

The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance

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I. Introduction

Concerned about the extent of international tax non-compliance, Congress enacted the Foreign Account Tax Compliance Act (FATCA).¹ Among other provisions found in FATCA was Code Sec. 6038D, which requires certain individuals to annually report to the IRS data about their interests in foreign financial assets. Sounds simple enough, right? Well, this seemingly straightforward obligation has been causing significant havoc for taxpayers and their advisors in 2012, as they wrestle for the first time with tricky new issues when deciding whether and/or how to complete Form 8938 (*Statement of Specified Foreign Financial Assets*).²

Given the challenges associated with the current rules and the finalization in the near future of additional regulations expanding the coverage of Code Sec. 6038D, uncertainty will persist for some time. Confusion about Code Sec. 6038D and Form 8938 can trigger a series of negative results for taxpayers, including new information-reporting penalties, increased accuracy-related penalties, criminal charges, extended assessment periods, and a fight with the U.S. government on three fronts simultaneously. Confusion about this new international tax requirement could cause severe problems for tax advisors, too, because misinformed clients facing IRS problems tend to point their fingers (and their malpractice firms) squarely toward the trusted tax



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professionals on whom they relied. In an effort to avoid these types of problems, this article provides taxpayers and their advisors a comprehensive analysis of the new requirements and explains the obscure, yet serious, consequences for taxpayers falling into noncompliance.

II. Analysis of the New Foreign Financial Asset Reporting Requirement

A. General Rule and Overview

The general rule in Code Sec. 6038D(a) looks innocuous enough, but it is loaded with defined terms, conditions and nuances. This provision contains the following mandate:

Any individual who, during any taxable year, holds any interest in a specified foreign financial asset shall attach to such person's return of tax imposed by subtitle A for such taxable year the information described in subsection (c) with respect to each such asset if the aggregate value of all such assets exceeds \$50,000 (or such higher dollar amount as the Secretary may prescribe).

When faced with a statutory mouthful like this, it helps to break the language into manageable bites. The following morsels will serve as our guide throughout this article in analyzing the complex aspects of Code Sec. 6038D:

- Any individual who
- during any tax year
- holds any interest
- in a specified foreign financial asset ("SFFA")
- shall attach to such person's tax return
- the information described in subsection (c)
- if the aggregate value of all such assets
- exceeds \$50,000 (or such higher amount prescribed)

The guidance available at this time derives from relatively few sources. These include the statutory language of Code Sec. 6038D, legislative history, the temporary regulations issued in December 2011, the IRS's Instructions to Form 8938, and information provided on various IRS webpages. With the goal of presenting a comprehensive view of the tricky issues, data from each of these sources is incorporated into the analysis below.

B. "Any Individual Who"—To Whom Does Code Sec. 6038D Apply?

1. General Rules. Code Sec. 6038D(a) simply states that the new filing requirement pertains to "individuals." The regulations expand on this notion, indicating that the rules apply to "specified persons," which term includes both "specified individuals" (SIs) and "specified domestic entities" (SDEs).³ The regulations regarding SDEs are merely in proposed form at this juncture, so this article addresses only SIs.⁴

According to the regulations, the following categories of individuals are considered SIs: (1) U.S. citizens, (2) individuals who are U.S. residents for any portion of the relevant year, (3) nonresident aliens who are married to a U.S. citizen or U.S. resident and who elect under Code Sec. 6013(g) or Code Sec. 6013(h) to be treated as U.S. residents for certain federal tax purposes, (4) nonresident aliens who are *bona fide* residents of Puerto Rico, and (5) nonresident aliens who are *bona fide* residents of a so-called "Section 931 Possession," which, at this point, means American Samoa.⁵

2. Special Rule for Dual Residents. With respect to U.S. residents, the IRS makes it clear that residency status for any part of the year, no matter how small or nonexclusive, suffices to trigger the Form 8938 filing requirement. In this regard, the preamble to the regulations explains that "[a] resident alien who elects to be taxed as a resident of a foreign country pursuant to a U.S. income tax treaty's residency tie-breaker rules is [an SI] for purposes of Section 6038D and the regulations."⁶ The Instructions to Form 8938 echo that sentiment, giving the following warning to individuals with multiples residences: "If you qualify as a resident alien, you are [an SI] even if you elect to be taxed as a resident of a foreign country under the provisions of a U.S. income tax treaty. If you have to file Form 8938, attach it to your Form 1040NR."⁷

3. No Tax Return Requirement Means No Form 8938 Requirement. Generally, an SI who is not required to file an annual tax return with the IRS for the relevant year is not required to file a Form 8938 either.⁸ The Instructions to Form 8938 expand on this idea, indicating that if an SI has no tax return filing duty, then he has no Form 8938 filing duty, even if the value of the SFFAs exceeds the applicable reporting threshold.⁹ This exception could affect various taxpayers, such as those whose gross income is below certain levels.¹⁰ It could also impact those living in Puerto Rico and American Samoa, as explained by the preamble to the regulations:

In general, *bona fide* residents of the U.S. Virgin Islands and U.S. territories to which Code Sec. 935 applies (currently, Guam and the Northern Mariana Islands) are *not required* to file a federal income tax return provided they correctly report and pay tax on their worldwide income to their U.S. territory taxing authority. Bona fide residents of Puerto Rico or a Code Sec. 931 possession (currently, American Samoa) generally are *required* to file a federal income tax return with the IRS *only if* they have income from sources without the relevant U.S. territory, because Code Secs. 931(a) and 933 generally exclude from gross income any income derived from sources within the relevant U.S. territory. Code Sec. 6038D and these regulations generally require only *bona fide* residents of Puerto Rico or a Code Sec. 931 possession that are required to file a federal income tax return with the IRS to file a Form 8938 with the IRS.¹¹

C. “During Any Taxable Year”— What Is the Reporting Period?

The requirement to file a Form 8938 currently applies *only* to individuals, and they are calendar-year taxpayers by default, starting each tax period on January 31 and ending it on December 31.¹² Thus, when an individual meets the definition of SI for the entire year, the reporting period generates no uncertainty. Things get more complicated, though, when an individual is considered an SI for only part of a calendar year, which could occur when an individual is arriving to or departing from the United States, when an individual dies mid-year, *etc.*

The regulations explain that the reporting period covered by Form 8938 is the SI’s tax year (*i.e.*, January 1 to December 31), except in cases where the individual is an SI for less than a full year. In such situations, the reporting period is shortened to the portion of the calendar year that the individual actually meets the definition of SI.¹³ The Instructions to Form 8938 contain three examples that elucidate these partial-year scenarios: (1) John is a calendar-year taxpayer. The Form 8938 reporting period begins on January 1 and ends on December 31; (2) 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; and (3) George, a

calendar-year taxpayer, is not a U.S. citizen or married. George arrived in the United States on February 1 and satisfied the substantial presence test for the tax year. The Form 8938 reporting period begins on George’s residency starting date, February 1, and ends on December 31.¹⁴

D. “Holds any Interest”—What Constitutes a Reportable Interest?

1. General Rules. Holding an interest in an asset means different things in different contexts. For instance, when dealing with FBARs, an individual has a “direct financial interest” in a foreign account when he is the owner of record or holds legal title, regardless of whether the account is maintained for his own benefit or for the benefit of others.¹⁵ The individual has an “indirect financial interest” for FBAR purposes where the accountholder is (1) a person acting as an agent, nominee, attorney, *etc.*, for the individual, (2) a corporation in which the individual owns, directly

or indirectly, more than 50 percent of the voting power or total value of the shares, (3) a partnership in which the individual owns, directly or indirectly, 50 percent or more of the profits or capital interests, (4) any other entity (other than certain trusts) in which the individual

owns, directly or indirectly, more than 50 percent of the profits interests, capital interests, voting power, or assets, (5) a grantor trust where the individual is the grantor, or (6) a trust in which the individual has a present beneficial interest in more than 50 percent of the assets or from which the individual receives more than 50 percent of the current income.¹⁶

The definition of “holding any interest” varies significantly for purposes of Form 8938, and this has caused some confusion among taxpayers and practitioners accustomed to the FBAR standards. Generally, an SI has an interest in a SFFA if any income, gains, losses, deductions, credits, gross proceeds or distributions attributable to the holding or disposition of the SFFA are (or should be) reported, included, or otherwise reflected on the SI’s annual tax return.¹⁷ The regulations clarify that an SI has an interest in the SFFA *even if* no income, gains, losses, deductions, credits, gross proceeds or distributions are attributable to the holding or disposition of the

Code Sec. 6038D also matters because, in addition to subjecting violators to specialized penalties under Code Sec. 6038D, transgressions could also lead to other civil penalties.

SFFA for the year in question.¹⁸ Stated differently, an SI must file a Form 8938 despite the fact that none of the SFFAs that must be reported affect his tax liability for the year.¹⁹

2. Special Rules in Three Situations. Three special rules about “holding any interest” exist. First, an SI is *not* treated as having an interest in an SFFA that is held by a corporation, partnership, trust or estate solely as a result of the SI’s status as a shareholder, partner, or beneficiary of such entity.²⁰ In other words, there is no attribution here; no ascribing an interest in an SFFA simply because the SI has an interest, no matter the size, in the entity that actually holds SFFAs. This nonattribution rule is distinct from the FBAR standards, which generally demand reporting of foreign financial accounts that the individual is deemed to hold, directly or through others.

Second, an SI who owns a so-called “disregarded entity” is treated as having an interest in any SFFA that is held by such entity.²¹ As the Instructions to Form 8938 succinctly put it, “[i]f you are the owner of a disregarded entity, you have an interest in any [SFFAs] owned by the disregarded entity.”²²

Third, similar to the treatment afforded owners of disregarded entities, an SI who is the owner (full or partial) of a grantor trust is considered to hold an interest in any SFFA that is actually held by such trust or the relevant portion of such trust.²³

E. “In a Specified Foreign Financial Asset”—What Assets Constitute SFFAs?

For purposes of Code Sec. 6038D, the term SFFA includes two major categories: (1) foreign financial accounts, and (2) other foreign financial assets not held in foreign financial accounts. The details and unexpected twists associated with each category are examined below.

1. Foreign Financial Accounts. As explained above, the term SFFA encompasses any “financial account” that is maintained by a “foreign financial institution.”²⁴ Like many things associated with Form 8938, this rule is deceptively complicated for various reasons.

