

Re: FATCA Reporting and Form 8938

Taxpayers have long been required by the Bank Secrecy Act to report certain foreign accounts. Now, there is another reporting requirement in the Foreign Account Tax Compliance Act of 2010. Since tax years starting after March 18, 2010, however, the IRS has required certain taxpayers to report their specified foreign financial assets in which they have an interest. For most individual taxpayers, this means reporting by filing new Form 8938, Statement of Specified Foreign Financial Assets, along with their annual income tax return. This annual foreign-asset disclosure to the IRS is in addition to any reporting requirement to the Treasury Department under the Bank Secrecy Act using the so-called "FBAR" form. This letter highlights some of the key elements of the new reporting requirement.

Who must file Form 8938?

Form 8938 must be filed by "specified individuals" with "specified foreign financial assets." The IRS has explained in the Instructions to Form 8938 and in guidance that a specified individual is a U.S. citizen; a resident alien of the U.S. for any part of the tax year; a nonresident alien who makes an election to be treated as resident alien for purposes of filing a joint income tax return; or a nonresident alien who is a bona fide resident of American Samoa or Puerto Rico.

The IRS also reported that in the future it intends to require specified domestic entities to file Form 8938 if the entity is formed or availed of to hold specified foreign financial assets, and the value of those assets exceeds the appropriate reporting threshold. The IRS has issued proposed regulations which provide that specified domestic entities include certain domestic corporations, domestic partnerships, and trusts. At this time, there is no Form 8938 filing requirement for specified domestic entities. More guidance about specified domestic entities is being developed by the IRS.

Specified foreign financial assets

The IRS has described what constitutes a specified foreign financial asset in the Instructions to Form 8938 and in guidance. Generally, the IRS has explained that specified foreign financial assets include foreign financial accounts, and foreign non-account assets held for investment (as opposed to held for use in a trade or business), such as foreign stock and securities, foreign financial instruments, contracts with non-US persons, and interests in foreign entities.

Along with knowing what assets meet the definition of a specified foreign financial asset, it is important to know what assets are excluded from the definition of a specified foreign financial asset. The IRS has explained that certain assets of a foreign nature are not specified foreign financial assets that require Form 8938 reporting. Additionally, certain specified foreign financial assets reported elsewhere do not need to be reported on Form 8938.

Exceptions are also made for certain trusts and assets held by bona fide residents of U.S. possessions. One important exception applies to an interest in a social security, social insurance, or other similar program of a foreign government. If you have any questions about the types of assets that are excluded from the definition of specified foreign financial asset, please contact our office.

Thresholds

The IRS has developed monetary thresholds for reporting. The thresholds vary depending on the taxpayer's status.

1. Unmarried taxpayers living in the U.S.: The total value of the taxpayer's 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.
2. Married taxpayers filing a joint income tax return and living in the U.S.: The total value of the couple's 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.
3. Married taxpayers filing separate income tax returns and living in the U.S.: The total value of the taxpayer's 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.
4. Taxpayers living abroad. An individual is a taxpayer living abroad if (1) the individual is a U.S. citizen whose tax home is in a foreign country and the individual is either a bona fide resident of a foreign country or countries for an uninterrupted period that includes the entire tax year; or the individual is a U.S. citizen or resident, who during a period of 12 consecutive months ending in the tax year is physically present in a foreign country or countries for at least 330 days.

Taxpayers will need to determine the value of their specified foreign financial assets. Generally, the IRS has explained that specified individuals may rely on periodic account statements for the tax year to report a financial account's maximum value unless the taxpayer knows or has reason to know that the statements do not reflect a reasonable estimate of the maximum account value during the tax year. The IRS has provided guidance on valuing other types of specified foreign financial assets.

Form 8938 is filed with the specified individual's federal income tax return. A specified individual does not need to file Form 8938 if he or she is not required to file a federal income tax return, the IRS has explained.



International cooperation

After Congress passed FATCA, the U.S. Treasury began discussing the new reporting and disclosure requirements with foreign governments, especially France, Germany, Italy, Spain, and the United Kingdom. From these discussions, model intergovernmental agreements (so-called Model IGAs) has been developed to facilitate government-to-government implementation of FATCA. To finalize additional IGAs before implementation of mandatory 30 percent U.S. withholding on all foreign financial institutions that do not disclose the names of U.S. depositors, the Treasury Department announced in July 2013 a six-month delay in mandatory withholding, from January 1, 2014 to July 1, 2014. The U.S. hopes to expand FATCA implementation of its Model IGA to many other countries within that timeline This delay does not postpone any Form 8938 reporting responsibilities required of individuals holding foreign accounts.



Penalties

Penalties for noncompliance with FATCA can be substantial. There is a failure to file (Form 8938) penalty of \$10,000 and an additional penalty of up to \$50,000 for continued failure to file after notification by the IRS. However, a taxpayer may avoid a penalty if failure is due to reasonable cause and not willful neglect. In addition, penalties for underpayment and fraud may apply as well as criminal penalties.

FBAR filing

The new Form 8938 filing requirement does not replace or otherwise affect a taxpayer's obligation, if there is one, under the Bank Secrecy Act to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (known as the "FBAR"). Taxpayers generally must file an FBAR if they have a financial interest in, signature authority or other authority over one or more accounts in a foreign country, and the value of the account exceeds \$10,000 at any time during the calendar year. The FBAR must be received by the IRS on or before June 30 of the year following the calendar year being reported. The FBAR is not filed with the taxpayer's federal income tax return. Instead, it has been required to be mailed to the Treasury Department or filed electronically with the Treasury Department. Mandatory electronic filing is required after June 30, 2013.

If you have any questions about FATCA's reporting requirements or new Form 8938, please contact our office.