February 14, 2012

CC:PA:LDP:PR (REG-130302-10)
Room 5205
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Via Federal eRulemaking Portal: http://www.regulations.gov (IRS REG-130302-10)

RE: Comments to Proposed Regulations to Section 6038D

Dear Sir or Madam:

I am pleased to submit The Florida Bar Tax Section's comments to the proposed regulations to Section 6038D.

Principal responsibility for these comments was exercised by Erika Litvak, Daniel Martinez, Alfredo Tamayo, and Abrahm W. Smith. The comments were reviewed by James Barrett.

Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by the proposed regulations to Section 6038D, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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The Florida Bar Tax Section is comprised of approximately 2,000 members. These materials were prepared by the Comment Projects Subcommittee of the Tax Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

Dominick R. Lioce, Chair

Comments to Proposed Regulations to Section 6038D

A. General Comments

1. Burdensome Information Reporting Requirements Affect U.S. Business Climate

The information reporting in cross-border transactional practice has become so complex, and the penalties for non-compliance have become so severe, that the information reporting is serving as a significant impediment to legitimate business transactions. The excessive information reporting requirements reduce foreign investments into the United States ("U.S.") and reduce U.S. job creation at the time when the U.S. unemployment rate is very high.

As an example, some foreign companies have expressed reluctance to establish branches in the U.S. because they find it difficult to find qualified executives willing to move to the U.S. and be subject to U.S. information reporting requirements. The cost of preparing information returns (accounting and legal fees) often exceeds the U.S. federal income tax liability.

The Treasury Department should consolidate all foreign asset reporting on one form and eliminate duplicative reporting for the same assets. This would increase compliance rate and reduce compliance burden on taxpayers.

2. Exclusion for Certain Categories of U.S. Persons

The regulations should provide exceptions from reporting for certain individuals whose holding of foreign assets is not related to tax non-compliance. Imposing onerous information reporting requirements on these categories of individuals does not further the goal of Section 6038D, and instead reduces U.S. economic activity. The categories that should not be subject to Section 6038D reporting requirements may include:

- Foreign executives and employees who are temporarily relocated to the U.S. and hold a non-immigrant visa (such as H or L visa).
- Foreign investors and traders who are in the U.S. on a temporary, non-immigrant visa (such as E visa).
- Aliens who are claiming the benefits of a tax treaty and who have resided in the U.S. for less than 3 years. There is very little benefit to the IRS from collecting information from people who are not liable to tax in the U.S. and who do not have significant connections with the U.S.

3. Expressly Address Reporting with Regard to Assets Held by Disregarded Entities

The regulations should address the reporting of assets held by disregarded entities. Under the current regulations, taxpayers may take the position that assets held by single-member LLCs do

not need to be reported on Form 8938. The three specific fact patters that need to be addressed by the regulations include:

- Foreign individual owns a U.S. disregarded entity that owns specified foreign financial assets. We recommend that Form 8938 reporting should not be required in this case.

- U.S. individual owns a foreign disregarded entity that owns assets that are not specified foreign financial assets. We recommend that Form 8938 reporting should not be required in this case.

- U.S. individual owns a U.S. disregarded entity that owns specified foreign financial assets. We recommend that Form 8938 reporting should be required in this case.

B. Specific Comments

1. § 1.6038D-2T(a)(3) & (a)(4)

Prop. Reg. § 1.6038D-2T(a)(3) provides an increased reporting threshold for a specified individual who is a qualified individual under Section 911(d)(1) (citizens or residents of the U.S. living abroad). Such specified individual is not required to file Form 8938 unless the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds $200,000 on the last day of the taxable year or $300,000 at any time during the taxable year. Prop. Reg. § 1.6038D-2T(a)(4) increases these reporting thresholds to $400,000 and $600,000 respectively when married specified individuals file a joint annual U.S. income tax return and either spouse is a qualified individual under Section 911(d)(1).

A qualified individual under Section 911(d)(1) includes an individual whose tax home is in a foreign country and who meets a bona fide resident test or a physical presence test under Sections 911(d)(1)(A) and 911(d)(1)(B), respectively. A qualified individual under Section 911(d)(1)(A) is a citizen of the U.S. who establishes to the satisfaction of the Secretary that he has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year. A qualified individual under Section 911(d)(1)(B) is a citizen or resident of the U.S. who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.

