

# International Tax CPE

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# Form 8938 - Statement of Specified Foreign Financial Assets and Form 114 FBAR Requirements

Form 8938 Does not replace or otherwise affect a taxpayer's obligation to file FinCEN Form 114 (Report of Foreign Bank and Financial Accounts). Form 114 is not filed with the IRS, it is filed directly with the office of Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury.

# Who must file?

- Form 8938 - Specified individuals (which include US citizens, resident aliens and certain non-resident aliens) and specified domestic entities (which include domestic corporation, partnerships and trusts) that have an interest in specified foreign financial assets and meet the reporting threshold.
  - For the purposes of Form 8938 U.S. territories are not included.

- Form 114 - U.S. persons, which include U.S. citizens, resident aliens, trusts, estates and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold.
  - For the purposes of Form 114 resident aliens of U.S. territories and U.S. territory entities are subject to FBAR reporting.

# When do you have an interest in an account or asset?

- Form 8938:
  - If any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the account or asset are or would be required to be reported, included, or otherwise reflected on your income tax return.
- Form 114:
  - Financial interest: you are the owner of record or holder of legal title ; the owner of record or holder of legal title is your agent or representative; you have sufficient interest in the entity that is the owner of record or holder of legal title.
  - Signature authority: you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account.

# Reporting Threshold

- **Form 8938 - Specified individuals living in the US:**
  - Single and Married filing separately - Total value of assets was more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the year.
  - Married filing jointly - Total value of assets was more than \$100,000 on the last day of the year
- **Form 8938 - Specified individuals living outside the US:**
  - Single and Married filing separately - Total value of assets was more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the year.
  - Married filing jointly - Total value of assets was more than \$400,000 on the last day of the tax year, or more than \$600,000 at any time during the year.
- **Form 8938 - Specified domestic entities:**
  - Total value of assets was more than \$50,000 on the last day of the year, or more than \$75,000 at any time during the tax year.

- Form 114:
  - Aggregate value of financial accounts exceeds \$10,000 at any time during the calendar year. This is a cumulative balance if the total of all accounts exceeds \$10,000 all accounts must be reported.

# What to report?

- Form 8938:
  - Maximum value of specified foreign financial assets, which include financial accounts with foreign financial institutions and certain other foreign non-account investment assets.
- Form 114:
  - Maximum value of financial accounts maintained by a financial institution physically located in a foreign country.



# How are maximum account or asset values determined and reported?

- Form 8938:
  - Fair market value in U.S. dollars. Convert to U.S. dollars using the end of the taxable year exchange rate and report in U.S. dollars
- Form 114:
  - Use periodic account statements to determine the maximum value in the currency of the account. Convert to U.S. dollars using the end of the calendar year exchange rate and report in U.S. dollars.

# When Due?

- Form 8938:
  - Form is attached to your annual return and due on the date of that return, including any applicable extensions.
- Form 114:
  - Received by April 15 (6-month automatic extension or Oct 15) FBAR is not filed with a federal return.

# Penalties?

- Form 8938:
  - Up to \$10,000 for failure to disclose and an additional \$10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of \$60,000; criminal penalties may also apply.
- Form 114:
  - Civil monetary penalties are adjusted annually for inflation. For civil penalty assessment prior to Aug 1, 2016, if non-willful, up to \$10,000; if willful, up to the greater of \$100,000 or 50% of account balances; criminal penalties may also apply.

# Form 5471 - Information Return of U.S. Persons with Respect to Certain Foreign Corporations

- Form 5471 is used by certain U.S. persons who are officers, directors, or shareholders in certain foreign corporations. This form satisfy the reporting requirements of sections 6038 and 6046, and the related regulations, as well as to report amounts related to section 965.

# Who must file?

- Five Categories of filers

- Category 1 filers - U.S. shareholder who owns (directly, indirectly or constructively) 10% or more of the total combined voting power of all classes of voting stock of an SFC.
- Category 2 filers - U.S. citizen or resident who is an officer or director of a foreign corporation and meets the 10% stock ownership requirement.
- Category 3 filer - U.S. person who acquires stock in a foreign in a foreign corporation which, when added to any stock owned on the date of acquisition, meets the 10% stock ownership requirements.
- Category 4 filer - U.S. person who had control of a foreign corporation during the annual accounting period.
- Category 5 filer - U.S. shareholder who owns stock in a foreign corporation that is a CFC at any time during any tax year.

