "specified foreign financial assets" or "SFFAs"; and (3) the value of those assets must be more than the "applicable reporting threshold."<sup>21</sup> However, if a taxpayer does not have to file an income tax return<sup>22</sup> for the year, he or she does not need to file Form 8938, even if the value of the SFFAs is more than the appropriate reporting threshold.

### Filing Criteria—FBAR

While the filing criteria for an FBAR are similar to these requirements, they are clearly not the same. In the case of an FBAR, all of the following requirements must apply: (1) the filer must be a U.S. person; (2) the filer must have a financial account(s); (3) the financial account must be located in a foreign country; (4) the filer must have a financial interest in the account or signature authority<sup>23</sup> over the foreign financial account; and (5) the aggregate value in dollars must exceed \$10,000 at any time during the year.<sup>24</sup> If the FBAR requirements are met, a U.S. person must file

an FBAR even if he or she does not have to file an income tax return for the year or have income from such accounts.

## Confidentiality

In general, tax returns, including Form 8938 and the related tax return information, are confidential as required by Code Sec. 6103. In contrast, the information collected in the FBAR, which is authorized under Title 31 (Money and Finance), is not subject to the tax confidentiality provisions of Code Sec. 6103, and the information collected may be provided to federal, state and foreign law enforcement agencies in the performance of their official duties.<sup>25</sup>

## II. Detailed Discussion of Form 8938 Filing Requirements

### Persons Subject to Form 8938 Reporting Obligation

At present, only “specified individuals” who meet the reporting threshold must file the Form 8938. “Specified individuals” includes:

- U.S. citizens;
- resident aliens for any portion of the tax year<sup>26</sup>; or
- certain nonresident aliens who make an election to be treated as a resident aliens for purposes of filing a joint income tax return.<sup>27</sup>

**Special Rules for Resident Alien—Form 8938.** For this purpose, an individual is a resident alien under the green card test or the substantial presence test. However, if an individual qualifies as a resident alien under either rule, he or she will nonetheless be a resident alien even if he or she elects to be taxed as a resident of a foreign country under the provisions of a U.S. income tax treaty.<sup>28</sup>

**Dual Citizens.** Some taxpayers are dual citizens of the United States and a foreign country. As a U.S. citizen, a taxpayer must file an annual U.S. income tax return for any tax year in which the gross income is equal to greater than the applicable exemption amount and standard deduction, and if such person meets the reporting threshold must attach the Form 8938 whether they are also citizens of another country or irrespective of where they reside.<sup>29</sup>

**Comparison to FBAR Filers.** For purposes of determining “who” must *file*, FBAR reporting is at the same time broader and narrower than Form 8938 reporting. An FBAR must be filed by all “U.S. persons” who meet the reporting threshold, while a

Form 8938 need only be filed by “specified persons.” For this purpose, a “United States” person means a U.S. citizen, resident alien and an entity, including but not limited to, a corporation, partnership or limited liability company created or organized in the United States and a trust or estate formed under the laws of the United States, regardless of whether it is “formed or availed of” to hold foreign financial assets.<sup>30</sup> A U.S. resident is an alien residing in the United States within the meaning of the residency tests under Code Sec. 7701(b).<sup>31</sup>

However, when applying these residency tests rules, the definition of “United States” is broader than under the Code, and includes the States, the District of Columbia, all United States territories and possessions and the Indian lands as defined in the Indian Gaming Regulatory Act.<sup>32</sup> Also, a single-member LLC that is treated as a disregarded entity for U.S. tax purposes will have a separate FBAR filing if it owns a foreign financial account.

### Specified Foreign Financial Assets

The term “specified foreign financial asset” or “SFFA” means<sup>33</sup>:

- any “financial account”<sup>34</sup> maintained by a foreign financial institution,<sup>35</sup> and
- any of the following assets or instruments that are held for investment and not held in an account maintained by a financial institution, including: (1) any stock or security issued by a person other than a U.S. person<sup>36</sup>; (2) any financial instrument or contract that has an issuer or counterparty that is other than a U.S. person; and (3) any interest in a foreign entity.

An asset or instrument may be a SFFA subject to reporting under Code Sec. 6038D even if the asset or instrument does not have a positive value.<sup>37</sup>

In broad terms, SFFAs consist of financial accounts in foreign financial institutions and certain directly-held “foreign” assets or instruments. An asset held in a financial account maintained by a foreign financial institution is not required to be separately reported, but its value is taken into account in determining the value of the financial account.<sup>38</sup> In addition, a financial account (or assets held in that account) that is maintained by a U.S. payor,<sup>39</sup> such as a domestic financial institution, is not a SFFA. A U.S. payor generally also includes a domestic branch of a foreign bank or foreign insurance company and a foreign branch or foreign subsidiary of a U.S. financial institution.



As noted, interests in a foreign entity constitute one category of directly held SFFA. For this purpose, a foreign entity is any "entity" which is not a U.S. person under Code Sec. 1473(5) unless an exception applies. One such exception is for an interest in social security, social insurance or other similar program of a foreign government, which will not be a SFFA.<sup>40</sup>

The term "U.S. person" means (1) a citizen or resident of the United States; (2) a partnership created or organized in the United States or under the law of the United States or of any state; (3) a corporation created or organized in the United States or under the law of the United States or of any state; (4) any estate other than a foreign estate; or (5) a trust if a court within the United States is able to exercise primary supervision over the administration of the trust ("the court test") and one or more U.S. persons have the authority to control all substantial decisions of the trust ("the control test").<sup>41</sup> Thus, a foreign entity includes a foreign corporation, a foreign partnership, and a foreign complex trust or estate if a specified person receives a distribution. Other juridical entities created or organized under foreign law may also be foreign entities, pending future guidance.

***Financial Account Maintained by a Foreign Financial Institution or Its Expanded Affiliated Group.***

A financial account is any depository or custodial account maintained by a foreign financial institution, as well as any equity or debt interest in the foreign financial institution (other than interests which are regularly traded on an established securities market). For this purpose, presumably the term financial account will also include any financial accounts (as defined above) maintained by any other foreign financial institution which is a member of the expanded affiliated group of the FFI under Code Sec. 1471(e) absent future guidance. At first blush, it seems incongruous that equity or debt interests in a FFI (or in the FFI affiliates) that are regularly traded on an established exchange are not SFFAs, while such interests would be SFFAs if not held in an account maintained by a financial entity.

***Foreign Financial Institution.*** A "foreign financial institution" or "FFI" is any financial institution that is not a U.S. entity and satisfies one or more of the following tests: (1) it accepts deposits in the ordinary course of banking or similar business; (2) it holds financial assets for the account of others as a substantial part of its business; or (3) it is engaged (or holds itself out as being engaged) primarily in the business of investing, reinvesting or trading in securities, partner-

ship interests, commodities or any interest, including a futures, forward contract or option in such securities, partnership interests or commodities.<sup>42</sup>

***Excepted Financial Accounts.*** A financial account is not a SFFA if the rules of Code Sec. 475(a) apply to all holdings in the account or an election under Code Sec. 475(e) or (f) is made with respect to all holdings in the account.<sup>43</sup> A financial account maintained by a U.S. payor,<sup>44</sup> including assets held in such account is not a SFFA. For example, a specified person is not required to report on Form 8938 (or a FBAR) for a financial account maintained by a U.S. branch of a foreign financial institution described in Reg. §1.1441-1(b)(2)(iv).<sup>45</sup> A SFFA also includes a financial account maintained by a financial institution that is organized under the laws of a U.S. possession.<sup>46</sup> Thus, even though a financial institution which is organized under the laws of a U.S. territory is not generally a foreign financial institution for purposes of Code Sec. 1471(d)(4), a SFFA includes a financial account maintained by such financial institution and must be reported unless it is owned by a bona fide resident of the U.S. territory.<sup>47</sup>

***Other Specified Foreign Financial Assets.*** Other specified foreign financial assets include any of the following assets or instruments that are held for investment and that are not held in an account maintained by a financial institution including: (1) any stock or security issued by a person other than a U.S. person; (2) any financial instrument or contract that has an issuer or counterparty that is other than a U.S. person; and (3) any interest in a foreign entity.<sup>48</sup>

According to the 6038D Temporary Regulations these three categories are broad and overlap in certain cases such that an asset not held in a financial account may be within more than one of the statutory categories of Code Sec. 6038D(b)(2). For example, stock issued by a foreign corporation is stock that is issued by a person other than a U.S. person, and is also an interest in a foreign entity.

**Held for Investment.** An asset is held for investment for purposes of Code Sec. 6038D if that asset is not used in, or held for use in, the conduct of a trade or business of a specified person.<sup>49</sup> The 6038D Temporary regulations apply principles based on the asset use test of Reg. §1.864-4(c)(2),<sup>50</sup> with certain modifications.<sup>51</sup> Under the asset-use test, a determination is made whether the income, gain or loss is derived from assets used in or held for use in the conduct of a trade or business in the United States.<sup>52</sup> This test looks to the relevant facts and circumstances.<sup>53</sup>

**Trade or Business Test.** An asset is used in or held for use in a trade or business and not held for investment if the asset is: (1) held for the principal purpose of promoting the present conduct of a trade or business; (2) acquired and held in the ordinary course of a trade or business, as for example, in the case of an account or note receivable arising from that trade or business; or (3) otherwise held in a direct relationship to the trade or business.<sup>54</sup> Presumably, this test is made on a tax-year-by-tax-year basis, but no further guidance has as yet been provided.

**Direct Relationship Between Holding an Asset and a Trade or Business.** For purposes of determining whether an asset is held in a direct relationship to the trade or business, principal consideration will be given to whether the asset is needed in the trade or business of the specified person. An asset will be considered needed in a trade or business only if the asset is held to meet the present needs of that trade or business and not its anticipated future needs. For example, an asset will be considered as needed in the trade or business if the asset is held to meet the operating expenses of the trade or business. In contrast, an asset will 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.<sup>55</sup> For this purpose, stock is never considered to be used or held for use in a trade or business.<sup>56</sup>

**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: (1) 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; (2) the income of the asset is retained or reinvested in the trade or business; and (3) personnel who are actively involved in the conduct of the trade or business exercise significant management and control over the investment of such asset.<sup>57</sup>

**Special Rule for Interests in Foreign Trusts and Foreign Estates.** A beneficial interest in a foreign trust or a foreign estate is not a SFFA unless the specified 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.<sup>58</sup> It is presently unclear if a specified person will be deemed to know or have reason to know of the interest in a foreign trust or estate based on periodic notices or

written or oral statements from the trustee, executor, administrator or other agent of such foreign trust or estate regarding such interest.

**Examples.** The following are examples of other SFFAs if they are held for investment:

- Stock issued by a foreign corporation
- A capital or profits interest in a foreign partnership
- A note, bond, debenture or other form of debt issued by a foreign person
- An interest in a foreign trust
- 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
- An option or other derivative instrument with respect to any of the above examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer

**Comparison to FBAR Financial Accounts.** In many respects, a “financial account” for purposes of the FBAR filing is broader and in certain respects narrower than an SFFA. A financial account for FBAR purposes includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit such as certificates of deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account includes a commodity futures or options account, an insurance policy only with a cash value, such as a whole life insurance policy, an annuity policy with cash value, and shares in a mutual fund that is available to the general public with a regular net asset value determination and regular redemptions.

It should be noted that the FBAR final regulations specifically reserved on the treatment of an investment company as a financial account, such as a privately held venture capital, private equity or hedge fund.<sup>59</sup> For FBAR purposes, a financial account does not include individual bonds, notes, lines of credit, or stock certificates directly held by the U.S. person, which are not “financial accounts”; nor does it include an unsecured loan to a foreign trade or business that is not a financial institution. In addition, a financial account is not foreign and is not subject to FBAR reporting if it is maintained in the United States, even if the account contains foreign assets. While the SFFA definition does not include an account maintained with a branch of a U.S. bank that is physically located outside the United States, this account would be a foreign financial account for FBAR purposes.