We recommend that Prop. Reg. § 1.6038D-2T(a)(3) & (a)(4) expressly state that a qualified individual under Section 911(d)(1)(A) (bona fide resident test) include U.S. residents who would otherwise qualify under this test but for not being U.S. citizens so that such individuals are not limited to being physically present in a foreign country for 330 full days during a period of 12 consecutive months in order to claim the increased Form 8938 reporting threshold.

2. § 1.6038D-2T(c)(1)(ii)

Prop. Reg. §1.6038D-2T(c)(1)(ii) provides that a married specified individual that files a separate annual return and his or her spouse is a specified individual must include one-half of the

value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining if the married specified individual meets the reporting threshold. The inclusion of one-half of the value of a specified foreign financial asset in the computation is only available if the spouse of the married specified individual is a specified individual herself. However, Prop. Reg. §1.6038D-2T(c)(1)(ii) does not expressly state what happens if the spouse is not a specified individual. We recommend that a sentence be added clarifying that in the event the spouse is not a specified individual, the married specified individual must include the entire value of a specified foreign financial asset jointly owned with his or her spouse in calculating if the married specified individual meets the reporting threshold.

3. §1.6038D-2T(c)(2)(ii)

We recommend that Prop. Reg. §1.6038D-2T(c)(2)(ii) expressly state that the married specified individual must include the entire value of the married specified individual's jointly owned specified foreign financial asset even if for purposes of calculating the married specified individual's reporting threshold under Prop. Reg. §1.6038D-2T(c)(1)(ii) the married specified individual only used one-half of the value of such jointly owned specified foreign financial assets. It is not entirely clear by reading Prop. Reg. §1.6038D-2T(c)(2)(ii) (without reading the example that appears on Prop. Reg. §1.6038D-2T(d)(2)(i)) that the entire value of the jointly owned specified foreign financial asset needs to be included. It becomes clear by reading the example included in Prop. Reg. §1.6038D-2T(d)(2)(i)).

4. §1.6038D-2T(d)(2)(i)

The cross-reference to Prop. Reg. §1.6038D-4T(b) in the example appears to be incorrect.

5. § 1.6038D-3T(a)(3)

To avoid ambiguity, the regulations should provide that American Depositary Receipts (ADRs) are not specified foreign financial assets because they are assets in a financial account maintained by a U.S. payor as defined in Treas. Reg. § 1.6049-5(c)(5)(i).

6. § 1.6038D-3T(b)(3)

The Proposed Regulations should exclude from the definition of specified foreign financial assets certain hedging transactions. Without an exemption for hedging transactions, taxpayers who are engaged in an active trade or business might face a disincentive in hedging certain business risks on international derivative markets. The Proposed Regulations could exclude from "specified foreign financial assets" certain hedging transactions described in Section 1221(a)(7).

7. § 1.6038D-3T(b)(3)

In order to reduce administrative burden, the Proposed Regulations should exclude from the definition of specified foreign financial assets certain assets held for a short period of time. In

some circumstances, U.S. persons may inadvertently acquire specified foreign financial assets (e.g., as a result of a corporate reorganization or in-kind distribution). In such cases, U.S. persons who quickly terminate their foreign assets should not be treated as holding the foreign assets for investment. The Proposed Regulations currently require reporting by specified individuals who held specified foreign financial assets at any time during the year, which can lead to a lot of unnecessary reporting by persons who inadvertently acquire a short-lived foreign financial interest throughout the year.

8. §1.6038D-3T(b)(4)

The trade-or-business test can be too technical and subjective for a specified individual that has no technical knowledge or assistance from a tax professional. The inclusion of bright-line test (such as an asset and income test) may provide objective guidelines, particularly for filers that intend to prepare the form without the assistance of a tax professional.

