Reporting Cash, Gold, and Safe Deposit Boxes

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In this article, Wood and Ball discuss reporting obligations for U.S. taxpayers with foreign financial accounts, even when those overseas assets produce no taxable income, such as precious metals and currency.

With the Swiss bank controversies, the Foreign Account Tax Compliance Act, and the Panama Papers, it is becoming less common to hear a client say, "I didn't know I had to report that." Over the last half-decade, many U.S. taxpayers have become keenly aware that the foreign financial accounts they hold are subject to U.S. income tax reporting and disclosure obligations. There is still confusion, and there is still noncompliance, but not to the same extent.

The nuances continue to evolve, and a "disclose everything" mantra is becoming more common. Indeed, many U.S. taxpayers could be unaware that they might be subject to reporting obligations even when they hold assets overseas that produce no taxable income.[1] Two areas taxpayers often overlook are precious metals and currency.

When discussing the tax reporting obligations of assets held outside the United States, there are three main areas of concern: Financial Crimes Enforcement Network Form 114, "Report of Foreign Bank and Financial Accounts"; Form 1040 or Form 1040A Schedule B, "Interest and Ordinary Dividends" (Schedule B); and Form 8938, "Statement of Specified Foreign Financial Assets." For precious metals and currency, much of the debate surrounds two issues: (1) the definition of "financial institution"; and (2) whether safe deposit boxes that hold precious metals or currency are considered financial accounts.

Whether to disclose can involve glass-half-full-versus-half-empty debates, and if the answer isn't clear, some people will disclose to be sure. Some will not. Adding to the difficulty is the fact that the particulars between the taxpayer and the institution can influence whether reporting is required.

FBARs

Foreign bank account reports have been around since 1970, but they were ignored in many sectors until around 2008. At that point, and in the years since, the IRS and Justice Department have made clear that while FBARs may be about money laundering, they are at the heart of tax compliance, too. Significantly, FBAR failures — willful, non-willful, civil, or criminal — are all very serious.

The penalties for failing to file FBARs, even if they are civil and even if they are non-willful, can mount up mercilessly. So they are nothing to take lightly in any circumstance. Although we have seen FBAR prosecutions and civil penalty disputes, it is likely that there will be many more FBAR cases in the future.

Treasury's FinCEN bureau issued rules amending the Bank Secrecy Act regulations, which went into effect March 28, 2011.[2] Under the regulations, U.S. persons are required to keep records and file

[1]IRS, "Report of Foreign Bank and Financial Accounts (FBAR)" (Dec. 11, 2015), *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-FBAR.

[2]"Amendment to the Bank Secrecy Act Regulations — Reports of Foreign Financial Accounts," 76 F.R. 10234-10246 (Feb. 24, 2011).

reports that the U.S. government has determined are useful in criminal, tax, regulatory, and counterterrorism matters.[3] Therefore, a U.S. person is required to file an FBAR if: (1) he had a financial interest in or signatory authority over at least one financial account located outside the United States; and (2) the aggregate value of all foreign financial accounts exceeded $10,000 at any time during the calendar year.[4]

To determine whether the aggregate value of all financial accounts exceeds $10,000, ''a reasonable approximation of the greatest value of currency or *nonmonetary* assets in [each] account during the calendar year'' will be used.[5] Bank Secrecy Act Regulation 31 CFR section 1010.350(c) states that the following account types are subject to the FBAR reporting requirements: (i) bank accounts, including ''any other account maintained with a person engaged in banking''; (ii) securities accounts; and (iii) other financial accounts, including ''an account with a person that is in the business of accepting deposits as a financial agency.''[6]

In the past few years, articles and blogs have started relying on the phrase ''an account with a person that is in the business of accepting deposits as a financial agency'' to contend that a safe deposit box is a financial account under the FBAR reporting requirements.[7] That is supported by Bank Secrecy Act Regulation 31 CFR section 1010.100(v), which defines a ''foreign financial agency'' as a:

> person acting outside the United States for a person . . . as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit securities, or gold.

However, the reach of that provision appears to go well beyond safe deposit boxes at banks and vaults. It appears to reach individuals holding assets for U.S. persons outside the United States. The exact parameters, however, might be debated.

