

**FORM 8938 FOREIGN FINANCIAL ASSET
DISCLOSURES – THE WHO, WHAT & HOW**

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Mr. Rubin has received favorable peer ratings and recognition by various publications and rating services, including Best Lawyers, Chambers USA, Martindale-Hubble, Who's Who in America Law, Top Lawyers in the South Florida Legal Guide, SuperLawyers and Florida Trend's Florida Legal Elite, and his firm has a Tier 1 ranking in the U.S. News & World Report Best Law Firm rankings.

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ENHANCING INDIVIDUAL,
BUSINESS
FAMILY AND BUSINESS
WEALTH THROUGH:
PRESERVING AND
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WEALTH THROUGH:

- Planning to Minimize Taxes (U.S. & International)
- Estate Planning, Charitable, Marital and Succession Planning
- Business Structuring and Transactions
- Trusts & Estates Administration
- Creditor Protection
- Trust, Estate & Tax Litigation and Disputes

I. Introduction

A. Enacted under FATCA

B. First active for 2011 tax years

C. Does not eliminate FBAR reporting

D. Code provisions - Code §6038D

E. Regulations

1. Issued in TD 9567, 12/14/2011

II. Who Must Report.

A. Any individual who holds an interest in a "specified foreign financial asset (SFFA)" that exceeds the filing threshold. Code §6038D(a). Regulations provide reporting applies to "specified persons" with such an interest. [Treas. Regs. §1.6038D-2T(a)(1)]

B. Restatement: (a) a specified person, (h) has an interest, (c) in specified foreign financial assets, (d) that exceed the filing threshold

C. (a) a "specified person"

1. A "specified individual" or a "specified domestic entity" [Treas. Regs. §1.6038D-1T(a)(1)]

a) "specified individual" [Treas. Regs. §1.6038D-1T(a)(2)]

(1) U.S. citizen, resident alien, nonresident alien with election under Code §6013(g) or (h), or nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession

(2) Resident aliens who elect to be taxed as a resident of a foreign country under the provisions of an income tax treaty are STILL specified individuals who must report [Instructions for Form 8938, November 2011]

2. Presently, restricted to individuals. Domestic entities covered only to extent provided in future regulations, which are anticipated to be issued for domestic entities formed or availed of to hold SFFA's that exceed the filing threshold. [Instructions for Form 8938, November 2011]

a) Query whether can avoid reporting through use of domestic entities until then

(1) Proposed regulation indicates they will apply to tax years starting after 2011, so risky

A. (b) has an "interest"

1. General Rule: If any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the specified foreign financial asset are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return [Treas. Regs. §1.6038D-2T(a)(1)]

a) But not necessarily in the current tax year

b) Including by reason of a parent making an election under Code §1(g)(7) to include a child's unearned income in the parent's gross income [Treas. Regs. §1.6038D-2T(b)(1)]

2. Interests owned through a disregarded entity are treated as owned by the tax owner [Instructions for Form 8938, November 2011]

3. Generally, a person is not treated as having an interest in any foreign financial asset held by a corporation, partnership, trust or estate solely by reason of being a shareholder, partner, or beneficiary [Treas. Regs. §1.6038D-2T(b)(3)]

a) Except if owner of a trust under grantor trust rules or certain other trusts [Treas. Regs. §1.6038D-2T(a)(3)]

(1) Note that Treas. Regs. §1.6038D-7T(a)(2) (discussed below) provides an exception for Form 8938 reporting of the trust SFFA's at times. However, it would appear that the SFFA's of the trust are still counted for purposes of the filing threshold.

b) But consult Treas. Regs. §1.6038D-3T(c) to determine whether an interest in a foreign trust or foreign estate is itself a specified foreign financial asset that would need to be reported

4. No interest exists as to SFFA's held in a financial account [Instructions for Form 8938, November 2011]

a) OBSERVATIONS:

(1) Thus, it appears that SFFA's held through a U.S. financial account do not have to be reported. This is consistent with the Committee Reports, but a more explicit confirmation of this in the Instructions or regulations would be helpful.