For FBAR purposes, an investor is not required to file an FBAR for an omnibus account that pools assets outside of the United States provided the investor can only access the account holdings through a domestic financial institution. However, if the custodial arrangement permits the U.S. person to directly access foreign holdings maintained by the foreign institution, such account is treated as FBAR reportable. It is likely that an omnibus account or a foreign master account at an FFI will be treated as a SFFA.

## Interest in a SFFA

### What Is an Interest in a SFFA?

A specified person is generally considered to have an interest in an SFFA if any income, gains, losses, deductions, credits, gross proceeds or distributions attributable to the holding or disposition of the asset are or would be required to be reported or otherwise reflected on a specified person's annual return.<sup>60</sup> Similar to an FBAR filer, a Form 8938 filer will have an interest in a SFFA whether or not there is income, gains, losses, deduction, credits, gross proceeds or distributions from holding or disposing of the asset reflected on the tax return for the year. If a specified person has an interest in the SFFA and the total amount of the SFFAs exceeds the reporting threshold a Form 8938 must be filed for the year.

**Interests in Assets Held in Financial Accounts.** The SFFA definition includes among other foreign assets any capital or profits interest in a foreign partnership or any debt or stock interest in a foreign corporation (other than a FFI) or a non-publicly traded debt or stock interest in a FFI if the reporting threshold is met. If a Form 8938 filer reports his or her interest in a financial account, he or she generally does not need to separately report an interest in the assets held in the financial account. In other words, the 6038D Temporary Regulations make clear that even though a person may be required to file because of his or her ownership of an interest in a foreign entity that is not disregarded, such as a partnership, trust, estate or corporation, he or she will not have an ownership interest in the foreign assets held by such entities solely as a result of such person's status as a partner, shareholder or beneficiary.<sup>61</sup>

**Interest in Foreign Trust.** Generally, an interest in a foreign trust is not a SFFA unless the filer knows or should have known of the interest. For this purpose, a filer is considered to know of the interest if he or she receives a distribution from such foreign trust or estate. However, if such filer owns any part of a grantor trust (other than a domestic bankruptcy liquidating trust, a confirmed plan under Chapter 11 or a domestic widely held investment trust under Reg. §1.671-5), he or she will own an interest in the SFFAs held by that part of the trust.<sup>62</sup>

**Disregarded Entity.** If a Form 8938 filer is the owner of a disregarded entity,<sup>63</sup> he or she will have an interest in any SFFAs owned by the disregarded entity. In contrast, a single-member LLC that is treated a disregarded entity for U.S. tax purposes will have a separate FBAR filing if it owns a foreign financial account.

**Joint Owner.** For Form 8938 purposes, a joint owner of an asset has an interest in the entire asset and must include the full value of the jointly

owned asset for purposes of determining whether the aggregate value of all SFFAs in which the joint owner has an interest exceeds the applicable reporting thresholds.<sup>64</sup> See "Reporting Thresholds."

**Comparison to FBAR 'Financial Interest.'** For FBAR purposes, a United States person has a financial

interest in each bank, securities or other financial account in a foreign country for which he is the owner of record or has legal title whether the account is maintained for his own benefit or for the benefit of others. If the account is maintained in the name of more than one person, each United States person in whose name the account is maintained has the financial interest in the account. In addition, for FBAR purposes, a U.S. person who has a financial interest in a foreign financial account in which the U.S. person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the U.S. person or the benefit of another person is FBAR reportable. Similarly, if a U.S. person has a financial interest in a foreign financial account for which the owner of record or holder of legal title is an agent, nominee, attorney or person acting in some capacity on behalf of the U.S. person with respect to the account FBAR reporting is also required.

The new tax return reporting requirements under Code Sec. 6038D are not intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by the HIRE Act.



In contrast, Form 8938 must only be filed for an SFFA if a specified person has the right to the underlying income, loss, deduction, gross proceeds or distributions from the SFFA, assuming the reporting threshold is met. As noted, this test is based upon the amount that would have been required to be reported under U.S. tax law on an annual return file with the IRS and not based upon foreign law reporting. Put simply, the rules are different for determining whether a financial interest exists for Form 8938 reporting and FBAR reporting.

**Interest in Foreign Corporation.** Reporting of the stock of a foreign corporation as an SFFA on Form 8938 is required if a U.S. specified person has any interest in foreign stock if the reporting threshold has otherwise been met, assuming the foreign corporation is not a disregarded entity for U.S. tax purposes. If a Form 8938 filer reports his or her interest in such corporation, he or she does not need to separately report an interest in the assets held in the corporation.

For FBAR purposes, reporting is required only if a U.S. person has a financial interest in a foreign financial account for which the owner of record is a corporation in which the U.S. person owns directly or indirectly more than 50 percent of the total value or voting power for the stock of such foreign corporation.

**Interest in Foreign Partnership.** Reporting a foreign partnership interest as an SFFA on Form 8938 is required by a U.S. specified person assuming the reporting threshold has been met. Also, if a Form 8938 filer reports his or her interest in the partnership, he or she does not need to separately report an interest in the assets held in the partnership.

For FBAR purposes, reporting is required only if a U.S. person has a financial interest in a foreign financial account for which the owner of record is a partnership in which the U.S. person owns directly or indirectly more than 50 percent of the interest in profits (e.g., the distributive share of partnership income taking into account any special allocation agreement) or capital of such foreign partnership.

**Interest in Simple or Complex Foreign Trust.** An interest in a simple or complex foreign trust is not an SFFA, unless the specified person knows or should have known of the interest based on readily accessible information of the interest. For this purpose, a filer is "considered to know" of the interest if he or she receives a distribution from such foreign trust or estate.<sup>65</sup> It is presently unclear whether a specified person will be deemed to know or have reason to know of the interest in a foreign trust or estate based

on periodic notices or written or oral statements from the trustee, executor, administrator or other agent of such foreign trust or estate regarding such interest.

For FBAR purposes, only a trust beneficiary who is a U.S. person who has either a present beneficial interest in more than 50 percent of the trust assets or receives more than 50 percent of the trust's current income will be required to report the trust's financial accounts on an FBAR. A U.S. person, for FBAR purposes will not be treated as having a financial interest in a foreign financial account held by a foreign trust if the U.S. person is a discretionary beneficiary or holds a remainder interest in the trust, unless the U.S. person is the trust's grantor and has an ownership interest in the trust.<sup>66</sup> For this purpose, an ownership interest would include either a present beneficial interest in more than 50 percent of the trust's assets or receives more than 50 percent of the trust's current income.<sup>67</sup>

**Interest in Grantor Trust.** Under a look-through rule, if a specified person owns any part of a grantor trust<sup>68</sup> (other than a domestic bankruptcy liquidating trust,<sup>69</sup> a confirmed plan under Chapter 11<sup>70</sup> or a domestic widely held investment trust under Reg. §1.671-5),<sup>71</sup> he or she will own an interest in the SFFAs held by that part of the trust and have a Form 8938 reporting obligation if the applicable reporting threshold is otherwise.

For FBAR purposes, a U.S. person has a financial interest in a foreign financial account for which the owner of record or holder of legal title is a trust of which the U.S. person is the trust grantor and has an ownership interest in the trust for U.S. tax purposes under Code Secs. 671-679.

**Disregarded Entity.** If a Form 8938 filer is the owner of a disregarded entity,<sup>72</sup> he or she will have an interest in any SFFAs owned by the disregarded entity and a reporting obligation under Form 8938 for such SFFAs if the reporting threshold is met.

For FBAR reporting purposes, a U.S. person has a financial interest in a foreign financial account for which any other entity, including for this purpose a disregarded entity, in which the U.S. person owns directly or indirectly more than 50 percent of the voting power, total value of equity interests or assets, or interests in profits. In addition, a single-member LLC that is treated a disregarded entity for U.S. tax purposes will have a separate FBAR filing if it owns a foreign financial account; and a trust for which the trust income, deductions, or credits are taken into account by another person



for purposes of U.S. tax law must file an FBAR if otherwise required to do so.

**Signature Authority.** For FBAR reporting purposes, a U.S. person that has “signature authority” over a foreign financial account that meets the \$10,000 reporting threshold must file an FBAR. Signature authority is the authority of an individual, alone or with another individual to control the disposition of assets held in a foreign financial account by direct communication, whether in writing or otherwise to the bank or other financial institution that maintains the financial account. For Form 8938 filing purposes, the fact that a U.S. person has signature authority will not, in and of itself, trigger a filing requirement absent some other interest in the SFFA.

## Reporting Thresholds

### What Is the Reporting Threshold?

If a specified person satisfies the reporting threshold and no other exception applies, he or she must file a Form 8938 with his or her tax return.

**Taxpayers Living in the United States.** The following “reporting thresholds” apply if the taxpayer is living in the United States: (1) a person that is not married and not living abroad satisfies the reporting threshold only if the total value of SFFAs is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year; (2) for a married person filing jointly and not living abroad, these reporting thresholds are increased to \$100,000 and \$150,000 respectively; and (3) for a married person filing separately and not living abroad, these reporting thresholds are \$50,000 and 75,000, respectively.

**Taxpayers Living Abroad—Foreign Presence Test.** According to the preamble to the 6038D temporary regulations, the reporting thresholds are higher for a person “living abroad” than for a person living in the United States because such person can be reasonably expected to have a greater amount of SFFAs unrelated to the policies of Code Sec. 6038D.<sup>73</sup> The 6038D temporary regulations and the final Form 8938 clarify what is meant by the term “living abroad” for purposes of the reporting threshold test.

More specifically, for a person with a tax home is a foreign country that meets one of the presence abroad tests, the reporting thresholds are increased. The following persons satisfy the presence abroad test: (1) A U.S. citizen who has been a *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire tax year;

or (2) a U.S. citizen or resident who is present in a foreign country or countries at least 330 days during any period of 12 consecutive months that ends in the tax year being reported.

This is the same language that is used when determining if a U.S. person working in a foreign location meets the requirements of the Code Sec. 911 foreign earned income exclusion. The tests are usually referred to as the “bona fide residence test” and the “physical presence test.”<sup>74</sup> However, a specified person is not required to claim the earned income exclusion under Code Sec. 911 in order to be considered as “living abroad” for purposes of these increased Form 8938 reporting thresholds, which are summarized in Table 1.

Assets reported by a specified person on certain other timely filed tax forms are not required to be separately identified on Form 8938, but the value of SFFAs that qualifies for this exception should be included for purposes of determining whether a specified person exceeds the applicable reporting thresholds.<sup>75</sup> However, the 6038 Temporary Regulations exclude from this calculation assets that are excepted from reporting and are considered owned by a specified person that is treated as the owner of certain trusts and certain assets held by a specified individual who is a *bona fide* resident of a U.S. territory.<sup>76</sup>

The reporting thresholds are summarized in Table 1.

If the fair market value of a SFFA is less than zero, the instructions direct to use a value of zero both to determine the maximum value of the assets for reporting purposes and to determine the total value of all your SFFAs.<sup>77</sup>

## Information Required to Be Reported on Form 8938

### What Information Is Required to Be Reported on Form 8938?

Although the information required to be reported on Form 8938 is similar to the information disclosed on an FBAR, it is not identical.

The information to be included on the statement includes identifying information for each asset and its maximum value during the tax year. In the case of an account, the information to be attached to an individual’s tax return with respect to any such asset is the name and address of the financial institution in which such account is maintained and the account number of such account. In the case of any stock or

security, the required information includes the name and address of the issuer and such information as is necessary to identify the terms and class or issue of which such stock or security is a part. In the case of any other instrument, contract or interest a filer must include such information as is necessary to identify the instrument, contract or interest; the nature or terms of such instrument, contract or interest; the names and addresses of all issuers and counterparties with respect to such instrument, contract or interest. In each case, the maximum value of the asset during the year must be disclosed.<sup>78</sup> In addition, all information on Form 8938 must be reported in English.

Commentators suggested before the release of the 6038D regulations that clarity is needed for the phrase, “any financial instrument or contract” and have asked whether this term includes: (1) foreign social security programs; (2) private pension funds; (3) private life insurance contracts; (4) mortgages; (5) futures, options and derivatives; and (6) other contracts.<sup>79</sup> The 6038D regulations have provided a better understanding of this term, and exclude certain foreign social security programs,<sup>80</sup> but more guidance and examples will no doubt be helpful.

