

MP&S TAX ALERT

DECEMBER 2011

IRS RELEASES GUIDANCE ON FOREIGN ACCOUNT TAX COMPLIANCE ACT

Temporary regulations (the "Regulations") have been issued under Section 6038(D) relating to the requirement that individuals attach a statement to their tax return with respect to foreign financial assets. IRS will release Form 8938 shortly which will be used to identify and report interests in foreign financial assets. It is important for taxpayers to determine whether they are subject to this new requirement because the tax law imposes significant penalties for non-compliance. Form 8938 does not replace or otherwise affect a taxpayer's obligation to file an FBAR.

Section 6038(D) and the Regulations require an individual who holds any interest in a foreign financial asset to attach Form 8938 to that individual's tax return, if the aggregate value of the foreign financial asset exceeds \$50,000 on the last day of the taxable year, or \$75,000 at any time during the taxable year. Married individuals filing a joint return are required to file Form 8938 if the aggregate value of the foreign financial assets exceeds \$100,000 on the last day of the taxable year or \$150,000 at any time during the taxable year.

The Regulations increase the reporting threshold in the case of an individual who resides abroad. The Regulations provide that such individual need only file Form 8938 if the aggregate value of the foreign financial assets exceeds \$200,000 on the last day of the taxable year or \$300,000 at any time during the taxable year. With respect to married individuals filing a joint return where either spouse resides abroad, the Regulations provide that they are required to file Form 8938 if the aggregate value of foreign financial assets exceeds \$400,000 on the last day of the taxable year or \$600,000 at any time during the taxable year.

Foreign financial assets include (but are not limited to) foreign accounts at traditional banking facilities as well as interests in foreign hedge funds, foreign mutual funds, foreign private equity funds, foreign entities, stocks, securities and derivatives. A foreign asset will generally not be treated as a foreign financial asset where a dealer employs mark-to-market accounting.

Section 6038(D) and the Regulations state that an individual must report certain information on Form 8938. Such information includes (but is not limited to), the name and address of the financial institution and the account number and in the case of stock, securities or derivatives, the name and address of the issuer and or counterparty.

An individual who fails to disclose the information on Form 8938 will be subject to a \$10,000 penalty, with an additional penalty for continued failure to file up to \$50,000. A 40 percent penalty on any understatement of tax attributable to non-disclosed assets can also be imposed. Failure to file Form 8938 or report a foreign financial asset may

cause the statute of limitations to remain open until three years after the date on which Form 8938 is filed. If you fail to include in income an amount relating to a foreign financial asset, and the amount you omit is more than \$5,000, any tax you owe for the year can be assessed at any time within six years after you file your return.

It should be noted that certain domestic entities will have filing requirements under Section 6038(D) that are similar to the filing requirements for individuals. However, the filing requirements for such entities are not yet effective.

FOR MORE INFORMATION

For more information about this alert, please contact a MP&S tax advisor or James Robbins by phone at 212.503.8971 or by email at jrobbins@markspaneth.com.

IRS CIRCULAR 230 DISCLOSURE

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