



ADDITIONAL REPORTING REQUIREMENT FOR OWNERS OF FOREIGN FINANCIAL ASSETS - FORM 8938

Client Advisories

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Just when U.S. individual taxpayers with foreign assets thought that reporting requirements could not get worse, they got worse. One of the surprises facing taxpayers who are preparing their 2011 returns is a new reporting requirement contained in Form 8938. This requires 1040 filers who have an interest in specified foreign assets having a value of \$50,000 or more to report their foreign holdings on an 8938 form as part of their return.

A taxpayer is not required to complete a Form 8938 if he or she is not otherwise required to file a 1040 return. One is also not required to file this form to report financial accounts maintained by a U.S. payor such as a U.S. domestic financial institution, the foreign branch of a U.S. financial institution or the U.S. branch of a foreign financial institution. Although the IRS has not offered any specific guidance on ADRs - American Deposit Receipts, as they are foreign stocks whose shares are held by a U.S. bank - ADRs are not assets that must be reported on an 8938.

The focus of the assets that must be reported are foreign assets that are beyond the control of an institution with U.S. ties. A foreign financial asset that comes within the reporting requirements includes the following:

1. Any financial account maintained by a foreign financial institution that is not excluded by way of having ties to a U.S. reporting institution.
2. Other financial assets held for investment that are not in an account maintained by a U.S. or foreign financial institution; namely, (a) stock or securities issued by someone other than a U.S. person; (b) any interest in a foreign entity and (c) any financial instrument or contract that has an issuer or counterparty that is other than a U.S. person. Examples of assets that may have to be reported include foreign stock, interests in foreign partnerships, foreign

estates, foreign mutual funds, swaps, options and derivative contracts, and foreign pensions. Foreign bank holdings may have to be reported, even if a 90-22.1 (FBAR) form was or will be filed.

Examples of assets that do not need to be reported include direct ownership of real estate, and interests in social security, social insurance or similar program of a foreign government. Also assets used principally in a trade or business do not have to be reported.

An 8938 form only needs to be filed if the total value of the foreign assets exceeds certain thresholds. These depend on filing status and whether the taxpayer lives in the U.S. or abroad.

An 8938 form must be filed if the aggregate value of the applicable foreign assets of the taxpayer

Living in U.S.	On last day of the year	Or any time during the year
Single or married filing separate	Exceeds \$50K	Exceeds \$75
Married filing joint return	Exceeds \$100K	Exceeds \$150K

Living Abroad	On last day of the year	Or any time during the year
Single or married filing separate	Exceeds \$200K	Exceeds \$300K
Married filing joint return	Exceeds \$400K	Exceeds \$600K

In determining value, first determine the value in the foreign currency, and then apply the conversion rate as of the last day of the tax year.

Penalties for not filing an 8938 form are severe. The penalty is \$10,000 for the first 90-day period and increases by \$10,000 for each additional 30-day period until the maximum of \$50,000 is reached. The penalty arises whether or not the income from the foreign asset was reported on the tax return. The penalty can be waived if reasonable cause can be shown for the non-filing.

More information on the Form 8938 can be found at the IRS website www.irs.gov.



If you have any questions about or would like to discuss Form 8938 or a related matter, please contact Archer's Tax Law and International Law Practice Group.

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