9. §1.6038D-3T(c)

Prop. Reg. §1.6038D-3T(c) provides that unless the person knows or has reason to know based on readily accessible information that the person has an interest in a foreign trust or a foreign estate, such interest shall not be treated as a specified foreign financial asset of the specified individual. Receipt of a distribution from the foreign trust or foreign estate constitutes actual knowledge for this purpose. May a person safely assume that he or she has no knowledge of his or her interest if he or she never received a distribution from a foreign trust or foreign estate even if the person knows of such interest due to other reasons? It is unclear what constitutes "readily accessible information" for this purpose. There are circumstances in which beneficiaries (in particular, discretionary beneficiaries) do not receive distributions from the foreign trust, particularly in the event the grantor of the trust is living, but know that they are beneficiaries of a foreign trust. In general, they have no access to the trust agreement, trustee or financial information of the trust, so there is no "readily accessible information" of the trust. However, these beneficiaries may know of the interest because the grantor or a family member informed them of the interest. Due to the fact that there are no distributions, these beneficiaries have no Form 3520 filing requirement. The Section considers that it would be advisable to include a presumption that in the event a beneficiary does not have to file a Form 3520 in a calendar year because he or she did not receive distributions from a foreign trust, such beneficiary should not be required to file a Form 8938 with respect to such interest either.

The alternative discussed above also would clarify the reporting obligations of a beneficiary that received a distribution on year 1 and reported the interest in the foreign trust on a Form 8938 on year 1, but who does not receive distributions in subsequent years. Under Prop. Reg. §1.6038D-3T(c) it would appear that a beneficiary in that situation would have to continue filing Form 8938 reporting the interest, but with zero value due to the fact that no distributions were received (even if there is no Form 3520 that is due). Under the alternative described above, the beneficiary would solely be required to report the interest in a Form 8938 in the year that he or she receives a distribution from the foreign trust, but not in the years in which there is no distribution. This may be more accurate too because the distribution provides actual evidence that the beneficiary has

indeed an interest in such foreign trust during the year in which there is a distribution. If the beneficiary never again receives a distribution, the beneficiary appears to be required to file the Form every subsequent year even if, for example, unbeknown to him, he was removed as beneficiary or the trust was revoked.

Also in connection with trust beneficiaries, under the FBAR rules, a trust beneficiary with a financial interest is not required to report the trust's foreign financial accounts on an FBAR if the trust, trustee of the trust, or agent of the trust is a U.S. person and files an FBAR disclosing the trust's foreign financial accounts. In the context of Form 8938, if the grantor of a foreign trust is a specified individual that is treated as the owner of the trust assets under Sections 671-679, the Proposed Regulations should provide relief for trust beneficiaries to file a Form 8938 if the grantor files a Form 8938 disclosing the specified foreign financial assets of the foreign trust.

10. § 1.6038D-4T(a)(6) - (8)

Information required in § 1.6038D-4T(a)(6) - (8) of the Proposed Regulations is beyond the scope of the information required in Section 6038D. We recommend that the regulations stay within the scope of Section 6038D.

11. § 1.6038D-5T(a)

It is difficult to determine fair market value on an annual basis of certain illiquid assets, such as contractual rights and interests in non-publicly-traded entities. Although the Proposed Regulations require simply a "reasonable estimate," the Proposed Regulations should provide some guidance of which estimates would be considered reasonable. For example, the Proposed Regulations could provide that, absent actual knowledge to the contrary, the fair market value of an asset can be presumed to equal (a) its book value, (b) its value at the end of the previous tax year, or (3) its value reflected on a financial statement prepared for any accounting or regulatory purpose.

12. § 1.6038D-5T(b)(3)

The valuation guidelines should address the treatment of assets that are subject to non-recourse liabilities. Prop. Reg. § 1.6038D-5T(a)(5) and § 1.6038D-5T(b)(3) can be interpreted as reducing the fair market value of an asset by non-recourse liability, but not below zero. To avoid ambiguity and different reporting approached by different taxpayers, the Proposed Regulations should expressly address whether the fair market value is calculated without regard to any liabilities, or whether the fair market value is reduced by the amount of certain non-recourse liabilities.

13. § 1.6038D-6(b)(2)

Prop. Reg. § 1.6038D-6(b)(2) excludes from the definition of passive income rents and royalties derived in the active conduct of a trade or business. However, this exception only applies to trade or business conducted by employees of the corporation or partnership. It is difficult to find

a trade or business that is conducted solely by employees of a corporation or partnership. Almost all businesses employ some outside agents to conduct their business. The requirement that the business be conducted by employees should be modified to allow businesses to use agents to some extent.

14. § 1.6038D-6(b)(3)(ii)

With respect to determining capital or profits interest in a domestic partnership, it is often difficult to determine the precise percentage interest of a partner because it may shift depending on the performance of the partnership. The regulations should provide that the interest in a partnership is determined on a year-by-year basis.