# Penalties

- A \$10,000 penalty is imposed for each annual accounting period of each foreign corporation for failure to furnish required information.
- If the information is not filed within 90 days after the IRS has mailed a notice of failure to the U.W. person, an additional \$10,000 penalty is charged for each 30-day period. The additional penalty is limited to a maximum of \$50,000 for each failure.

# Form 5472 - Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business

- Form 5472 is used to provide required information on reportable transactions of a reporting corporation with a foreign or domestic related party.
- A reporting corporation is either; a 25% foreign-owned U.S. corporation or a foreign corporation engaged in a trade or business within the United States.

# Who Must File and What to Report?

- U.S. corporations with 25% or more foreign shareholders.
- Report all intercompany transactions between the U.S. reporting company and all related foreign persons.
- File a separate form for each 25% foreign shareholder.



# Form 8858 - Information Return of U.S. Persons With Respect to Foreign Disregarded Entities and Foreign Branches

- Form 8858 is used by U.S. persons that operate a Foreign Branch or own a Foreign Disregarded Entity directly, indirectly or constructively.

# Who Must File?

- The U.S. person filing Form 8858 is any U.S. person that:
  - Is the tax owner of a Foreign Disregarded Entities
  - Owns a specified interest in a Foreign Disregarded Entities indirectly or constructively through a controlled foreign corporation or a controlled foreign partnership.
  - Operates (directly or indirectly through a tier of Foreign Disregarded Entities or partnerships) a Foreign Branch.

# Penalties

- A \$10,000 penalty is imposed for each annual accounting period of each CFC or CFP for failure to furnish the required information within the time prescribed. If the information is not filed within 90 days after IRS has mailed a notice of the failure to the U.S. person, an additional \$10,000 penalty is charged for each 30-day period. The additional penalty is limited to a maximum of \$50,000 for each failure.
- Any person who fails to file or report all of the information required within the time prescribed will be subject to a reduction of 10% of the foreign taxes available for credit. If the failure continues 90 days or more after the date the IRS mails notice of the failure to the U.S. person an additional 5% reduction is made for each 3-month period.

# Form 8865 - Return of U.S. Persons With Respect to Certain Foreign Partnerships

- Form 8865 is used to report information about controlled foreign partnerships, transfers to foreign partnerships, and acquisitions, dispositions and changes in foreign partnership interests.
- If applicable, the filer of Form 8865 must provide the necessary information for its calculation of the Foreign-derived intangible income (FDII) deduction.

# Who must file?

- A U.S. person qualifying under one or more of the Categories of Filers
  - Categories of filers:
    - Category 1 - Control through more than 50% interest in partnership
    - Category 2 - Control through 10% or more interest when the partnership is controlled by U.S. persons each owning at least 10% interest.
    - Category 3 - Control through contributed property resulting in at least 10% interest or value exceeding \$100,000 in 12-month period
    - Category 4 - Reportable event: acquisition, disposition, change in proportional interest (10% thresholds)

# Penalties

- A \$10,000 penalty is imposed for each annual accounting period of each CFC or CFP for failure to furnish the required information within the time prescribed. If the information is not filed within 90 days after IRS has mailed a notice of the failure to the U.S. person, an additional \$10,000 penalty is charged for each 30-day period. The additional penalty is limited to a maximum of \$50,000 for each failure.
- Any person who fails to file or report all of the information required within the time prescribed will be subject to a reduction of 10% of the foreign taxes available for credit. If the failure continues 90 days or more after the date the IRS mails notice of the failure to the U.S. person an additional 5% reduction is made for each 3-month period.

# Streamlined Filing Compliance Procedures

- Streamlined Foreign Offshore Procedures
- Streamlined Domestic Offshore Procedures

Will not be subject to failure-to-file and failure-to-pay penalties, accuracy-related penalties, information return penalties, or FBAR penalties.

