

## Global Rewards Update: United States – Final reporting rules for Specified Foreign Financial Assets on Form 8938

January 2015

### Background

Effective from the 2011 tax year, certain United States (US) taxpayers holding non-US financial assets may be required to report additional information about those assets.

Generally, Form 8938 must be attached to the annual US tax return if the specified individual has an interest in specified foreign financial assets and the aggregate value of the specified foreign financial interests exceeds the applicable reporting threshold.

The applicable reporting threshold varies depending on filing status and whether the individual lives in the US.

Significant civil and criminal penalties may be imposed for failure to file Form 8938.

Recently, the Internal Revenue Service (IRS) issued final rules on the filing of Form 8938 providing additional clarification and addressing comments received since the issuance of the proposed and temporary rules on this.

### Individuals required to report

Generally a “specified individual”, that may be required to file Form 8938, includes a US citizen, a resident alien, and a non-resident alien who elects to be treated as a resident alien.

Under the proposed and temporary rules, an individual who is classified as a resident alien under domestic US tax rules, but who claimed non-resident alien status under an income tax treaty with the US, was still considered a specified individual subject to the Form 8938 reporting requirements.

In response to comments, the final rules provide an exemption for certain dual resident taxpayers. Under this exemption, a dual resident is exempt from reporting non-US financial assets on Form 8938 if the individual determines his or her US tax liability as a non-resident alien and claims a treaty benefit under an income tax treaty with the US, provided the individual timely files Form 1040NR and attaches Form 8833.

### Specified Foreign Financial Assets

In addition to being a specified individual, the individual must have an interest in a “specified foreign financial asset” to fall within the scope of Form 8938. A specified foreign financial asset generally includes the following:

- Any depository or custodial account maintained by a foreign financial institution,

- Any equity or debt instrument in a foreign financial institution, and
- Certain other foreign financial assets held for investment and not held in an account maintained by a foreign financial institution including stock and securities issued by non-US persons, an interest in a foreign entity, and any financial instrument or contract that has a non-US person counterparty/issuer.

Based on the proposed and temporary rules and informal IRS guidance, vested and unvested shares as well as stock options were considered reportable assets for the purposes of Form 8938.

However, the final rules clarify that **only vested property** is considered a reportable asset for the purposes of Form 8938. Unvested property (including unvested shares) generally may be disregarded for purposes of Form 8938 until the time of vest, unless the individual makes a valid election to include the assets in income for income tax purposes (an 83(b) election). Stock options are generally not considered property and are not considered a reportable asset until exercise.

## Reporting thresholds

Specified foreign financial assets should be reported if their aggregate value exceeds the thresholds below:

Filing status	Value on the last day of the tax year is at least	Or, at any time during the tax year, the value is greater than
Unmarried Taxpayers or Married Taxpayers filing separately, and living in the United States	\$50,000	\$75,000
Married Taxpayers filing jointly living in the United States	\$100,000	\$150,000
Taxpayers not filing a joint return who are living abroad and otherwise qualify for the foreign earned income exclusion	\$200,000	\$300,000
Married Taxpayers filing jointly who are living abroad and otherwise qualify for the foreign earned income exclusion	\$400,000	\$600,000

Specified foreign financial assets should be reported on Form 8938 in US dollars. If the asset is denominated in foreign currency, the maximum value is first determined in the foreign currency and is then converted to US dollars at the taxable year-end spot rate for converting that currency. Specific guidelines are provided to determine the exchange rate that should be used.

The final rules clarify that the maximum value may be determined based on a periodic account statement showing the currency conversion of foreign assets if a statement is provided at least annually by or on behalf of a financial institution maintaining an account.

Note, the IRS declined to eliminate Form 8938 reporting in situations where similar information is also reported on FinCEN Form 114 (formerly, Form TD 90-22.1, Report of Foreign Bank Account and Financial Accounts (FBAR)).

## Action

Reporting and income inclusion associated with foreign accounts and assets continues to be a focus for the IRS. Taxpayers should be diligent in determining their taxable income and fulfilling any reporting obligations, including Form 8938 reporting.

Employees should determine if they are specified individuals and value their specified foreign financial assets held to determine whether the applicable reporting threshold is met. Consultation with the individual's personal tax advisor is recommended to determine whether and how these rules apply to the individual's situation.

Employees should monitor US tax reporting practice and rules for further clarification from the IRS.

Employers should consider providing employees with informational guidance on Form 8938 when drafting employee communication.

## People to contact

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