

Alerts and Updates

Preparation of Your 2011 Tax Return May Be Much More Complicated Than You Think: Beware of a New IRS Reporting Requirement for This Tax Season

February 23, 2012

Separate and apart from U.S. taxpayer's obligations to annually file a Report of Foreign Bank and Financial Accounts (Form TD F 90-22.1, FBAR) with the U.S. Department of Treasury,¹ U.S. citizens, certain U.S. non-resident aliens and non-resident aliens who elected to be taxed as a resident of the United States will now have another reporting obligation, starting with tax year 2011. In the latest attempt to ferret out U.S. taxpayers hiding assets overseas, Congress now requires filing with the IRS new Form 8938, Statement of Specified Foreign Financial Assets.

Presently, Form 8938 generally must be filed by any individual who holds an interest in specified foreign assets with an aggregate value exceeding \$50,000 (\$100,000 for joint filers) as of December 31 or \$75,000 (\$150,000 for joint filers) at any time during the tax year. Additionally, the reporting requirement applies to disregarded entities, such as single-member limited liability companies whereby the individual is considered the owner and bears the Form 8938 filing responsibility.

Specified foreign financial assets include:

- financial accounts, depository or custodial, maintained by foreign financial institutions; and
- other assets not held in accounts maintained by financial institutions, such as stock or securities issued by non-U.S. persons, financial instruments or contracts with issuers or counterparties (e.g., currency swaps, other swap contracts, options and other derivative contracts) that are non-U.S. persons, and any interest in a foreign entity.

Special rules apply to other assets, such as gold holdings, artwork and real estate, to name a few. For example, if gold is held in a safety deposit box, it is not deemed a specified foreign financial asset. However, gold held by a custodian is considered a specified foreign financial asset. Artwork and real estate are presently not deemed specified foreign financial assets.

The rules for foreign trusts, foreign estates, foreign pension plans and foreign deferred compensation plans are intricate and depend on whether or not distributions have been made. For example, the value of an interest in a foreign estate, pension or deferred compensation plan is the fair market value (FMV)—determined as of the last day of the tax year—of the currency or other property distributed during the tax year to the beneficiary or participant. However, the value of an interest in a foreign trust is the sum of the FMV of currency or other property distributed to the beneficiary during the taxable year **plus the value**, as of the last day of the tax year, of the beneficiary's right to receive distributions. If no distributions occurred during the tax year, the FMV for reporting purposes is zero. It would be prudent to discuss with your tax practitioner how to properly value and report these assets.

The penalty for failure to report specified foreign financial assets on Form 8938 is \$10,000. However, where the failure continues for more than 90 days after the IRS mails notice of the failure, additional penalties of \$10,000 for each 30-day period (or fraction thereof) apply, up to a maximum penalty of \$50,000. These penalties are separate from the stiff penalties that apply to the failure to file an FBAR. Penalties ranging from \$10,000 for a non-willful violation, up to \$250,000 for willful violations may apply for failure to file an FBAR. Additionally, willful failure to comply with FBAR filing requirements may result in imprisonment of up to five years.

It may be worthwhile to consult with a tax practitioner to determine how these complex reporting requirements may apply to you, given the unique facts and circumstances of your situation.

For Further Information

If you have any questions regarding this Alert, or for further information, please contact [Barbara A. Ruth, CPA, JD](#), or [Steven M. Packer, CPA](#), of the [Tax Accounting Group](#) or the practitioner with whom you are regularly in contact.

As required by United States Treasury Regulations, you should be aware that this communication is not intended by the sender to be used, and it cannot be used, for the purpose of avoiding penalties under United States federal tax laws.

Notes

1. Form TD F 90-22.1 (FBAR) is required to be filed annually by every taxpayer with a financial interest in or signature authority over foreign bank and securities accounts, or other foreign financial accounts where the aggregate value of the accounts exceeds \$10,000 during any part of the tax year. The FBAR is not filed as part of the tax return, but must be filed with the U.S. Department of the Treasury by June 30 of each year.

Disclaimer: This Alert has been prepared and published for informational purposes only and is not offered, or should be construed, as legal advice. For more information, please see the firm's [full disclaimer](#).