One complicating factor is that the critical definitions are not found in Code Sec. 6038D or the corresponding regulations, but rather in the international tax withholding provisions, Code Secs. 1471 to 1474. According to the cross-referenced rules, a “financial account” is defined for purposes of Form 8938 as any depository account maintained with a financial institution, any custodial account maintained with a financial institution, and any equity

or debt interest in a financial institution, other than interests that are regularly traded on an established securities market.²⁵

For its part, a “financial institution” generally means an entity that (1) accepts deposits in the ordinary course of a banking or similar business, (2) holds financial assets for the account of others as a substantial portion of its business, or (3) is engaged primarily in the business of investing, reinvesting, or trading securities, partnership interests, commodities, or any interest in such securities, partnership interests or commodities.²⁶ To be of relevance to a discussion about Form 8938, the “financial institution” must be “foreign,” which, for these purposes, means that it is not a “U.S. person” (*i.e.*, a domestic entity).²⁷ The term “foreign” also applies to financial institutions organized under the laws of a U.S. possession, such as American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands.²⁸

Murkiness is also caused by special rules applicable to financial institutions that are considered “U.S. payors.” The regulations explain that a financial account maintained by a “U.S. payor” is *not* an SFFA for purposes of Code Sec. 6038D.²⁹ They then broadly define the term “U.S. payor” as a “U.S. person” (*i.e.*, a domestic entity), including a foreign branch of the U.S. person, a foreign office of the U.S. person, as well as a U.S. branch of certain foreign banks and foreign insurance companies.³⁰ The Instructions to Form 8938 clarify this concept:

The following financial accounts and the assets held in such accounts are *not* specified foreign financial assets and do *not* have to be reported on Form 8938 ... A financial account that is maintained by a U.S. payer, such as a domestic financial institution. *In general, a U.S. payer also includes a domestic branch of a foreign bank or a foreign insurance company and a foreign branch or foreign subsidiary of a U.S. financial institution.*³¹

Finally, complexity results from the special treatment of foreign financial accounts to which the mark-to-market accounting rules apply. The regulations and the preamble thereto indicate that a foreign financial account is *not* considered an SFFA (and thus not reportable on Form 8938) if the mark-to-market rules under Code Sec. 475 apply to all holdings in such account.³²

2. Other Foreign Financial Assets. The term SFFA also covers certain other assets not deposited in foreign

financial accounts, including (1) stocks or securities issued by a non-U.S.-person, (2) financial instruments or contracts held for investment purposes whose issuer or counterparty is a non-U.S.-person, and (3) any interest in a “foreign entity.”³³ The IRS recognized in the preamble to the regulations that creating such expansive categories could lead to redundancies:

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 ... For example, stock issued by a foreign corporation is stock that is issued by a person other than an U.S. person, and is also an interest in a foreign entity.³⁴

The regulations enlarge and clarify the categories of non-foreign-financial-account-assets. They identify the following items as SFFAs: (1) stock issued by a foreign corporation, (2) a capital interest or profits interest in a foreign partnership, (3) a note, bond, debenture or other form of debt issued by a foreign person, (4) an interest in a foreign trust, (5) an interest swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty, and (6) any option or other derivative instrument with respect to any of the items listed as examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer.³⁵

The regulations and their preamble then proceed to expressly *exclude* two types of foreign assets from classification as SFFAs. First, they state that an interest in a social security, social insurance, or other similar program of a foreign government is not an SFFA.³⁶ Second, they provide that an interest in a foreign trust or a foreign estate is not an SFFA, unless the SI knows or has reason to know of the interest based on readily accessible information.³⁷ Receipt of a distribution from the foreign trust or foreign estate constitutes actual knowledge of its existence for purposes of Code Sec. 6038D; that is, an SI who

receives cash or other property from a foreign trust or estate during a given year is prohibited from later denying its existence when it comes to reporting it on Form 8938.³⁸

As mentioned above, financial instruments or contracts “held for investment purposes” whose issuer or counterparty is a non-U.S.-person constitute one type of SFFA.³⁹ What does this phrase mean for purposes of Code Sec. 6038D? The regulations indicate that an asset is “held for investment purposes” if it is not used in, or held for use in, the conduct of a trade or business.⁴⁰ Stating this is in the converse, an asset is used in, or held for use in, the conduct of a trade or business (and thus not held for investment purposes) if the asset is (1) held for the principal purposes of promoting the present conduct of a trade or business, (2) acquired and held in the ordinary course of a trade or business, such as an account or note receivable arising

from the trade or business, or (3) otherwise held in a direct relationship to the trade or business.⁴¹ In analyzing the direct-relationship criterion, the regulations indicate that the IRS will give principal consideration to whether the asset is needed in the trade or business; that is, is the asset held to meet the present needs of the trade or business (such as its operating expenses) and not

its anticipated future needs.⁴² The regulations clarify that an asset is *not* currently needed in the trade or business (and thus is held for investment purposes) if it is held to allow future diversification into a new trade or business, future plant replacement, or future business contingencies.⁴³ The regulations further state that stock is never considered an asset used or held for use in a trade or business for purposes of Code Sec. 6038D.⁴⁴ Finally, the regulations feature a presumption that an asset is held in direct relationship to conducting a trade or business if (1) the asset was acquired with funds generated by the trade or business of the taxpayer or the affiliated group of the taxpayer, (2) the income from 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.⁴⁵

The IRS continues to devote more resources to international tax enforcement, and violations of the Form 8938 filing duty will surely be leveraged to obtain additional penalty revenue, extend assessment periods indefinitely, and/or support criminal prosecutions.

3. Examples and Clarifications About SFFAs. The statutory rules and regulations concerning SFFAs are dense. Moreover, these primary sources do not contain certain key information, forcing taxpayers and their advisors to search elsewhere or forge ahead in a cloud of ignorance. The latter is not a good option. Fortunately, additional guidance about SFFAs can be gleaned from different sources, such as the “Basic Questions and Answers on Form 8938,” which the IRS initially posted on its website in February 2012. This IRS guidance, subject to change in the future as Code Sec. 6038D expands and evolves, is set forth below.

- **What are the specified foreign financial assets that I need to report on Form 8938?** If you are required to file Form 8938, you must report your financial accounts maintained by a foreign financial institution. Examples of financial accounts include: savings, deposit, checking, and brokerage accounts held with a bank or broker-dealer. And, to the extent held for investment and not held in a financial account, you must report stock or securities issued by someone who is not a U.S. person, any other interest in a foreign entity, and any financial instrument or contract held for investment with an issuer or counterparty that is not a U.S. person. Examples of these assets that must be reported if not held in an account include: Stock or securities issued by a foreign corporation; A note, bond or debenture issued by a foreign person; 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 these examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer; A partnership interest in a foreign partnership; An interest in a foreign retirement plan or deferred compensation plan; An interest in a foreign estate; Any interest in a foreign-issued insurance contract or annuity with a cash-surrender value. The examples listed above do not comprise an exclusive list of assets required to be reported.⁴⁶
- **Does foreign real estate need to be reported on Form 8938?** Foreign real estate is not a specified foreign asset required to be reported on Form 8938. For example, a personal residence or a rental property does not have to be reported. If the real estate is held through a foreign entity, such as a corporation, partnership, trust or estate, then

the interest in the entity is a specified foreign financial asset that is reported on Form 8938, if the total value of all your specified foreign financial assets is greater than the reporting threshold that applies to you. The value of the real estate held by the entity is taken into account in determining the value of the interest in the entity to be reported on Form 8938, but the real estate itself is not separately reported on Form 8938.⁴⁷

- **I directly hold foreign currency (that is, the currency isn't in a financial account). Do I need to report this on Form 8938?** Foreign currency is not a specified foreign financial asset and is not reportable on Form 8938.⁴⁸
- **I am a beneficiary of a foreign estate. Do I need to report my interest in a foreign estate on Form 8938?** Generally, an interest in a foreign estate is a specified foreign financial asset that is reportable on Form 8938 if the total value of all of your specified foreign financial assets is greater than the reporting threshold that applies to you.⁴⁹
- **I acquired or inherited foreign stock or securities, such as bonds. Do I need to report these on Form 8938?** Foreign stock or securities, if you hold them outside of a financial account, must be reported on Form 8938, provided the value of your specified foreign financial assets is greater than the reporting threshold that applies to you. If you hold foreign stock or securities inside of a financial account, you do not report the stock or securities on Form 8938.⁵⁰
- **I directly hold shares of a U.S. mutual fund that owns foreign stocks and securities. Do I need to report the shares of the U.S. mutual fund or the stocks and securities held by the mutual fund on Form 8938?** If you directly hold shares of a U.S. mutual fund you do not need to report the mutual funds or the holdings of the mutual fund.⁵¹
- **I have a financial account maintained by a U.S. financial institution that holds foreign stocks and securities. Do I need to report the financial account or its holdings?** You do not need to report a financial account maintained by a U.S. financial institution or its holdings. Examples of financial accounts maintained by U.S. financial institutions include U.S. mutual fund accounts, IRAs (traditional or Roth), 401(k) retirement plans, qualified U.S. retirement plans, brokerage accounts maintained by U.S. financial institutions.⁵²
- **I have a financial account maintained by a foreign financial institution that holds investment assets.**

Do I need to report the financial account if all or any of the investment assets in the account are stock, securities, or mutual funds issued by a U.S. person? If you have a financial account maintained by a foreign financial institution and the value of your specified foreign financial assets is greater than the reporting threshold that applies to you, you need to report the account on Form 8938. A foreign account is a specified foreign financial asset even if its contents include, in whole or in part, investment assets issued by a U.S. person.⁵³

- ***I have a financial account with a U.S. branch of a foreign financial institution. Do I need to report this account on Form 8938?*** A financial account, such as a depository, custodial or retirement account, at a U.S. branch of a foreign financial institution is an exception to the general rule that a financial account maintained by a foreign financial institution is a specified foreign financial asset. A financial account maintained by a U.S. branch or U.S. affiliate of a foreign financial institution does not have to be reported on Form 8938 and any specified foreign financial assets in that account also do not have to be reported.⁵⁴
- ***I own foreign stocks through a foreign branch of a U.S.-based financial institution. Do I need to report these on Form 8938?*** If a financial account, such as a depository, custodial or retirement account, is held through a foreign branch or foreign affiliate of a U.S.-based financial institution, the foreign account is not a specified foreign financial asset and is not required to be reported on Form 8938.⁵⁵
- ***I have an interest in a foreign pension or deferred compensation plan. Do I need to report it on Form 8938?*** If you have an interest in a foreign pension or deferred compensation plan, you have to report this interest on Form 8938 if the value of your specified foreign financial assets is greater than the reporting threshold that applies to you.⁵⁶
- ***I am a U.S. taxpayer and have earned a right to foreign social security. Do I need to report this on Form 8938?*** Payments or rights to receive the foreign equivalent or social security, social insurance benefits or another similar program of a foreign government are not specified foreign financial assets and are not reportable.⁵⁷

