First FBAR, Now FATCA: New Information Reporting Requirements for U.S. Taxpayers with Foreign Financial Assets

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U.S. citizens, resident aliens and certain non-resident aliens who held "specified foreign financial assets" at any point during 2011 may be required to file IRS Form 8938 (Statement of Specified Foreign Financial Assets) with their 2011 U.S. federal income tax returns. This new information reporting obligation – which is in addition to the Form TD F 90-22.1 (FBAR) that also must be filed annually – arose under the FATCA (Foreign Account Tax Compliance Act) provisions of the HIRE Act of 2010 for the purpose of enforcing higher tax compliance among U.S. taxpayers with foreign accounts and assets.

The following summary sets forth a description of (1) the types of foreign assets that may need to be reported to the IRS; (2) the applicable reporting thresholds; (3) the information that must be disclosed if the thresholds are met; and (4) the consequences of non-compliance.

What is a "Specified Foreign Financial Asset"?

For purposes of IRS Form 8938, the term "specified foreign financial asset" generally includes (1) accounts maintained by foreign financial institutions (i.e., foreign banks, brokers and custodians), and (2) assets held for investment that are not in a foreign account, such as stock or securities issued by a non-U.S. person, financial instruments and contracts that have non-U.S. issuers or counterparties, and any interest in a non-U.S. entity. Accordingly, in addition to accounts maintained by foreign financial institutions, "specified foreign financial assets" generally include (but are not limited to): (1) interests in foreign corporations, partnerships, hedge funds, private equity funds, mutual funds, trusts, estates, pension plans and deferred compensation plans, (2) foreign swaps, options and derivative contracts, and (3) loans to foreign persons.

What are the Reporting Thresholds?

The aggregate value of a U.S. taxpayer's specified foreign financial assets must exceed either of the following thresholds for the applicable taxpayer category in order to trigger the IRS Form 8938 reporting requirement:

Taxpayer	Aggregate Value on Last Day of Tax Year	Aggregate Value at Any Time During Tax Year
Unmarried/Married Filing Separately (Living in U.S.)	$50,000	$75,000
Married Filing Jointly (Living in U.S.)	$100,000	$150,000
Unmarried/Married Filing Separately (Living Abroad*)	$200,000	$300,000
Married Filing Jointly (Living Abroad*)	$400,000	$600,000

* "Living Abroad" means that (1) a U.S. taxpayer's tax home is outside the United States and the taxpayer is a bona fide resident of a non-U.S. jurisdiction for the entire tax year, or (2) a U.S. taxpayer is a U.S. resident who is physically present in a non-U.S. jurisdiction for at least 330 days during a period of 12 consecutive months ending in the tax year.

What Must be Disclosed to the IRS if Reporting is Required?

If reporting is required, the information that must be disclosed on IRS Form 8938 for each specified foreign financial asset generally includes: (1) a description of the account or asset; (2) information regarding whether the account or asset was acquired or disposed of during the tax year; (3) the maximum value of the account or asset during the tax year; (4) the name and address of the relevant foreign financial institution, issuer or counterparty; (5) the tax attributes of the account or asset for the tax year (income, gains, losses, deductions, etc.); and, (6) if the asset is an interest in a foreign entity, whether the foreign entity is a passive foreign investment company for U.S. federal tax purposes.

What are the Penalties for Non-Compliance?

Failure to file a correct IRS Form 8938 on time or, if a taxpayer has an understatement of tax or omission of income relating to a specified foreign financial asset, may cause the taxpayer to be subject to a penalty. If a taxpayer is required to file IRS Form 8938, but fails to file a complete and correct IRS Form 8938 by the due date (including extensions) for the underlying tax return, the taxpayer may be subject to a penalty of $10,000 (which may be increased to $60,000 for continued delinquency after the IRS issues a notice of the failure to file). In addition, if a taxpayer underpays his or her tax as a result of a transaction involving an undisclosed specified foreign financial asset, the taxpayer may have to pay a penalty equal to 40% of that underpayment. Criminal penalties may also apply.

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Please note that, for 2011 tax returns, this new reporting requirement only applies to individual taxpayers. The IRS and U.S. Treasury have issued proposed regulations that, once finalized, will extend the IRS Form 8938 reporting obligation in later tax years – possibly as early as 2012 – to U.S. entities that meet certain ownership percentage thresholds. Finally, as stated above, the IRS Form 8938 requirement is in addition to any FBAR requirement that may also apply. Despite any potential overlap in the information that must be disclosed on IRS Form 8938 and the FBAR, if a taxpayer is required to file both forms, filing one does not relieve a taxpayer from the obligation of filing the other. We encourage U.S. individual taxpayers to consult with their personal tax advisers to determine whether they have IRS Form 8938 and/or FBAR filing obligations.

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