# Who is eligible?

- Available for US individual taxpayers (including estates of individual taxpayers) who:
  - may have failed to report income from a foreign financial assets and pay taxes on these assets as required,
  - may have failed to file an FBAR, and
  - Such failures resulted from non-willful conduct



# Streamlined Foreign Offshore Procedures - For US taxpayers residing outside the United States

- For each of the most recent 3 years for which the U.S. tax return due date:
  - Submit Delinquent 1040s, including all required foreign information returns, OR
  - Submit Amended 1040s, including all required foreign information returns
  - Include at the top of the first page of each delinquent or amended tax return and at the top of each information return "Streamlined Foreign Offshore" written in **RED**
- For each of the most recent 6 years for which the FBAR due date has passed, file delinquent FBARs and include a statement explaining that the FBARs are being filed as part of the Streamlined Filing Compliance Procedures.
- Complete and sign Form 14653 - Certification by U.S. Person Residing Outside of the US for Streamlined Foreign offshore Procedures

# Streamlined Domestic Offshore Procedures - For US taxpayers residing the United States

- For each of the most recent 3 years for which the U.S. tax return due date:
  - Must have previously filed a US tax return, if required (you may not file delinquent income tax returns under these procedures)
  - Submit Amended 1040s, including all required foreign information returns
  - Include at the top of the first page of each amended tax return and at the top of each information return "Streamlined Foreign Offshore" written in **RED**
- For each of the most recent 6 years for which the FBAR due date has passed, file delinquent FBARs and include a statement explaining that the FBARs are being filed as part of the Streamlined Filing Compliance Procedures.
- Complete and sign Form 14654 - Certification by U.S. Person Residing in the US for Streamlined Domestic offshore Procedures
- Submit payment of the Title 26 miscellaneous offshore penalty

# Title 26 Miscellaneous offshore penalty

- Equal to 5 percent of the highest aggregate balance/value of the taxpayer's foreign financial assets that are subject to the miscellaneous offshore penalty during the years in the covered tax return period and the covered FBAR period.
- The highest aggregate balance/value is determined by aggregating the year-end account balances and year-end asset values of all the foreign financial assets subjected to this penalty and selecting the highest aggregate balance/value from among those years.
- Submit this penalty payment together with any taxes due on unreported foreign income, including all applicable all statutory interest with respect to each of the late payment amounts.

# Form 8992 - U.S. Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI)

- Pursuant to section 951A of the TCJA of 2017, U.S. shareholders of controlled foreign corporation (CFCs) are required to include GILTI in gross income. Form 8992 is used by U.S. shareholders to determine their GILTI inclusion.
  - A CFC is generally a foreign corporation of which more than 50% of the total combined voting power or value is owned directly, indirectly, or constructively by U.S. shareholders.

# Who Must File?

- A U.S. shareholder (including a partner of a domestic partnership) that owns stock in one or more CFCs.
- A U.S. shareholder is one who owns (directly, indirectly, or constructively) 10% or more of the total combined voting power of all the classes of voting stock of the foreign corporation or 10% or more of the total value of shares of all classes of stock of the foreign corporation.

# Form 8993 - Section 250 Deduction for Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI)

- The Tax Cuts and Jobs Act of 2017 enacted section 250 for the allowance of a deduction for the eligible percentage of Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI).
- Form 8993 is used to figure the amount of the eligible deduction at a rate equal to 37.5% of FDII and 50% of GILTI.

# Who Must File?

- Domestic corporations
  - NOT including real estate investment trusts, regulated investment companies and S Corps
- U.S. individual shareholders of controlled foreign corporations (CFCs) making a section 962 election (Election by Individuals to Be Subject to Tax at Corporate Rates with respect to a GILTI inclusion)

# Form 1116 - Foreign Tax Credit - Individuals

- Who Should file?
  - Individuals, trust or estate with foreign taxes paid to a foreign country or U.S. possession.
  - Individuals may elect to claim the credit without filing Form 1116, if all foreign income is “passive category income”.
  - All the income and any foreign taxes paid on it were reported to you on a qualified payee statement which include; Form 1099-DIV, Form 1099-INT, Schedule K-1, or similar statement.
  - The taxes paid are less than \$300 for Single and Married filing separately or less than \$600 for married filing jointly filers.



# Form 1118 - Foreign Tax Credit - Corporations

- This form is used to compute a corporation's foreign tax credit for certain taxes paid to foreign countries or U.S. possessions.

## Who Should File?

- Any corporation that elects the benefits of the foreign tax credit under section 901 must complete and attach Form 1118 to its income tax return.