Putting aside the controversy regarding their weight as tax authority, the preceding “Basic Questions and Answers on Form 8938” clarify certain information

found in other sources and contain new guidance on various aspects of Form 8938 reporting requirements. Additional new guidance can be found in the Instructions to Form 8938, which state that “[a] foreign financial institution includes investment vehicles such as foreign mutual funds, foreign hedge funds, and foreign private equity funds.”⁵⁸

F. “Shall Attach to Such Person’s Tax Return”—When and How Does One File?

1. General Rule. If an SI must file a Form 8938, then it must be attached to his “annual return” for the relevant year.⁵⁹ The regulations clarify that, in the case of SIs, the “annual return” means the federal income tax return, such as Form 1040 (*U.S. Individual Income Tax Return*) or Form 1040NR (*U.S. Nonresident Alien Income Tax Return*).⁶⁰ Answering a question that will surely be raised by countless taxpayers and return-preparers, the Instructions to Form 8938 indicate that the Form 8938 will still be considered timely if it accompanies a Form 1040 filed on extension: “Attach Form 8938 to your annual return and file by the due date (*including extensions*) for that return.”⁶¹

2. Special Rules for Married Taxpayers. Special rules apply in the case of married individuals. According to the regulations, married SIs who file joint Forms 1040 must include a single Form 8938 reporting all the SFFAs in which either spouse has an interest.⁶² If the married SIs jointly own an SFFA, then the SFFA must be reported only once on the single Form 8938.⁶³ The filing requirements vary when married SIs file separately. The regulations state that a married SI who files a separate Form 1040 must include a separate Form 8938 reporting all the SFFAs in which the married SI has an interest, including assets jointly held with his spouse.⁶⁴

G. “The Information Described in Subsection (c)”—What Information Is Required?

1. General Rule. As with most tax statutes, Code Sec. 6038D itself does not identify the form on which taxpayers will be required to report the requisite data; this type of detail is best left to the regulations promulgated after Congress has given its mandate. Indeed, while Code Sec. 6038D(c) purports to list the “required information,” Congress was careful to state that “[t]he Secretary shall prescribe such regulations

or other guidance as may be necessary or appropriate to carry out the purposes of this section, including regulations or other guidance which provide appropriate exceptions from the application of this section... .”⁶⁵ Based on this authority, the IRS issued 14 pages of opaque regulations in the Federal Register, 10 pages of detailed Instructions to Form 8938, and various pages on the IRS website. Together, these items mandate that SIs subject to Code Sec. 6038D provide extensive information about their interests in foreign financial accounts and other SFFAs.⁶⁶

2. Items Exempted from Reporting on Form 8938.

As explained in the preceding paragraph, Code Sec. 6038(h) expressly granted the IRS authority to create certain exemptions from filing Form 8938, and it has exercised this authority.

a. Exemption for SFFAs Reported Elsewhere. One exemption is designed to eliminate duplicative reporting of SFFAs. The regulations state that an SI is not required to report an SFFA on Form 8938, provided that the SI already reports such SFFA on at least one of the following information returns that was timely filed with the IRS: Form 3520 (*Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*), Form 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*), Form 8621 (*Return by a Shareholder of a Passive Foreign Investment Company of a Qualified Electing Fund*), Form 8865 (*Return of U.S. Persons with Respect to Certain Foreign Partnerships*), or Form 8891 (*U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans*).⁶⁷ Even though the SI avoids the need to resubmit lots of information to the IRS thanks to this exemption, all duties are not eliminated. He must still specifically identify on Form 8938 the type and number of other information returns that he previously filed with the IRS.⁶⁸ For instance, if the SI held a reportable interest in a controlled foreign corporation, then he would file a Form 5471 and, instead of repeating much of the same data about the corporation on a separate Form 8938, he would check the box on Form 8938 confirming that he had already filed a Form 5471.

b. Exemption for Certain SFFAs in Puerto Rico or American Samoa. As explained above, various categories of nonresident aliens are considered SIs, namely, nonresident aliens who are *bona fide* residents of Puerto Rico, and nonresident aliens who are *bona fide* residents of a so-called “Section 931 Possession,” *i.e.*, American Samoa.⁶⁹ Also as explained above, *bona fide* residents of Puerto Rico

and American Samoa must file Forms 1040 with the IRS if they have income from sources outside their respective territories.⁷⁰ Cognizant of these realities, the IRS adopted another exemption. An SI who is a *bona fide* resident of a U.S. possession and who is required to file a Form 8938 with the IRS is *not* required to report the following SFFAs: (1) a financial account maintained by a financial institution organized under the laws of the U.S. possession of which the SI is a *bona fide* resident; (2) a financial account maintained by a branch of a financial institution not organized under the laws of the U.S. possession of which the SI is a *bona fide* resident, if the branch is subject to the same tax and information reporting requirements applicable to a financial institution organized under the laws of the U.S. possession; (3) stock or securities issued by an entity organized under the laws of the U.S. possession of which the SI is a *bona fide* resident; (4) an interest in an entity organized under the laws of the U.S. possession of which the SI is a *bona fide* resident; and (5) a financial instrument or contract held for investment, provided that each issuer or counterparty that is a non-U.S.-person is either an entity organized under the laws of the U.S. possession of which the SI is a *bona fide* resident or a *bona fide* resident of the U.S. possession of which the SI is a *bona fide* resident.⁷¹ The IRS warned in the preamble to the regulations that these criteria would be enforced, as this exemption is not applicable to assets held by an SI who is not a *bona fide* resident of any U.S. territory or an SI who is a *bona fide* resident of a U.S. territory other than the one to which the SFFAs are connected.⁷²

c. Exemption for Certain Foreign Grantor Trusts. The IRS created two filing exemptions concerning trusts. The first states that an SI who is an owner of a foreign trust under the grantor trust rules of Code Secs. 671 to 679 is not required to report any SFFAs held by the foreign trust, provided that three conditions are met: (1) the SI reports the trust on a Form 3520 that is timely filed with the IRS, (2) the foreign trust timely files Form 3520-A (*Annual Information Return of Foreign Trust with U.S. Owner*) with the IRS, and (3) the SI checks the proper boxes on Form 8938 to confirm the prior filing of Form 3520 and Form 3520-A.⁷³

d. Exemption for Certain Domestic Grantor Trusts. The second exemption deals with certain domestic trusts. It provides that an SI who is treated as an owner of a domestic trust under the grantor trust rules of Code Secs. 671 to 679 does not need to file a Form

8938 to report any SFFA held by the trust, if the trust is a domestic liquidating trust created pursuant to a court order issued in a Chapter 7 bankruptcy, a confirmed plan in a Chapter 11 bankruptcy, or a domestic widely held fixed investment trust.⁷⁴

H. “If the Aggregate Value of All Such Assets”—What Are the Valuation Rules?

Valuing SFFAs can be deceptively complicated. This is caused, in part, by various rules applicable to different types of SFFAs. These rules are examined below.

1. General Valuation Principles. The value of an SFFA is normally its fair market value, which can be determined from a “reasonable estimate.”⁷⁵ The preamble to the regulations confirms how lax this standard can be:

A specified person may determine the fair market value of a specified foreign financial asset based on information publicly available from reliable financial information sources or from other verifiable sources. Even if there is no information from reliable financial information sources regarding the fair market value of a reported asset, the regulations do not require a specified person to obtain an appraisal by a third party in order to reasonably estimate the asset’s fair market value.⁷⁶

2. Valuation of Foreign Currency. Building on the preceding general rule, the regulations provide specifics for valuing different types of SFFAs. For instance, with respect to valuing foreign currency, they instruct SIs to use the Treasury Department’s Financial Management Service foreign currency exchange rate.⁷⁷ If no such rate is available, then SIs can utilize another publicly available currency exchange, though the source must be expressly disclosed on Form 8938.⁷⁸ In terms of timing, the regulations clarify that SIs should use the applicable foreign currency exchange rate on the last day of the relevant year, even if the SI sold or otherwise disposed of an SFFA before the last day of the year.⁷⁹

3. Valuation of Foreign Accounts. In the case of foreign accounts, an SI can rely on “periodic account statements provided at least annually” to determine the maximum value, unless the SI knows or has reason to know based on readily accessible information that the statements do not reflect a reasonable estimate of the maximum account balance during the year.⁸⁰

4. Valuation of Other SFFAs. When it comes to SFFAs other than foreign accounts, the regulations provide that an SI may use the value of the asset on the last day of the year in which the SI held an interest, except in situations where the SI has actual or constructive knowledge, based on readily accessible information, that such year-end value does not constitute a reasonable estimate of the maximum value.⁸¹ The Instructions to Form 8938 illustrate this idea with the following example:

I have publicly-traded foreign stock not held in a financial account that has a fair market value as of the last day of the tax year of \$100,000, although, based on daily price information that is readily available, the 52-week high trading price for the stock results in a maximum value of the stock during the year of \$150,000. If you are required to file Form 8938, the maximum value of the foreign stock to be reported is \$150,000, based on readily available information of the stock’s maximum value during the tax year.⁸²

5. Valuation of Foreign Trusts. The rules regarding valuation of foreign trusts considered SFFAs are different. If the SI is a beneficiary of a foreign trust, then the maximum value of his interest is the sum of (1) the fair market value, determined on the last day of the relevant year, of all the currency and other property distributed by the trust during the year to the SI as a beneficiary, plus (2) the fair market value, determined on the last day of the relevant year, of the SI’s right as a beneficiary to receive mandatory distributions from the trust.⁸³

6. Valuation of Foreign Estates, Pension Plans, and Deferred Compensation Plans. The regulations simplify the valuation process when it comes to interests in foreign estates, foreign pension plans, and foreign deferred compensation plans. They say to report the fair market value, as determined on the last day of the relevant year, of the SI’s beneficial interest in the assets of the foreign estate, pension plan, or deferred compensation plan.⁸⁴ If this information is not readily accessible and the SI does not otherwise have it, then the SI should use the year-end fair market value of the currency and other property that was distributed to the SI as a beneficiary or participant during the year.⁸⁵ The IRS provided further guidance about these valuations on its webpage called “Basic Questions and Answers on Form 8938,” as follows:

How do I value my interest in a foreign pension or deferred compensation plan for purposes of reporting this on Form 8938?

