

Kluwer International Tax Blog

U.S. Persons Foreign Assets and Entities Reporting for the FATCA, FBAR and BE-10 Forms Due in June (Part I)

William Byrnes (Texas A&M University Law) · Monday, June 15th, 2015

Three significant filing deadlines fall in June, one today and two more on the last day of the month.

(1) The 15 June FATCA [Form 8938](#) filing deadline (with the income tax return) with the IRS for a U.S. person who lives abroad and has specified foreign assets of at least \$50,000 on the last day of the tax year or at least \$75,000 at any time during the tax year.

(2) The 30 June FBAR filing deadline with FINCEN for a U.S. person that has a financial interest in, or signature authority over, a foreign financial account whereby the aggregate value of all the persons foreign financial accounts exceeds \$10,000 during the calendar year.

(3) The 30 June BE-10 form filing deadline with the Department of Commerce, Bureau of Economic Analysis, for a U.S. person who is a first time BE-10 filer and had a direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise at any time during the U.S. person's 2014 fiscal year.

Non-filing of any of these three forms attracts civil penalties and, where willful non-compliance is determined, criminal sanctions. Yet, many U.S. taxpayers are unaware of these forms, the filing requirements and deadlines.

Today's Kluwer Blog post will address the Form 8938, and a Wednesday post will address the Form 114 (FBAR) and Form BE-10.

Form 8938

U.S. taxpayers with international assets, including income from foreign trusts and foreign bank and securities accounts, in most cases, must complete and attach a [Schedule B](#) with the annual 1040 tax return. As part of the enforcement mechanism of FATCA, since 2011 a U.S. person with foreign accounts and assets of at least a \$75,000 value at any time during the year, or at least \$50,000 on the last day the year, is required to report annually to the Internal Revenue Service ("IRS") their interests in financial assets held outside of the U.S on a Form 8938 "Statement of Specified Foreign Financial Assets", which information may overlap with Schedule B (as well as FBAR and the BE-10 to be addressed in Wednesday's post).

A U.S. person for purposes of Form 8938 includes U.S. nationals, permanent residents ("green

card holders”), foreign executives and employees resident in the United States under non-immigrant H, L, or E visas. Moreover, persons who are “substantially present” within the U.S. during a calendar year are subject to the rules for filing a tax return and thus also the rules for filing a Form 8938 with that return. Substantial presence is established by physical presence in the U.S. on at least:

- 31 days during the current year, and
- 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting:
 1. All the days present in the current year, and
 2. 1/3 of the days present in the immediate previous year, and
 3. 1/6 of the days present two years preceding.

A U.S. person who was resident outside the U.S. on the regular filing date of April 15, 2015 received an automatic extension to file by today (post-mark or electronic filing on Monday, June 15, 2015).

The final section 6038D regulations of 12 December 2014 amended the reporting rules for dual resident taxpayers, retroactive for taxable years beginning after December 19, 2011. Thus, the 2014 Form 8938 and its instructions have correspondingly been modified. The most pertinent modifications follow.

Jointly Owned Assets

Each of the joint owners of a specified foreign financial asset who are not married to each other must include the full value of the asset (rather than only the value of the specified person’s interest in the asset) in determining whether the aggregate value of such specified individual’s specified foreign financial assets exceeds the applicable reporting thresholds, and each joint owner must report the full value of the asset on his or her Form 8938.

In addition, the final rule clarifies that, in the case of joint owners who are married to each other and file separate returns, each joint owner of a specified foreign financial asset must report the full value of the asset (rather than only the value of the specified person’s interest in the asset) on the individual’s Form 8938, even if both spouses are specified individuals and only one-half of the value of the asset is considered in determining the applicable Form 8938 reporting thresholds.

Individual filing as a nonresident alien at the end of his or her taxable year

An individual who determines his or her U.S. income tax liability as a nonresident alien on the last day of the taxable year is not required to report specified foreign financial assets on Form 8938 for the portion of the individual’s taxable year covered by Form 1040NR “U.S. Nonresident Alien Income Tax Return,” (or Form 1040NR-EZ, “U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents”).

Individual filing as a resident alien at the end of his or her taxable year

An individual who computes his or her U.S. income tax liability as a resident alien on the last day of the taxable year because of a change to U.S. nationality or U.S. tax residence from nonresident status is not required to report specified foreign financial assets on Form 8938 for the portion of the

individual's taxable year reflected on the schedule to Form 1040, "U.S. Individual Income Tax Return," or the schedule to Form 1040EZ "Income Tax Return for Single and Joint Filers With No Dependents," as applicable.

Accounts excluded from the Form 8938 reporting definition of a financial account under an applicable Model 1 or Model 2 IGA

For taxable years beginning on or before December 12, 2014, if the jurisdiction in which a financial account is maintained has a FATCA information collection and reporting intergovernmental agreement ("IGA") in effect with the U.S., or is treated as having a Model 1 IGA or Model 2 IGA in effect, on or before the last day of the taxpayer's taxable year, then the retirement, pension accounts, and certain non-retirement savings accounts that are excluded from the definition of financial account in the IGA are also not required to be reported on Form 8938.

Professor Byrnes (Texas A&M Law) 2015 edition of the [Guide to FATCA Compliance](#) is now available.

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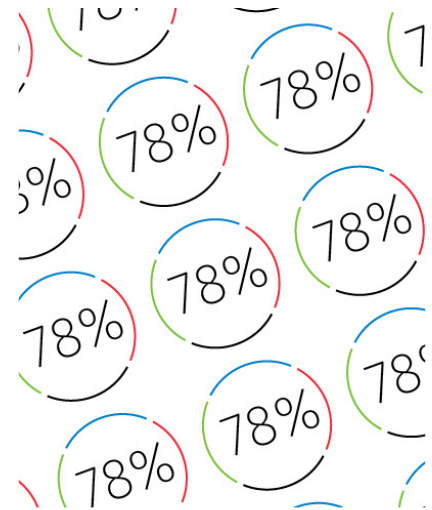
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