

Another Year, Another Form: A Primer on Form 8938 and Additional Reporting Requirements for Foreign Financial Assets

By Brandon N. Mourges

In a continuing effort to increase federal tax revenue and hamper offshore tax evasion, the IRS recently published regulations requiring additional disclosures related to foreign financial assets. These changes will require certain taxpayers to take additional action for all income tax returns filed for the tax year of 2011 going forward.

Form 8938. Pursuant to the Foreign Account Tax Compliance Act (“FATCA”), enacted as part of the HIRE Act of 2010, the IRS released temporary regulations at Treas. Reg. § 1.6038D-1T on December 16, 2011. These temporary regulations establish the new Form 8938 (Statement of Specified Foreign Financial Assets), which requires a much more comprehensive disclosure of information related to foreign financial assets. In many instances, this form supplements information already provided to the IRS in the Form TD F 90-22.1 (Report of Foreign Bank and Financial Assets or “FBAR”); however, the requirements of these forms are not completely coextensive and the procedures and penalties for the Form 8938 are separate from those associated with FBARs. Moreover, many taxpayers will be required to file both forms.

Requirements. Any individual who holds “any interest” in a “specified foreign financial asset” must attach to their income tax return certain required information (in the Form 8938), if the aggregate value of such assets exceeds \$50,000. A “specified foreign financial asset” includes any financial account maintained by a foreign financial institution, and if not maintained by a foreign financial institution, any stock or security issued by a non-U.S. person, any other financial instrument or contract where the issuer or counterparty is a non-U.S. person, or any interest in a foreign entity. An “interest” can include any position that has a tax effect (e.g., if it may create a gain, loss, deduction, credit, etc.).

This means that for the tax year of 2011, individuals will be required to supplement either the Form 1040 (for an individual), Form 1120 or Form 1120S (for corporations), Form 1065 (for partnerships) or Form 1041 (estates or trusts), as applicable, with the Form 8938. For each asset, the taxpayer will need to include information such as the identifying information of the account or asset, the maximum value of the account or asset, and any tax attributes associated with the account or asset.

Thresholds. While the filing threshold for FBARs is \$10,000 (in the aggregate), the filing threshold for Form 8938 is higher and can vary depending upon particular circumstances. The threshold depends upon the (1) filing status of the individual, (2) residency, and (3) both the end of year value of the assets and the highest value of the assets during the year. For example, an unmarried individual with residency solely in the U.S. will be required to file the Form 8938

if the aggregate value of the accounts exceeded \$50,000 at the end of the year or \$75,000 at any point during the year. For a married couple filing jointly and living solely abroad, the Form 8939 filing requirement would only be triggered if the aggregate value of the accounts exceeded \$400,000 at the end of the year or \$600,000 at any point during the year. Other filing thresholds may be applicable if different statuses apply.

Exceptions. While the Form 8938 can be burdensome for taxpayers with numerous offshore holdings, there are some (very minor) exceptions to disclosure. If the taxpayer is also filing a return which would otherwise duplicate the information contained in the Form 8938 (e.g., a Form 3520, Form 5471, Form 8865, Form 8621, or Form 8891), the taxpayer need only identify the asset and disclose the type of form which already contains this information. Furthermore, taxpayers do not need to disclose certain assets that are held by certain trusts or that are subject to mark-to-market accounting rules.

Penalties. In addition to any other assessable penalties, failure to file a Form 8938 containing all necessary information can subject an individual to an initial penalty of \$10,000. If notice of such failure is mailed to the individual, failure to remit the necessary information thereafter could lead to a penalty of up to \$50,000. These penalties may be applied based on each failure to file a Form 8938 (i.e., on an asset-by-asset basis) and failure to file this return could be a basis for applying other penalties associated with the taxpayer's income tax return. An individual may be able to avoid these penalties upon proof of reasonable cause for any such failure.

This new form will impact many individuals owning assets abroad and should be carefully considered prior to the filing of a tax return. If you wish to discuss the requirements for reporting foreign assets or the other implications of foreign investment, please contact Brandon N. Mourges (410-951-1149 or bmourges@rosenbergmartin.com) or any attorney in our tax group:

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