In general, the value of your interest in the foreign pension plan or deferred compensation plan is the fair market value of your beneficial interest in the plan on the last day of the year. However, if you do not know or have reason to know based on readily accessible information the fair market value of your beneficial interest in the pension or deferred compensation plan on the last day of the year, the maximum value is the value of the cash and/or other property distributed to you during the year. This same value is used in determining whether you have met your reporting threshold. If you do not know or have reason to know based on readily accessible information the fair market value of your beneficial interest in the pension plan or deferred compensation plan on the last day of the year and you did not receive any distributions from the plan, the value of your interest in the plan is zero. In this circumstance, you should also use a value of zero for the plan in determining whether you have met your reporting threshold. If you have met the reporting threshold and are required to file Form 8938, you should report the plan and indicate that its maximum is zero.⁸⁶

7. Valuation of SFFAs with No Value. The regulations state that an SFFA is subject to reporting on Form 8938 even if it does not have a positive value.⁸⁷ They further clarify that, in situations where the maximum value of an SFFA is less than \$0, its value is treated as \$0 for purposes of determining the aggregate value of the SFFAs in which the SI has an interest.⁸⁸

8. Valuation of SFFAs Exempt from Reporting on Form 8938. As explained earlier in this article, certain SFFAs are exempt from reporting on Form 8938, despite the fact that they meet all the regular criteria for reporting.

Just because an SFFA is exempt from reporting on Form 8938 does not necessarily mean that it can be disregarded when valuing SFFAs to determine whether an SI surpasses the applicable reporting threshold. The regulations create two distinct valuation-related rules in this regard. On one hand, the value of any SFFA in which the SI has an interest that is exempt from reporting on Form 8938 because of Reg. §1.6038D-7T(a) (*i.e.*, SFFAs that the SI already reported to the IRS on information returns other than the Form 8938, such as Forms 3520, 5471, 8621,

8865 or 8891, and certain SFFAs held by a foreign grantor trust properly reported to the IRS) *is included* for purposes of determining the aggregate value.⁸⁹ On the other hand, the value of any SFFA in which the SI has an interest that is exempt from reporting on Form 8938 because of Reg. §1.6038D-7T(b) or (c) (*i.e.*, certain SFFAs held by SIs in Puerto Rico and American Samoa, and SFFAs held by certain domestic trusts specified in the regulations) *is excluded* when it comes to calculating the aggregate value.⁹⁰

9. Valuation of Jointly Owned SFFAs. Special rules also exist in cases of jointly owned SFFAs. Generally, each SI who is a joint owner of an SFFA must include the entire value of the SFFA (and not just the value of the person's interest) for purposes of determining whether the aggregate value of the SFFA exceeds the reporting thresholds.⁹¹

Exceptions to this general rule apply in the case of married SIs. For instance, married SIs who file joint Forms 1040 must include only once the value of an SFFA that they jointly own for purposes of calculating whether the aggregate value of all SFFAs in which either spouse holds an interest exceeds the reporting thresholds.⁹² By contrast, if a married SI files a separate Form 1040 and his spouse is also an SI, then he includes one-half of the value of the SFFA in determining whether he has an interest in SFFAs whose aggregate value surpasses the reporting thresholds.⁹³ The preceding rules pertaining to married SIs are illustrated by the following examples:

- **Facts.** Two married specified individuals, H and W, jointly own a specified foreign financial asset with a value of \$90,000 at all times during the tax year. H separately has an interest in a specified foreign financial asset with a value of \$10,000 at all times during the tax year. W separately has an interest in a specified foreign financial asset with a value of \$1,000 at all times during the tax year.
- **Married SIs Filing Separate Forms 1040.** If H and W file separate annual returns, the aggregate value of the specified foreign financial assets in which H has an interest at the end of the tax year is \$55,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of H's separately owned specified foreign financial asset, \$10,000. The aggregate value of the specified foreign financial assets in which W has an interest at the end of the tax year is \$46,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of W's separately owned

specified foreign financial asset, \$1,000. H must file Form 8938 with his annual return for the tax year because the aggregate value of the specified foreign financial assets in which H has an interest exceeds the applicable reporting threshold (\$50,000) set forth in Reg. §1.6038D-2T(a)(1). H must report the maximum value of the entire jointly owned asset, \$90,000, and the maximum value of the separately owned asset, \$10,000. See Reg. §1.6038D-4T(b) regarding the maximum value of a jointly owned specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. The aggregate value of the specified foreign financial assets in which W has an interest, \$46,000, does not exceed the applicable reporting threshold set forth in Reg. §1.6038D-2T(a)(1). W is not required to file Form 8938 with her separate annual return.

- **Married SIs Filing Joint Forms 1040.** If H and W file a joint annual return, they must file a single Form 8938 with their joint annual return for the tax year because the aggregate value of all of the specified foreign financial assets in which either H and W have an interest (\$90,000 (included only once), \$10,000, and \$1,000, or \$101,000) exceeds the applicable reporting threshold (\$100,000) set forth in Reg. §1.6038D-2T(a)(2). The single Form 8938 must report the maximum value of the jointly owned specified foreign financial asset, \$90,000, and the maximum value of the specified foreign financial assets separately owned by H and W, \$10,000 and \$1,000, respectively.⁹⁴

I. “Exceeds \$50,000 (or Higher Amount)” – What Are the Reporting Thresholds?

Even if an individual is considered an SI and holds an interest in certain SFFAs during a given year, he is only required to file a Form 8938 if the aggregate value of the SFFAs surpasses certain reporting thresholds. This is easy to say but often hard to determine because the thresholds, numerous in amount, vary depending on an SI’s location, civil status, and return-filing status. The differing reporting thresholds were implemented with good intentions. Indeed, recognizing that “[a]n individual residing outside the United States can reasonably be expected to have a greater amount of [SFFAs] for reasons unrelated to the policies underlying Section 6038D,” the IRS created the following thresholds.⁹⁵

- *Unmarried SI living in the United States.* The SI must attach a Form 8938 to his Form 1040 if the aggregate value of the SFFAs exceeds (1) \$50,000 on the last day of the year, or (2) \$75,000 at any time during year.⁹⁶
- *Unmarried SI living abroad.* An SI who is a “qualified individual” for purposes of Code Sec. 911 during the relevant year must attach a Form 8938 to his Form 1040 if the aggregate value of the SFFAs exceeds (1) \$200,000 on the last day of the year, or (2) \$300,000 at any time during the year.⁹⁷ A “qualified individual” in the context of Code Sec. 911 is either 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 calendar year or a U.S. citizen or U.S. resident who is present in a foreign country or countries at least 330 full days during any consecutive 12-month period.⁹⁸
- *Married SI living in the United States filing separate Form 1040 from his spouse.* The married SI must attach a Form 8938 to his separate Form 1040 if the aggregate value of the SFFAs exceeds (1) \$50,000 on the last day of the year, or (2) \$75,000 at any time during year.⁹⁹
- *Married SI living abroad filing separate Form 1040 from his spouse.* The married SI who is a “qualified individual” for purposes of Code Sec. 911 during the relevant year must attach a Form 8938 to his separate Form 1040 if the aggregate value of the SFFAs exceeds (1) \$200,000 on the last day of the year, or (2) \$300,000 at any time during the year.¹⁰⁰
- *Married SIs living in the United States and filing joint Forms 1040.* The married SIs must attach a Form 8938 to their joint Form 1040 if the aggregate value of the SFFAs exceeds (1) \$100,000 on the last day of the tax year, or (2) \$150,000 at any time during the year.¹⁰¹
- *Married SIs living abroad and filing joint Forms 1040.* The married SI who is a “qualified individual” for purposes of Code Sec. 911 during the relevant year and his spouse must attach a Form 8938 to their joint Form 1040 if the aggregate value of the SFFAs held by either spouse exceeds (1) \$400,000 on the last day of the year, or (2) \$600,000 at any time during the year.¹⁰²

The reporting thresholds, like other aspects of Form 8938 and the regulations to Code Sec. 6038D, are intricate. In an effort to clarify these issues, the Instructions to Form 8938 contain the following il-

illustrations to help taxpayers decide whether filing is required:

- **I am not married and do not live abroad. The total value of my specified foreign financial assets does not exceed \$49,000 during the tax year.** You do not have to file Form 8938. You do not satisfy the reporting threshold of more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the year.¹⁰³
- **I am not married and do not live abroad. I sold my only specified foreign financial asset on October 15, when its value was \$125,000.** You have to file Form 8938. You satisfy the reporting threshold even though you do not hold any specified foreign assets on the last day of the tax year because you did own specified foreign financial assets of more than \$75,000 at any time during the tax year.¹⁰⁴
- **I am not married and do not live abroad. An unrelated U.S. resident and I jointly own a specified foreign financial asset valued at \$60,000.** You each have to file Form 8938. You each satisfy the reporting threshold of more than \$50,000 on the last day of the tax year.¹⁰⁵
- **I am not married and do not live abroad. I own an entity disregarded for tax purposes, which owns one specified foreign financial asset valued at \$30,000.** In addition, I own a specified foreign financial asset valued at \$25,000. You have to file Form 8938. You own both the specified foreign financial asset owned by the disregarded entity and the specified foreign financial asset you own directly, for a total value of \$55,000. You satisfy the reporting threshold of more than \$50,000 on the last day of the tax year.¹⁰⁶
- **My spouse and I do not live abroad and file a joint income tax return. We jointly own a single specified foreign financial asset valued at \$60,000.** You and your spouse do not have to file Form 8938. You do not satisfy the reporting threshold of more than \$100,000 on the last day of the tax year or more than \$150,000 at any time during the tax year.¹⁰⁷
- **My spouse and I do not live abroad, file a joint income tax return, and jointly and individually own specified foreign financial assets.** On the last day of the tax year, my spouse and I jointly own a specified foreign financial asset with a value of \$90,000. My spouse has a separate interest in a specified foreign financial asset with a value of \$10,000. I have a separate interest in a specified foreign financial asset with a value of \$1,000. You and your spouse have to file a combined Form 8938. You and your spouse have an interest in specified foreign financial assets in an amount of \$101,000 on the last day of the tax year. This is the entire value of the specified foreign financial asset that you jointly own, \$90,000, plus the value of the asset that your spouse separately owns, \$10,000, plus the value of the asset that you separately own, \$1,000. You and your spouse satisfy the reporting threshold of more than \$100,000 on the last day of the tax year.¹⁰⁸
- **My spouse and I do not live abroad, file separate income tax returns, and jointly own a specified foreign financial asset valued at \$60,000 for the entire year.** Neither you nor your spouse has to file Form 8938. You each use one-half of the value of the asset, \$30,000, to determine the total value of the specified foreign financial assets that you each own. Neither of you satisfies the reporting threshold of more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the year.¹⁰⁹
- **My spouse and I file separate income tax returns, jointly and individually own specified foreign financial assets, and do not live abroad. On the last day of the tax year, my spouse and I jointly own a specified foreign financial asset with a value of \$90,000. My spouse has a separate interest in a specified foreign financial asset with a value of \$10,000. I have a separate interest in a specified foreign financial asset with a value of \$1,000.** You do not have to file Form 8938, but your spouse does. Your spouse has an interest in specified foreign financial assets in the amount of \$55,000 on the last day of the tax year. This is one-half of the value of the asset that you jointly own, \$45,000, plus the entire value of the asset that your spouse separately owns, \$10,000. You have an interest in specified foreign financial assets in the amount of \$46,000 on the last day of the tax year. This is one-half of the value of the asset that you jointly own, \$45,000, plus the entire value of the asset that you separately own, \$1,000. Your spouse satisfies the reporting threshold of more than \$50,000 on the last day of the tax year. You do not satisfy the reporting requirement of more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year.¹¹⁰
- **My spouse and I are U.S. citizens but live abroad for the entire tax year and file a joint income**

tax return. The total value of our combined specified foreign financial assets on any day of the tax year is \$150,000. You and your spouse do not have to file Form 8938. You do not satisfy the reporting threshold of more than \$400,000 on the last day of the tax year or more than \$600,000 at any time during tax year for married individuals who live abroad and file a joint income tax return.¹¹¹

