

# ADVANCE RELEASE Documents, Draft Instructions for Form 8938, (Oct. 18, 2011)

2011ARD 200-6

## Foreign financial assets: Reporting: Draft instructions

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## Instructions for Form 8938

### Statement of Specified Foreign Financial Assets

Section references are to the Internal Revenue Code unless otherwise noted.

### General Instructions

#### What's New

**New reporting requirements.** For tax years beginning after March 18, 2010, certain individuals must file new Form 8938 to report the ownership of specified foreign financial assets if the total value of those assets exceeds an applicable threshold amount (the "reporting threshold"). The reporting threshold varies depending on whether an individual lives in the United States, is married, or files a joint income tax return with his or her spouse. Specified foreign financial assets include any financial account maintained by a foreign financial institution and, to the extent held for investment, any stock, securities, or any other interest in a foreign entity and any financial instrument or contract with an issuer or counterparty that is not a U.S. person.

For more information on who must file and the types of foreign financial assets that must be reported, see *Who Must File, Specified Foreign Financial Assets, Specified Foreign Financial Assets Required to be Reported, and Exceptions to Reporting*, later.

**New failure-to-file and accuracy-related penalties.** If you are required to file Form 8938 and fail to do so, or if you have an understatement of tax or omission of income relating to a specified foreign financial asset, you may owe a penalty. See *Penalties*, later.

#### CAUTION

*Filing Form 8938 does not relieve you of the requirement to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), if you are otherwise required to file Form TD F 90-22.1.*

**Statute of limitations.** If you fail to file Form 8938 or fail to report a specified foreign financial asset that you are required to report, the statute of limitations for the tax year may remain open for all or a part of your income tax return until 3 years after the date on which you file Form 8938.

#### Purpose of Form

Use Form 8938 to report your interests in specified foreign financial assets if the total value of all the specified foreign financial assets in which you have an interest is more than the appropriate reporting threshold. See *Determining the Reporting Threshold That Applies to You*, later.

#### When and How to File

Attach Form 8938 to your annual return and file by the due date (including extensions) for that return.

An annual return includes the following returns.

- Form 1040.
- Form 1120.
- Form 1065.
- Form 1041.
- Form 1120-F.
- Form 1120-S.
- Form 1040NR of a nonresident alien who is a bona fide resident of Puerto Rico or American Samoa.

A reference to an “annual return” or “income tax return” in the instructions includes a reference to any return listed here, whether it is an income tax return or an information return.

**Transitional rule for 2011** . Your obligation to file Form 8938 in 2011 is deferred to 2012 if you are an individual who satisfies all of the following.

- You had a tax year that began after March 18, 2010.
- You were required to file Form 8938.
- You filed an annual return before Form 8938 was released.

See Notice 2011-55, 2011-29 I.R.B. 53, available at [http://www.irs.gov/irb/2011-29\\_IRB/ar06.html](http://www.irs.gov/irb/2011-29_IRB/ar06.html). You must now satisfy your filing obligation for any such prior tax year by filing Form 8938 for such prior year with your annual return for your current tax year. If you are required to complete a Form 8938 for your prior tax year and your current tax year, attach both forms to your income tax return for the current tax year.

**Note.** If you are filing Form 8938 for a prior year under this transitional rule, check the box on Form 8938 to show it is being filed for a prior tax year.

#### **Who Must File**

Unless an exception applies, you must file Form 8938 if you are a specified person that owns specified foreign financial assets and the value of those assets is more than the applicable reporting threshold. A specified person includes any specified individual, or, to the extent provided in future regulations or other guidance, a specified domestic entity. If the value of your specified foreign financial assets is more than the appropriate reporting threshold and no other exception applies, file Form 8938 even if none of the specified foreign financial assets affect your tax liability for the tax year.

#### **TIP**

**Exception if no income tax return required.** *If you do not have to file an income tax return for the tax year, you do not need to file Form 8938, even if the value of your specified foreign financial assets is more than the appropriate reporting threshold.*

**Specified individual.** You are a specified individual if you are one of the following.

- A U.S. citizen.
- A resident alien of the United States for any part of the tax year (but see *Reporting Period*, later).
- A nonresident alien who makes an election to be treated as a resident alien for purposes of filing a joint income tax return.
- A nonresident alien who is a bona fide resident of American Samoa or Puerto Rico. See Pub. 570, Tax Guide for Individuals With Income From U.S. Possessions, for a definition of bona fide resident.