(2) SFFA's held through a foreign financial account do not have to be reported, either. Of course, this does not relieve the taxpayer from reporting as to the foreign account itself.

B. (c) in specified foreign financial assets (SFFA)

1. See the definition of an SFFA below.

C. (d) that meet or exceed the filing threshold

1. If the aggregate of such assets exceeds \$50,000 (or such higher prescribed value). Code §6038D(a).

a) Contrast this \$50,000 threshold with the \$10,000 FBAR threshold.

b) Regulations require filing if aggregate value exceeds \$50,000 on the last day of the taxable year, OR \$75,000 at any time during the taxable year [Treas. Regs. §1.6038D-2T(a)(1)]

c) Married filing jointly: \$100,000 on the last day of the year or \$150,000 during the year [Treas. Regs. §1.6038D-2T(a)(2)]

d) Qualified individual under Code §911(d)(1): \$200,000 (\$400,000 if married and filing jointly) on the last day of the year or \$300,000 (\$600,000 if married filing jointly) at any time during the year [Treas. Regs. §1.6038D-2T(a)(3) & (4)]

(1) Higher threshold granted due to expectation that such persons will have higher assets abroad

e) Married filing separately if living in the U.S. - use \$50,000/\$75,000 threshold [Instructions for Form 8938, November 2011]

f) Include in these totals assets that are exempt from reporting under Treas. Regs. §1.6038D-7T [Treas. Regs. §1.6038D-2T(a)(6)]

(1) But exclude assets excluded from reporting under Treas. Regs. §1.6038D-7T(b) and (c) [Treas. Regs. §1.6038D-2T(a)(6)]

2. Selling specified foreign assets before the end of the year will not avoid the filing requirement, if the "during the year" threshold was exceeded [Instructions for Form 8938, November 2011, Examples]

3. If the IRS determines that an individual has a specified foreign financial asset, it can presume the \$50,000 threshold is met if insufficient proof is provided otherwise. Code §6038D(e).

4. For purposes of calculating reporting thresholds, include 100% of value of property held jointly with others, with special rules for married persons. [Treas. Regs. §1.6038D-2T(c)(1)]

a) But see Treas. Regs. §1.6038D-2T(c)(1)(ii) for additional special counting rules for married persons

D. Exception - no annual return

1. Filing not required if the specified person is not required to file an annual return [Treas. Regs. §1.6038D-2T(a)(7)]

a) "Annual return" means an annual federal income tax return of a specified individual or an annual federal income tax return or information return of a specified domestic entity filed with the Internal Revenue Service under section 876, 6011, 6012, 6013, 6031, or 6037, and the regulations. [Treas. Regs. §1.6038D-1T(a)(11)]

E. Reporting required even if none of the reported assets affect the taxpayer's tax liability for that year.

II. How to Report

A. Attach Form 8938 to the individual's income tax return. Code §6038D(a).

1. Married individuals who file a joint return must file a single Form 8938 reporting all specified foreign financial assets in which either have an interest [Treas. Regs. §1.6038D-2T(c)(2)(i)]

B. Instructions refer to the "annual return" of the specified person

1. Forms 1040, 1120, 1065, 1041, 1120-S, and 1040NR

III. What Gets Reported - "Specified Foreign Financial Assets" Defined [Code §6038D(b)]

A. SFFA includes:

1. A "financial account" (FA) (using Code §1471(d)(2) definition) maintained by a "foreign financial institution" (FFI) (using Code §1471(d)(4) definition) [Treas. Regs. §1.6038D-3T(a)(1)]

a) FA/financial account: [Instructions for Form 8938, November 2011]

(1) A depository or custodial account, or

(2) An equity or debt interest in a foreign financial institution (other than interests that are publicly traded)

(3) Includes a FA in a financial institution organized in a possession [Treas. Regs. §1.6038D-3T(a)(2)]

b) FFI/foreign financial institution, generally means a non-U.S. financial institution that: [Instructions for Form 8938, November 2011]