- **My spouse and I live abroad and file separate income tax returns. My spouse is not a specified individual. On the last day of the tax year, my spouse and I jointly own a specified foreign financial asset with a value of \$150,000. My spouse has a separate interest in a specified foreign financial asset with a value of \$10,000. I have a separate interest in a specified foreign financial asset with a value of \$60,000.** You have to file Form 8938, but your spouse, who is not a specified individual, does not. You have an interest in specified foreign financial assets in the amount of \$210,000 on the last day of the tax year. This is the entire value of the asset that you jointly own, \$150,000, plus the entire value of the asset that you separately own, \$60,000. You satisfy the reporting threshold for a married individual living abroad and filing a separate return of more than \$200,000 on the last day of the tax year.¹¹²

II. Overlap of Form 8938 and the FBAR

One issue that warrants clarification is the perceived overlap between the new Form 8938 and the existing FBAR. From the outset, taxpayers and tax practitioners have complained about the compliance burden; that is, the duplication of effort involved in preparing both of these annual information returns. One thing is clear: the government has been fully cognizant of this issue from the beginning, as evidenced by a number of documents. For example, the legislative history to Code Sec. 6038D from early 2010 explains the following:

Although the nature of the information required [on Form 8938] is similar to the information disclosed on an FBAR, it is not identical. For example, a beneficiary of a foreign trust who is not within the scope of the FBAR reporting requirements because his interest in the trust is

less than 50 percent may nonetheless be required to disclose the interest in the trust with this tax return under [Section 6038D] if the value of his interest in the trust together with the value of other specified foreign financial assets exceeds the aggregate value threshold. Nothing in [Section 6038D] is intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by [Code Sec. 6038D].¹¹³

Later, in June 2011, when the IRS issued provisional guidance about Code Sec. 6038D in Notice 2011-55, the IRS confirmed the dual filing requirement: “Compliance with Sections 6038D ... does not relieve a person of the responsibility to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, (FBAR) if the FBAR is otherwise required to be filed.”¹¹⁴ Likewise, when the IRS released Form 8938 and the official Instructions thereto in November 2011, they contained the following words of caution: “Filing Form 8938 does not relieve you of the requirement to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), if you are otherwise required to file Form TD F 90-22.1.”¹¹⁵ Shortly thereafter, in December 2011, the Treasury Department issued the temporary regulations under Code Sec. 6038D. The preamble to the regulations mirrored the ideas previously adopted by the IRS on this topic, providing a lengthy justification:

Reporting on Form TD F 90-22.1 is required under Title 31 (31 U.S.C. 5314) for other law enforcement purposes in addition to tax administration. As a consequence, different policy considerations apply to Form 8938 and FBAR reporting. These are reflected in the different categories of persons required to file Form 8938 and the FBAR, the different filing thresholds for Form 8938 and FBAR reporting, and the different assets (and accompanying information) required to be reported on each form. Although certain information may be reported on both Form 8938 and the FBAR, the information required by the forms is not identical in all cases, and reflects the different rules, key definitions (for example, “financial account”), and reporting requirements applicable to Form 8938 and FBAR reporting. These differing policy considerations were recognized during the passage of the HIRE Act and the enactment of section 6038D, and the intention to retain FBAR reporting notwithstanding the enactment of section 6038D

was specifically noted in the Technical Explanation [of the HIRE Act by the U.S. Joint Committee on Taxation] ... Against this background, reporting on Form 8938 and the FBAR is not duplicative and both forms must be filed, if required.¹¹⁶

The objections raised by taxpayers and practitioners apparently grabbed the attention of certain lawmakers, as those heading the Senate Finance Committee and the Senate Judiciary Committee recently requested that the U.S. Government Accountability Office (GAO) analyze potential duplicative reporting requirements triggered by Forms 8938 and the FBAR.¹¹⁷ The GAO issued a report in February 2012 called “Reporting Foreign Accounts to IRS – Extent of Duplication Not Currently Known, but Requirements Can Be Clarified.”¹¹⁸ The GAO report concluded that problems exist:

The Form 8938 and FBAR were developed to meet two different governmental needs—tax administration and law enforcement. As a result, some filers have to report the same or similar information twice, but through different mechanisms and at different times. This increases compliance burden and adds complexity that can create confusion, potentially resulting in inaccurate or unnecessary reporting. Currently, the instructions and guidance for both forms lack any explanation of why and where duplication exists. Actions to reduce duplicate reporting requirements while maintaining their usefulness for tax administration and law-enforcement purposes would benefit filers. However, until Form 8938 filing data is available, it is not known whether these benefits would exceed the costs of implementation.¹¹⁹

Despite the problems, the GAO report did not recommend immediate action by the IRS. Instead, it suggested that the IRS (1) revise the instructions to Form 8938 and the FBAR and other relevant guidance to explain to taxpayers the extent to which duplication exists and the circumstances in which taxpayers are, or are not, expected to comply with both reporting requirements, and (2) as additional data becomes available, determine whether the benefits of implementing a less duplicative reporting process exceed the costs, and if so, implement that process.¹²⁰ Seemingly in response to the GAO report, the IRS posted to its website in late March 2012 a comparison chart

of the Form 8938 and FBAR requirements. This chart can be found as Exhibit 1 to this article.

IV. The Importance of Code Sec. 6038D—Why Does It Really Matter?

A good number of articles have already been published about Code Sec. 6038D and Form 8938, which do an admirable job of describing the parameters of the new international tax filing requirement.¹²¹ The key, though, particularly for those who are not regularly embroiled in international tax issues, is identifying the obscure yet critical issues and anticipating how they could potentially impact taxpayers and practitioners in the future. Below is an explanation of why Code Sec. 6038D *really* matters.

A. Penalties for Violating Code Sec. 6038D

The most obvious reason why Code Sec. 6038D matters is that noncompliance triggers new civil penalties. Like other penalties in the international arena, this one comes in layers. If the taxpayer fails to file the Form 8938 in a timely manner, then he “shall” pay a penalty of \$10,000.¹²² The penalty increases if the taxpayer does not rectify the problem quickly after contact from the IRS. In particular, if the taxpayer has not filed a Form 8938 within 90 days after the day on which the IRS sends a notice about the missing return, then, in addition to the initial penalty of \$10,000, the taxpayer “shall” pay another penalty of \$10,000 for each 30-day period (or portion thereof) during which he fails to file the Form 8938, with a maximum penalty of \$50,000.¹²³

A few issues arise with respect to penalties under Code Sec. 6038D. First, married individuals filing joint Forms 1040 are penalized just once. In this regard, the regulations clarify that such taxpayers are subject to penalties “as if the married [SIs] are a single specified person.”¹²⁴ The regulations note, however, that the penalties on joint taxpayers are joint and several, such that the IRS can take collection actions against either taxpayer.¹²⁵

Second, ambiguity exists with respect to the highest penalty under Code Sec. 6038D. Specifically, is the maximum penalty \$60,000 (*i.e.*, \$10,000 for the initial violation, plus up to \$50,000 more in penalties for failing to supply Form 8938 after notification from the IRS) or is it \$50,000 (*i.e.*, \$10,000 for the

initial violation, plus up to \$40,000 in additional penalties for failing to rectify the issue after notice)? The statute is unclear on this issue, but the legislative history leaves no doubt:

[A]n individual who is notified of his failure to disclose with respect to a single taxable year under [Code Sec. 6038D] 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 the 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.¹²⁶

Third, Code Sec. 6038D(e) and the corresponding regulations create a presumption of noncompliance in certain situations. Specifically, if the IRS determines that an SI has an interest in one or more SFFAs but the SI fails to provide sufficient information to prove the aggregate value of the SFFAs, then the IRS will presume that the value exceeds the applicable reporting threshold and thus assert the \$10,000 penalty.¹²⁷

Fourth, an SI who unintentionally failed to file a timely Form 8938 can avoid penalties under Code Sec. 6038D if he can demonstrate that the violation was due to reasonable cause.¹²⁸ The regulations clarify that the SI bears the burden of making “an affirmative showing of all the facts alleged as reasonable cause for the failure to disclose.”¹²⁹ They also emphasize that civil or criminal penalties threatened or imposed by a foreign country against the SI (or any other person) for disclosing the information on the Form 8938 does not constitute reasonable cause.¹³⁰ Various practitioner groups have already raised issues with the “reasonable cause” defense under Code Sec. 6038D. For instance, the Florida Bar Tax Section has suggested that the regulations be modified to reflect that (1) taxpayers have “reasonable cause” for failing to file Form 8938 if they timely filed another information return (such as a Form 3520, 3520-A, 5471, 8621 and/or 8865) reporting the same SFFA, and (2) based on the concepts introduced by the IRS in the recent offshore voluntary disclosure initiatives, a presumption of

reasonable cause should exist for specific categories of taxpayer, including some dual citizens, taxpayers who have reported all taxable income on their Forms 1040, and certain taxpayers residing abroad, complying with local tax law, and having a limited amount of U.S.-source income each year.¹³¹ Taking a broader view of “reasonable cause,” the New York State Society of Certified Public Accountants has recommended that the IRS grant a blanket first-time penalty waiver. In its recent comments about the regulations, this group proposed that for 2011 “reasonable cause should generally be presumed to exist to encompass a broad range of errors as it will be difficult the first year to gather all of this information and also to be able to understand what exactly is required in order to accurately report such assets on the Form 8938.”¹³² The IRS has yet to heed any of these suggestions regarding reasonable cause.

B. Penalties Doubled for Tax Underpayments Related to Unreported SFFAs

Code Sec. 6038D also matters because, in addition to subjecting violators to specialized penalties under Code Sec. 6038D, transgressions could also lead to other civil penalties.¹³³ Code Sec. 6662(a) generally provides that, if there is a tax underpayment on any return, then the IRS may assert a penalty equal to 20 percent of the amount of such underpayment.¹³⁴ Code Sec. 6662(b) lists the items that give rise to tax underpayments susceptible to penalties. FATCA expanded this penalty regime by adding Code Sec. 6662(b)(7), which says that any “undisclosed foreign financial asset understatement” can be grounds for an accuracy-related penalty.