## Foreign Deposit and Custodial Accounts and Other Financial Accounts Maintained by FFI

Part I of Form 8938 reports the information for foreign deposit and custodial accounts and directs a filer that has more than one account to attach a continuation sheet with the required information for each additional account. This Part requests that the filer: (1) identify the account as a deposit or custodial account; (2) provide an account number or other designation, (3) provide the maximum value of the account during the year; (4) indicate whether the filer used a foreign currency exchange rate to convert the value of the account to U.S. dollars, and, if so, the foreign currency in which the account is maintained, the foreign currency exchange rate used, and source of the exchange rate if not from the U.S. Treasury Financial Management Service; and (5) provide the name and mailing address of the financial institution. In addition, the filer must check whether the account was opened or closed during the tax year, whether it was jointly owned with spouse, and whether no tax item of income, loss, deduction or credit was

**Table 1**

### Form 8938 Reporting Thresholds

Filing Status	Value on the Last Day of the Tax Year More Than	Value at Any Time of the Tax Year
Unmarried and living in the United States	\$ 50,000	\$ 75,000
Married filing jointly and living in the United States	\$100,000	\$150,000
Married filing separately and living in the United States	\$ 50,000	\$ 75,000
Bona fide resident of foreign country or present in foreign countries at least 330 days during a 12-month period and not filing jointly	\$200,000	\$300,000
Bona fide resident of foreign country or present in foreign countries at least 330 days during a 12-month period and filing jointly	\$400,000	\$600,000

### FBAR Reporting Threshold

	Aggregate value any time during the calendar year
U.S. person that has a financial interest in or signature authority over foreign financial accounts	\$ 10,000

reported on Part III. Presumably, the final Form 8938 will also require other FFI financial accounts (such as debt or equity interests in a FFI or its expanded affiliated group which are not regularly traded on an established securities exchange) to be reported either on Part I or Part II of the new form.

## Other Foreign Assets

Part II of Form 8938 reports the information for SFFAs which are not held in a foreign financial account and which are not otherwise reported on Forms 3520, 3520-A, 5471, 8621 or 8865. See "Duplicative Reporting." If the filer has more than one asset, the instructions to Form 8938 direct that the filer attach a continuation sheet with the same information for each additional asset. Part II requests that the filer provide: (1) a description of the asset; (2) an identifying number or other designation; (3) the maximum value of the asset during the year by value ranges up to \$200,000 or the actual maximum value if more than \$200,000; (4) the date acquired or disposed of during the tax year, if applicable (5) identification whether the asset is jointly owned with spouse; (6) whether no tax item of income, loss, deduction or credit was reported on Part III; and (7) whether the filer used a foreign currency exchange rate to convert the value of the account to U.S. dollars, and, if so, the foreign currency in which the account is maintained, the foreign currency exchange rate used, and the source of the exchange rate if not from the U.S. Treasury Financial Management Service.

The instructions to Form 8938 indicate that as part of the description of the stock or securities the filer should include the class or issue of stock or securities. The instructions provide two examples. In example 1, the filer owns 100 shares of XYZ Company, an Italian S.A. A sufficient description is "100 Class A shares of XYZ Company, S.A." In example 2, the filer owns a bond issued by AB GmbH, a German GmbH. A sufficient description is "Bond of AB GmbH, maturing on December 31, 2015."

In addition, if the asset reported is stock of a foreign entity or is an interest in a foreign entity, the filer should report the name and mailing address of the foreign entity, the type of foreign entity (e.g., partnership, corporation, trust or estate), and whether the foreign entity is a PFIC. If the asset is not stock of a foreign entity or an interest in a foreign entity, the filer should report the name and mailing address of the issuer or counterparty, the type of issuer or counterparty, and whether the issuer or counterparty is a U.S. person or foreign person. If the asset has more than one issuer or

counterparty, the instructions direct that a continuation sheet should be provided with the same information for each additional issuer or counterparty.

## Tax Items Attributable to SFFAs

Part III of Form 8938 reports the amount of income, gain or loss, deductions, or credits for the filer's SFFAs and the schedule, form or return on which the filer reported the item (e.g., form and line). The following items are specifically identified as separately reportable: interest, dividends, royalties, gains or losses, deductions and credits.

## Asset Valuation

### Valuation Guidelines

The value of a SFFA must be determined both for purposes of determining whether the aggregate value of the SFFAs in which a specified person holds an interest exceeds the reporting thresholds (see "Reporting Thresholds"), and for purposes of determining the maximum value of a SFFA on Form 8938. The value of a SFFA for both of these purposes generally is the asset's fair market value.<sup>81</sup> If the maximum value of a SFFA is less than zero, the value of the SFFA is treated as zero for purposes of determining the aggregate value of SFFAs in which a specified person has an interest and determining the maximum value of a SFFA to be reported on Form 8938.<sup>82</sup>

### What Is the Maximum Value of SFFA Assets?

**Valuing Financial Accounts.** The maximum value during the tax year of each SFFA must generally be reported on Form 8938. The value of a SFFA is its fair market value and in most cases, a filer can make a reasonable estimate of the asset's maximum fair market value during the year. The draft instructions to the Form 8938 indicate that an appraisal by a third party is not necessary to estimate the maximum fair market value during the year. A taxpayer may rely upon periodic account statements provided at least annually to report a financial account's maximum value unless the taxpayer has actual knowledge or reason to know that the statements do not reflect a reasonable estimate of the maximum account value during the tax year.<sup>83</sup>

**Valuing SFFAs Other Than Financial Accounts.** In most cases, a taxpayer may use the value of a SFFA other than a financial account as of the last day of the tax year as the maximum value unless he or she

has reason to know otherwise, for example, because there is reason to know that the asset's value declined significantly during the year.<sup>84</sup>

**Foreign Currency Conversion.** The values of SFFAs denominated in a foreign currency must be determined in the foreign currency and then converted to U.S. dollars.<sup>85</sup> For purposes of determining the maximum value of the asset during the tax year, the taxpayer determines the maximum value in the foreign currency during the tax year and converts that value to U.S. dollars by using the spot rate in effect on the last day of the tax year, even if the taxpayer sold or otherwise disposed on the SFFA before the last day of the tax year.<sup>86</sup>

**Valuing Interests in Trusts and Estates, Pension Plans and Deferred Compensation Plans.** If a taxpayer is a beneficiary of a foreign trust, the maximum value of the interest in the trust is the sum of the fair market value determined as of the last day of the tax year of all of the currency or other property distributed from the foreign trust during the tax year to the specified person, plus the value as of the last day of the tax year of the specified person's right as a beneficiary to receive mandatory distributions from the foreign trust as determined under the valuation tables under Code Sec. 7520.<sup>87</sup>

If a taxpayer has an interest in a foreign estate, foreign pension plan or foreign deferred compensation plan, the maximum value of such interest is the fair market value of the taxpayer's beneficial interest in the assets of the estate, pension plan or deferred compensation plan as of the end of the tax year. If the taxpayer does not know or have reason to know the fair market value, the maximum value is the fair market value determined as of the end of the tax year of the cash paid and other property distributed during the tax year to the taxpayer as a beneficiary or participant.<sup>88</sup>

The 6038D Temporary Regulations also provide that, if the taxpayer does not know or have reason to know based on readily ascertainable information the fair market value during the taxable year of an interest in a foreign trust, foreign estate, foreign pension plan or foreign deferred compensation plan, then the foregoing maximum values are to be used in applying the reporting thresholds.<sup>89</sup>

Since the maximum value of a specified person's interest in a foreign estate, trust, pension plan or

deferred compensation arrangement may, but is not required to, be reflected on a period account statement or other statement during the tax year this may ease the compliance burden somewhat for the filers of Form 8938. However, presumably the executor, trustee, plan sponsor, administrator or employer must nonetheless report the amount of cash paid and the fair market value of other property distributed to the beneficiary or participant in sufficient time for the taxpayer to file his or her tax return on a timely basis.

**Spouses Filing a Joint or Separate Return and Other Joint Owners.** If a joint return is filed with a spouse, the taxpayer and spouse need only report the maximum value of a jointly held account once on a single Form 8938 with the joint return.<sup>90</sup> However, if married persons file separately, each spouse must report the maximum value of a jointly held account separately on separate Forms 8938 to be filed with each separate income tax return.<sup>91</sup> For other joint owners, the draft instructions to Form 8938 indicate that the maximum value of the entire jointly held account should be reported

on Form 8938, regardless of the value of the separate interest in the account.

**Comparison to FBAR.** For FBAR reporting purpose, the maximum value of an account is the largest or highest value and not the average amount of currency and nonmonetary assets during the calendar year being reported. As is the case for Form 8938 reporting, the maximum value for FBAR reporting purposes can be a reasonable approximation of the greatest value of currency or nonmonetary assets during the calendar year. Periodic account statements may be relied upon to determine the maximum value of the account, provided that the statements fairly reflect the maximum value during the calendar year. For example, if the statement closing balance is \$9,000, but at any time during the year a balance of \$15,000 appears on a statement, the maximum value is 15,000. The currency conversions rules applicable to FBARs generally are the same as for Form 8938.<sup>92</sup>

For purposes of determining whether a taxpayer must attach a Form 8938 to his or her return a taxpayer must determine whether the fair market value of the total value of his or her SFFAs exceeds the appropriate reporting threshold either on the last day of the tax year, or at any time during the year

Taxpayers in many cases now will have to file both a Form 8938 as well as an FBAR and will no doubt provide duplicative information.



depending upon the appropriate threshold amount tested. (See "Reporting Thresholds.") If the reporting threshold is met, among other reporting requirements, a taxpayer must then determine the maximum value of each SFFA asset at any time during the tax year. In contrast, for FBAR purposes, a U.S. person must determine whether the maximum value of the aggregate foreign financial accounts that he or she has a financial interest in, or signature authority over, exceeds \$10,000 at any during the calendar year. If this filing requirement is met, he or she must then determine the maximum account separately for each such account.

## Exceptions to Form 8938 Reporting

### Are There Exceptions to Form 8938 Reporting?

A specified person is not required to report a financial account or other SFFA if the account is either an excepted financial account, or is subject to another SFFA exception. An "excepted financial account" includes the following:

- A financial account (or assets held in that account) that is maintained by a U.S. payor,<sup>93</sup> such as a domestic financial institution. A U.S. payor generally also includes a domestic branch of a foreign bank or foreign insurance company and a foreign branch or foreign subsidiary of a U.S. financial institution (see "U.S. Payor Exception").
- An account maintained by a dealer or trader in securities or commodities if all of the holdings in the account are subject to mark-to-market accounting rules (the "MTM rules") for dealers in securities or an election under Code Sec. 475(e) or (f) is made for all of the holdings in the account. At present, it is unclear if future guidance will permit a taxpayer to have separate trades or business and/or sub-accounts which are either subject to the MTM rules, and therefore exempt from Form 8938 reporting or are identified as securities or commodities covered by a particular Code Sec. 475 exception, and therefore subject to Form 8938 reporting unless another exception applies.

A specified person will also not be required to file a Form 8938 if one of the other SFFA exceptions apply:

- The asset is reported by the taxpayer on certain other forms filed with the IRS for the tax year. See "Duplicative Reporting."