# Form 8854 - Initial and Annual Expatriation Statement

- Form 8854 is used by U.S. Citizens who have relinquished their citizenship and long-term residents who have ended their residency (expatriated on or after June 17, 2008).
- Who should file?
  - You must file your initial Form 8854 if you relinquished your U.S. citizenship in 2020 or you are a long-term resident and terminated your residency status in 2020.
  - You must file an annual Form 8854 if you expatriated before 2020 and have deferred the payment of tax, have an item of eligible deferred compensation or have an interest in a nongrantor trust.

# Form 8288 - U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests

- Form 8288 is used by the buyer or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person. This withholding (at 15%) serves to collect U.S. tax that may be owed by the foreign person for the disposition of their real property.
- Who should file?
  - The buyer or other transferee of a U.S. real property interest, and a corporation, qualified investment entity, or fiduciary that is required to withhold tax, must file Form 8288 to report and transmit the amount withheld.
  - Must also complete Form and submit 8288-A

# Form 8288-A - Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests

- Form 8288-A is completed and submitted by the buyer or other transferee (withholding agent) together with Form 8288 for each foreign person that disposes of real property located in the U. S. to report withholding on the amount realized.
- The foreign person uses their copy of this form when they file a U.S. tax return and receive any federal tax credit on taxes withheld.

# Form 8288-B - Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests

- Foreign persons use this form to apply for a withholding certificate to reduce or eliminate withholding on dispositions of U.S. real property interests, based on:
  - A claim that the transferor is entitled to nonrecognition treatment or is exempt from tax,
  - A claim solely on a calculation that shows the transferor's maximum tax liability is less than the tax otherwise required to be withheld, or
  - A claim that the special installment sales rules reduced withholding.

# Form 1042 - Annual Withholding Tax Return for U.S. Source Income of Foreign Persons

- Form 1042 is used to report:
  - Tax withheld under chapter 3 on certain income of foreign persons, including nonresident aliens, foreign partnerships, foreign corporations, foreign estates, and foreign trusts.
  - Tax withheld under chapter 4 on withholdable payments.
  - Tax withheld pursuant to section 5000C on specified federal procurement payments.
- Who must file?
  - Every withholding agent or intermediary who receives, controls, has custody of, disposes of, or pays a withholdable payment or an amount subject to withholding, unless an exception to filing applies.
- Related forms:
  - Form 1042-S - Foreign Person's U.S. Source Income Subject to Withholding
  - Form 1042-T - Annual Summary and Transmittal of Forms 1042-S

# Form 8804 - Annual Return for Partnership Withholding (Section 1446)

- Form 8804 is used to report section 1446 withholding tax based on effectively connected taxable income (ECTI) allocable to foreign partners
- Who must file?
  - Every partnership (other than a publicly traded partnership) that has effectively connected gross income allocable to a foreign partner
- Related forms:
  - Form 8805 - Foreign Partner's Information Statement of Section 1446 Withholding Tax
  - Form 8813 - Partnership Withholding Tax Payment Voucher

# Form 926 - Return by a U.S. Transferor of Property to a Foreign Corporation

- Form 926 is used to report certain transfers of tangible or intangible property to a foreign corporation.
- Who must file?
  - U.S. citizen or resident, a domestic corporation or a domestic estate or trust who:
    - Immediately after the transfer, the U.S. transferor holds 10% or more of the total voting power or total value or
    - The amount of the cash transferred in a 12-month period exceeds \$100,000
- For partnerships, the filing requirement is at the partner level
  - Be sure to read through all the schedules attached to K-1s!
- Penalties - Failure to comply equals 10% of the fair market value of the property at time of transfer, limited to \$100,000. A 40% penalty may be imposed on any underpayment resulting from an undisclosed foreign financial asset understatement.



# Form 965 - Inclusion of Deferred Foreign Income Upon Transition to Participation Exemption

- Who must file?
  - Any person that is required to include amounts in income under section 965(a), because the person is a direct or indirect partner in a domestic partnership, a shareholder in a S corporation, or a beneficiary of another pass-through entity.

# Form 2555 - Foreign Earned Income

- Form 2555 is used to calculate your foreign earned income exclusion and your housing exclusion or deduction. You cannot exclude or deduct more than the amount of your foreign earned income for the year.
- You cannot exclude or deduct more than the amount of your foreign earned income for the year. For 2020, the maximum exclusion amount is \$107,600
- Who Qualifies?
  - You qualify to exclude your foreign earned income from gross income if both of the following apply.
    - You meet the tax home test (physical residence outside the US)
    - You meet either the bona fide residence test or the physical presence test

# Form 3520 - Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts

- Who Must File?