To appreciate this new brand of penalty, one must turn to the other provision introduced by FATCA, Code Sec. 6662(j). This statute does several things. For example, it defines an “undisclosed foreign financial asset understatement” as the portion of a tax understatement for a tax year that is attributable to any transaction involving an “undisclosed foreign financial asset.”¹³⁵ It also describes the term “undisclosed foreign financial asset” as any asset with respect to which information was required to be reported to the IRS under various tax provisions, including Code Sec. 6038D, but was not reported.¹³⁶ Finally, this provision doubles the size of the accuracy-related penalty, providing that, in the case of any tax underpayment due to an “undisclosed foreign

financial asset” (such as an SFFA not reported on a Form 8938), the penalty jumps from 20 percent of the underpayment to 40 percent.¹³⁷ The legislative history clarifies the applicability of these rules in light of the new Form 8938:

An understatement is attributable to an undisclosed foreign financial asset if it is attributable to any transaction involving such asset. Thus, a U.S. person who fails to comply with 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 penalty provision, as would any underpayment related to interest, dividends, or other returns accrued on such undisclosed amounts.¹³⁸

The Instructions to Form 8938 contain additional information about the application of the strengthened accuracy-related penalty under Section 6662, providing examples of transactions involving undisclosed SFFAs: (1) “You do 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;” (2) “You do not report ownership of shares in a foreign company on Form 8938 and you sold the shares in the company for a gain and did not report the gain on your income tax return;” and (3) “You do 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 income tax return.”¹³⁹

C. Do Not Forget the Criminal Penalties

Code Sec. 6038D is also important because, aside from taking a big bite out of a taxpayer’s pocketbook for civil penalties, violations can lead to potential criminal penalties. Lest there be any doubt in this regard, the regulations explain that “[i]n addition to other penalties, failure to comply with the reporting requirements of Section 6038D and the regulations, or any underpayment related to such failure, may result in criminal penalties under Sections 7201,

7203, 7206, et seq., or other provisions of Federal law.”¹⁴⁰ Similarly, the Instructions to Form 8938 warn taxpayers that “if you fail to file Form 8938, fail to report an asset, or have an underpayment of tax, you may be subject to criminal penalties.”¹⁴¹

D. Extension of the Assessment Period

The importance of Code Sec. 6038D derives from its impact on assessment periods, too. FATCA modified the assessment period rules under Code Sec. 6501 in two major ways: it modified the existing Code Sec. 6501(c)(8) to insert violations of Code Sec. 6038D, and it added a new Code Sec. 6501(e)(1)(A) concerning “substantial omissions” of income from returns. These two modifications are discussed further below.

1. Unlimited Assessment Period if Form 8938 Not Filed. The general rule is that the IRS has three years from the time a taxpayer files his tax return for the IRS to audit him and propose adjustments.¹⁴² There are various exceptions to the normal three-year rule. One such exception applies to situations where a taxpayer fails to file an information return with the IRS regarding particular foreign entities, transfers, or assets.¹⁴³ Code Sec. 6501(c)(8), before the enactment of FATCA, stated the following:

In the case of any information which is required to be reported to the Secretary [under various international tax provisions, but not Code Sec. 6038D], the time for assessment of any tax imposed by [the Internal Revenue Code] with respect to any event or period or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported ...¹⁴⁴

Congress changed the preceding exception in two major ways with FATCA. The first way is that Congress specifically identified Code Sec. 6038D as one of the relevant international tax provisions. The second way, which was more subtle, is that Congress added the phrase “tax return,” such that under Code Sec. 6501(c)(8) the IRS now has additional time to assess taxes and penalties with respect to any “tax return, event, or period” to which the omitted information relates. Thus, if an SI neglects to file a Form 8938 or files an incomplete Form 8938, then the assessment period essentially stays open indefinitely with respect to the *entire tax return*. This expansive notion is supported by legislative history, which contains the following explanation:

[Code Sec. 6501(c)(8)] also suspends the limitations period for assessment if a taxpayer fails to provide timely information with respect to ... the new self-reporting of financial assets. The limitations period will *not* begin to run until the information required ... has been furnished to the Secretary. [Code Sec. 6501(c)(8)] also clarifies that the extension is *not* limited to adjustments of income related to the information required to be reported by one of the enumerated sections.¹⁴⁵

Notably, Code Sec. 6501(c)(8)(B), which was added in 2010 by separate legislation, clarifies that the extended assessment period applies, even if the taxpayer's failure to file Form 8938 was unintentional. However, in such instances, the only open issues are those related to the Form 8938 itself, not the entire Form 1040 to which the Form 8938 should have been attached.¹⁴⁶

In late 2011, the IRS released a Chief Counsel Advisory clarifying and confirming the points above about the extended assessment period.¹⁴⁷ Particularly helpful in such IRS guidance is the following example illustrating how the former version and current version of Code Sec. 6501(c)(8) could apply to a single taxpayer:

Taxpayer timely filed tax returns for the tax years 2004 through 2009 but failed to properly include a Form 5471 with each return. Under the general limitations period provided in Section 6501(a), only the assessment periods for the 2008 and 2009 tax years remain open under the general three-year limitations period.

For the 2004 and 2005 tax years, it is assumed that the general three-year assessment period for each year had expired before 3/18/2010, the effective date of the recent amendments to Section 6501(c)(8). Accordingly, based on the [IRS's] prior application of 6501(c)(8), the assessment statute remains open for these tax years *only with respect to any item(s) related to the failure to provide the required information.*

For the 2006 through 2009 tax years, the assessment limitations period remains open indefinitely *with respect to all items on the tax returns for each of these tax years ...* However, if the taxpayer can establish that the failure to file the required form was due to reasonable and not willful neglect for any of these tax years, then the limitations period is

only extended with respect to those items related to the failure to furnish the required information.¹⁴⁸

2. Six-Year Assessment Period for Certain Income Omissions. In addition to modifying the existing rules of Code Sec. 6501(c)(8), FATCA also added new Code Sec. 6501(e)(1)(A) about “substantial omissions” of income from returns. The new provision states that if (1) a taxpayer omits from gross income amounts that should have been included, and (2) such omitted amount exceeds 25 percent of the amount of gross income actually reported on the return, or (3) such omitted amount is attributable to one or more SFFAs that were required to be reported under Code Sec. 6038D (or that would have been required to be reported if Code Sec. 6038D were applied without regard to the reporting threshold specified in Code Sec. 6038D(a) and without regard to any filing exemptions in Code Sec. 6038(h)) and exceeds \$5,000, then the tax may be assessed within six years of the time the relevant Form 1040 was filed.¹⁴⁹ The legislative history provides additional background about this extended assessment period:

In providing that the applicability of Section 6038D information reporting requirements is to be determined without regard to the statutory or regulatory exceptions, the statute ensures that the longer limitation period [*i.e.*, the six-year assessment period] applies to omissions of income with respect to transactions involving foreign assets owned by individuals. Thus, a regulatory provision that alleviates duplicative reporting obligations by providing that [an information return] that complies with another provision of the Code may satisfy one's obligations under new Section 6038D does not change the nature of the asset subject to reporting. The asset remains one that is subject to the requirements of Section 6038D for purposes of determining whether the exception to the three-year statute of limitation applies.¹⁵⁰

E. Fighting the U.S. Government on Three Fronts Simultaneously

Code Sec. 6038D is particularly important because taxpayers violating this provision could find themselves fighting the U.S. government on three fronts simultaneously, engaged in a war of attrition against a rival with unlimited resources. A simple example helps clarify this possibility.

Assume that Tommy Taxpayer held two accounts in Switzerland during 2011, with an aggregate balance of approximately \$2 million, which generated a total of \$200,000 in interest income. Further assume that Tommy Taxpayer did not report the foreign-source income on his 2011 Form 1040, did not disclose the existence of the Swiss accounts by checking the “yes” box on Schedule B of the 2011 Form 1040, did not enclose a Form 8938 with his 2011 Form 1040, and did not file a separate FBAR with the proper Treasury Department office by the deadline of June 30, 2012. After conducting an audit of 2011, the IRS issues the following items to Tommy Taxpayer: (1) a Notice of Deficiency proposing increased taxes on the \$200,000 of unreported income, a 40-percent accuracy-related penalty under new Code Sec. 6662(b)(7), and, of course, interest charges, (2) an FBAR 30-day letter (*i.e.*, Letter 3709) and an FBAR Agreement to Assessment and Collection (*i.e.*, Letter 13449) asserting a penalty of \$1 million, which constitutes the maximum sanction of 50 percent of the highest aggregate balance of the unreported foreign accounts,¹⁵¹ and (3) a Notice Letter (*i.e.*, Letter 4618) and/or Form 8278 (Assessment and Abatement of Miscellaneous Civil Penalties) asserting a penalty of \$10,000 for failure to file a Form 8938 and warning of increased penalties of up to \$50,000 for continued noncompliance.¹⁵² Things could be considerably worse if the IRS decided to bring criminal charges, but we are assuming for purposes of this example that this route was not pursued.

If Tommy Taxpayer disputes all the proposed taxes and penalties, then he will become familiar with three different venues, as well as the costs of fighting in each. First, Tommy Taxpayer may file a Petition with the Tax Court to dispute the taxes and accuracy-related penalty proposed in the Notice of Deficiency.¹⁵³ Doing so delays the assessment of such amounts against Tommy Taxpayer until the conclusion of the Tax Court proceeding and any judicial appeal thereof.¹⁵⁴

Second, because the FBAR penalty derives from Title 31 of the U.S. Code (*i.e.*, money and finance) as opposed to Title 26 of the U.S. Code (*i.e.*, the Internal Revenue Code) it cannot be challenged in Tax Court.¹⁵⁵ Thus, after Tommy Taxpayer exhausts his administrative appeal rights with the IRS, the U.S. government, through the U.S. Department of Justice, will bring a civil collection against Tommy Taxpayer in U.S. district court.¹⁵⁶

Third, given that penalties for not filing Form 8938 are not related to a tax deficiency, the IRS takes the position that they are not challengeable in Tax Court. Specifically, the IRS’s internal guidance states that “[d]

efficiency procedures under Subchapter B of Chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) do *not* apply to penalties discussed in this section.”¹⁵⁷ The IRS’s viewpoint is consistent with a recent Tax Court case explaining that it “has never exercised jurisdiction over an assessable penalty that was not related to a deficiency, even absent Congress’ explicitly circumscribing [its] jurisdiction.”¹⁵⁸ Some international penalties, including those under Code Sec. 6038D, may be eligible for so-called “accelerated Appeals consideration” in certain circumstances.¹⁵⁹ This allows taxpayers to expeditiously challenge the penalties on a post-assessment, pre-payment basis before the IRS Appeals Office. After that administrative process, though, the taxpayer’s only remedy is to pay the entire penalty and initiate a refund action. This is evident from the Internal Revenue Manual, which explains that, if a taxpayer contesting an international penalty like that for failure to file a Form 8938 disagrees with the initial conclusion of the Appeals Office, “the taxpayer will not receive any additional Appeals consideration before or after paying that penalty.”¹⁶⁰ Seeking vindication by way of refund can be a slow, costly process that eventually lands the taxpayer in U.S. district court.

