Changes in FATCA and FBAR Reporting

Changes of FBAR Due Date

The filing of FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR) (formerly TD F 90-22.1) is imposed by the Bank Secrecy Act (BSA), passed by Congress in 1970. FinCEN Form 114 is used to report a financial interest in or signature authority over a foreign financial account if you meet the reporting threshold. U.S. persons that are subject to the filing requirement include U.S. citizens, resident aliens, trusts, estates, and domestic entities. While there is no change in reporting requirements, the due date for Form 114 has changed from June 30 to April 15 for tax year starting January 1, 2016. Besides, the first time, an automatic six-month extension is allowed for FBAR filing.

A civil penalty of $10,000 is imposed for failure to file an FBAR. The penalty is $100,000 or 50% of the balance in the account, whichever is greater, for each willful violation. Willful violations may also be subject to criminal penalties.

New Rules for Form 8938 Filing

Prior to 2016, only individual taxpayers are required to file Form 8938. For tax year starting January 1, 2016, certain domestic corporations, partnership, and trusts are also required to file Form 8938.

Background

The Foreign Account Tax Compliance Act (FATCA), which was passed as part of the HIRE Act of 2010, requires specified U.S. taxpayers to report financial assets held outside of the United States if the aggregate value exceeds reporting threshold. Reporting is done on Form 8938 which must be filed with the income tax return.

A specified individual includes U.S. citizens, resident aliens, non-resident aliens who make an election to be treated as a resident alien for purposes of filing a joint income tax return, and non-resident aliens who are bona fide residents of American Samoa or Puerto Rico.

Unmarried individuals (including married individuals filing a separate return from his/her spouse) are required to file Form 8938 if the total value of his/her specified foreign financial assets is more than $50,000 on the last day of the year or more than $75,000 at any time during the tax year. These amounts are increased to $100,000 and $150,000, respectively, for married taxpayers filing a joint return. To determine if you satisfy the reporting threshold, the value of all specified foreign financial assets are included, even if they are reported on another form (see forms listed under "Exceptions" below).

New Reporting Requirement for Domestic Entities

Starting for the tax year beginning on or after January 1, 2016, specified domestic entities are required to file Form 8938. These entities include

1. Closely held domestic corporation that has at least 50% of its gross income from passive income
2. Closely held domestic corporation if at least 50% of its assets produce or are held for production of passive income
3. Closely held domestic partnership that has at least 50% of its gross income from passive income.
4. Closely held domestic partnership if at least 50% of its assets produce or are held for the production of passive income.
5. Domestic trust that has one or more specified individual or specified domestic entity as a current beneficiary.

Specified domestic entities are required to file Form 8938 if the total value of its specified foreign financial assets is more than $50,000 on the last day of the year or more than $75,000 at any time during the tax year. Unlike individuals, the value of any specified foreign financial assets reported on other form(s) listed under “Exceptions” below is excluded in order to determine if a specified domestic entity satisfies the applicable reporting threshold.

Exceptions from Reporting
If you do not have to file an income tax return for the tax year, you do not have to file Form 8938, even if the value of your specified foreign financial assets is more than the appropriate reporting threshold.

If you report specified foreign financial assets on other forms, you do not have to report them again on Form 8938 for the same tax year. These forms include Form 3520, Form 5471, Form 8621, and Form 8865. The foreign financial assets that are reported on these forms are not reported again on Form 8938. Simply identify on Form 8938 which and how many of these form(s) you file.

Non-Compliance with Form 8938 Reporting Requirements
A severe penalty is imposed for failure to comply with Form 8938 reporting. The penalty is $10,000 per failure to file, an additional penalty of up to $50,000 for continued failure to file after IRS notification, and a 40% penalty on an understatement of tax attributable to non-disclosed assets.

The statute of limitations is extended to six years after you file your return if you omit from gross income more than $5,000 that is attributable to a specified foreign financial asset, without regard to the reporting threshold or any reporting exceptions. If you fail to file or properly report an asset on Form 8938, the statute of limitations for the tax year is extended to three years following the time you provide the required information.

FATCA versus FBAR Reporting Requirements
FATCA requirement is in addition to FBAR filing requirements. Filing of Form 8938 does not relieve taxpayers from FBAR filing requirements. While certain foreign financial accounts are reported on both Form 8938 and Form 114, information required by the two forms is not identical. You may have to file both Form 8938 and Form 114 for any given year. IRS has published a chart comparing the filing requirements of the two forms.

Comparison of Form 8938 and FBAR Requirements: https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements

Rules on Foreign Assets reporting are complicated and the penalty is severe. You are advised to address these matters early with your tax advisors.

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