- (1) Accepts deposits in the ordinary course of a banking or similar business, or
- (2) Holds financial assets for the account of others as a substantial part of its business, or
- (3) Engaged in business of investing, reinvesting, or trading in securities, partnership interests, commodities, or interests in such items

c) Exceptions

- (1) FA maintained by a U.S. payor [Treas. Regs. §1.6038D-3T(a)(3)(i)]

*(a) A financial account maintained by a U.S. payor, such as a domestic financial institution.
[Instructions for Form 8938, November 2011]*

(i) Includes domestic branch of a foreign bank or foreign insurance company and a foreign branch or foreign subsidiary of a U.S. financial institution

(ii) COMMENT: This is a major exception

- (2) Mark-to-market election applies to all the holdings in the account [Treas. Regs. §1.6038D-3T(a)(3)(ii)]

(a) Instructions describe this as an account maintained by a dealer or trader in securities or commodities

d) The account gets reported, not the specific assets within the account [Treas. Regs. §1.6038D-3T(a)(1)]

e) Items specifically included as an FFI:[Instructions for Form 8938, November 2011]

- (1) Foreign mutual funds
- (2) Foreign hedge funds
- (3) Foreign private equity funds

2. An asset not held in an account of a financial institution, if held for investment, and one of: [Treas. Regs. §1.6038D-3T(b)(1)]

a) Stock or securities issued by a non-U.S. person

b) Financial instrument or contract with an non-U.S. issuer or counterparty

- (1) Includes a note, bond, or other form of indebtedness issued by a foreign person
- (2) Includes swaps with foreign counterparties
- (3) Includes options and derivative instruments for currency or commodities if a foreign counterparty or issuer

c) An interest in a non-U.S. entity

(1) Thus, ownership of the following are reportable:

(a) Stock in a foreign corporation

(b) Partnership or member interest in a foreign partnership or LLC

(c) Interest in a foreign trust or foreign estate

(i) COMMENT: Does this only apply to current beneficiaries only, or does it include remaindermen and contingent or more remote beneficiaries? Will the "interest" requirement above likely will eliminate contingent or remote beneficiaries?

(d) Interest in an offshore foundation

(2) But as to foreign trusts and estates, an interest is a SFFA only if the person knows or has reason to know based on readily accessible information [Treas. Regs. §1.6038D-3T(c)]

(a) Receipt of a distribution constitutes knowledge

(b) COMMENT: Thus, this provision presumably protects a beneficiary of a foreign trust from having to report if the individual is not aware it is a beneficiary

(3) The instructions also include an interest in a foreign pension plan or foreign deferred compensation plan.

d) Exceptions

(1) Mark-to-market election applies to the asset [Treas. Regs. §1.6038D-3T(b)(2)]

(2) Interest in a social security, social insurance or other similar program of a foreign government [Instructions for Form 8938, November 2011]

e) "Held for investment" means not used or held for use in a trade or business of the specified person [Treas. Regs. §1.6038D-3T(b)(3)]

(1) Thus, trade or business use is an exception from reporting

(2) Nontraditional definition - defined by exclusion

(3) "Trade or business" use includes: [Treas. Regs. §1.6038D-3T(b)(4)]

(a) For promoting a trade or business

(b) Acquired and held in the ordinary course of business, such as an account or note receivable

(c) Otherwise held in a direct relationship to the business

(i) Focus on "present need" in the business

(ii) No "present need" if held for future business, plant replacement or future contingencies

(iii) Stock is never held for "present need"

(iv) Presumed within this if the asset was acquired with funds generated by the business (or affiliated group business), the income from the asset is retained or reinvested in the business, and business personnel exercise significant management and control over the investment

(d) COMMENT: Treasury is apparently concerned about the scope of this exception and has devoted much ink to it. Unfortunately, to use the exception the preparer will have to undertake a judgment call on whether the asset fits the criteria.

