

Six Things to Know About Foreign Financial Asset Reporting

By Brian Wainwright

In the Federal Register for December 12, 2014, the Treasury Department and Internal Revenue Service published final regulations under Internal Revenue Code section 6038D, dealing with annual reporting by U.S. citizens and residents of specified foreign financial assets on IRS Form 8938, Statement of Specified Foreign Financial Assets. The final regulations replace temporary regulations published in the Federal Register on December 19, 2011.

1. Income Tax regulations section 1.6038D-2(a) retains the generally higher reporting thresholds of the temporary regulations (as opposed to the \$50,000 statutory amount). Reporting is required if the aggregate value of specified foreign financial assets exceeds:
 - a. \$50,000 on the last day of the taxable year or \$75,000 at any time during the taxable year.
 - b. For married individuals filing a joint U.S. federal income tax return, \$100,000 on the last day of the taxable year or \$150,000 at any time during the taxable year.
 - c. For qualified individuals under section 911(d)(1) (*i.e.*, certain U.S. citizens living abroad), \$200,000 at the end of the taxable year or \$300,000 at any time during the taxable year.
 - d. For qualified individuals under section 911(d)(1) filing joint U.S. federal income tax returns with their spouses, \$400,000 at the end of the taxable year or \$600,000 at any time during the taxable year.
2. The final regulations clarify that a specified foreign financial asset not having a positive value at any time during the taxable year must be included on Form 8938 if the reporting threshold is satisfied, but that such an asset is deemed to have a maximum value during that taxable year of zero. *Income Tax Regs. §§ 1.6038D-2(a)(5), 1.6038D-5(b)(3).*
3. The final regulations also clarify that in the case of jointly owned property each person having an interest in the property must take into account the full value of the property (and not just the value

of the person's interest in the property) in determining whether the reporting threshold is satisfied and must report the full value of the property on Form 8938 if reporting is required. However, there are special rules for assets jointly held by spouses, especially where they file separate U.S. federal income tax returns. *Income Tax Regs.* §§ 1.6038D-2(c), 1.6038D-2(d).

4. Income Tax Regulations section 1.6038D-2(b)(2) clarifies that a person first has an interest in nonvested property transferred in connection with the performance of services on the first date the property is substantially vested or, if an election is made under section 83(b), on the date the property is transferred to the person.
5. An exemption from reporting was added for dual residents who elect under a treaty residence tie-breaker to be treated by the U.S. as nonresident aliens as long as they file the return required by Procedure and Administration Regulations section 301.7701(b)-7 (e.g., IRS Form 1040NR) and attach to that return IRS Form 8833, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*. *Income Tax Regs.* § 1.6038D-2(e).
6. The final regulations retain the rule of the temporary regulations that foreign financial assets reported on certain IRS forms (e.g., Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*, and Form 8621, *Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*) need not also be reported on Form 8938. However, Treasury and the IRS explicitly declined to include in the list of eligible forms FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (an "FBAR" and formerly TD 90-22.1), citing the legislative history of section 6038D and the different purposes of information reporting under the Internal Revenue Code (Form 8938) and the Bank Secrecy Act (FBAR). Thus many foreign financial assets will continue to be reportable on both forms.

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