

TAX ALERT

UPDATES ON FINCEN AND IRS INTERNATIONAL REPORTING REQUIREMENTS

BY EDUARDO S. CHUNG

January 25, 2017



MAZARS USA TAX PRACTICE BOARD

Stephen Brecher

646.225.5921

stephen.brecher@mazarsusa.com

Jeffrey Katz

212.375.6816

jeffrey.katz@mazarsusa.com

Howard Landsberg

212.375.6604 | 516.282.7209

howard.landsberg@mazarsusa.com

James Toto

732.205.2014

james.toto@mazarsusa.com

Faye Tannenbaum

212.375.6713

faye.tannenbaum@mazarsusa.com

EDITOR

Richard Bloom

732.475.2146

richard.bloom@mazarsusa.com



There have been recent updates regarding the filing requirements for the following forms:

- FinCEN Form 114 (Report of Foreign Bank and Financial Accounts) – automatic extension granted
- Form 8938 (Statement of Specified Foreign Financial Assets) – specified domestic entities now required to file Form 8938
- Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business) – foreign owned disregarded entities now required to file Form 5472

FinCEN Form 114

A United States person that has a financial interest or signature authority over foreign financial accounts must file FinCEN Form 114 (commonly referred to as the “FBAR”) if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year.

The filing deadline for FinCEN Form 114 has historically been June 30th of every year. The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the “Act”), signed into law on July 31, 2015, changed the due date of several tax returns including the FBAR. Under the Act, effective for the 2016 calendar year, the due date of the FBAR is now April 15th with a potential for a six month extension. FinCEN has announced that they will adopt Federal income tax due date guidance with respect to due dates falling on weekends or legal holidays. The FBAR for the 2016 calendar year therefore is due April 18, 2017. In order to implement the new deadlines with minimal burdens, FinCEN has also announced that they will grant automatic six month extensions without specific requests.

Form 8938

Form 8938 has been required to be filed by specified individuals (generally U.S. citizens and resident aliens) that have an interest in specified foreign financial assets and the value of those assets exceeds the applicable reporting threshold. Form 8938 is filed with one’s income tax return as opposed to FinCEN Form 114 which is filed separately with the Department of the Treasury. Many assets that are reportable on Form 8938 are also reportable on FinCEN Form 114.

Treasury Regulations finalized in 2016, which adopt in large part previously issued proposed regulations, now require specified domestic entities (corporations, partnerships and trusts) to file Form 8938 if the entity is “formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets.” The final regulations apply to tax years beginning after December 31, 2015.

A domestic corporation or partnership is formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets if: 1) the corporation or partnership is closely held by a specified individual, and 2) at least 50 percent of the corporation’s or partnership’s gross income for the taxable year is passive income or at least 50 percent of the assets held by the corporation or partnership for the taxable year are assets that produce or are held for the production of passive income. A domestic trust is formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets if the trust has one or more specified persons as a current beneficiary.

Form 8938 for the 2016 tax year has been modified to include categories for identification of the type of filer.

Form 5472

Form 5472 is used to report select transactions between a domestic corporation and foreign related parties as required under Internal Revenue Code (IRC) §6038A. This Form is also used to meet the reporting requirements under IRC §6038C by foreign corporations engaged in a business or trade in the United States.

Final regulations have been issued revising Treas. Reg. §1.6038A-1, §1.6038A-2 and §301.7701-2 which expand the reporting requirements under IRC §6038A. The changes are effective for taxable years beginning after December 31, 2016 and ending on or after December 13, 2017. A domestic business entity previously classified as a disregarded entity (such as a single member limited liability company) under Treas. Reg. §301.7701-3(b)(1)(ii) will now be treated a domestic corporation for purposes of §6038A if one foreign person has direct or indirect sole ownership of the entity. Consequently, U.S. single member LLCs that are 100% owned by foreign entities will now be required to file Form 5472, adhere to record keeping requirements and obtain an employer identification number.

The penalties for not completing the above forms on a timely basis can be substantial. Please contact your Mazars USA LLP professional for additional information.

FOR MORE INFORMATION CONTACT:

 **EDUARDO S. CHUNG, JD, LL.M.**
SENIOR MANAGER
+1 212.375.6617
eduardo.chung@mazarsusa.com

VISIT US AT www.mazarsusa.com



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