B. It does not matter if the assets have no positive value. [Treas. Regs. §1.6038D-2T(a)(5)]

C. Exceptions

1. Duplicative Reporting - SFFA is reported on one of these forms by the specified person in that tax year: [Treas. Regs. §1.6038D-7T(a)(1)]

a) Form 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts" (in the case of a specified person who is the beneficiary of a foreign trust);

b) Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations";

c) Form 8621, "Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund";

d) Form 8865, "Return of U.S. Persons With Respect to Certain Foreign Partnerships"; or

e) Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans

f) But FBAR not included

g) BUT must report on the Form 8938 on which form the asset is reported [Treas. Regs. §1.6038D-7T(a)(1)(ii)]

h) BUT still counted towards filing threshold [Instructions for Form 8938, November 2011]

2. Owner of a foreign grantor trust, as to SFFA's owned by the trust, if: [Treas. Regs. §1.6038D-7T(a)(2)]

a) The specified foreign person reports the trust on a timely filed Form 3520 for the tax year;

b) The trust timely files Form 3520-A for the tax year; and

c) The specified person reports the filing of the Forms 3520 and 3520-A on its Form 8938

3. Owner of a domestic grantor trust is not required to report SFFA's of the domestic trust if: [Treas. Regs. §1.6038D-7T(b)]

a) The trust is a widely-held fixed investment trust under Treas. Regs. §1.671-5, or

b) A bankruptcy liquidating trust.

c) Thus, SFFA's of other, more typical domestic grantor trusts, are reportable

4. Bona fide residents of a U.S. possession can exclude reporting of certain assets [Treas. Regs. §1.6038D-7T(c)]

D. Questions

1. Foreign real estate

a) Directly owned interests do not appear to be reportable

(1) But indirect reporting if held in a reportable foreign entity

2. Foreign issuer life insurance or annuities

a) Unclear

b) Does appear to be "a financial instrument or contract with an non-U.S. issuer or counterparty"

(1) But is it always "held for investment?" Remember the narrow definition above of "held for investment" – i.e., not held for use in a trade or business.

3. Gold

a) Direct ownership in a foreign safe deposit box would appear not to be covered

b) More murky if held in a shared allocation account or other type of "account" with a non-U.S. institution

IV. Information to Include on the Report. Code §6038D(c).

A. For an "account," the name and address of the financial institution in which such account is maintained and the number of such account [Treas. Regs. §1.6038D-4T(a)(1)]

B. For a "stock or security," the name and address of the issuer and such information as is necessary to identify the class or issue of which such stock or security is a part [Treas. Regs. §1.6038D-4T(a)(2)]

C. For a financial instrument or contract— [Treas. Regs. §1.6038D-4T(a)(3)]

1. Such information as is necessary to identify such instrument, contract, or interest, and
2. The names and addresses of all issuers and counterparties with respect to such instrument, contract, or interest.

D. For an interest in a foreign entity, information that identifies the interest, including the name and address of the entity [Treas. Regs. §1.6038D-4T(a)(4)]

E. The maximum value of the SFFA during the year while held by the specified person [Treas. Regs. §1.6038D-4T(a)(5)]

F. Depository or custodial accounts under Code §1471(d)(2), info whether the account was opened or closed [Treas. Regs. §1.6038D-4T(a)(6)]

G. Date of acquisition or disposition of nonaccount assets. [Treas. Regs. §1.6038D-4T(a)(7)]

H. Amount of income, gain, loss, deduction or credit recognized with respect to the SFFA and the schedule on which it is reported [Treas. Regs. §1.6038D-4T(a)(8)]

I. The foreign currency exchange rate and the source of rate, used to calculate maximum reported value [Treas. Regs. §1.6038D-4T(a)(9)]

J. For SFFA's excepted from reporting under Treas. Regs. §1.6038D-7T(a), the number of Forms 3520, 5471, 8621, 8865, 8891 or other similar forms [Treas. Regs. §1.6038D-4T(a)(10)]

