

December 12, 2014  
2014-116

## flash Alert

A Publication for Global Mobility and Tax Professionals by KPMG's Global Mobility Services Practice

### United States – Final FATCA Regs Include Significant Changes

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The U.S. Department of the Treasury and Internal Revenue Service (IRS) recently released final regulations (T.D. 9706) that, among other things, may make foreign financial asset reporting easier for taxpayers with certain deferred compensation and for those who are dual residents. The regulations concern I.R.C. section 6038D, *Information with Respect to Foreign Financial Assets*, which requires U.S. taxpayers to report ownership of specified foreign financial assets with their U.S. income tax returns, to the extent the total value of those assets exceeds certain threshold amounts. The reporting is required for all tax years beginning after March 18, 2010, and is satisfied using Form 8938, *Statement of Specified Foreign Financial Assets*.

This *GMS Flash Alert* highlights some of the changes made with the final regulations.

### Why This Matters

The final regulations make a couple of significant changes affecting the reporting requirements, regarding dual residents who claim tax residency in a foreign country pursuant to the tie-breaker provisions of a treaty, and what deferred compensation is subject to reporting.

With respect to dual residents, this change represents a coordination of the reporting requirement with the individual's tax residency status. And in terms of deferred compensation reporting, the relevant change recognizes the economic realities of an employee's interest in unvested compensation. In both cases, taxpayer's reporting requirements are modified or reduced.

For prior coverage of the foreign financial asset reporting requirements see [Flash International Executive Alert 2011-208A](#) (December 19, 2011), [Flash International Executive Alert 2011-207](#) (December 15, 2011), [Flash International Executive Alert 2011-166](#) (October 11, 2011), and [Flash International Executive Alert 2010-066](#) (March 19, 2010).

### Dual Resident Taxpayers

Under some circumstances an individual may simultaneously meet the residency tests of both the United States and another country, so that he is considered a dual resident. In this case, if there is an income tax treaty between the U.S. and the other country, the individual, after considering a number of factors, may be considered a resident of the other country and a nonresident of the United States.

Under the temporary regulations, such an individual was subject to the foreign financial asset reporting requirement, even though he was a U.S. nonresident for income tax purposes. The final regulations reverse that position so that, for the period an individual is considered a nonresident of the U.S. pursuant to the residency tie-breaker provisions of a treaty, he is not subject to the foreign financial asset reporting requirements.<sup>2</sup>

### ***Example***

George arrived in the U.S. from Canada for a three-week business trip on February 1, 2014. Subsequently, George moved to the U.S. for a four-year assignment on June 1, 2014. He did not return to Canada for the rest of 2014. Under Canadian domestic law, George is considered a resident of Canada through May 31, 2014. At the same time, under U.S. domestic law, George would be considered a U.S. resident starting February 1, 2014. However, pursuant to the U.S.-Canada income tax treaty, George would be a resident only of Canada through May 31, 2014. If George claims the benefit of the treaty so that he is not a resident of the U.S. until June 1, 2014, he will not be subject to the foreign financial reporting requirements for the period January 1, 2014 through May 31, 2014<sup>3</sup> (whereas under the temporary regulations he would have been subject to the reporting requirements from February 1, 2014).

### **Deferred Compensation**

Deferred compensation such as stock options, restricted stock, and retirement or pension plans from foreign employers or held in foreign trusts or accounts are considered specified foreign financial assets subject to reporting under I.R.C. section 6038D. The temporary regulations did not distinguish between unvested (i.e., subject to a substantial risk of forfeiture) and vested amounts. The final regulations provide that property transferred in connection with the performance of personal services is not a specified foreign financial asset until the first day the property is substantially vested.<sup>4</sup>

### ***Example***

Anne was granted an option to purchase 1,000 shares of her employer's stock on April 1, 2014. The option has a three-year vesting period, during which time Anne must remain an employee in order to eventually exercise her option to purchase the stock. Under the temporary regulations, Anne's unvested stock options were subject to the foreign financial asset reporting rules. Under the final regulations, Anne's stock options will not be subject to foreign financial asset reporting until they vest in 2017.

### **Other Changes**

For purposes of Form 8938 and foreign financial asset reporting, all foreign currency amounts are to be converted using a specific exchange rate issued by the U.S. Treasury Department's Bureau of Fiscal Service.<sup>5</sup> The final regulations include an exception to this requirement in that a foreign currency conversion shown on a periodic financial account statement may also be used.<sup>6</sup>

The final regulations also include minor changes which clarify, without changing, the meaning of certain terms (e.g., an asset with no positive value has a maximum value of zero).

*Footnotes:*

- 1 See: [http://www.ofr.gov/\(X\(1\)S\(hxtqfbii3zomzdu4adr4rezb\)\)/OFRUpload/OFRData/2014-29125\\_PI.pdf](http://www.ofr.gov/(X(1)S(hxtqfbii3zomzdu4adr4rezb))/OFRUpload/OFRData/2014-29125_PI.pdf).
- 2 Treas. Reg. sec. 1.6038D-2(e)(1).
- 3 Treas. Reg. sec. 1-6038D-2(e)(3).
- 4 Treas. Reg. sec. 1-6038D-2(b)(2).
- 5 Treas. Reg. sec. 1-6038D-5(c)(1).
- 6 Treas. Reg. sec. 1-6038D-5(d).

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The following information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230 as the content of this document is issued for general informational purposes only.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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