No topic has probably generated more opinions than safe deposit boxes. At the same time, a good deal has arguably been put to rest by updates to the IRS's Internal Revenue Manual. IRM section 4.26.16.3.2.3 declares that safe deposit boxes are not financial accounts, with one important exception. In the note to that section, the IRM reveals:

> A reportable account may exist where the financial institution providing the safety deposit box has access to the contents and can dispose of the contents upon instruction from, or prearrangement with, the person.[8]

The exception could swallow the rule. Suppose that a taxpayer keeps her safe deposit box with a foreign financial agency that has been granted access to it. That is a reportable financial account for FBAR purposes. As a result, a tax authority may argue that a safe deposit box containing precious metals or currency may in itself trigger FBAR reporting obligations when its value exceeds $10,000.[9]

Schedule B

A U.S. taxpayer could also be under an obligation to report her foreign accounts on Schedule B. One must answer ''yes'' if at any time during the tax year, the taxpayer held a ''financial interest in or signatory authority over a financial account located in a foreign country.''[10] Schedule B suggests a taxpayer is required to report a foreign account even when the account produces no income on Question 1, line 7a.[11]

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[3]*Id.* at 10234.

[4]IRS, *supra* note 1.

[5]FinCEN, ''BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts,'' FinCEN Form 114, at 10 (June 2014) (This amount includes ''the maximum value of an account is a reasonable approximation of the greatest value of currency or *nonmonetary* assets in the account during the calendar year'' (emphasis added).); *see* IRM section 4.26.16.3.6.

[6]31 CFR section 1010.350(c).

[7]Before the first half of 2014, many articles and blogs stated that there is no need to report precious metals or currency held in a safe deposit box on FBARs. The authors relied on the IRS's ''Basic Questions and Answers on Form 8938'' and other IRS authorities for the argument that safe deposit boxes are not financial accounts. IRS, ''Basic Questions and Answers on Form 8938'' (Sept. 25, 2015), *available at* https://www.irs.gov/Businesses/Corporations/Basic-Questions-and-Answers-on-Form-8938. The Form 8938 FAQs state that a ''safe deposit box is not a financial account.'' The Form 8938 FAQs also state that precious metals and foreign currency held directly are not subject to Form 8938 reporting. It can be surmised that eventually the authors realized that this language is not applicable to FBARs. By mid-2014, authors and bloggers began to shift their reasoning and read the phrase ''an account with a person that is in the business of accepting deposits as a financial agency'' more broadly.

[8]*See also* IRM section 4.26.16.2.3.D n. (''31 USC 5314 defines 'foreign financial agency' as 'a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.' Therefore, a reportable account relationship may exist where a foreign agency holds precious metals on deposit or provides insurance or other services as an agent of the person owning the precious metals.'').

[9]*See* IRS, ''Comparison of Form 8938 and FBAR Requirements'' (May 4, 2016), *available at* https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements.

[10]IRS, 2015 Form 1040A or Form 1040, Schedule B, ''Interest and Ordinary Dividends,'' *available at* https://www.irs.gov/pub/irs-pdf/f1040sb.pdf.

[11]*See* IRS, 2015 Form 1040A or Form 1040, Schedule B, ''Interest and Ordinary Dividends, Specific Instructions 2''

(Footnote continued on next page.)

Recently, the IRS reminded taxpayers that they must report the ''*existence* of foreign accounts'' on Schedule B.[12] That is true even if the taxpayer is not otherwise required to file FBARs or Form 8938.[13] That lack of symmetry will catch some taxpayers unawares.

For purposes of Schedule B, the ''Specific Instructions to Schedule B'' state that a financial account includes, but is not limited to, ''securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution).'' The language stating ''other account maintained with a financial institution'' appears to be all-encompassing. That is further supported by the next sentence in the specific instructions to Schedule B.

It includes additional examples of financial accounts that go beyond the traditional notions of financial accounts. Thus, a financial account is also ''a commodity futures or options account, an insurance policy with a cash value (such as a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund (that is, a fund that is available to the general public with a regular net asset value determination and regular redemptions).''

It may be difficult to argue that the specific instructions to Schedule B do not encompass safe deposit boxes as well as the precious metals and currency held inside. Perhaps that is not your father's definition of a financial account, but caution would suggest taking that definition seriously. Remarkably, however, neither Schedule B nor the specific instructions to Schedule B indicate that a taxpayer must disclose the value of a foreign financial account on Schedule B.

Moreover, if the taxpayer is not required to file FBARs, the taxpayer is not required to disclose any further information on Schedule B.[14] Regardless, it appears that a taxpayer that holds precious metals and currency in a foreign country, but outside of a financial institution, would not have a Schedule B tax-reporting obligation. Notably, the specific instructions to Schedule B contain definitions for the terms ''financial account,'' ''financial account located in a foreign account,'' and ''signatory authority,'' but refers to the FBAR instructions for other relevant terms.[15]

Thus, a taxpayer must look to the FBAR instructions for the definition of financial institution. Unfortunately, the definition of financial institution is not included in the Bank Secrecy Act Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts (FBAR instructions).[16] Therefore, one can assume that the term ''financial institution'' should be interpreted according to its ordinary and common meaning for the purpose of FBAR tax reporting obligations.