V. Conclusion

Congress passed the new law requiring annual reporting of certain foreign financial assets, and the Treasury Department and the IRS scrambled to quickly generate the guidance necessary to implement the law. These efforts resulted in long, dense temporary regulations, an equally challenging set of Instructions to Form 8938, and various IRS webpages subject to modification at the government’s whim. This recent guidance, combined with overlapping obligations and different rules related to the FBAR, has resulted in significant confusion. As this article explains, such confusion can trigger unexpected, detrimental consequences for taxpayers and, in turn, the advisors who failed to properly advise them about all facets of Form 8938. The IRS continues to devote more resources to international tax enforcement, and violations of the Form 8938 filing duty will surely be leveraged to obtain additional penalty revenue, extend assessment periods indefinitely, and/or support criminal prosecutions. Accordingly, taxpayers have more incentive than ever to consult practitioners who focus on international tax to avoid being caught in the web that is Code Sec. 6038D.

Exhibit 1. IRS's Comparison Chart of Form 8938 and FBAR Requirements and Issues

	Form 8938, Statement of Specified Foreign Financial Assets	Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR)
Who Must File?	Specified individuals, which include U.S. citizens, resident aliens, and certain non-resident aliens that have an interest in specified foreign financial assets and meet the reporting threshold	U.S. persons, which include U.S. citizens, resident aliens, trusts, estates, and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold
Does the United States include U.S. territories?	No	Yes, resident aliens of U.S. territories and U.S. territory entities are subject to FBAR reporting
Reporting Threshold (Total Value of Assets)	\$50,000 on the last day of the tax year or \$75,000 at any time during the tax year (higher threshold amounts apply to married individuals filing jointly and individuals living abroad)	\$10,000 at any time during the calendar year
When do you have an interest in an account or asset?	If any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the account or asset are or would be required to be reported, included, or otherwise reflected on your income tax return	Financial interest: you are the owner of record or holder of legal title; the owner of record or holder of legal title is your agent or representative; you have a sufficient interest in the entity that is the owner of record or holder of legal title. Signature authority: you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account. See instructions for further details.
What is Reported?	Maximum value of specified foreign financial assets, which include financial accounts with foreign financial institutions and certain other foreign non-account investment assets	Maximum value of financial accounts maintained by a financial institution physically located in a foreign country
How are maximum account or asset values determined and reported?	Fair market value in U.S. dollars in accord with the Form 8938 instructions for each account and asset reported Convert to U.S. dollars using the end of the taxable year exchange rate and report in U.S. dollars.	Use periodic account statements to determine the maximum value in the currency of the account. Convert to U.S. dollars using the end of the calendar year exchange rate and report in U.S. dollars.
When Due?	By due date, including extension, if any, for income tax return	Received by June 30 (no extensions of time granted)
Where to File?	File with income tax return pursuant to instructions for filing the return	Mail to: Department of the Treasury Post Office Box 32621 Detroit, MI 48232-0621 For express mail to: IRS Enterprise Computing Center ATTN: CTR Operations Mailroom, 4th Floor 985 Michigan Avenue Detroit, MI 48226 Certain individuals may file electronically at BSA E-Filing System
Penalties	Up to \$10,000 for failure to disclose and an additional \$10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of \$60,000; criminal penalties may also apply	If non-willful, up to \$10,000; if willful, up to the greater of \$100,000 or 50 percent of account balances; criminal penalties may also apply

Exhibit 1. IRS's Comparison Chart of Form 8938 and FBAR Requirements and Issues

Types of Foreign Assets and Whether They are Reportable		
Financial (deposit and custodial) accounts held at foreign financial institutions	Yes	Yes
Financial account held at a foreign branch of a U.S. financial institution	No	Yes
Financial account held at a U.S. branch of a foreign financial institution	No	No
Foreign financial account for which you have signature authority	No, unless you otherwise have an interest in the account as described above	Yes, subject to exceptions
Foreign stock or securities held in a financial account at a foreign financial institution	The account itself is subject to reporting, but the contents of the account do not have to be separately reported	The account itself is subject to reporting, but the contents of the account do not have to be separately reported
Foreign stock or securities not held in a financial account	Yes	No
Foreign partnership interests	Yes	No
Indirect interests in foreign financial assets through an entity	No	Yes, if sufficient ownership or beneficial interest (i.e., a greater than 50 percent interest) in the entity. See instructions for further detail.
Foreign mutual funds	Yes	Yes
Domestic mutual fund investing in foreign stocks and securities	No	No
Foreign accounts and foreign non-account investment assets held by foreign or domestic grantor trust for which you are the grantor	Yes, as to both foreign accounts and foreign non-account investment assets	Yes, as to foreign accounts
Foreign-issued life insurance or annuity contract with a cash-value	Yes	Yes
Foreign hedge funds and foreign private equity funds	Yes	No
Foreign real estate held directly	No	No
Foreign real estate held through a foreign entity	No, but the foreign entity itself is a specified foreign financial asset and its maximum value includes the value of the real estate	No
Foreign currency held directly	No	No
Precious Metals held directly	No	No
Personal property, held directly, such as art, antiques, jewelry, cars and other collectibles	No	No
'Social Security'- type program benefits provided by a foreign government	No	No

ENDNOTES

- ¹ FATCA is a portion of Public Law 111-147, the Hiring Incentives to Restore Employment Act, enacted on March 18, 2010.
- ² Section 511(c) of Public Law 111-147 indicates that Code Sec. 6038D applies to tax years beginning after the date on which the legislation was enacted, *i.e.*, March 18, 2010. Since Code Sec. 6038D applies only to individuals at this point, and since individuals ordinarily are calendar-based taxpayers, Code Sec. 6038D first applied to 2011. Thus, taxpayers and their advisors first confronted Code Sec. 6038D as they prepared Forms 1040 for 2011 for filing by April 15, 2012, or by October 15, 2012, in case of an extension.
- ³ Reg. §1.6038D-2T(a)(1); Reg. §1.6038D-7T(a)(1)(i).
- ⁴ Code Sec. 6038D(f); REG-130302-10; *IRS Issues Proposed Regs on Reporting Foreign Financial Assets*, 2011 TAX NOTES TODAY 241-9 (Dec. 14, 2011). Given the current state of the law, this article is written solely to address issues related to SIs, not SDEs.
- ⁵ Reg. §1.6038D-1T(a)(2).
- ⁶ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78555.
- ⁷ Instructions to Form 8938 (November 2011), at 2.
- ⁸ Reg. §1.6038D-2T(a)(7)(i).
- ⁹ Instructions to Form 8938 (November 2011), at 1.
- ¹⁰ Code Sec. 6012(a).
- ¹¹ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78555.
- ¹² Code Sec. 441; Reg. §1.441-1.
- ¹³ Reg. §1.6038D-2T(a)(9).
- ¹⁴ Instructions for Form 8938 (Nov. 2011), at 5.
- ¹⁵ 31 C.F.R. 1010.350(e)(1).
- ¹⁶ 31 C.F.R. 1010.350(e)(2).
- ¹⁷ Reg. §1.6038D-2T(b)(1).
- ¹⁸ Reg. §1.6038D-2T(b)(1).
- ¹⁹ Reg. §1.6038D-2T(a)(8).
- ²⁰ Reg. §1.6038D-2T(b)(3).
- ²¹ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78555.
- ²² Instructions for Form 8938 (Nov. 2011), at 4.
- ²³ Reg. §1.6038D-2T(b)(3). This rule does not apply to domestic liquidating trusts under Reg. §301.7701-4(d) created pursuant to a court order issued in a Chapter 7 bankruptcy, a confirmed plan in a Chapter 11 bankruptcy, or a domestic widely held fixed investment trust under Reg. §1.671-5.
- ²⁴ Code Sec. 6038D(b)(1); Reg. §1.6038D-3T(a)(1).
- ²⁵ Code Sec. 1471(d)(2).
- ²⁶ Code Sec. 1471(d)(5).
- ²⁷ Code Sec. 1471(d)(4); Code Sec. 1473(5); Code Sec. 7701(a)(30).
- ²⁸ Reg. §1.6038D-3T(a)(2); Reg. §1.6038D-1T(a)(5).
- ²⁹ Reg. §1.6038D-3T(a)(3)(i).
- ³⁰ Reg. §1.6038D-3T(a)(3)(ii); Reg. §1.6049-5(c)(5)(i); T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78556.
- ³¹ Instructions for Form 8938 (Nov. 2011), at 6 (emphasis added).
- ³² Reg. §1.6038D-3T(a)(3)(ii); Reg. §1.6038D-3T(b)(2); T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78556.
- ³³ Code Sec. 6038D(b)(2); Reg. §1.6038D-3T(b)(1).
- ³⁴ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78556.
- ³⁵ Reg. §1.6038D-3T(d).
- ³⁶ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78556. *See also* Instructions for Form 8938 (Nov. 2011), at 4., which states that “[a]n interest in social security, social insurance, or other similar program of a foreign government is not a specified foreign financial asset.”
- ³⁷ Reg. §1.6038D-3T(c).
- ³⁸ Reg. §1.6038D-3T(c).
- ³⁹ Code Sec. 6038D(b)(2); Reg. §1.6038D-3T(b)(1).
- ⁴⁰ Reg. §1.6038D-3T(b)(3).
- ⁴¹ Reg. §1.6038D-3T(b)(4).
- ⁴² Reg. §1.6038D-3T(b)(5)(i).
- ⁴³ Reg. §1.6038D-3T(b)(5)(i).
- ⁴⁴ Reg. §1.6038D-3T(b)(5)(i).
- ⁴⁵ Reg. §1.6038D-3T(b)(5)(ii).
- ⁴⁶ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #1.
- ⁴⁷ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #3.
- ⁴⁸ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #4.
- ⁴⁹ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #5.
- ⁵⁰ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #6.
- ⁵¹ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #7.
- ⁵² IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #8.
- ⁵³ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #9.
- ⁵⁴ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #10.
- ⁵⁵ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #11.
- ⁵⁶ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #12.
- ⁵⁷ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #14.
- ⁵⁸ Instructions for Form 8938 (Nov. 2011), at 4.
- ⁵⁹ Code Sec. 6038D(a); Reg. §1.6038D-2T(a)(1).
- ⁶⁰ Reg. §1.6038D-1T(a)(11).
- ⁶¹ Instructions for Form 8938 (Nov. 2011), at 1 (emphasis added).
- ⁶² Reg. §1.6038D-2T(c)(2)(i).
- ⁶³ Reg. §1.6038D-2T(c)(2)(ii).
- ⁶⁴ Reg. §1.6038D-2T(c)(2)(ii).
- ⁶⁵ Code Sec. 6038(h).
- ⁶⁶ *See* Code Sec. 6038D(c); Reg. §1.6038D-4T(a).
- ⁶⁷ Reg. §1.6038D-7T(a)(1)(i).
- ⁶⁸ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78554; Instructions for Form 8938 (Nov. 2011), at 6.
- ⁶⁹ Reg. §1.6038D-1T(a)(2).
- ⁷⁰ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78555.
- ⁷¹ Reg. §1.6038D-7T(c).
- ⁷² T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78558.
- ⁷³ Reg. §1.6038D-7T(a)(2).
- ⁷⁴ Reg. §1.6038D-7T(b).
- ⁷⁵ Reg. §1.6038D-5T(a); Reg. §1.6038D-5T(b)(1).
- ⁷⁶ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78557.
- ⁷⁷ Reg. §1.6038D-5T(c)(1).
- ⁷⁸ Reg. §1.6038D-5T(c)(2).
- ⁷⁹ Reg. §1.6038D-5T(c)(4).
- ⁸⁰ Reg. §1.6038D-5T(d).
- ⁸¹ Reg. §1.6038D-5T(f)(1).
- ⁸² Instructions for Form 8938 (Nov. 2011), at 5.
- ⁸³ Reg. §1.6038D-5T(f)(2)(i).
- ⁸⁴ Reg. §1.6038D-5T(f)(3)(i).
- ⁸⁵ Reg. §1.6038D-5T(f)(3)(i).
- ⁸⁶ IRS website – Basic Questions and Answers on Form 8938 (posted Feb. 29, 2012) – FAQ #13.
- ⁸⁷ Reg. §1.6038D-2T(a)(5).
- ⁸⁸ Reg. §1.6038D-5T(b)(3).
- ⁸⁹ Reg. §1.6038D-2T(a)(6).
- ⁹⁰ Reg. §1.6038D-2T(a)(7).
- ⁹¹ Reg. §1.6038D-2T(c)(1)(i).
- ⁹² Reg. §1.6038D-2T(c)(1)(ii).
- ⁹³ Reg. §1.6038D-2T(c)(1)(iii).
- ⁹⁴ Reg. §1.6038D-2T(d).
- ⁹⁵ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78554.
- ⁹⁶ Reg. §1.6038D-2T(a)(1); Instructions for Form 8938 (Nov. 2011), at 2.
- ⁹⁷ Reg. §1.6038D-2T(a)(3); Instructions for Form 8938 (Nov. 2011), at 2.
- ⁹⁸ Code Sec. 911(d)(1).
- ⁹⁹ Reg. §1.6038D-2T(a)(1); Instructions for Form 8938 (Nov. 2011), at 2.
- ¹⁰⁰ Reg. §1.6038D-2T(a)(3); Instructions for Form 8938 (Nov. 2011), at 2.
- ¹⁰¹ Reg. §1.6038D-2T(a)(2); Instructions for Form 8938 (Nov. 2011), at 2.
- ¹⁰² Reg. §1.6038D-2T(a)(4); Instructions for Form 8938 (Nov. 2011), at 2.
- ¹⁰³ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹⁰⁴ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹⁰⁵ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹⁰⁶ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹⁰⁷ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹⁰⁸ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹⁰⁹ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹¹⁰ Instructions for Form 8938 (Nov. 2011), at 3.
- ¹¹¹ Instructions for Form 8938 (Nov. 2011), at 3.