- The specified person is treated as the owner of any part of a domestic bankruptcy liquidating trust under Chapter 7, a confirmed plan under Chapter 11 of the Bankruptcy Code<sup>94</sup> or a domestic widely held fixed investment trust under Reg. §1.671-5, and the trust holds the asset.
- Is an interest in a social security, social insurance or similar program of a foreign government.<sup>95</sup> See "Foreign Governmental Retirement Plans."
- Is a beneficial interest in a foreign trust or estate and the specified person does not know or have reason to know of the interest.<sup>96</sup>

**U.S. Payor Exception.** A financial account maintained by a U.S. payor, including the assets in the account) is not a SFFA for purposes of Code Sec. 6038D. A U.S. payor is defined to include: (1) a person described in Code Sec. 7701(a)(30)<sup>97</sup> including a foreign branch or office of such person; (2) the U.S. government or a state government or political subdivision thereof and any agency or instrumentality of any of these governments; (3) a controlled foreign corporation as defined under Code Sec. 957(a); (4) a foreign partnership, if any time during the year, one or more partners are U.S. persons holding more than 50 percent of the income or capital interest in the partnership, of if at any time during its tax year it is engaged in the conduct of a trade or business in the United States; (5) a foreign person 50 percent or more of the gross income of which, from all sources for the three-year period ending with the close of the tax year preceding the collection or payment (or such part of such period as the person was in existence), was effectively connected to the conduct of a trade or business within the United States; (6) a U.S. branch of a foreign bank or foreign insurance company described in Reg. §1.1441-1(b)(2)(iv).<sup>98</sup> For this purpose, a U.S. branch of a foreign bank or insurance company is one that is subject to the regulatory supervision by the Federal Reserve Board or the National Association of Insurance Commissioners. A U.S. branch must furnish a U.S. branch withholding certificate on Form W-8.<sup>99</sup>

**Foreign Governmental Retirement Plans.** A KPMG Note<sup>100</sup> has observed that the exception that applies to foreign government mandated retirement arrangements may be construed by the IRS narrowly and suggests that:

while the additional exception is welcome, taxpayers should not assume that all government-mandated arrangements meet this exception,

even if considered part of the foreign country's social insurance. It is unlikely that accounts such as the Australia Superannuation fund or the India Provident Fund will meet this exception. This is because many of these types of arrangements operate like a foreign pension plan where the employee and employer contributions are set aside in a privately-directed account for the benefit of the individual. In addition, often time the balance in the account can be withdrawn upon permanent departure from the country which is not the type of foreign social security plan that would meet the exception described in the temporary regulations.

## Comparison to FBAR Exceptions to Reporting

**Nostro Accounts.** For FBAR purposes, correspondent or nostro accounts which are maintained by banks and used solely for bank-to-bank settlements are not required to be reported. It is presently unclear whether there is a similar exception for Form 8938 filing purposes.

**Accounts Owned by A Governmental Entity, International Financial Institution Tax-Exempt Organization.** A foreign

financial account of a governmental entity is not required to be FBAR reported by any person. Similarly, a foreign financial account of any international financial institution is not required to be FBAR reported. However, there does not appear to be any exception for FBAR reporting purposes for charitable or other private nonretirement tax-exempt organizations such as universities, endowments or private foundations, and thus such organizations and U.S. persons who have a financial interest in such organizations under the FBAR financial interest rules may have a FBAR reporting obligation. See "What Is an Interest in a SFFA—Comparison to FBAR 'Financial Interest.'"

The 6038D Proposed Regulations extending Code Sec. 6038D to specified domestic entities contemplate filing by certain United States partnerships, corporations or trusts, but provide an exemption for specified domestic entities that are tax exempt under Code Sec. 501(a). Presumably, accounts of govern-

mental entities and certain international financial institutions will be granted an exemption similar to the FBAR exception when the proposed regulations are finalized.

**IRA Owners and Beneficiaries.** For FBAR purposes, an owner or beneficiary of an IRA is not required to file a FBAR. Similarly, an interest in an IRA will likely not be treated as a SFFA, although guidance has not yet been provided on this point. It should be noted that an IRA is not a specified U.S. person for purposes of Code Sec. 1473(3)(C).

**Pensions and Deferred Compensation Arrangements.** For FBAR purposes, a participant or beneficiary of a retirement plan as described in Code Sec. 401(a), 403(a) or 403(b) is not required to report a foreign financial account held by or on behalf of the retirement plan. In contrast, a specified person holding an interest in a foreign nongovernmental pension plan, retirement plan or foreign deferred compensation plan may be required to file Form 8938.

## Duplicative Reporting

A taxpayer does not need to report a SFFA on Form 8938 if the asset is reported by the taxpayer on one or more of the following forms for the same tax year: Form 3520<sup>101</sup> (or Form 3520-A), Form 5471,<sup>102</sup> Form 8621,<sup>103</sup> Form 8865<sup>104</sup> and Form 8891.<sup>105</sup> Instead, the taxpayer must provide his or her name, identifying number (social security number or taxpayer identification number (ITIN)), address, and tax year at

the top of Form 8938, and complete Part IV to identify the forms on which the taxpayer reported the SFFA and the number of these forms he or she filed. The taxpayer must still include the value of these assets which are reported on these forms in determining whether the taxpayer satisfies the appropriate reporting threshold. (See "What Is the Reporting Threshold?") Note, however, that filing a FBAR does not relieve a specified person from filing the Form 8938 if the applicable reporting threshold is met and an exception does not otherwise apply.

**Comparison to FBAR.** The broad based exception for duplicate reporting for Code Sec. 6038D purposes is generally not available for purposes of FBAR reporting.

Both Form 8938 under new Code Sec. 6038D and the FBAR continue to rely upon self-reporting.

## Foreign Grantor Trusts

If a taxpayer is treated as the owner of all or any portion of a foreign grantor trust, the taxpayer does not have to report any of the SFFA held by foreign trust if the following conditions are satisfied. First, the taxpayer must report the foreign trust on a Form 3520 filed with the IRS for the tax year. Second, the foreign trust must file Form 3520-A<sup>106</sup> with the IRS for the tax year. In addition, the taxpayer must identify on Form 8938 the form on which the taxpayer reported the assets and the number of forms filed.

## Administrative Requirements

### When and How to File

If a specified person meets the reporting threshold, such person must attach the Form 8938 to the annual return and file by the due date including extensions. An annual return includes a Form 1040, a Form 1120, a Form 1065, a Form 1041, a Form 1120-F, a Form 1120-S and a Form 1040NR of a nonresident alien who is a resident of Puerto Rico or Samoa.<sup>107</sup>

Code Sec. 7502(a) generally provides the so-called "mail box" rule under which the date on which the taxpayer mailed the document (e.g., the date the return was postmarked) is treated as the date that the return was filed, when a taxpayer properly mails certain documents before the deadline (regardless of whether it is the original deadline or an extended deadline) but the IRS does not receive such document until after the deadline. In contrast, the FBAR is a separate filing obligation that must be received by the Treasury on or before June 30 of the year immediately following the calendar year being reported, and it is not attached to the annual return. If a specified person does not have to file an income tax return for the year, he or she does not need to file Form 8938 even if he or she otherwise meets the reporting threshold. There is no similar exception for FBAR filers. The Form 8938 should be filed with the applicable IRS service center where the taxpayer files his or her return, while the FBAR should be filed with the Department of the Treasury and copy to the Enterprise Computing Center, both located in Detroit, Michigan.

### Reporting Period

The reporting period for a Form 8938 is the tax year of the specified individual or specified domestic entity. If the taxpayer is a specified individual for less than the entire tax year, the reporting period is the part of the year that he or she is a U.S. citizen or resident

alien.<sup>108</sup> The draft instructions to Form 8938 provide the following examples:

- John is a calendar-year taxpayer. The Form 8938 reporting period is the calendar year.
- Agnes was a single calendar-year taxpayer who died on March 6. The Form 8938 reporting period begins on January 1 and ends on March 6.
- George, a calendar-year taxpayer, is not a U.S. citizen or married. George arrived in the United States on February 1 and met the conditions of the substantial presence test on August 2. The Form 8938 reporting period begins on George's U.S. residency starting date, February 1, and ends on December 31.

**Comparison to FBAR Reporting Period.** In contrast to the Form 8938 reporting period, the FBAR must be filed on or before June 30 of the year following the calendar year. Unlike the Form 8938, the FBAR is not attached to the filer's tax return and no extension of time is permitted to file the FBAR. Also, an FBAR is considered filed when it is received by the IRS, not when it is postmarked as is the case for income tax returns

### Is Consolidated or Combined Reporting Permissible?

If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated return, the Form 8938 of the specified domestic entity must be filed with the consolidated federal income tax return of the affiliated group.<sup>109</sup> In contrast, for FBAR reporting purposes, if a U.S. person that is an entity is named in a consolidated FBAR filed by a greater-than-50-percent owner, such entity is not required to file a separate FBAR.

### Signatures

As a separately filed report, the FBAR must be signed by the person identified in Part I of the FBAR as the filer. If the FBAR is being filed on behalf of a partnership, corporation, fiduciary or other legal entity, it must be signed by an authorized individual. Since the Form 8938 is a part of the annual return there is no separate signature or attestation clause on the Form 8938. Rather, the return itself must be signed by the taxpayer.

### Recordkeeping Requirements

Records must be kept to substantiate the information on Form 8938 and to satisfy the federal income tax recordkeeping requirements. The Temporary 6038D regulations indicate that books and records



relating to the collection of information must be retained as long as their contents may become material in the administration of any internal revenue law.<sup>110</sup> For this purpose, a taxpayer will be required to keep and retain records supporting the income tax return until the period for limitations expires (generally six years) and for so long as they may be material to the administration of the tax law.<sup>111</sup> Records may need to be maintained for a longer period by persons who have been formally charged with a criminal tax violation.<sup>112</sup>

**Comparison to FBAR Recordkeeping Requirements.** If an FBAR is required to be filed, certain records must be retained by the filer in addition to the requirements under Title 26. Each person having a financial interest in, or signature or other authority over, any such account must keep the following records: (1) name in which the account is maintained; (2) number or other designation of the account; (3) name and address of the foreign bank or other person whom the account is maintained; (4) type of account; and (5) maximum value of such account during the reporting period. While retaining a copy of the FBAR is not required, a copy of the current FBAR contains most of the required information. The records must be kept for five years and be available at all times for inspection as provided by law.

### **Filing Amended or Delinquent Forms**

The instructions to Form 8938 indicate a filer should check a box indicating whether it is an original, amended or supplemental Form 8938 that relates to a previously filed return or whether two Forms 8938 are being filed for the current year under the transitional rule for tax years beginning after March 18, 2010.<sup>113</sup> At present, the draft instructions to Form 8938 do not require any explanation for an amended or delinquent Form 8938.

**Comparison to FBAR Amended or Delinquent Reports.** Similar to the Form 8938, a filer of an amended FBAR should check the box on the FBAR indicating it is an amended report. However, unlike the amended Form 8938, to amend an FBAR or file a delinquent FBAR one must also not only make the needed additions or corrections, but must attach a statement explaining the additions or subtractions and staple a copy of the original FBAR to the amended report. Presumably, this may help to prevent sizeable civil penalties and may also forestall criminal prosecution in certain cases as a mitigation strategy.

## **Noncompliance with Form 8938 Reporting Requirements**

### **Penalty for Failure to Disclose SFFAs**

If an individual fails to file a properly complete and correct Form 8938 with his or her return by the due date including extensions such person may be subject of a penalty of \$10,000 for the tax year.<sup>114</sup> In addition, if any such failure continues for more than 90 days after the day on which the IRS mails notice of such failure, such individual may be subject to an additional penalty of \$10,000 for each 30-day period (or part thereof) during which such failure continues with such penalty not to exceed \$50,000 for one taxable period.<sup>115</sup>

The computation of the penalty is similar to that applicable to failures to file reports with respect to certain foreign corporations under Code Sec. 6038. Thus, an individual who is notified of his failure to disclose with respect to a single tax year and who takes remedial action on the 95th day after such notice is mailed incurs a penalty of \$20,000 comprising the base amount of \$10,000, plus \$10,000 for the fraction (*i.e.*, the five days) of a 30-day period following the lapse of 90 days after the notice of noncompliance was mailed. An individual who postpones remedial action until the 181st day is subject to the maximum penalty of \$50,000; the base amount of \$10,000, plus \$30,000 for the three 30-day periods, plus \$10,000 for the one fraction (*i.e.*, the single day) of a 30-day period following the lapse of 90 days after the notice of noncompliance was mailed.