K. Form 8938 Comments

1. If all SFFA's are reported on other forms, still need to fill out the Form 8938, but only Part IV

2. Copy Part's I and II for as many separate accounts and assets to report

V. Valuation Aspects

A. Need values to determine filing thresholds and reported maximum values

B. General rule - report maximum "fair market value" [Treas. Regs. §1.6038D-5T(a)]

C. Not as rigorous as Form 706 or 709 - can use a "reasonable estimate" [Treas. Regs. §1.6038D-5T(b)(1)]

1. Can rely on annual periodic account statements if no knowledge or reason to know they are not a reasonable estimate of value [Treas. Regs. §1.6038D-5T(d)(1)]

a) COMMENT: This will be of benefit only to brokerage and similar type statements

2. Instructions specifically provide that an appraisal by a third party is not necessary.

a) COMMENT: This is very helpful

b) Preamble to regulations indicate that can rely on publicly available information from reliable or verifiable sources, but still no need for an appraisal if such sources are not available.

D. Must convert foreign currency values to dollar values [Treas. Regs. §1.6038D-5T(b)(2)]

1. Use U.S. Treasury Department's Financial Management Service foreign currency exchange rate [Treas. Regs. §1.6038D-5T(c)(1)]

a) [Http://www.fms.treas.gov/intn.html](http://www.fms.treas.gov/intn.html)

2. Use the rate on the last day of the year [Treas. Regs. §1.6038D-5T(c)(4)]

a) Even if the asset was sold or disposed of during the year [Instructions for Form 8938, November 2011]

E. Encumbrances?

1. Not mentioned, but presumably use gross values, without reduction for encumbrances and pledges

F. Value cannot be treated as less than zero [Treas. Regs. §1.6038D-5T(a)(b)(3)]

G. Special rules

1. Except for certain special assets, can use value as of last day of the year, unless reason to know it is not a reasonable estimate of the maximum value [Treas. Regs. §1.6038D-5T(f)(1)]

a) For example, if readily available price information is available for publicly traded foreign stock, you should use the highest value during the year and not the value on the last day of the year [Instructions for Form 8938, November 2011]

2. Beneficial interest in a foreign trust [Treas. Regs. §1.6038D-5T(f)(2)]

a) "Maximum value" is sum of:

(1) FMV on last day of the year of all currency and other property distributed during the year to the specified person, and

(2) Value as of the last day of beneficiary's right to receive mandatory distributions as determined under Section 7520.

(a) Thus, need to do an actuarial computation using IRS tables

(b) And to do this computation, you will need value of underlying assets of the trust

b) Thus, if no mandatory distribution rights, it appears you are off the hook to do a valuation based on all underlying trust assets

(1) But still need to otherwise determine full value of beneficial interest as far as computing filing thresholds, unless specified person does not know or have reason to know based on readily accessible information the FMV of the interest (in which case they can use the first "maximum value rule" rule relating to amounts distributed only). [Treas. Regs. §1.6038D-5T(f)(2)(ii)]

3. Interests in estates, pension plans, and deferred compensation plans [Treas. Regs. §1.6038D-5T(b)(3)]

a) If the specified person does not know or have reason to know based on readily accessible information such fair market value, the "maximum value" to be reported is the fair market value, determined as of the last day of the taxable year, of the currency and other property distributed during the taxable year to the specified person as a beneficiary or participant.

(1) Same rule for determining value for filing threshold computations

(2) If no distributions and no knowledge based on readily accessible information, use a zero value [Instructions for Form 8938, November 2011]

VI. Penalties. Code §6038D(d); Treas. Regs. §1.6038D-8T.

A. \$10,000 penalty.

1. Married persons filing a joint return are treated as a single person, with joint and several liability. [Treas. Regs. §1.6038D-8T(b)]

B. For continuing failure 90 days after IRS mails a notice of failure to file, \$10,000 for each subsequent 30 day failure, up to \$50,000 maximum.