- U.S. person who transferred property (including cash) to a related foreign trust in exchange for an obligation or you hold a qualified obligation from that trust that is currently outstanding.
- U.S. person who, during the current tax year, is treated as the owner of any part of the assets of a foreign trust.
- U.S. person or an executor of the estate of a U.S. person who received (directly or indirectly) a distribution from a foreign trust during the current tax year.

- Penalties

- Greater of \$10,000 or 35% of gross value of transfer or distribution, or 5% of gross value of assets owned by U.S. person.

# Form 3520A - Annual Information Return of Foreign Trust With a U.S. Owner

- Who Must File?
  - A foreign trust with a U.S. owner must file Form 3520-A in order for the U.S. owner to satisfy its annual information reporting.
- Penalties
  - The U.S. owner is subject to an initial penalty equal to the greater of \$10,000 or 5% of the gross value of the portion of the trust's assets treated as owned by the U.S. person at the close of that tax year.

# Form 8621 - Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund

- Who Must File?
  - Qualifying Insurance Corporation
    - A U.S. person that owns stock of a foreign corporation and elects to treat such stock as the stock of a qualifying insurance corporation.
  - Passive Foreign Investment Corporation (PFIC)
    - A U.S. person that is a direct or indirect shareholder of a PFIC must file Form 8621 for each tax year.

# Form W-8BEN - Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)

- Form W-8BEN is used by foreign persons receiving certain types of income to:
  - Establish that they are not a U.S. person;
  - Claim that they are the beneficial owner of the income for which Form W-8BEN is being provided or a foreign partner in a partnership subject to section 1446; and
  - If applicable, claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty and who is eligible for treaty benefits.

# Form W-8BEN-E - Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)

- Form W-8BEN is used by a foreign entity receiving certain types of income to:
  - Claim that they are the beneficial owner of the income for which Form W-8BEN-E is being provided or a foreign partner in a partnership subject to section 1446; and
  - If applicable, claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty and who is eligible for treaty benefits.

# Form W-8CE - Notice of Expatriation and Waiver of Treaty Benefits

- Form W-8CE is used to notify the payer that you are a covered expatriate individual subject to special tax rules.



# Form W-8ECI - Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States

- Form W-8ECI is used by a foreign person and must be provided to the withholding agent or payer if such foreign person is the beneficial owner of U.S. source income that is (or is deemed to be) effectively connected with the conduct of a trade or business within the United States or are an entity (including a foreign partnership or foreign trust) engaged in a U.S. trade or business submitting this form on behalf of your owners, partners, or beneficiaries.

# Form W-8 EXP - Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding and Reporting

- Form W-8EXP is used by a foreign government or other foreign entity and must be provided to the withholding agent or payer if such foreign entity is a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession receiving a withholdable payment or receiving a payment subject to chapter 3 withholding, or are such an entity maintaining an account with an FFI requesting this form.

# Form W-8 IMY - Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting

- Form W-8EXP is used by foreign intermediaries or flow-through entities who are receiving a reportable amount or withholdable payment on behalf of another person or as a flow-through entity.

# Form 8843- Statement for Exempt Individuals and Individuals with a Medical Condition

- Form 8843 is used by an alien individual to explain the basis of their claim that they can exclude days present in the United States for purposes of the substantial presence test because you:
  - Were an exempt individual.
  - Were unable to leave the United States because of a medical condition or medical problem.

# Resources

- Access to complete BNA International
- Chart of Foreign reporting forms
- HW International Tax Team
  - GML
  - CDB
  - FFP
  - JDR



# Looking Forward to 2021

- IRS has issued drafts of two new forms for 2021
  - New Form K-2, Partner's Distributive Share Items - International, replaces portions of Lines 16(a) through 16(r) on Schedule K-1. So, instead of potentially 18 lines on a K-1, we will now have a new twenty page form.
  - New Form K-3, Partner's Share of Income, Deductions Credits - International, replace portions of Schedule K-1, Part III boxes 16 and 20 with a new 22 page form.



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