The Bank Secrecy Act does not use the term ''financial institution'' in determining whether a financial account is subject to FBAR reporting. Instead, it refers to whether a financial account is held with a ''foreign financial agency.'' This is probably because the Bank Secrecy Act — which authorizes the Treasury secretary to obligate U.S. persons to adhere to FBAR reporting requirements — uses the term ''foreign financial agency'':

> The Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency.[17]

Despite the use of the term ''financial agency'' in the Bank Secrecy Act and the accompanying regulations, the FBAR Instructions do not use the term

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(''Check the 'Yes' box if at any time during 2015 you had a financial interest in or signature authority over a financial account located in a foreign country.'').

[12]IRS, ''IRS Reminds Those With Foreign Assets of U.S. Tax Obligations,'' IR-2015-70 (Apr. 10, 2015); IRS, ''Offshore Income and Filing Information for Taxpayers with Offshore Accounts,'' FS-2014-7 (June 2014). Nothing in the Schedule B instructions indicates that a monetary threshold triggers Schedule B reporting. It appears the existence of a foreign financial account alone requires the taxpayer to check ''Yes'' on Question 1, line 7a.

[13]*See* IRS, 2015 Form 1040A or Form 1040, Schedule B, ''Interest and Ordinary Dividends,'' at 2 (''Check the 'Yes' box [Question 1, line 7a] even if you are not required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR). . . . Regardless of whether you are required to file FinCEN Form 114 (FBAR), you may be required to file Form 8938, Statement of Specified Foreign Financial Assets, with your income tax return.'').

[14]*See id*. (''[Question 2, line 7a] If 'yes,' [to Question 1, line 7a] are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements. . . . [line 7b], If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located.'').

[15]*See* IRS, 2015 Form 1040A or Form 1040, Schedule B, ''Interest and Ordinary Dividends,'' at 2 (''Other definitions. For definitions of 'financial interest,' 'United States' and other relevant terms see the instructions for FinCEN Form 114.'').

[16]FinCEN, ''BSA Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts,'' FinCEN Form 114 (June 2014).

[17]31 U.S.C. section 5314.

"financial agency."[18] Instead, the FBAR Instructions replace the term "financial agency" with "financial institution."[19] Indeed, the IRM appears to use the terms interchangeably.[20] Therefore, a taxpayer may want to err on the side of caution and report financial accounts at foreign financial agencies on Schedule B.

Form 8938

A U.S. taxpayer must file Form 8938 with his tax return when: (1) he has an interest in a "specified foreign financial asset"; and (2) the aggregate value of his specified foreign financial assets exceeds the reporting thresholds applicable to him.[21] The IRS has issued administrative guidance, "Basic Questions and Answers on Form 8938" (Form 8938 FAQs), on whether some assets are specified foreign financial assets and reportable on Form 8938.[22] Fortunately, the guidance accompanying Form 8938 leaves few questions unanswered regarding the tax reporting of precious metals and currency.

The Form 8938 FAQs clearly state "a safe deposit box is not a financial account." Also, the Form 8938 FAQs proclaim that "directly held precious metals, such as gold, are not specified foreign financial assets." Still, the tax reporting obligations for directly held currency are less clear.

In the answer to one of the questions under the heading "Cash or foreign currency, real estate, precious metal, art and collectibles," the Form 8938 FAQs imply that any currency, not just foreign currency, is excluded from the definition of specified foreign financial asset:

> 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.*

The answer to the question implies that directly held cash is also excludable from Form 8938 reporting obligations. The use of the word "or" in the heading, "Cash or foreign currency . . ." arguably indicates that the word "cash" can replace the term "foreign currency" in that question.

Consequently, it is probable that precious metals and currency held in a taxpayer's safe deposit box are not required to be reported on Form 8938. However, there are still two issues to consider when not reporting precious metals or currency on Form 8938. First, if a U.S. taxpayer sells his precious metals to a foreign person, the contract with the foreign person is considered a specified foreign financial asset.[23]

Second, precious metal certificates issued by foreign persons, such as gold certificates, are also deemed specified foreign financial assets.[24] In either case, if the U.S. taxpayer meets the reporting threshold, the taxpayer is required to file Form 8938.

Practical and Legal Considerations

Taxpayers who never want to fight about these issues may be best advised to disclose everything whenever there is any doubt. It is hard to argue with the wisdom of going overboard when the FBAR penalty structure is so draconian. Yet some taxpayers may not heed that advice.

