

# PKF PERSPECTIVES

---

## UPDATE ON REPORTING OF SPECIFIED FOREIGN ASSETS

---

**As a result of 2010 tax legislation, U.S. individuals with interests in *specified foreign financial assets* must attach a disclosure statement to their personal income tax return for any year in which the aggregate value of such assets is greater than \$50,000 (or higher value as the IRS may prescribe). This requirement begins with tax year 2011 or 2012 dependent on whether certain conditions are met.**

A U.S. individual includes:

- A United States citizen.
- A resident alien of the United States for any part of the tax year.
- A nonresident alien who makes an election to be treated as a resident alien for purposes of filing a joint income tax return.

*Specified foreign financial assets* are:

1. depository or custodial accounts at foreign financial institutions, and
2. to the extent not held in an account at a financial institution:
  - a. stocks or securities issued by foreign persons,
  - b. any other financial instrument or contract held for investment that is issued by or has a counterparty that is not a U.S. person, and
  - c. any interest in a foreign entity.

The IRS has developed Form 8938, Statement of Specified Foreign Assets, as a mandatory filing to report these assets. A draft version of this form was released in June 2011 and, most recently, draft instructions were released at the end of September 2011.

The draft instructions provide for various asset value thresholds dependent upon categories such as an individual's filing status and whether or not the person is living in the United States.

Within each category there is a higher reporting threshold dependent upon asset values at any time

during the year. The first threshold is more than \$50,000 for financial assets held on the last day of the tax year and more than \$100,000 for assets held at any time during the year by unmarried taxpayers and married taxpayers living in the U.S. and filing separate returns. These thresholds increase to \$100,000 and \$200,000, respectively, for married filing jointly taxpayers if they are living in the U.S.

Bona fide residents of a foreign country or taxpayers who are present in a foreign country or countries during at least 330 full days during any period of 12 consecutive months have an increased threshold. Such individuals meet the reporting threshold if they are not filing a joint return and the value of their specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$400,000 at any time during the tax year. These thresholds increase to \$400,000 and \$600,000 respectively for married filing jointly taxpayers living abroad.

### Observation

Form 8938 must be filed in addition to the Report of Foreign Bank and Financial Accounts (FBARs), Form TD 90-22.1, even though the same accounts may be reported on both forms.

### Duplicative Reporting

Taxpayers, however, do not have to report a specified foreign financial asset on Form 8938 if it has already been reported on one or more of the following forms that are filed with the IRS for the same year. In such cases, Form 8938 should be used to identify on which of the following forms the taxpayer has met the reporting requirement.

- Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts.
- Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations.

- Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund.
- Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships.
- Form 8891, U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans.

### Filing Deadline and Transitional Role

The draft instructions to Form 8938 state that for tax years beginning after March 18, 2010, taxpayers must report their interest in the specified assets if the value thresholds have been exceeded. However, a transitional rule is in place that provides an individual with a deferral until 2012 to satisfy a 2011 filing requirement if he or she

- had a tax year that began after March 18, 2010;
- was required to file Form 8938; and
- filed an annual return before Form 8938 was released.

Thus, if these conditions are met, the prior year filing requirement is satisfied by filing Form 8938 for such prior year with the current year personal income tax filings. For business entities in which these rules apply, the filing deadline could be earlier.

### Penalties for Failure to File Form 8938

The draft instructions explain that if an individual fails to file a correct and complete Form 8938, he or she may be subject to a penalty of \$10,000. If this failure continues for more than 90 days after the day on which the IRS mails a notice of the failure to the individual, he or she will be penalized \$10,000 for each 30-day period (or fraction of the 30-day period) during which the failure continues after the expiration of the 90-day period. **The penalty imposed for any failure cannot exceed \$50,000.** For married taxpayers filing a joint return, the failure-to-file penalty applies as if the taxpayer and his or her spouse were a single person. However, the taxpayer's and spouse's liability for all penalties remains joint and several.

### Statute of Limitations

For taxpayers who fail to file Form 8938 or fail to report a specified foreign financial asset required to be reported, the statute of limitations for the tax year may remain open for all or a portion of an income tax return until 3 years after the date on which Form 8938 is filed.

### Extended Statute of Limitations for Failure to Include Income

If any gross income related to one or more specified foreign financial assets is not included and the amount omitted is more than \$5,000, any tax owed for the tax year can be assessed at any time within 6 years after the return has been filed.

The IRS also notes in the instructions that if it determines that a taxpayer has an interest in one or more specified financial assets and it asks for information about the value of any asset, but the taxpayer fails to provide sufficient information for the IRS to determine the value, the taxpayer is presumed to own specified foreign assets with a value of more than the applicable reporting threshold.

\*\*\*

Draft Form 8938 and instructions can be obtained using the following links:

<http://www.irs.gov/pub/irs-dft/f8938--dft.pdf>

<http://www.irs.gov/pub/irs-dft/i8938--dft.pdf>

Items in this publication should not be considered official statements of position, nor advice for individuals or organizations without consulting a professional advisor. This information is not intended to be, nor can it be, used by any taxpayer for the purpose of avoiding tax penalties. For more information, please contact tax partners Leo Parmegiani or Joe Lee.

#### PKF LLP

Certified Public Accountants

29 Broadway + New York, NY 10006

Telephone: (212) 867-8000 + Telefax: (212) 687-4346

www.pkfnewyork.com + E-mail: info@pkfnyc.com