One commentator<sup>116</sup> has suggested that the 90-day period and subsequent 30-day periods are too short by stating:

Americans who reside abroad and have received individual communications from the IRS have complained that they receive IRS mailings months after the date on the communication report and often after the deadline indicated for compliance. An automatic increase in the penalty can lead to totally unjustified penalties if the individual residing overseas does not receive the document within a time frame to allow him/her to study the issue, and if necessary, correct the reporting and pay the initial penalty.

In addition, this commentator also questioned the definition of "mailing" by stating:



What is the definition of 'mailing' by the IRS—the date on the IRS document or the actual time that the document is put into U.S. postal system for mailing? Or does the IRS assemble mail and hold it for some time before actually initiating the mailing to a foreign location for further mail distribution? In some places in Africa, Latin America and Asia, it may take two months or more for a mailing from the United States to arrive. The law presumes that all mail sent to a foreign address will arrive within the same delays as those for U.S. addresses; this simply is not the case.

### Presumption of Maximum Value

If the IRS determines that an individual has an interest in an SFFA, the IRS asks such individual for information about the value of the asset, and such individual does not provide enough information to enable the IRS to determine the value of such asset, then the individual is presumed to own SFFAs with a value of more than the applicable reporting threshold. In such cases, the individual may be subject to failure to file penalties for failure to file the Form 8938.<sup>117</sup>

### Reasonable Cause Exception

However, no penalty will be imposed on any failure which is shown to be due to reasonable cause and not due to willful neglect. The taxpayer must affirmatively show the facts to support a reasonable cause claim. Foreign law prohibitions, such as the fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer for disclosing the required information, are not reasonable cause.<sup>118</sup>

### Accuracy-Related Penalties

The new law adds a new 40-percent accuracy-related penalty under Code Sec. 6662. The 40-percent penalty is imposed on any understatement of income attributable to an undisclosed SFFA, subject to the same defenses as are otherwise applicable under Code Sec. 6662. Under the new law, an asset is an "undisclosed foreign financial asset" if it is an asset subject to certain information reporting requirements, and the required information was not provided by the taxpayer during the relevant tax year.

Thus, a U.S. person who fails to comply with the various self-reporting requirements for a foreign financial asset and engages in a transaction with respect to that asset incurs a penalty on any resulting underpayment that is double the otherwise

applicable penalty for substantial understatements or negligence. For example, if a taxpayer fails to disclose amounts held in a foreign financial account, any underpayment of tax related to the transaction that gave rise to the income would be subject to the new penalty provision, as would any underpayment related to interest, dividends or other returns accrued on such undisclosed amounts.

The instructions to Form 8938 provide the following examples of underpayments due to transactions involving an undisclosed SFFA:

- You did not report ownership of shares in a foreign corporation on Form 8938 and you received taxable distributions from the company that you did not report on your income tax return.
- You did not report ownership of shares in a foreign company on Form 8938 and you sold the shares in the company for a gain on your income tax return.
- You did not report a foreign pension on Form 8938 and you received a taxable distribution from the pension plan that you did not report on your tax return.

### Civil Fraud and Possible Criminal Penalties

If a taxpayer underpays tax due to fraud, he or she may have to pay penalty of up to 75 percent of the underpayment due to fraud. In addition to civil penalties discussed above, a taxpayer who fails to file a Form 8938, fails to report an asset, or have an underpayment of tax may be subject to criminal penalties.<sup>119</sup>

**Comparison to FBAR Penalties.** A person that is required to file an FBAR who fails to properly file may be subject to a penalty not to exceed \$10,000, and if there is reasonable cause for such failure and the balance in the account is properly reported no penalty will be imposed.<sup>120</sup> However, a person who willfully fails to report an account or identifying information may be subject to a civil monetary penalty equal to the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation,<sup>121</sup> and willful violations may also trigger criminal penalties.

### Burden of Proof

Unlike the assessment of civil tax penalties, which may be applied in if a specified person fails to file a Form 8938 and report his or her SFFAs or has an underpayment of tax, there is no presumption of correctness in connection with the imposition of

FBAR penalties.<sup>122</sup> Similarly, in a Title 26 proceeding in connection with a failure to file a complete and accurate Form 8938, the IRS will have the burden of production with respect to penalties and additions to tax asserted by the government. This burden of production generally does not apply to the FBAR penalty.<sup>123</sup>

## Audits

When the IRS is conducting compliance activities under its delegated authority from FinCEN regarding FBAR reporting, it is acting as FinCEN's agent and is not normally permitted to use tax return information gathered under Title 26 or information systems derived from that information. As a result, the IRS has generally been precluded from verifying FBAR information against tax return information due to privacy and disclosure concerns. Thus, the IRS has separate examination guidelines in the Internal Revenue Manual for FBAR examinations<sup>124</sup> and has been required to develop FBAR processing and inventory case control systems separate and apart from the tax return processing and examination return control systems. Code Sec. 6038D will have none of these restrictions and will permit the IRS to use its full complement of tools to verify the information or lack of information filed on the Form 8938.

## Assessments

The IRS assessment authority for Title 26 matters, such as the failure to file a complete and accurate Form 8938 and underpayment of tax, is found in Code Sec. 6201 for income tax determinations. In contrast, FBAR assessments by the IRS emanate from Title 31 rather than Title 26. The IRS may impose a civil penalty on any person who violates or causes any violations of the FBAR rule, under 31 USC §5321(a) (5), which allows for an assessment within a specified period of time. See "Statute of Limitations."

## Statute of Limitations

If a taxpayer fails to file a Form 8938 or fails to report a SFFA, the statute of limitations for the taxable year may remain open for all or a portion of the taxable year until three years after the date on which the taxpayer files a Form 8938. In addition, if the taxpayer does not include in his or her gross income an amount relating to one or more SFFAs, and the amount that is omitted is more than \$5,000, any tax owed for the tax year can be assessed at any time within six years after he or she files the return.

For this purpose, a SFFA includes any SFFA in which the taxpayer has an interest without regard to the applicable reporting threshold and or whether the SFFA is excepted from Form 8938 reporting. See "Reporting Threshold" and "Are There Exceptions to Form 8938 Reporting?"

**Comparison to FBAR.** The above-described Title 26 statutes of limitation do not apply to FBAR cases. The statute of limitations on assessment of civil FBAR penalties is six years from the date of the violation. The statute of limitations on bringing suit to collect the assessment of civil penalties is two years from the date of assessment or the date any judgment becomes final in any criminal action under 31 USC §5322.220. The IRS may commence a civil action to recover a civil penalty assessed under 31 USC §5321(a) at any time before the end of the two-year period beginning on the later of (1) the date the penalty was assessed, or (2) the date any judgment becomes final in any criminal action under 31 USC §5322 in connection with the same transaction with respect to which the penalty is assessed. FBAR civil statutes of limitation on assessment and collection may be waived. The period of limitation for FBAR criminal penalties is the general statute of limitation found in 18 USC §3282, which provides that, except as otherwise provided by law, no person shall be prosecuted, tried or punished for any noncapital offense unless the indictment is found or the information is instituted within the five years next after such offense shall have been committed.

## Collection Rules

The authority to collect FBAR penalties comes from Title 31 rather than Title 26. While the penalty assessment in connection with a failure to file a complete and accurate Form 8938 is subject to the administrative collection remedies normally available for a tax or penalty under the Internal Revenue Code's broad collection provisions<sup>125</sup> with respect to notice and demand,<sup>126</sup> liens<sup>127</sup> and levies,<sup>128</sup> this is not the case in connection with a FBAR penalty assessment.

For purposes of the FBAR penalty assessment, the remedies available to collect the civil penalty are limited to collection through the Financial Management System (FMS), which collects on tax debts via a civil proceeding in U.S. district court to recover a civil penalty.<sup>129</sup> Presumably, these collection efforts include the use of the Department of Justice and

the U.S. Marshal to enforce judgments for FBAR penalties by taking possession of the debtor's assets and selling them to satisfy the judgment or the garnishment of his wages, rather than the Revenue Agent's broad lien and levy powers under the Internal Revenue Code for Title 26 matters including the failure to file Form 8938.

**Tax Court Challenge.** While taxpayers who want to challenge penalties in connection with a failure to file a Form 8938 can challenge them in Tax Court, where they do not have to pay taxes, interest and penalties up front, they cannot do so in connection with FBAR penalties, but must pay the liability, which may be large, and sue for a refund in U.S. District Court or wait until the government files suit in District Court to collect the FBAR penalty and challenge the assessment. It was suggested at a recent ABA Tax Section meeting that litigants should have a right to a jury trial in an FBAR proceeding. It should be noted the FBAR penalty will not fall within the exception to discharge in bankruptcy under the Bankruptcy Code while a tax penalty in connection with the failure to file Form 8938 may.

## Conclusion

Taxpayers in many cases now will have to file both a Form 8938 as well as an FBAR and will no doubt provide duplicative information. While the IRS to its

credit has tried to eliminate duplication of information for forms filed under Title 26, absent a legislative change, it may not be able to avoid some duplication relating to FBAR reporting under Title 31. Thus, complexity will no doubt be encountered because of the differences between such forms. It should be borne in mind that the FBAR was intended to combat white collar crime and money laundering, while Form 8938 has a narrower goal to improve tax compliance by U.S. taxpayers with offshore financial accounts.<sup>130</sup>

Both Form 8938 under new Code Sec. 6038D and the FBAR continue to rely upon self-reporting. It is still possible for U.S. tax cheats trying to hide assets offshore to open financial accounts with foreign financial institutions who have chosen not to participate in FATCA and are non-participating FFIs who are not investing in U.S. assets. However, in cases where a person intentionally tries to avoid reporting his or her interest in SFFAs on new Form 8938 or filing an FBAR, if required to do so, it is likely the IRS will seek not only to impose civil fraud penalties, but the IRS or the Department of Justice may try to impose criminal penalties, especially if the taxpayer has not reported the underlying income from these investments. While it is too early to tell, it is not too far a reach to suggest that the new 6038D reporting statement on Form 8938 may become the tool of choice for the next decade (akin to the FBAR now) to enforce criminal prosecutions against taxpayers who fail to report and pay their U.S. income taxes from their offshore accounts and assets.

## ENDNOTES

<sup>1</sup> Statement by Monika A. Templeman, Director of IRS employee plans examinations (Baltimore). See "Globalization, Tax Evasion Sharpen IRS Focus on International Issues," BLOOMBERG BNA DAILY REAL TIME (Jan. 1, 2012).

<sup>2</sup> See U.S. Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Tax Haven Banks and U.S. Tax Compliance, Staff Report (July 17, 2008) (the "Report"). The Report cites several studies by tax experts to support the \$100 billion gap.

<sup>3</sup> P.L. 111-47.

<sup>4</sup> Chapter 4 was added to the Code by Act Sec. 501(a) of the Hiring Incentives to Restore Employment Act of 2010 (P.L. No. 111-147), enacted March 18, 2010. Chapter 4 is a revised version of provisions that first appeared in a bill entitled the "Foreign Account Tax Compliance Act of 2009," H.R. 3933 and S. 1934, which was introduced on October 27, 2009, and is sometimes referred to as "FATCA."

<sup>5</sup> Baucus, Rangel, Kerry, Neal Press Release on Foreign Account Tax Compliance Act of 2009 (Oct. 27, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> Sec. 511(c) of the HIRE Act.

<sup>8</sup> T.D. 9567 (hereinafter "6038D Temporary Regulations"), 76 FR 78553 (Dec. 29, 2011).

<sup>9</sup> REG-130302-10 (hereinafter "6038D Proposed Regulations"), 76 FR 78594 (Dec. 29, 2011).

<sup>10</sup> Preamble to Code Sec. 6038D Temporary Regulations 76 FR 78553, at 78558.

<sup>11</sup> Unless expressly stated otherwise in this document, all references to the Code are to the Internal Revenue Code of 1986 and the regulations thereunder, as amended.

<sup>12</sup> Titles I and II of P.L. -508, as amended, codified at 12 USC §1829b, 12 USC §§1951-59, and 31 USC §5311-30. Regulations implementing Title II of the Bank Secrecy Act (BSA) were codified at 31 USC §§5311-30 and 31 CFR §103.

