



IRS Issues Strict Filing Requirements for Taxpayers with Substantial Foreign Assets

JANUARY 2012

As part of a broad initiative by the federal government to increase U.S. tax compliance, particularly by those with foreign accounts or foreign assets, some taxpayers may be required to file a new tax form with their 2011 income tax returns. Holders of foreign bank accounts may be familiar with the requirement to file Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts*, (FBAR). Get ready for the Foreign Account Tax Compliance Act (FATCA), which has given rise to a new filing requirement for foreign assets.

Form 8938, *Statement of Specified Foreign Financial Assets*, is a new reporting requirement that will be effective for 2011 and future tax years. It is possible that the provisions will affect you, even though you may not believe you own "anything foreign." Some of the financial assets that must be reported on the new Form 8938 include:

- Direct ownership of stock or securities in a foreign corporation (outside of a financial institution);
- Financial accounts maintained at foreign financial institutions;
- Foreign retirement accounts;
- Foreign life insurance products;
- Foreign partnership interests, such as foreign hedge funds and foreign private equity funds;
- Foreign deferred compensation arrangements;
- Beneficial interests in foreign trusts or estates;
- Loans to non-US borrowers;
- Any financial instrument in which the issuer or counterparty is a non U.S. person.

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There are various thresholds at which Form 8938 reporting is required. Some taxpayers will be required to report if they have foreign assets and foreign accounts with an aggregate value of \$50,000 at any time during the year. Other thresholds are higher based on filing status and whether the taxpayer lives in the US or lives abroad. For 2011, only individuals are required to file Form 8938. However in future years, business entities, trusts and estates may be required to file. Note that no tax is due with Form 8938 - - it is simply a disclosure form which lists the required foreign assets.

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The requirement to file Form 8938 is completely independent of the requirement to file an FBAR form. Many taxpayers will have to file both the FBAR and Form 8938. Some will just file one of the two forms. Unlike the FBAR which is filed separately on June 30th of every year, Form 8938 is part of the annual income tax return, starting with the 2011 return which is filed in 2012.

As with other IRS foreign disclosure reporting, there are significant civil and criminal penalties for failure to file the Form 8938 when required or to complete the form as required.

No doubt there will be many open questions surrounding Form 8938. For example, if an individual owns stock in a private foreign corporation, how is the value of that asset determined in order to conclude if Form 8938 is required? Given the harsh penalties for noncompliance, it is better to err on the side of caution and disclose the asset if there is not a clear exception from reporting. If you have any questions about whether you may be subject to the new disclosure rules on Form 8938, please consult your Wilkin & Guttenplan advisor.

Any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

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