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Determining If the New Foreign Asset Reporting Requirements Impact You

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From Waldron Rand's February 2012 Newsletter: Accelerating Business Success

As a result of the passage of the Hiring Incentives to Restore Employment (HIRE) Act of 2010, a new foreign asset disclosure form known as Form 8938 was born. Form 8938, Statement of Specified Foreign Financial Assets, will significantly increase the compliance burden for affected taxpayers due to the nature, complexity and quantity of data required to complete the form properly. By providing you with detailed information about these requirements now, along with useful tools to help you organize your data, we hope to highlight features of the new requirement. Our goal is to increase the efficiency and compliance costs of the process if you are required to complete the form and ideally prevent a delay in processing your tax return.

For individuals with foreign bank accounts, you are probably already familiar with the Reporting of Foreign Bank and Financial Accounts (FBAR). Form 8938 is similar to the FBAR in some ways but does not replace that reporting requirement. First, filing thresholds, reportable assets and required information differ between the forms. Secondly, Form 8938 is issued and managed by the Internal Revenue Service, rather than the U.S. Treasury, and therefore affected taxpayers will be required to attach this form to their 2011 individual income tax return. Below we will address common questions designed to guide you through the process of determining whether you will be impacted by Form 8938 and, if so, how to best compile the data required.

Who is affected by the new reporting obligations?

At this point, only individual taxpayers are subject to Form 8938 reporting requirements. In general, the reporting requirement is imposed on U.S. citizens or individuals taxed as U.S. resident aliens with an interest in "specified foreign financial assets" valued above the applicable reporting threshold. The thresholds vary depending on filing status and whether the taxpayer is living in the U.S. or abroad; however, at a minimum the total value of such "specified foreign financial assets" must be more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the year for filing to be required. These thresholds are doubled for married individuals living in the U.S and filing a joint income tax return. Taxpayers living abroad are afforded even higher thresholds for filing. The regulations provide for certain exceptions to reportable assets.

In general, "specified foreign financial assets" include the following:

- Financial accounts maintained by a foreign financial institution

- The following foreign financial assets if they are held for investment and not held in an account maintained by a financial institution:
 - Stock or securities issued by a non-U.S. person
 - Any interest in a foreign entity (such as a corporation, partnership, estate or trust)
 - Any financial instrument or contract with a non-U.S. issuer or counterparty

How do I value my assets?

Valuation of foreign assets, particularly non-bank account assets, can be quite daunting. Valuation for these purposes is the assets' fair market value. For bank accounts, you may generally rely on account statements to determine the value of a foreign financial account. The regulations provide specific rules for determining the fair market value of assets held in a foreign trust, estate, pension plan or deferred compensation plan. For other types of foreign assets you can generally use the value as of the last day of the tax year. In many cases, it will be challenging to establish a reasonable estimate of the fair market value of a foreign asset. It is important to note that if no information is available from reliable financial information sources, the regulations do not require a third party appraisal. Our recommendation in cases of uncertain valuation is to make a best estimate and add a statement to Form 8938 to describe the valuation approach used. If the value of the asset is uncertain but is a determining factor in whether the filing thresholds are met, we suggest a conservative approach of filing Form 8938 including the best estimate of the asset's value, even if below the filing thresholds.

What currency conversion method should I use?

In general, if the asset is maintained in a foreign currency, the value must first be determined in the foreign currency and then converted to U.S. dollars. The exchange rate to be used is the U.S. Treasury Department's Financial Management Service foreign currency exchange rate as of the last day of the tax year, which can be found at www.fms.treas.gov/intn.html.

What are the penalties for noncompliance?

Failure to file Form 8938 can result in a penalty of \$10,000. Continued failure to file, after notice from the IRS, is subject to supplemental penalties, capped at an additional \$50,000. No penalty will be imposed if you can prove to the IRS' satisfaction that the failure was due to reasonable cause. If you underpay your tax in a transaction associated with an undisclosed foreign asset, you may be assessed a penalty equal to 40% of that underpayment (higher if the underpayment is due to fraud). Failure to file Form 8938 also has the potential of extending the statute of limitations on your entire income tax return until three years after the date on which you file Form 8938. Finally, and typically only in extreme cases, criminal penalties could apply.

What type of information is required on Form 8938?

The type of information required is dependent on the nature of the foreign asset. In general, you must provide identifying information about the account or entity, including a mailing address, the maximum value of the asset or account during the year, as well as foreign currency details. Further, you must provide detailed information about all the tax items attributable to these foreign assets and identify where those items can be found on your income tax return. Finally, if you do not need to include certain assets on Form 8938 under a reporting exception intended to avoid duplicative filings, you will need to identify for the IRS the type of alternative foreign disclosure form that you have filed which includes such assets.

What is the best way to increase the efficiency of this process?

In order to help you gather and organize this data, we have prepared several questionnaires for our clients. The first is for foreign bank accounts and includes a consolidated list of information required for both the FBAR and Form 8938. The second form is for other foreign financial assets, such as interests in foreign entities.

Depending on information provided in these questionnaires, we might need to follow up to discuss additional foreign reporting requirements that may apply.

We recognize that Form 8938 is destined to complicate the tax returns of many filers. With the final form, form instructions and temporary regulations just recently released, there is a great deal of uncertainty surrounding the implementation of this form and the application to individual fact patterns. Further, we understand that the process of gathering this information in some cases may be challenging, to say the least. In an effort to navigate this process as smoothly, accurately and cost-effectively as possible, we strongly suggest you proactively assess your foreign interests and investment, discuss those with us to determine proper compliance and complete our questionnaires.

As always, we are here to support your needs. Given how complex this is, please do not hesitate to contact any of us to discuss your situation in more detail.



About Waldron H. Rand & Company, P.C.

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Waldron Rand, located in Needham, MA, provides unmatched accounting, auditing, tax, and consulting services to individuals and privately held businesses in a wide range of industries throughout the U.S. and globally.

At Waldron Rand, our business, tax and assurance experts are more than scorekeepers. We take a holistic approach to working with clients. **For 100 years** we have been providing partner-level service to help our clients manage challenges and seize business opportunities.

For more information or to personally speak with a partner, please call **781.449.5825** or email us at: **advice@waldronrand.com**.



Partner Profile

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Sharon is a partner with **Waldron Rand** with fifteen years of experience in public accounting. She specializes in the areas of international taxation, stock options, state and local taxation and tax planning and compliance for both individuals and privately held businesses.

Sharon is the firm's representative for KS International, an independent association of top international accounting practices around the globe. She is also a member of the American Institute of Certified Public Accountants' Foreign Nationals and Foreign Asset Disclosures Task Forces as well as the Massachusetts Society of Certified Public Accountants' International Taxation Committee.

She graduated Summa Cum Laude from Tufts University and earned her Master of Science degree in Taxation with high distinction at Bentley College's McCallum Graduate School of Business.

Sharon's niche in US international taxation fills a void in an industry that is largely comprised of either impersonal multi-national firms or small firms lacking this complex knowledgebase.

Supported by a full-service CPA firm, rich with diverse expertise, Sharon helps individual, emerging companies and well-established businesses proactively plan for and manage cross-border tax laws, tax treaty provisions and foreign information reporting requirements.