C. Code §6662(j) imposes an accuracy-related penalty in the case of any portion of an underpayment attributable to any undisclosed foreign financial asset understatement. [Treas. Regs. §1.6038D-8T(f)(1)]

1. 40% of the underpayment

2. 75% if fraud

3. Examples: Shares of foreign corporation not reported and a dividend was paid or the shares were disposed of for a gain

D. IRS can presume that filing threshold is exceeded if a specified person does not provide sufficient information on aggregate value of an account upon request by the IRS [Treas. Regs. §1.6038D-8T(d)]

E. There is a reasonable cause exception.

1. However, foreign law prohibitions against disclosure of the required information cannot be relied upon to establish reasonable cause.

F. Extended statute of limitations if SFFA's not reported

1. Indefinite Suspensions [Code §6501(c)]

a) Summary.

(1) Generally, taxes are required to be assessed within 3 years after a taxpayer's return is filed.

(2) However, under prior law the statute of limitations did not run as to certain foreign transactions if certain required information returns were not filed

(3) Instead, such statute of limitations did not expire until 3 years after the required information was furnished to the IRS.

(4) FATCA added Code §6038D reporting to the list of failures that suspends the statute of limitations

(a) Election by a PFIC shareholder to have the PFIC taxed as a qualifying electing fund (QEF) (Code § 1295(b));

(b) Annual report by U.S. person that is a PFIC shareholder (new under the Act) (Code §1298(f));

(c) Self-reporting of specified foreign financial assets (new under the Act) (Code §6038D).

(5) The Act now clarifies that the suspension of the statute of limitations applies with respect to any "tax return, event, or period" to which the information relates.

(a) However, pursuant to an amendment by the Education jobs Act of 2010, if the failure to report was due to reasonable cause and not wilful neglect, all items on the return are not subject to the expanded statute - only items related to the failure.

(i) Such related items include (1) adjustments made to the tax consequences claimed on the return with respect to the transaction that was the subject of the information return; (2) adjustments to any item to the extent the item is affected by the transaction even if it is otherwise unrelated to the transaction; and (3) interest and penalties that are related to the transactions or the adjustments made to the tax consequences.

b) Comments.

(1) Thus, the filing of an income tax return by the taxpayer will not result in the standard 3 year statute of limitation, if one of the enumerated foreign reporting requirements are not met.

(2) The Act revision, by insertion of the term "tax return" as to items for which the suspension applies, suspends the statute of limitations for all items reported on the taxpayer's income tax return - even those unrelated to the missing foreign reporting.

(a) Except if the filing was due to reasonable cause.

(3) Incomplete filings may trigger these rules.

2. 6 Year Statute [Code §6501(e)(1)]

a) Summary:

(1) A new six-year limitations period for assessment of tax on understatements of income attributable to foreign financial assets. Code §6501(e)(1).

(a) Essentially is an extension of the existing 6 year statute of limitations for 25%+ omissions from gross income.

(2) Applies to returns filed if the taxpayer omits from gross income an amount properly includible if:

(a) The amount is attributable to one or more assets which should have been reported under Code §6038D (or would have been required but for the \$50,000 dollar threshold in Code §6038D(a) and without regard to certain other exceptions in Code §6038D relating to duplicative reporting), and

(b) The amount is in excess of \$5,000.

b) Effective Date.

(1) Returns filed after March 18, 2010, and returned filed before that if the assessment period specified in Code §6501 had not expired as of March 18, 2010.

G. Criminal penalties may apply [Instructions for Form 8938, November 2011]

VII. Effective Date.

A. For tax years beginning after Mar. 18, 2010.

1. Due with 2011 individual income tax return

B. Notice 2011-55 provides that the Code Sec. 6501(c)(8) limitations period for tax assessments for periods for which reporting is required under Code Sec. 6038D won't expire before three years after the date on which the IRS receives Form 8938

C. The temporary regulations generally apply to taxable years ending after 12/19/11, and the regulations expire on 12/12/14

VIII. Misc.

A. IRS webpage of updated information is at www.irs.gov/form8938

B. Still need to file Form TD F 90-22.1 (FBAR) if otherwise required [Instructions for Form 8938, November 2011]

C. What impact does value have on later transfer tax values?