<sup>13</sup> The Code Sec. 6038D Temporary Regula-

tions provide increased thresholds in certain cases, as discuss in text below.

<sup>14</sup> Code Sec. 6038D Temporary Reg. §1.6038D-2T(a)(8).

<sup>15</sup> Code Sec. 6038D(h).

<sup>16</sup> 31 CFR §103.27(c). The \$10,000 threshold is the aggregate value of all of foreign financial accounts in which a U.S. person has a financial interest or over which the U.S. person has signature or other authority.

<sup>17</sup> It is likely that the IRS will use among other files the following files to identify each U.S. account holder or specified person: (1) DM-1 file—a file containing all the SSNs ever issued by the SSA; (2) the EIN-name control file—a file containing all the IRS-assigned EINs; (3) the ITIN file—a file containing all the IRS-assigned ITINs; and (4) the ATIN file—a file containing all the IRS assigned ATINs.

<sup>18</sup> Douglas O'Donnell, IRS Assistant Deputy Commissioner (International), at the recent 2012 Pacific Rim Tax Institute on January 20, 2012 stated, "Since the Group of 20



launched its global initiative in 2009 to safeguard the international financial system through improved transparency, more than 700 additional EOI agreements have been signed and 81 nations—including the United States—have undergone peer reviews.” In addition, Emily McMahon, Acting Assistant Secretary for Tax Policy at the New York State Bar Tax Section meeting on January 24, 2012 suggested that the IRS has already begun conversations with foreign governments about bilateral approaches to overcome the legal impediments to privacy and other laws in many countries, and is exploring the possibility that financial institutions of a particular country could report the information required by FATCA to their home country government, which would then transmit the information to the IRS in order to overcome obstacles to direct reporting. McMahon suggested that since bilateral solutions require reciprocity, the IRS may provide tax information about nonresidents to such foreign governments, such as the amount of bank deposit interest paid to nonresident account holders.

<sup>19</sup> On January 9, 2012, the IRS in IR-2012-5 announced yet another offshore voluntary disclosure program (2012 OVDP) to enable taxpayers hiding offshore accounts to get current with their taxes. This program follows the success of the 2009 Offshore Voluntary Disclosure Program (the 2009 OVDP) and the 2011 Offshore Voluntary Disclosure Initiative (the 2011 OVDI). The IRS noted that it has seen 33,000 voluntary disclosures from 2009 and the 2001 offshore initiatives, and that these two programs have collected more than \$4.4 billion to date and that the new program will be open for an indefinite period. The program is similar to the 2011 OVDI in many respects, but has a few key differences. For example, there is no set deadline for people to apply unlike the earlier program. While taxpayers with undisclosed accounts or assets and income may be able to avoid criminal prosecution the IRS news release indicates that under the 2011 program the penalty has now gone up from 25 percent to 27.5 percent. However, some taxpayers may be eligible for lesser penalties. As part of the voluntary disclosure, participants must file all original and amended tax returns and include the payment for back taxes and interest for up to eight years as well as paying the accuracy-related penalties or delinquency penalties. According to Charles Rettig, Esq. in a recent article describing the new program, “The ability of a U.S. taxpayer to maintain an undisclosed, “secret” foreign financial account is fast becoming nonexistent.”

<sup>20</sup> “Specified individuals” constitute in principle a subcategory of the broader class of “specified persons” required to make Code Sec. 6038D filings. However, “speci-

fied domestic entities” constitute the other subcategory of “specified persons” and are subject to a later effective date.

<sup>21</sup> Instructions for Form 8938 under the headings, “New reporting requirements” and “Who must file” at page 1.

<sup>22</sup> Preamble to 6038D Temporary Regulations, 76 FR 78553, at 78555. For this purpose, an annual return includes a Form 1040, Form 1120, Form 1065, Form 1041, Form 1120-F, Form 1120-S and a Form 1040NR of a nonresident who is a *bona fide* resident of Puerto Rico or American Samoa.

<sup>23</sup> Much consternation regarding the FBAR filing requirements as arisen from the provision requiring filing by persons having signature authority over, but not beneficial interest in, foreign accounts. This article focuses only on persons having a beneficial interest in a foreign account or asset.

<sup>24</sup> Instructions to FBAR (Rev. Nov. 3, 2011) under the heading, “General Instructions—Who Must File an FBAR.”

<sup>25</sup> Code Sec. 6103(d) permits disclosure to State tax and enforcement officials but only to the extent necessary in the administration of state tax laws.

<sup>26</sup> Preamble to 6038D Temporary Regulations, 76 FR 78553, at 78554-55. For this purpose, status as a resident alien is determined under Code Sec. 7701(b) and Reg. §301.7701(b)-1 through 201.7701(b)-9.

<sup>27</sup> A nonresident alien may elect under Code Sec. 6013(g) or (h) to be taxed as a U.S. resident. Code Sec. 6038D reporting requirements may also apply to residents of Puerto Rico or a U.S. possession depending on whether they are required to file a federal income tax return. See Preamble to 6038D regulations, 76 FR 78553, at 78555.

<sup>28</sup> Preamble to 6038D Temporary Regulations, 76 FR 78553, at 78555.

<sup>29</sup> FS-2011-13.

<sup>30</sup> Instructions to FBAR under the heading, “General Instructions—United States Person.”

<sup>31</sup> To determine whether the FBAR filer is an alien residing in the United States, the filer should apply the residency tests in Code Sec. 7701(b). For this purpose, an individual can generally establish that he is not a resident for FBAR purposes if he can show that *none* of the following three criteria apply: (1) the green-card test—individuals who at any time during the calendar year have been lawfully granted the privilege of residing permanently in the United States under the immigration laws automatically meet the definition of resident alien under the green-card test; (2) individuals who are not lawful permanent residents are defined as resident aliens under the substantial presence test if they are physically present in the United States for at least 183 days during the calendar year, or they are physically present in the United States for at least 31 days during the current

year and the specifications contained in Code Sec. 7701(b)(3); or (3) the person files a first-year election on his income tax return to be treated as a resident alien under Code Sec. 7701(b)(4). However, when applying these residency tests for FBAR purposes the United States is more broadly defined to include the States, the District of Columbia, all United States territories and possessions (e.g., American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the United States Virgin Islands), and the Indian lands as defined in the Indian Gaming Regulatory Act. For purposes of filing Form 8938, the term “United States” under Title 26 is defined as only including the States and the District of Columbia. Code Sec. 7701(a)(9).

<sup>32</sup> Instructions to FBAR – Definition of “United State Person” and “United States.”

<sup>33</sup> Code Sec. 6038D(b); Temporary Reg. §1.6038-3T(a) & (b).

<sup>34</sup> A financial account has the same meaning as set forth in Code Sec. 1471(d)(2).

<sup>35</sup> Code Sec. 1471(d)(4).

<sup>36</sup> U.S. Person is defined in Code Sec. 7701(a)(30).

<sup>37</sup> Preamble to the 6038D Temporary Regulations, 76 FR 78553, at 78556.

<sup>38</sup> *Id.*

<sup>39</sup> U.S. payor is defined in Reg. §1.6049-5(c)(5)(i).

<sup>40</sup> *Id.*, at 78556.

<sup>41</sup> Code Sec. 7701(a)(30).

<sup>42</sup> Temporary Reg. §1.6038D-1T(a)(9); Code Sec. 1471(d)(5); Preamble to the 6038D Temporary Regulations, 76 FR 78553, at 78556.

<sup>43</sup> Temporary Reg. §1.6038D-3T(a)(3)(ii).

<sup>44</sup> Reg. §1.6049-5(c)(5)(i).

<sup>45</sup> Preamble to the 6038D Temporary Regulations, 76 FR 78553, at 78556; Instructions to the FBAR at page 6.

<sup>46</sup> Temporary Reg. §1.6038D-3T(a)(2). A U.S. possession includes American Samoa, Guam, the Northern Mariana Islands, Puerto Rico or the U.S. Virgin Islands. Temporary Reg. §1.6038D-1T(a)(5).

<sup>47</sup> Preamble to the 6038D Temporary Regulations, 76 FR 78553, at 78556.

<sup>48</sup> Code Sec. 6038D(b); Temporary Reg. §1.6038D-3T(b)(1)(i)-(iii); Preamble to the 6038D Temporary Regulations at pages 13-17; A foreign entity as determined under Code Sec. 1473(5).

<sup>49</sup> Temporary Reg. §1.6038D-3T(b)(3).

<sup>50</sup> Reg. §1.864-4(c)(2)(v) provides two examples which illustrate the application of the assets-use test for purposes of determining whether a taxpayer’s income, gain or loss is derived from assets used in or held for use in the conduct of a trade or business in the United States:

Example (1). M, a foreign corporation which uses the calendar year as the taxable year is engaged in industrial



manufacturing in a foreign country. M maintains a branch in the U.S. which acts as importer and distributor of the merchandise it manufactures abroad; by reason of these branch activities, M is engaged in business in the U.S. during 1968. The branch in the United States is required to hold a large current cash balance for business purposes, but the amount of the cash balance so required varies because of the fluctuating season nature of the branch's business. During 1968 at a time when large cash balances are not required the branch invests the surplus amount in U.S. Treasury bills. Since these Treasury bills are held to meet the present needs of the business conducted in the U.S. they are held in a direct relationship to that business, and the interest for 1968 on these bills is effectively connected for that year with the conduct of the business in the U.S. by M.

Example (2). Foreign corporation M, which uses the calendar year as the taxable year, has a branch office in the U.S. where it sells to customers located in the U.S. various products which are manufactured by that corporation in a foreign country. By reason of this activity M is engaged in business in the U.S. during 1997. The U.S. branch establishes in 1997 a fund to which are periodically credited various amounts which are derived from the business carried on at such branch. The amounts in this fund are invested in various securities issued by domestic corporations by the managing officers of the U.S. branch, who have the responsibility for maintaining proper investment diversification and investment of the fund. During 1997, the branch office derives from sources within the U.S. interest on these securities, and gains and losses resulting from the sale or exchange of such securities. Since the securities were acquired with amounts generated by the business conducted in the U.S., the interest is retained by the business, and the portfolio is managed by personnel activity involved in the conduct of that business, are securities are presumed...to be held in a direct relationship to that business. However, M is able to rebut this presumption by demonstrating that the fund was established to carry out a program of future expansion and not to meet the present needs of the business conducted in the U.S. Consequently, the income, gains, and losses from the securities for 1997, are not ef-

fectively connected for that year with the conduct of a trade or business in the U.S. by M.

- <sup>51</sup> Preamble to the 6038D Temporary Regulations, 76 FR 78553, at 78556.
- <sup>52</sup> Code Sec. 864(d)(2)(A).
- <sup>53</sup> Reg. §1.864-4(c).
- <sup>54</sup> Temporary Reg. §1.6038D-3T(b)(4).
- <sup>55</sup> Temporary Reg. §1.6038D-3T(b)(5)(i).
- <sup>56</sup> *Id.*
- <sup>57</sup> Temporary Reg. §1.6038D-3T(b)(5)(ii).
- <sup>58</sup> Temporary Reg. §1.6038D-3T(c).
- <sup>59</sup> 31 CFR §1010.350(c)(3)(iv)(B).
- <sup>60</sup> Temporary Reg. §1.6038D-2T(b)(1). A parent that makes an election under Code Sec. 1(g) (7) to include certain unearned income of a child in the parent's gross income which is required to be reported for the tax year has an interest in a SFFA held by the child. Married specified individuals who file a joint return include the value of the SFFA they jointly own together or a SFFA held by a child for which they have made the above election only once in determining whether the aggregate value of all SFFAs in which a married specified individual has an interest exceeds the appropriate reporting threshold.
- <sup>61</sup> Temporary Reg. §1.6038D-2T(b)(3).
- <sup>62</sup> *Id.*
- <sup>63</sup> Reg. §301.7701-2(c)(2)(i).
- <sup>64</sup> Temporary Reg. §1.6038D-2T(c)(1). This rule does not apply to resident aliens.
- <sup>65</sup> Temporary Reg. §1.6038D-3T(c).
- <sup>66</sup> For FBAR purposes, a U.S. person has a financial interest in a foreign financial account if: (1) a U.S. person is the owner of record or has legal title to the account, whether the account is maintained for his or her own benefit or the benefit of others; (2) the owner of record or holder of legal title is acting as an agent, nominee, attorney, or in another capacity on behalf of the U.S. person; (3) a corporation is the owner of record or holder of legal title and the U.S. person owns directly or indirectly more than 50 percent of the corporation's vote or value; (4) a partnership is the owner of record or holder of legal title and the U.S. owns directly or indirectly more than 50 percent of the profits or capital of the partnership; and (5) a trust is the owner of record or holder of legal title and the U.S. person is the trust's grantor and has an ownership interest in the trust or has a present beneficial interest in more than 50 percent of the trust's assets or receives more than 50 percent of the trust's current income.
- <sup>67</sup> 31 CFR §1010.350(e)(2)(iv).
- <sup>68</sup> Preamble to the 6038D Temporary Regulations at page 12. A specified person that is treated as the owner of a trust or any portion of a trust under Code Secs. 671-679 is treated as having an interest in a SFFA held by the trust or by the portion of the trust that the specified person owns.
- <sup>69</sup> For this purpose, a domestic liquidating trust

under Reg. §301.7701-4(d) created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 USC§§701 et. seq.) of the Bankruptcy Code.