**Special rules for resident aliens.** You are a resident alien if you are treated as a resident alien for U.S. tax purposes under the green card test or the substantial presence test. For more information, see Pub. 519, U.S. Tax Guide for Aliens. If you qualify as a resident alien under either rule, you are a resident alien even if you elect to be taxed as a resident of a foreign country under the provisions of a U.S. income tax treaty.

**Specified domestic entity.** The IRS anticipates issuing regulations or other guidance that will require a U.S. entity to file Form 8938 if the entity is formed or availed of to hold specified foreign financial assets and the value of those assets exceeds the appropriate reporting threshold. Until such regulations or other guidance is issued, only individuals must file Form 8938.

**Determining the Reporting Threshold That Applies to You** If you satisfy the reporting threshold discussed below that applies to you and no other exception applies, file Form 8938 with your income tax return.

**Unmarried taxpayers living in the United States.** If you are not married and not living abroad, you satisfy the reporting threshold if the total value of your specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$100,000 at any time during the tax year.

**Married taxpayers filing a joint income tax return and living in the United States.** If you are married and you and your spouse file a joint income tax return and do not live abroad, you satisfy the reporting threshold only if the value of your specified foreign financial assets is more than \$100,000 on the last day of the tax year or more than \$200,000 at any time during the tax year.

**Married taxpayers filing separate income tax returns and living in the United States.** If you are married, file a separate income tax return from your spouse, and do not live abroad, you satisfy the reporting threshold if the total value of your specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$100,000 at any time during the tax year.

**Taxpayers living abroad.** If you are a bona fide resident of a foreign country or countries for an uninterrupted period that includes the entire tax year, or are present in a foreign country or countries during at least 330 full days during any period of 12 consecutive months ending in the tax year, you satisfy the reporting threshold if you are not filing a joint return and the value of your specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$400,000 at any time during the tax year.

If you are married and file a joint income tax return, you satisfy the reporting threshold only if the value of all specified foreign financial assets you or your spouse owns is more than \$400,000 on the last day of the tax year or more than \$600,000 at any time during the tax year.

#### **Determining the Total Value of Your Specified Foreign Financial Assets**

**Foreign currency exchange rate.** If any specified foreign financial asset is denominated in a foreign currency during the tax year, the value of the asset must be determined in the foreign currency and then converted to U.S. dollars. In most cases, you must use the U.S. Treasury Department's Financial Management Service foreign currency exchange rate for purchasing U.S. dollars. You can find this rate on [www.fms.treas.gov/intn.html](http://www.fms.treas.gov/intn.html). If no Financial Management Service exchange rate is available, you must use another publicly available foreign currency exchange rate for purchasing U.S. dollars and disclose this rate on Form 8938.

**Asset with no positive value.** If the fair market value of a specified foreign financial asset is less than zero, use a value of zero both to determine the maximum value of the assets for reporting purposes and to determine the total value of all of your specified foreign financial assets.

**Joint interests.** If you jointly own an asset with someone else, the value that you use to determine the total value of all of your specified foreign financial assets depends on whether the other owner is your spouse and, if so, whether your spouse is a specified individual and whether you file a joint or separate return.

**Joint ownership with spouse filing joint income tax return.** If you and your spouse file a joint income tax return and, therefore, would file one combined Form 8938 for the tax year, include the value of the asset jointly owned with your spouse only once to determine the total value of all of the specified foreign financial assets you or your spouse owns.

**Joint ownership with spouse filing separate income tax return.** If you and your spouse are specified individuals and you each file a separate annual return, include one-half of the value of the asset jointly owned with your spouse to determine the total value of all of your specified foreign financial assets.

**Joint ownership with someone other than a spouse.** Each joint owner includes the entire value of the jointly owned asset to determine the total value of all of that joint owner's specified foreign financial assets.

