



GES NewsFlash

United States — Form 8938 and Reporting of Certain Foreign Financial Assets

November 15, 2011

In this issue:

Who is required to file?

Specified Individual and Specified Foreign Financial Assets

What are the applicable reporting thresholds?

Penalties

Deloitte's view

People to contact

Effective for 2011 tax returns, taxpayers with non-U.S. financial assets may be required to report additional information regarding these assets as part of their individual U.S. tax return. This additional reporting requirement was added to the law through the Foreign Account Tax Compliance Act provisions of the Hiring Incentives to Restore Employment Act. The legislation generally provides that any individual, who during any taxable year, holds any interest in a specified foreign financial asset must attach a statement to the individual's income tax return, if the aggregate value of all such assets exceeds \$50,000 (or such higher dollar amount as the Secretary of the Treasury may prescribe).

Recently, the Internal Revenue Service (IRS) released a draft form and instructions for the new Form 8938, Statement of Specified Foreign Assets, which is the form that will be used to report these foreign financial assets. The release of the draft instructions provides initial guidance from the IRS regarding various components of the required reporting.

Who is required to file?

The instructions provide that Form 8938 must be filed with an individual's annual federal income tax return (including extensions), beginning with the 2011 tax year, if an individual is a "specified individual" who has an interest in a "specified foreign financial asset" and the aggregate value of all of such assets is more than the applicable reporting threshold. Transitional relief may be available for 2011 if the final version of the form is not released by the IRS in time for taxpayers to include it with their 2011 tax returns, although the IRS is attempting to finalize the form by the end of 2011. If this relief is granted, this is a relief of time to file, not of the filing obligation. Taxpayers who are eligible for this relief will be required to complete Form 8938 and report information for both 2011 and 2012 on their 2012 tax returns.

The information that must be reported on a Form 8938 is similar to, but not identical to, the information required for a Treasury Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, (FBAR). The Form 8938 filing requirement is separate and apart from the FBAR filing requirement. If a taxpayer is required to file a Form 8938, the individual is still required to file the FBAR if the individual would otherwise be required to do so.

Specified Individual and Specified Foreign Financial Assets

The statute itself does not define the term "specified individual." The draft instructions provide that a specified individual is a U.S. citizen, a U.S. resident for any part of the taxable year, a nonresident alien who elects to be treated as a resident for purposes of filing a joint return, and a nonresident alien who is a bona fide resident of American Samoa or Puerto Rico. The IRS anticipates issuing future guidance that will require a U.S. entity 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 applicable threshold. Until such guidance is released, only individuals are required to file Form 8938.

In addition to being a specified individual, the individual must have an interest in a specified foreign financial asset (SFFA). An SFFA includes:

- Any depository or custodial account maintained by a foreign financial institution
- Any equity or debt interest in the foreign financial institution
- Other foreign financial assets held for investment and not held in an account maintained by a foreign financial institution, including:
 - Stock and securities issued by non-U.S. persons
 - An interest in a foreign entity
 - Any financial instrument or contract that has a non-U.S. person counterparty/issuer

What are the applicable reporting thresholds?

The aggregate value of all of the specified individual's SFFAs must exceed the applicable thresholds. Generally, if a specified individual has an interest in an SFFA and the total value of all such asset(s) exceeds the applicable reporting threshold, the individual is required to report the asset(s) on Form 8938, unless an exception applies. A summary of the reporting thresholds is provided below.

Filing status	Value on the last day of the tax year is at least	Or, at any time during the tax year, the value is greater than
Unmarried Taxpayers or Married Taxpayers filing separately, and living in the U.S.	\$50,000	\$100,000
Married Taxpayers filing jointly living in the U.S.	\$100,000	\$200,000
Taxpayers not filing a joint return who are living abroad and otherwise qualify for the foreign earned income exclusion	\$200,000	\$400,000
Married Taxpayers filing jointly who are living abroad and otherwise qualify for the foreign earned income exclusion	\$400,000	\$600,000

Penalties

Civil and criminal penalties may be imposed for a failure to file Form 8938. If an individual fails to file a Form 8938 by the due date, the individual may be subject to a penalty of \$10,000, unless reasonable cause can be shown. If the failure to file continues for 90 days after the IRS provides notice of the failure, an additional penalty of \$10,000 for each 30-day period (or part of a period) during which the failure continues after the 90-day period, up to a maximum of \$50,000. If the failure to disclose is due to reasonable cause and not willful neglect, no penalty will be imposed.

Deloitte's view

The Form 8938 filing requirement has arisen out of governmental concerns around tax evasion by U.S. persons who hold assets offshore. Taxpayers are required to report these interests in foreign assets and failure to do so may subject the taxpayer to civil and criminal penalties. While the filing is not required until the Form 8938 is finalized, the release of the draft form and instructions suggests that the IRS expects to finalize the form soon. The instructions provide that the definition of an SFFA is broad and includes a wide variety of foreign assets that range from foreign depository and custodial accounts to interests in certain funded foreign deferred compensation arrangements and estates, without regard to the level of ownership. Although additional guidance is still to come from the IRS, taxpayers should start compiling information necessary to determine if a Form 8938 filing is required.

[Back to top](#)

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[Back to top](#)

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