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[18]*See* FinCEN, *supra* note 16.

[19]*Id.* at 4, 8 ("Financial Account. A financial account includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account also includes a commodity futures or options account, an insurance policy with a cash value (such as a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund (i.e., a fund that is available to the general public with a regular net asset value determination and regular redemptions). . . . Record Keeping Requirements. Persons required to file an FBAR must retain records that contain the name in which each account is maintained, the number or other designation of the account, the name and address of the foreign financial institution that maintains the account, the type of account, and the maximum account value of each account during the reporting period.").

[20]IRM section 4.26.16.3.5 ("It is the location of an account, not the nationality of the financial institution, that determines whether an account is 'foreign' for FBAR purposes. Accounts of foreign financial institutions located in the U.S. are not considered foreign accounts for FBAR; conversely, accounts of U.S. financial institutions located outside the U.S. are considered foreign accounts.").

[21]IRS, "2015 Instructions to Form 8938" (Oct. 22, 2015), *available at* https://www.irs.gov/pub/irs-pdf/i8938.pdf ("Taxpayers living in the United States. . . . Unmarried taxpayers. If you are not married, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year. Married taxpayers filing a joint return. If you are married and you and your spouse file a joint income tax return, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than $100,000 on the last day of the tax year or more than $150,000 at any time during the tax year. Married taxpayers filing separate income tax returns. If you are married and file a separate income tax return from your spouse, you satisfy the reporting threshold only if the total value of your specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year."). *See* 2015 Instructions to Form 8938 for reporting thresholds for taxpayers living outside the United States.

[22]IRS, "Basic Questions and Answers on Form 8938" (Sept. 25, 2015), *available at* https://www.irs.gov/Businesses/Corporations/Basic-Questions-and-Answers-on-Form-8938.

[23]*Id.*

[24]*Id.*

Some taxpayers even find "for the avoidance of doubt" disclosures weak-kneed. In general, it may be safe for these taxpayers to assume that they probably do not need to disclose a non-U.S. safe deposit box to which neither a bank nor a trust company has access. That is probably not a foreign financial account or a specified foreign financial asset.

Therefore, it is probable that the safe deposit box need not be disclosed on an FBAR, Schedule B to Form 1040, or a Form 8938. The same result should apply to the precious metals or currency held inside. While there seems to be some consensus on this issue, there appears to be no official authority.[25]

On the other hand, if the safe deposit box can be accessed by a financial institution, the safe deposit holds precious metal certificates, or the financial institution provides insurance or other services for the contents within the safe deposit box, the safe deposit box and its contents are more likely to be subject to U.S. income tax reporting and disclosure obligations. That can be a slippery slope, and the U.S. depositor may not even know about all the terms and conditions applying to the box: Many people do not read or retain the form agreement they sign with a bank.

And what of the internal record keeping of the financial institution? For example, should it matter whether we are discussing a stand-alone safe deposit box at foreign bank X, or a safe deposit box that is somehow linked to a bank account at foreign bank X? It may matter. Arguably, the risk of the safe deposit box being deemed a financial account — even if the institution does not have access to it — goes up when there is a connection to a traditional bank account.

In sum, is it clear when a safe deposit box is itself a financial account? Not really. Is it clear that the safe deposit box's contents could be aggregated with the financial account amount to reach a higher dollar total? No. Is it clear that the government is prohibited from making these arguments? Unfortunately, this answer is also no.

Penalties

It is hard to discuss these topics without highlighting penalties. If one is uncertain whether and what to disclose, the penalty regime should matter. Axiomatically, there is no penalty for disclosing too much. These days, it seems safe to assume the IRS and FinCEN are getting many overly complete "for the avoidance of doubt" disclosures.

One reason is penalties. There are two FBAR civil penalties that can apply to individuals: (i) the penalty for non-willful FBAR violations;[26] and (ii) the penalty for willful FBAR violations.[27] In general, the IRS has six years to assess a civil FBAR penalty.[28] On May 13, 2015, the IRS issued "Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties," (Interim Guidance) defining the upper limits of FBAR penalties.[29]

For most cases involving non-willful violations, an IRS examiner will recommend one penalty per open year, with each penalty limited to $10,000. The Interim Guidance proclaims: "In no event will the total amount of the penalties for nonwillful violations exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts for the years under examination." In some cases, if the facts and circumstances indicate that asserting non-willful penalties in multiple years is unwarranted, the IRS may assert "a single penalty, not to exceed $10,000, for one year only."[30]