- <sup>70</sup> 11 USC §§1101 et. seq.
- <sup>71</sup> Reg. §1.671-5 addresses reporting for widely held fixed investment trusts.
- <sup>72</sup> Reg. §301.7701-2(c)(2)(i).
- <sup>73</sup> Preamble to 6038D Temporary Regulations at page 7.
- <sup>74</sup> Code Sec. 911(d)(1).
- <sup>75</sup> Preamble to 6038D Temporary Regulations at page 8. It should be noted the number of such other tax forms filed with the IRS must still be reported on Form 8938. See "Duplicative Reporting."
- <sup>76</sup> *Id.*
- <sup>77</sup> In most cases, the taxpayer is directed by the instructions to use the U.S. Treasury Department Financial Management Service foreign exchange rate for purchasing U.S. dollars. If no Financial Management Service exchange rate is available the taxpayer is directed to use another publicly available foreign currency rate for purchasing U.S. dollars and to disclose this rate on Form 8938.
- <sup>78</sup> Code Sec. 6038D(c).
- <sup>79</sup> *Id.*
- <sup>80</sup> Preamble to the 6038D Temporary Regulations.
- <sup>81</sup> Preamble to 6038D Temporary Regulations, 76 FR 78553, at 78557.
- <sup>82</sup> Temporary Reg. §1.6038D-5T(a)(3).
- <sup>83</sup> Temporary Reg. §1.6038D-5T(d).
- <sup>84</sup> Temporary Reg. §1.6038D-5T(f)(1).
- <sup>85</sup> Temporary Reg. §1.6038D-5T(b)(2). In most cases, the taxpayer is directed by the instructions to use the U.S. Treasury Department Financial Management Service foreign exchange rate for purchasing U.S. dollars. If no Financial Management Service exchange rate is available the taxpayer is directed to use another publicly available foreign currency rate for purchasing U.S. dollars and disclose this rate on Form 8938.
- <sup>86</sup> Temporary Reg. §1.6038D-5T(b)(4).
- <sup>87</sup> Temporary Reg. §1.6038D-5T(f)(2)(i).
- <sup>88</sup> Temporary Reg. §1.6038D-5T(f)(3).
- <sup>89</sup> Temporary Reg. §1.6038D-5T(f)(2)(ii) &(3)(ii).
- <sup>90</sup> Temporary Reg. §1.6038D-2T(c)(2).
- <sup>91</sup> Temporary Reg. §1.6038D-2T(c)(2)(ii) & (d), Example. A married specified individual that files a separate annual return and whose spouse is a specified person includes only one-half of the value of the SFFA that the married individual jointly owns with his or her spouse in determining whether the married individual has an interest in SFFAs aggregate value which exceeds the appropriate reporting threshold. Temporary Reg. §1.6038D-2T(c)(1)(ii).
- <sup>92</sup> *Id.* [query citation to preamble].
- <sup>93</sup> U.S. payor is defined in Reg. §1.6049-5(c)(5)(i).

## The New FATCA Information Reporting Requirement Under Code Sec. 6038D

<sup>94</sup> 11 USC §§ 701 et seq. and 1101 et seq.

<sup>95</sup> Preamble to the 6038D Temporary Regulations, 76 FR 78553, at 78556.

<sup>96</sup> Temporary Reg. §1.6038D-3T(c).

<sup>97</sup> Code Sec. 7701(a)(30) defines the term "U.S. person" to mean: (1) a citizen or resident of the United States; (2) a domestic partnership; (3) a domestic corporation; (4) any estate other than a foreign estate within the meaning of Code Sec. 7701(a)(31); and (5) any trust if a court within the United States is able to exercise primary supervision over the administration of the trust, and one or more

U.S. persons have the authority to control all substantial decisions of the trust. Code Sec. 7701(a)(31) defines the term "foreign estate" to mean an estate the income of which, from sources without the United States which is not effectively connected with the conduct of a trade or business within the United States is not include in the gross income under subtitle A.

<sup>98</sup> Reg. §1.6049-5(c).

<sup>99</sup> Reg. §§1.1441-1(b)(2)(iv) and(e)(3)(v).

<sup>100</sup> KPMG Flash International Executive Alert 2011-208 at page 3 (Dec. 19, 2011).

<sup>101</sup> Form 3520, *Annual Return To Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*.

<sup>102</sup> Form 5471, *Information Return of U.S. Persons with Respect to must Certain Foreign Corporations*.

<sup>103</sup> Form 8621, *Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*.

<sup>104</sup> Form 8865, *Return of U.S. Persons with Respect to Certain Foreign Partnerships*.

<sup>105</sup> Form 8891, *Beneficiaries of Certain Canadian Registered Retirement Plans*.

### Exhibit I. Comparison of 6038D Reporting to FBAR Reporting<sup>1</sup>

	Code Sec. 6038D—Form 8938	FBAR—Form TD F 90-22.1
Type of Taxpayer	U.S. citizen, nonresident alien or any domestic entity formed or availed of for purposes of holding directly or indirectly specified foreign financial assets or "SFFAs." A Form 8938 is not yet required to be filed by domestic entities.	U.S. person including a U.S. citizen, U.S. resident, or entity, including but not limited to, a corporation, partnership, limited liability company created or organized in the United States, a trust or estate formed under U.S. law, and an entity that is disregarded for federal tax purposes.
Reporting Period Covered	Taxable year	Anytime during the calendar year.
Filing Deadline	Due date of annual return, including extensions. For individual taxpayers a Form 8938 must be attached to the 2011 income tax return if the total value of SFFAs exceeds the applicable threshold amounts. For most individual taxpayers the due date will be April 15, 2012 unless a valid extension is obtained for their return.	June 30, with no extensions. The FBAR for the 2011 calendar year is due on June 30, 2012 if the U.S. person has a financial interest in or signature authority over foreign financial accounts which exceeds \$10,000 at any time during the calendar year.
Type of Filing	Filed with annual tax return. <sup>2</sup>	Filed separately.
Reporting Thresholds-Value making Foreign Account/Asset reportable	Aggregate value of all SFFAs exceeds, respectively, value on last day of taxable year or any time during taxable year <sup>3</sup> :  Individual Living in U.S.  1. Single      \$ 50,000      \$ 75,000 2. MFJ        \$ 100,000      \$ 150,000 3. MFS        \$ 50,000        \$ 75,000  Individual Living Abroad <sup>4</sup>  1. Single      \$ 200,000      \$ 300,000 2. MFJ        \$ 400,000      \$ 600,000 3. MFS        \$ 200,000      \$ 300,000	Aggregate value of foreign financial accounts exceeds \$10,000 at any time during the calendar year.
Penalty for Failure to File	Yes. Up to \$10,000 for each 30 days of non-filing not to exceed \$50,000, and reasonable cause abatement is permissible. In addition, may be subject to a 40-percent accuracy-related penalty, and a penalty equal to 75 percent of the underpayment due to fraud. Criminal penalties may also apply.	Yes. Penalty is not to exceed \$10,000 and reasonable cause abatement permitted for non-willful failure; willful failure to file an FBAR may be subject to a civil monetary penalty equal to \$100,000 or 50 percent of the balance in the account and criminal penalties may apply.

<sup>106</sup> Form 3520-A, *Annual Information Return of Foreign Trust with a U.S. Owner*.

<sup>107</sup> Code Sec. 876, 6011, 6012, 6013, 6031 or 6037 and the regulations thereunder.

<sup>108</sup> *Id.* The Form 8938 reporting for a specified individual who is a bona fide resident of Puerto Rico for less than the entire tax year under Reg. §1.937-1(f)(2)(ii) is the portion of the taxable year for which the specified individual is a U.S. citizen.

<sup>109</sup> Temporary Reg. §1.6038D-2T(a)(7)(ii).

<sup>110</sup> Preamble to 6038D Temporary Regulations at page 3.

<sup>111</sup> IRS Publication 552, *Recordkeeping for Individuals*, Dec. 2008, at 6.

<sup>112</sup> IRM §4.26.16.2.2(3).

<sup>113</sup> See Notice 2011-55, IRB 2011-29, 53 (temporary suspension of Form 8938 reporting).

<sup>114</sup> Code Sec. 6038D(d), Instructions to Form 8938.

<sup>115</sup> *Id.*

<sup>116</sup> ACA Comments at page 10.

<sup>117</sup> Code Sec. 6038D(e), Instructions to Form 8938.

<sup>118</sup> Code Sec. 6038D(g), Instructions to Form

8938.

<sup>119</sup> Instructions to Form 8938.

<sup>120</sup> 31 USC §5321(a)(5)(8).

<sup>121</sup> 18 USC §1001.

<sup>122</sup> 18 USC §3282.

<sup>123</sup> Code Sec. 7491(c).

<sup>124</sup> IRM § 4.26.16-17.

<sup>125</sup> Code Sec. 6301.

<sup>126</sup> Code Sec. 6303.

<sup>127</sup> Code Sec. 6321.

<sup>128</sup> Code Sec. 6331.

<sup>129</sup> 18 USC §5321(b)(2).

<sup>130</sup> IR-2011-117, Dec. 14, 2011.

	Code Sec. 6038D—Form 8938	FBAR—Form TD F 90-22.1
Anti-abuse Rule	The statute authorizes the Secretary to issue regulations to treat any domestic entity as if it were an individual Form 8938 filer if the domestic entity is formed or availed of for purposes of holding directly or indirectly SFFAs. Proposed regulations relating to this anti-abuse rule were released on December 14, 2011. <sup>5</sup>	A U.S. person that causes an entity to be created for a purpose of evading FBAR reporting will have a financial interest in any financial account in a foreign country for which the entity is the owner of record or legal title. The rule apparently only applies if the entity is created for the above-described purpose, and not to preexisting entities.
Type of interest in Financial Accounts/Assets	Any interest in a SFFA, whether or not the SFFA generates income, losses, deductions, credits or gross proceeds during the taxable year. The fact that the SFFA has a zero balance or negative balance is irrelevant if the filing threshold is otherwise met.	Financial interest in, or signature or other authority over foreign financial account, whether or not the financial account generates income, losses, deductions, credits or gross proceeds during the calendar year. The fact that the account has a zero balance or negative balance is irrelevant if the filing threshold is otherwise met
Type of Foreign Assets or Accounts Reportable	See final section.	See final section..
Electronic Filing Permitted	Yes	Yes
Voluntary Disclosure Practice Available	Yes. On January 12, 2012, the IRS announced another offshore voluntary disclosure program (2012 OVDP).	Yes. On January 12, 2012, the IRS announced another offshore voluntary disclosure program (2012 OVDP).
Signature Requirement	No. Form 8938 has no separate signature attestation requirement. However, the filer must sign his or her tax return to which the Form is attached as a part of the annual return.	Yes. The FBAR must be signed by the filer named on the form and if the FBAR is filed on behalf of a entity it must be signed by an authorized individual.
No Tax Return filed for the Tax Year-No Reporting Necessary	Yes. If a specified person does not have to file an income tax return for the year he or she does not have to file a Form 8938.	No. If the FBAR requirements are met, an FBAR must be filed even if the filer does not have to file an income tax return.
When is Form treated as Filed	Under the mail box rule, <sup>6</sup> when a taxpayer properly mails the tax return, including the Form 8938 before the deadline, but the IRS does not receive the return until after the deadline, the date on which the taxpayer mailed the return is treated as the date the return was filed (e.g., the date of the postmark).	Since the FBAR is a separate filing obligation it must be received by the Treasury on or before June 30th of the year immediately following the calendar year being reported and is not attached to the tax return.
Constructive Ownership Rules	Yes. For purposes of determining whether a domestic corporation or partnership is closely held under the proposed regulations. <sup>7</sup>	No. The ownership attribution rules in Title 26 are not applicable to FBARs.