ENDNOTES

- ¹¹² Instructions for Form 8938 (Nov. 2011), at 3-4.
- ¹¹³ U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate. JCX-4-10. Feb. 23, 2010, at 60.
- ¹¹⁴ IRS Notice 2011-55.
- ¹¹⁵ Instructions for Form 8938 (Nov. 2011), at 1.
- ¹¹⁶ T.D. 9657, Preamble, Fed. Reg. 76, No. 243, (Dec. 19, 2011), at 78559.
- ¹¹⁷ U.S. Government Accountability Office. "Reporting Foreign Accounts to IRS – Extent of Duplication Not Currently Known, but Requirements Can Be Clarified." GAO-12-403 (Feb. 2012), at 1.
- ¹¹⁸ U.S. Government Accountability Office. "Reporting Foreign Accounts to IRS – Extent of Duplication Not Currently Known, but Requirements Can Be Clarified." GAO-12-403 (Feb. 2012).
- ¹¹⁹ U.S. Government Accountability Office. "Reporting Foreign Accounts to IRS – Extent of Duplication Not Currently Known, but Requirements Can Be Clarified." GAO-12-403 (Feb. 2012), at 29.
- ¹²⁰ U.S. Government Accountability Office. "Reporting Foreign Accounts to IRS – Extent of Duplication Not Currently Known, but Requirements Can Be Clarified." GAO-12-403 (Feb. 2012), at 30.
- ¹²¹ See, e.g., J. Kevin Ciavarra and James Cameron, *Offshore Asset Reporting under the HIRE Act*, 2011 TAX NOTES TODAY 225-8 (Nov. 22, 2011); Charles M. Bruce, *FBAR and FATCA Foreign Financial Assets Reporting: Seeing Double? Not Really*, BNA DAILY TAX REPORT, No. 246, Dec. 22, 2011; Arthur J. Dichter, *New Year Brings New US Reporting Requirement Introducing Form 8938 – Statement of Specified Foreign Financial Assets*, ___ TAX PLANNING INTERNATIONAL REVIEW ___ (2012); Paul C. Lau, Amanda Zhong and Nora Stapleton, *Wow! Another Foreign Financial Assets Form*, TAXES – THE TAX MAGAZINE, Apr. 2012, at 15; Kevin E. Packman, *Foreign Account Reporting Using Form 8938 – Has the Service Created Compliance Traps?* J. TAX'N (2012).
- ¹²² Code Sec. 6038D(d)(1); Reg. §1.6038D-8T(a).
- ¹²³ Code Sec. 6038D(d)(2); Reg. §1.6038D-8T(c).
- ¹²⁴ Reg. §1.6038D-8T(b).
- ¹²⁵ Reg. §1.6038D-8T(b).
- ¹²⁶ U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate. JCX-4-10. Feb. 23, 2010, at 61.
- ¹²⁷ Code Sec. 6038D(e); Reg. §1.6038D-8T(d).
- ¹²⁸ Code Sec. 6038D(g); Reg. §1.6038D-8T(e)(1).
- ¹²⁹ Reg. §1.6038D-8T(e)(2).
- ¹³⁰ Code Sec. 6038D(g); Reg. §1.6038D-8T(e)(3).
- ¹³¹ *Florida Bar Tax Section Comments on Proposed Regs on Reporting Foreign Financial Assets*, 2012 TAX NOTES TODAY 42-20 (Feb. 14, 2012).
- ¹³² *CPA Group Comments on U.S. Regs for Reporting of Foreign Financial Assets*, 2012 WORLDWIDE TAX DAILY 75-37 (Mar. 19, 2012).
- ¹³³ Reg. §1.6038D-8T(f)(1).
- ¹³⁴ Code Sec. 6662(a).
- ¹³⁵ Code Sec. 6662(j)(1).
- ¹³⁶ Code Sec. 6662(j)(2).
- ¹³⁷ Code Sec. 6662(j)(3).
- ¹³⁸ U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate. JCX-4-10. Feb. 23, 2010, at 63-64.
- ¹³⁹ Instructions for Form 8938 (Nov. 2011), at 7.
- ¹⁴⁰ Reg. §1.6038D-8T(f)(2).
- ¹⁴¹ Instructions for Form 8938 (Nov. 2011), at 7.
- ¹⁴² Code Sec. 6501(a).
- ¹⁴³ Code Sec. 6501(c)(8).
- ¹⁴⁴ Code Sec. 6501(c)(8)(A) as in effect before Public Law 111-147, which was enacted on March 18, 2010.
- ¹⁴⁵ U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate. JCX-4-10. Feb. 23, 2010, at 66 (emphasis added).
- ¹⁴⁶ Code Sec. 6501(c)(8)(B).
- ¹⁴⁷ CCA 201147030 (Nov. 25, 2011).
- ¹⁴⁸ CCA 201147030 (Nov. 25, 2011) (emphasis added).
- ¹⁴⁹ Code Sec. 6501(e)(1)(A).
- ¹⁵⁰ U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," Under Consideration by the Senate. JCX-4-10. Feb. 23, 2010, at 66; See also Instructions to Form 8938 (Nov. 2011), at 7.
- ¹⁵¹ I.R.M. § 4.26.17.3 (Jan. 1, 2007).
- ¹⁵² I.R.M. § 20.1.9.2 (Apr. 22, 2011); I.R.M. § 20.1.9.2.1 (Apr. 22, 2011); I.R.M. § 20.1.9.22 (Apr. 22, 2011).
- ¹⁵³ Code Sec. 6213(a).
- ¹⁵⁴ Code Sec. 6213(a). Tommy Taxpayer could choose instead to pay the tax liability and initiate a refund action in U.S. district court or the Court of Federal Claims, but this option generally is not preferred because of the pre-payment requirement.
- ¹⁵⁵ See Hale E. Sheppard, *Two More Blows to Foreign Account Holders: Tax Court Lacks FBAR Jurisdiction and Bankruptcy Offers No Relief from FBAR Penalties*, 11(1) J. TAX PRACTICE & PROCEDURE 27 (2009).
- ¹⁵⁶ 31 U.S.C. § 5321(b)(2). The government must initiate this lawsuit within two years of assessing the FBAR penalty.
- ¹⁵⁷ I.R.M. § 20.1.9.2 (04-22-11) (emphasis added); I.R.M. Exhibit 20.1.9-4.
- ¹⁵⁸ *S.G. Smith*, 133 TC 424, Dec. 58,028 (Dec. 21, 2009).
- ¹⁵⁹ I.R.M. § 8.11.5.1 (Aug. 27, 2010); I.R.M. § 8.11.5.2 (Aug. 27, 2010).
- ¹⁶⁰ I.R.M. § 8.11.5.2.2 (Aug. 27, 2010); I.R.M. § 8.11.5.2.3 (Aug. 27, 2010).

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