**Examples.** These examples may help you decide if you need to file Form 8938.

***I am not married and do not live abroad. The total value of my specified foreign financial assets does not exceed \$49,000 during the tax year.*** You do not need to file Form 8938. You do not satisfy the reporting threshold of more than \$50,000 on the last day of the tax year or more than \$100,000 at any time during the tax year.

***I am not married and do not live abroad. I sold my only specified foreign financial asset on October 15, when its value was \$125,000.*** You need to file Form 8938. You satisfy the reporting threshold even though you do not hold any specified foreign financial assets at the end of the year because you did own specified foreign financial assets of more than \$100,000 at a time during the tax year.

***My spouse and I are U.S. citizens but live abroad for the entire tax year and file a joint income tax return. The total value of our combined specified foreign financial assets on any day of the tax year is \$150,000.*** You and your spouse do not need to file Form 8938. You do not satisfy the reporting threshold of more than \$400,000 on the last day of the tax year or more than \$600,000 at any time during the tax year for married individuals who live abroad and file a joint income tax return.

***My spouse and I do not live abroad and file a joint income tax return. We jointly own a single specified foreign financial asset valued at \$60,000.*** You and your spouse do not need to file Form 8938. You do not satisfy the reporting threshold of more than \$100,000 on the last day of the tax year or \$200,000 on any day of the tax year.

***My spouse and I do not live abroad, file a joint income tax return, and jointly and individually own specified foreign financial assets. On the last day of the tax year, my spouse and I jointly own a specified foreign financial asset with a value of \$90,000. My spouse has a separate interest in a specified foreign financial asset with a value of \$10,000. I have a separate interest in a specified foreign financial asset with a value of \$1,000.*** You and your spouse need to file a combined Form 8938. You and your spouse have an interest in specified foreign financial assets in the amount of \$101,000 on the last day of the tax year. This is the entire value of the specified foreign financial asset that you jointly own, \$90,000, plus the value of the asset that your spouse separately owns, \$10,000, plus the value of the asset that you separately own, \$1,000. You and your spouse satisfy the reporting threshold of more than \$100,000 on the last day of the tax year.

***My spouse and I do not live abroad, file separate income tax returns, and jointly own a specified foreign financial asset valued at \$60,000 for the entire year.*** You and your spouse do not need to file Form 8938. You each use one-half of the value of the asset, or \$30,000, to determine the total value of specified foreign financial assets that you each own. Neither of you satisfies the reporting threshold of more than \$50,000 on the last day of the tax year or more than \$100,000 at any time during the tax year.

***My spouse and I file separate income tax returns, jointly and individually own specified foreign financial assets, and do not live abroad. On the last day of the tax year, my spouse and I jointly own a specified foreign financial asset with a value of \$90,000. My spouse has a separate interest in a specified foreign financial asset with a value of \$10,000. I have a separate interest in a specified foreign financial asset with a value of \$1,000.*** You do not need to file Form 8938 but your spouse does. Your spouse has an interest in specified foreign financial assets in the amount of \$55,000 on the last day of the tax year. This is one-half of the value of the asset that you jointly own, \$45,000, plus the entire value of the asset that your spouse separately owns, \$10,000. You have an interest in specified foreign financial assets in the amount of \$46,000 on the last day of the tax year. This is one-half of the value of the asset that you jointly own, \$45,000, plus the entire value of the asset that you separately own, \$1,000. Your spouse satisfies the reporting threshold of more than \$50,000 on the last day of the tax year. You do not satisfy the reporting threshold of more than \$50,000 on the last day of the tax year.

***My spouse and I live abroad and file separate income tax returns. My spouse is not a specified individual. On the last day of the tax year, my spouse and I jointly own a specified foreign financial asset with a value of \$150,000. My spouse has a separate interest in a specified foreign financial asset with a value of \$10,000. I have a separate interest in a specified foreign financial asset with a value of \$60,000.*** You need to file Form 8938 but your spouse, who is not a specified individual, does not. You have an interest in specified foreign financial assets in the amount of \$210,000 on the last day of the tax year. This is the entire value of the asset that you jointly own, \$150,000, plus the entire value of the asset that you separately own, \$60,000. You satisfy the reporting threshold for a married individual living abroad and filing a separate return of more than \$200,000 on the last day of the tax year.