In other cases, the IRS examiner will not recommend a non-willful penalty when she determines that: (i) the FBAR violation was attributable to reasonable cause; and (ii) the person failing to file FBARs properly files delinquent FBARs that are correct and complete.[31] Willful violations, of course, are more expensive. For cases involving willful violations, an IRS examiner will recommend a penalty in each year there was willful violation.[32]

In most cases, the total penalty amount will be limited to 50 percent of the highest aggregated balance of all unreported financial accounts during the years under examination. According to the Interim Guidance, the IRS may recommend a lower or *higher* penalty based on the facts and circumstances. However, "in no event will the total penalty

[25]Geoffrey Weinstein and Patrick McCormick, "Storing Gold Offshore: What Your Clients Need To Know," 206 *N.J.L.J.* 286-287 (Oct. 17, 2011); *see* Marie Sapirie, "Consistency Is Focus of Voluntary Disclosure, IRS Official Says," *Tax Notes*, Mar. 28, 2011, p. 1517. (IRS Small Business and Self-Employed Special Counsel Samuel Berman "said a foreign safe deposit box could be a foreign account for purposes of the FBAR. 'It's really an account relationship that you're reporting,' he said. 'If someone is managing that safe deposit box overseas and reports to you what is in it, what goes into it, and what comes out, that would be reportable as a foreign account.' Berman stressed that the type of asset is irrelevant for reporting on the FBAR. 'What you're reporting is an account relationship with a foreign financial institution,' he said.")

[26]31 U.S.C. section 5321(a)(5)(A)-(B).

[27]31 U.S.C. section 5321(a)(5)(C).

[28]31 U.S.C. section 5321(b).

[29]IRS, "Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties," SBSE-04-0515-0025, at 2, Attachment 1 (May 13, 2015) (affecting IRM section 4.26.16 and 4.26.17).

[30]*Id.*; *see* IRM section 4.26.16.6.4.1.

[31]31 U.S.C. section 5321(a)(5)(B)(ii); Interim Guidance, *supra* note 29, at 3; IRM section 4.26.16.6.4.1.

[32]Interim Guidance, *supra* note 29, at 1; IRM section 4.26.16.6.5.3.

amount exceed 100 percent of the highest aggregate balance of all unreported foreign financial accounts during the years under examination.''[33]

In addition to civil penalties, a person may also be subject to criminal penalties for willful FBAR violations.[34] A person charged with a willful FBAR violation can face a fine of up to $250,000, up to five years in prison, or both.[35] In general, the statute of limitations on FBAR criminal penalties is five years from the date the offense is committed.[36]

A U.S. taxpayer that fails to file a correct and complete Form 8938 may be subject to a $10,000 penalty for failure to disclose.[37] If the IRS sends a notice of the failure to the taxpayer, the penalty for failure to disclose increases if the failure continues for more than 90 days after the IRS mailed notice. The penalty increases by ''$10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period.''[38] But the increase will not exceed $50,000. Thus, the potential maximum penalty for failure to disclose is $60,000.

The penalty for failure to disclose will not be imposed if a taxpayer can show reasonable cause. Notably, the penalty does not preclude any civil or criminal penalties that may otherwise apply.[39] Therefore, penalties for underpayment attributable to undisclosed specified foreign financial assets are still applicable, including the accuracy-related penalty under section 6662(j), which equals 40 percent of any underpayment; the fraud penalty under section 6663, which equals 75 percent of the underpayment attributable to fraud; and criminal penalties under sections 7201, 7203, 7206, et seq.[40]

Failure to report financial accounts on a Schedule B does not appear to elicit any penalties independent of those that otherwise accompany a Form 1040 or Form 1040A.[41] Therefore, even if a wrong answer on Schedule B does not in itself give rise to a civil or criminal penalty, the act of filing an incorrect return can still ''raise the specter of a tax perjury charge or even tax evasion if income is omitted and tax under reported.''[42] In light of the potential penalties, a disclosure ''for the avoidance of doubt'' might not look too bad. ■

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[33]*Id.*

[34]31 U.S.C. section 5321(d) (''A civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.'').

[35]31 U.S.C. section 5322(a).

[36]IRM section 4.26.17.5.5; *see* 18 U.S.C. section 3282(a) (statute of limitations for noncapital offenses).

[37]Section 6038D(d)(1).

[38]Section 6038D(d)(2).

[39]Section 6038D(g); reg. section 1.6038D-8(f).

[40]Reg. section 1.6038D-8(f); IRS, ''2015 Instructions to Form 8938,'' *supra* note 21.

[41]*See* Michael I. Saltzman and Leslie Book, *IRS Practice and Procedure*, para. 12.04[3][b] (2002 and 2016 Supp.).

[42]*Id.*