

## FTB Notice No. 92-2

Subject: California Conformity to Federal Reporting Requirements  
Relating to Certain Transfers to Foreign Persons [Internal  
Revenue Code § 6038B]

Section 6038B of the Internal Revenue Code ("IRC") imposes reporting requirements on United States persons with respect to certain transfers made to foreign persons. Revenue and Taxation Code ("RTC") Section 25940(b), as added by SB 169 (Stats. 1991, Ch. 117), incorporates by reference into California law these IRC 6038B disclosure requirements and makes them applicable to all transferors subject to taxation under the Bank and Corporation Tax Law, effective with respect to income years commencing on or after January 1, 1991. Under RTC Section 25940(b)(2), failure to comply with the filing requirements of RTC Section 25940(b)(1) results in the imposition of a penalty equal to 25% of the amount of gain realized on any such transfer.

Questions have arisen relating to the meaning of the terms "United States person" and "foreign person" as used in IRC Section 6038B and incorporated by reference into RTC Section 25940(b). RTC Section 19 defines a person as "any person, firm, partnership, association, corporation, company, syndicate, estate, trust, business trust, or organization of any kind." However, neither the term "United States person" nor the term "foreign person" is expressly defined in the Bank and Corporation Tax Law, nor are the definitions of these terms for federal income tax purposes (see IRC Section 7701(a)) otherwise incorporated into California law. This notice sets forth the Franchise Tax Board's interpretation of these terms solely for purposes of assisting taxpayers in complying with RTC Section 25940(b).

United States person. A question has arisen as to whether the disclosure filing requirements of RTC Section 25940(b) would be enforced against non-California unitary affiliates of taxpayers subject to the Bank and Corporation Tax Law. RTC Section 23037 defines a taxpayer for purposes of the Bank and Corporation Tax Law as "any person or bank subject to the tax imposed under Chapter 2, Chapter 2.5 or Chapter 3 of this part." Under general constitutional standards relating to jurisdiction, a person or bank would only be subject to the tax imposed under Chapter 2 if that person or bank is doing business or deriving income from sources within California. As a result, the Franchise Tax Board will only enforce the reporting requirements of RTC Section 25940(b)(1) against those persons and banks which are both taxpayers under the Bank and Corporation Tax Law and the specific transferor of property in a transaction subject to IRC Section 6038B reporting. In the context of a unitary group subject to combined reporting in this state, the reporting requirement of RTC Section 25940(b) applies only to the member of the unitary group which is a taxpayer in this state and transfers property to a "foreign person" as described below.

Foreign person. Questions have also arisen as to whether the filing disclosure requirements of RTC Section 25940(b) are applicable to transfers to all non-California persons or only to those transfers made to non-United States (i.e., "foreign") persons. The Bank and Corporation Tax Law does not define the term "foreign person" as used in RTC section 25940(b)(1), nor does the legislative history of SB 169 evidence any clear intent as to the proper definition of the term. However, because the incorporation of IRC Section 6038B into RTC Section 25940(b) was part of California's general 1991 federal conformity legislation, it is reasonable to infer that the Legislature did not intend to impose a broader filing requirement under RTC Section 25940(b) than would be required under IRC Section 6038B. Since under federal law only transfers made to non-United States persons would be subject to IRC Section 6038B reporting requirements, the Franchise Tax Board will similarly only require reporting of transfers by taxpayers subject to the Bank and Corporation Tax Law to non-United States persons.

How to file. RTC Section 25940(d) specifies that "the information required to be filed with the Franchise Tax Board under this section [including subdivision (b)] shall be a copy of the information filed with the Internal Revenue Service." The temporary regulations under IRC Section 6038B provide that the information required to be furnished is to be attached to the IRS Form 926 (Return by Transferor of Property to a Foreign Corporation, Foreign Estate or Trust, or Foreign Partnership) and filed on an annual basis, together with the taxpayer's federal income tax return, with the Internal Revenue Service Center where the United States person is required to file its federal income tax return. (Temp. Treas. Reg. § 1.6038B-1T(b)(1).) The regulations further provide that the attachment to the IRS Form 926 is to be filed subject to the transferor's declaration under penalties of perjury on the IRS Form 926 that the information submitted is true, correct, and complete to the best of the transferor's knowledge and belief. As a result, taxpayers who are required to comply with the filing requirements of RTC Section 25940(b)(1) under the analysis set forth in this notice must attach copies of each IRS Form 926 filed with the Internal Revenue Service to their corresponding California franchise or income tax return with respect to transfers occurring in each income year beginning on or after January 1, 1991.

#### DRAFTING INFORMATION

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