	Code Sec. 6038D—Form 8938	FBAR—Form TD F 90-22.1
Exceptions to Reporting	For Form 8938 purposes, a specified person is not required to report a SFFA if the account is an “excepted financial account” which includes: (i) a financial account (or assets held in that account) that is maintained by a U.S. payor, such as a domestic financial institution or a domestic branch of a foreign bank or insurance company or a foreign branch or subsidiary of a U.S. financial institution; (ii) a account maintained by dealers or traders in securities or commodities if all the holdings in the account are marked-to-market; (iii) the asset is reported by the specified person on other forms filed with the IRS; (iv) the specified person is treated as the owner of any part of a domestic liquidating trust, or a domestic widely-held fixed investment trust; (v) is an interest in a social security, social insurance or similar program of a foreign government; or (vi) holds a beneficial interest in a foreign trust or foreign estate that is not a SFFA unless the specified person has reason to know of the interest.	For FBAR purposes, the following financial accounts will be exempt from FBAR reporting: (i) correspondent or nostro account used by banks solely for bank-to-bank settlements; (ii) a foreign financial account of a governmental entity ; (iii) a foreign financial account of a international financial institution; (iv) an owner of an IRA; (v) a participant or beneficiary of a retirement plan described under Code Sec. 401(a), 403(a) or 403(b); (v) an entity that is named in a consolidated FBAR filed by a greater-than-50-percent owner; (vi) certain individuals who have only signature authority over but no financial interest in a foreign financial account provided certain conditions are met; (vii) a trust beneficiary with a financial interest provided the trust, trustee or agent of the trust is a U.S. person and files a FBAR disclosing the trust's foreign accounts; (viii) an account in a U.S. military banking facility; or (ix) an account maintained with a branch of a foreign bank that is physically located in the United States.
Recordkeeping Requirements	Yes. Taxpayer records must be kept to support the income tax return including the Form 8938 so long as they are material to the administration of the tax law.	Yes. For FBAR purposes, records must be kept under Title 31 for five years and be available for inspection.
Consolidated Filing	Yes. Under the proposed regulations if a specified domestic entity is a member of an affiliated group that files a consolidated return, the Form 8938 should be filed with the return.	Yes. For FBAR purposes, if a U.S. person is an entity is named in a consolidated FBAR filed by a greater-than-50-percent owner, such entity is not required to file a separate FBAR.
Does Form requires the date account opened or closed or the date the asset was acquired or disposed of?	No. While the specific date an account was opened or closed, or an asset was acquired or disposed of is not required on Form 8938, boxes must be checked if the account was opened or closed during the year, or an asset was acquired or disposed of during the year.	No. The FBAR does not require any information about when the account was opened or closed.
Filing Amended or Delinquent Returns	Yes. The filer should check a box indicating if the Form 8938 is an original, amended or supplemental that relates to a previously filed return.	Yes. The filer of an amended FBAR should check the box indicating it is an amended report, and attach a statement explaining the additions or deletions and staple a copy of the original FBAR to the report.
Confidentiality	Yes. The Form 8938 as well as the tax return is confidential under Code Sec. 6103.	No. The information collected on an FBAR is authorized under Title 31 (Money and Finance) rather than Title 26, and can be provided to federal, state, and foreign law enforcement agencies in the performance of their official duties.
Government Burden of Proof	Yes. The government has the burden of production with respect to additions to tax and the assessment of civil penalties if a specified person fails to file a Form 8938.	No. There is no presumption of correctness in connection with the imposition of FBAR penalties. <sup>9</sup>
I. Separate Audits II. Verification against Tax Returns	I. No. II. Yes. The Form 8938 as a part of the income tax return will likely be audited as part of a larger audit of the taxpayer. In addition, information from the Form 8938 likely will be matched against other information the IRS obtains under tax information sharing provisions of U.S. treaties, as well as information provided under FATCA by FFIs and other sources, such as the OVDP, John Doe summons and whistleblowers.	I. Yes. II. No. The IRS has been precluded from verifying FBAR information against tax return information due to privacy and disclosure concerns and historically has been required to develop audit, inventory and control processes separate and apart from its audit responsibilities relating to income tax returns under Title 26.

	Code Sec. 6038D—Form 8938	FBAR—Form TD F 90-22.1
Assessments	Yes. The IRS assessment authority for Title 26 matters, such as the failure to file a complete and accurate Form 8938 is found in Code Sec. 5201 for income tax determinations.	Yes. FBAR assessments emanate from Title 31 rather than Title 26. Under 31 USC §5321(a)(5) the Treasury may impose a civil penalty on any person who violates or cause the violation of the FBAR rules and allows for assessment within a specified period of time.
Statute of Limitations	Yes. If a taxpayer fails to file a Form 8938 the statute of limitations may remain open for all or a portion of the taxable year until three years after the date on which the taxpayer files a Form 8938. In addition, if the taxpayer does not include in his or her gross income an amount relating to one or more SFFAs, and the amount that is omitted is more than \$5,000, any tax owed for the tax year can be assessed at any time within six years after he or she files the tax return.	Yes. The statute of limitations for civil FBAR penalties is six years from the date of the violation.
Collection Rules—IRS Notice & Demand, Liens and Levies	Yes. A penalty assessment in connection with the failure to file a Form 8938 will be subject to the collection remedies normally available for an addition to tax or penalty under the IRS's collection provisions including notice and demand, <sup>10</sup> liens <sup>11</sup> and levies. <sup>12</sup>	No. The authority to collect FBAR penalties comes from Title 31, and not Title 26 and therefore the IRC broad collection mechanisms, such as notice and demand, liens, and levies are not available in connection with a FBAR penalty assessment. Remedies available to collect on a FBAR civil penalty are limited to collection through the Financial Management System (FMS) which collect tax debts via a civil penalty in U.S. District Court.
Types of Foreign Accounts or Assets to Disclose:	Code Sec 6038D—Form 8938	FBAR—Form TD F 90-22.1
Bank accounts such as checking, savings, demand, certificates of deposit, debit card accounts, prepaid credit card accounts	Yes	Yes
Bank account in a branch of a U.S. bank that is physically located outside the United States	No	Yes
Safe deposit boxes	No, the box itself is not a SFFA, but the assets held in it may be.	No, the box itself is not a financial account.
Gold, precious metals	No, gold or precious metal are not SFFAs, however, certificates of ownership interest in gold or precious metals may be SFFAs.	No, not a financial account.
Securities, brokerage accounts and other managed accounts	Yes	Yes
Custodial omnibus accounts in the name of global custodian	Yes	No, so long as the investor can only access the holdings maintained in the account assets through a domestic financial institution.
Insurance with cash value	Yes	Yes
Insurance without cash value	Yes	No
Annuity policy or contract with cash value	Yes. If the annuity policy or contract currently has no cash value it still must be reported on Form 8938.	Yes. If the annuity policy or contract currently has no cash value it does not have to be reported on the FBAR.
Accounts at financial institution or broker dealer with signature authority, but no financial interest	No	Yes
Accounts with a person that acts as a broker dealer for futures or options transactions in any commodity	Yes	Yes

## The New FATCA Information Reporting Requirement Under Code Sec. 6038D

	<b>Code Sec. 6038D—Form 8938</b>	<b>FBAR—Form TD F 90-22.1</b>
Shares in a mutual fund or similar pooled fund available to the general public	Yes	Yes
Interests in private equity, venture capital and hedge funds	Yes	No, but Treasury has reserved on the issue.
Interests in stock, stock options, stock rights, warrants, depository receipts or restricted stock units	Yes	No, unless the owner of record or holder of legal title is a corporation in which the U.S. person owns more than 50 percent (by vote or value) of the shares.
Interests in options, interest rate swap, basis swap, interest rate cap, interest rate floor, equity index swap, credit default swap or similar agreement w/ foreign counterparty	Yes	No
Interest in foreign trust	No, unless the specified person knows of the interest. Receipt of a distribution from a foreign trust constitutes actual knowledge for this purpose.	No, unless the owner of record or holder of legal title is a trust in which the U.S. person has a greater-than-50-percent present beneficial interest in the assets or income of the trust for the calendar year.
Interest in partnership	Yes	No, unless the owner of record or holder of legal title is a partnership in which the U.S. person owns more than 50 percent of the interest in profits or capital.
Interest in grantor trust or disregarded entity <sup>13</sup> for federal income tax purposes	No, but the specified person is treated as having an ownership in any SFFA held by the grantor trust or disregarded entity.	Yes, if the owner of record or holder of legal title is a trust in which the U.S. person is the trust grantor and has an ownership interest in the trust, or if the owner of record or holder of legal title is a disregarded entity for federal tax purposes. The grantor trust and disregarded entity will also have separate FBAR reporting obligations.
Interest in a foreign financial account held by a foreign trust as the owner of record or holder of legal title and specified person or U.S. person has a discretionary or remainder beneficiary	No, unless the specified person knows of the interest. Receipt of a distribution from a foreign trust constitutes actual knowledge for this purpose.	No, unless the U.S. person is the trust's grantor and also has an ownership interest in the trust. For this purpose, an ownership interest would include either a present beneficial interest in more than 50 percent of the trust's assets or receives more than 50 percent of the trust's current income.
Interest in a social security, social insurance or similar program of a foreign government	No	No
Interest in foreign estate	No, unless the specified person knows of the interest. Receipt of a distribution from a foreign estate constitutes actual knowledge for this purpose.	Yes. If a U.S. beneficiary inherits an interest of decedent in a foreign estate, then the U.S. beneficiary and U.S. executor should consider filing protective FBARs.
Interests in foreign financial assets with joint ownership	Yes	Yes
Direct ownership interest in real estate-residential and commercial	No	No
Personal Property—art, jewelry, automobiles, yachts	No	No



## ENDNOTES

<sup>1</sup> It is likely that many individual U.S. taxpayers with offshore accounts or assets will have to file both the new Form 8938 as well as the FBAR with Treasury for their 2011 tax year to be filed during their 2012 filing season or risk substantial penalties.

<sup>2</sup> For this purpose, an annual return includes a

Form 1040, a Form 1120, a Form 1041, a Form 1120F, a Form 1120S and a Form 1040NR.

<sup>3</sup> See PWC Global Watch for a list of the thresholds based on the earlier draft instructions of Form 8938 (Oct. 29, 2011).

<sup>4</sup> A *bona fide* resident of foreign country who is present in foreign countries at least 330 days during a 12-month period.

<sup>5</sup> REG-130302-10.

<sup>6</sup> Code Sec. 7502(a).

<sup>7</sup> Code Sec. 267 (c), (e)(3).

<sup>8</sup> Reg. §1.6049-5(c)(5)(i).

<sup>9</sup> 18 USC §3282.

<sup>10</sup> Code Sec. 6303.

<sup>11</sup> Code Sec. 6321.

<sup>12</sup> Code Sec. 6331.

<sup>13</sup> For example, a single-member limited liability company.

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