15. § 1.6038D-6(d)

The definition of "excepted domestic entity" should also include publicly traded partnerships because they are similar to publicly traded corporations which are described in Section 1473(3). There is very low risk of tax avoidance through publicly traded partnerships because they are subject to strict reporting requirements.

16. § 1.6038D-7T

We suggest that, rather than filing a Form 8938 to indicate that the specified foreign financial asset has already been disclosed on one of the forms listed in Prop. Reg. § 1.6038D-7T(a), consideration should be given to updating Part III, Schedule B of Form 1040 to satisfy the Form 8938 filing requirement. In other words, include a statement in Part III, Schedule B of Form 1040 that the specified individual can check to indicate the duplicative filing exception of the Proposed Regulations apply and no Form 8938 is being filed.

17. § 1.6038D-7T(a)

Prop. Reg. § 1.6038D-7T(a) should clarify that a specified individual who was included as part of a joint Form 5471 and/or Form 8865 filing pursuant to Prop. Reg. §§ 1.6038-2(j) and 1.6038-3(c) is considered to have filed such forms for purposes of Prop. Reg. § 1.6038D-7T(a) so that a specified individual can simply indicate on Form 8938 that the specified foreign financial asset has already been reported on Form 5471 and/or Form 8865.

18. § 1.6038D-7T(a)

We reiterate comment 8 of our comments to the draft Form 8938 (submitted by this Section to the Internal Revenue Service in a letter dated July 20, 2011). We recommend that Form 8858 be included.

In addition, given that the FBAR is not listed, a specified individual that is required to file an FBAR and is also required to file Form 8938 would be subject to duplicate reporting (even though the definitions for FBAR purposes and Form 8938 are different, it appears that in most of

the cases there will be duplication). There should be a relief for a specified individual filing an FBAR in order to avoid duplicative information.

19. § 1.6038D-7T(a)

We recommend that Prop. Reg. § 1.6038D-7T(a) include Form 8854 (Initial and Annual Expatriation Form) so that a specified individual who is also required to file Form 8938 can simply indicate on such form that Form 8854 has been timely filed in order to avoid duplicative informational reporting.

20. § 1.6038D-8T(e)

The Proposed Regulations should provide objective examples of what is considered to be "reasonable cause" for failing to file Form 8938. For example:

- A dual citizen by birth who has not lived in the U.S. for a significant amount of time and is under the age of 21 should be presumed to have reasonable cause for not filing Form 8938.

- A provision similar to FAQ # 17 of the 2011 Offshore Voluntary Disclosure Initiative (taxpayers who have properly reported all taxable income but only recently learned that they should have been filing Form 8938 in prior years to report Specified Foreign Financial Assets) should be presumed to have reasonable cause for not filing Form 8938.

- A provision similar to FAQ # 52 of the 2011 Offshore Voluntary Disclosure Initiative (reduced 5% offshore penalty for taxpayers who are foreign residents and meet all three of the following conditions for a certain amount of time (1) taxpayer resides in a foreign country, (2) taxpayer has made a good faith showing that he or she has timely complied with all tax reporting and payment requirements in the country of residency, and (3) taxpayer has $10,000 or less of U.S. source income each year) should be presumed to have reasonable cause for not filing Form 8938.

21. § 1.6038D-8T(e)

Because of an overlap in reporting requirements among various information reporting forms, multiple penalties can apply for failing to report the same foreign assets. The regulations should provide that penalties under Form 8938 would not be imposed if a penalty is already imposed under Forms 5471, 8621, 8865, 3520, or 3520-A for the same asset.

22. § 1.6038D-8T(e)

Prop. Reg. § 1.6038D-8T(e) provides a reasonable cause exception to the penalties that would otherwise apply for failure to timely and properly filing Form 8938. We recommend that Prop. Reg. § 1.6038D-8T(e) expressly state that if a specified foreign person timely and properly filed other IRS informational forms (such as 3520, 3520-A, 5471, 8621, 8858, 8865 and 8891) which

disclose the specified foreign financial asset, then such reporting is deemed to meet the reasonable cause standard of Prop. Reg. § 1.6038D-8T(e) so that no penalties apply for the failure to timely or properly file Form 8938.