***I am not married and do not live abroad. An unrelated U.S. resident and I jointly own a specified foreign financial asset valued at \$60,000.*** You each need to file Form 8938. You each satisfy the reporting threshold of more than \$50,000 on the last day of the tax year.

***I am not married and do not live abroad. I own an entity disregarded for tax purposes, which owns one specified foreign financial asset valued at \$30,000. In addition, I own a specified foreign financial asset valued at \$25,000.*** You need to file Form 8938. You own both the specified foreign financial asset owned by the disregarded entity and the specified foreign financial asset you own directly, for a total value of \$55,000. You satisfy the reporting threshold of more than \$50,000 on the last day of the tax year.

#### **Specified Foreign Financial Assets**

Specified foreign financial assets include the following assets.

1. Any financial account maintained by a foreign financial institution.

2. Other foreign financial assets, which include any of the following assets that are held for investment and not held in an account maintained by a financial institution.

- a. Stock or securities issued by someone other than a U.S. person,
- b. Any interest in a foreign entity, and
- c. Any financial instrument or contract that has an issuer or counterparty that is other than a U.S. person.

**Financial account.** A financial account is any depository or custodial account maintained by a foreign financial institution as well as any equity or debt interest in the foreign financial institution. A specified foreign financial asset includes a financial account maintained by a financial institution that is organized under the laws of a U.S. possession (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands).

**Foreign financial institution.** In most cases, a foreign financial institution is any financial institution that is not a U.S. entity and satisfies one or more of the following.

- It accepts deposits in the ordinary course of a banking or similar business.
- As a substantial part of its business, it holds financial assets for the account of others.
- It is engaged (or holds itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

A foreign financial institution includes investment vehicles such as foreign mutual funds, foreign hedge funds, and foreign private equity funds.

**Other specified foreign financial assets.** Examples of other specified foreign financial assets include the following, if they are held for investment.

- Stock issued by a foreign corporation.
- A capital or profits interest in a foreign partnership.
- A note, bond, debenture, or other form of indebtedness issued by a foreign person.
- An interest in a foreign trust or foreign estate.
- An interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty.
- An option or other derivative instrument with respect to any of these examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer.

**Assets held for investment.** You hold an asset, including stock or a partnership interest, for investment if you do not use it in, or hold it for use in, the conduct of any trade or business.

#### **Specified Foreign Financial Assets Required to be Reported**

If you have an interest in a specified foreign financial asset and the total value of all of your specified foreign financial assets exceeds the reporting threshold applicable to you, report the asset on Form 8938 unless an exception to reporting applies.

You have an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the asset are or would be required to be reported, included, or otherwise reflected on your income tax return.

You have an interest in a specified foreign financial asset even if there are no income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the asset included or reflected on your income tax return for this tax year.

**Interests in assets held by disregarded entities.** If you are the owner of a disregarded entity, you have an interest in any specified foreign financial assets owned by the disregarded entity.

**Interests in jointly owned assets.** A joint owner of an asset has an interest in the entire asset. For special rules for determining the total value of all of your specified foreign financial assets if you jointly own assets with your spouse who files a separate income tax return, see *Joint ownership with spouse filing separate income tax return*, earlier. For special rules applying to certain married specified individuals, see *Joint interests in Determining the Total Value of*

*Your Specified Foreign Financial Assets*, earlier.

**Interests in assets held in financial accounts.** If you report your interest in a financial account, you do not need to report an interest in the assets held in the financial account.

**Interests in assets generating certain unearned income of children.** If you file Form 8814, Parents' Election To Report Child's Interest and Dividends, with your income tax return to elect to include in your gross income certain unearned income of your child (the "kiddie tax" election), you have an interest in any specified foreign financial asset held by the child.

**Interests in assets held by entities that are not disregarded entities.** In most cases, you do not own an interest in any specified foreign financial asset held by a partnership, corporation, trust, or estate solely as a result of your status as a partner, shareholder, or beneficiary.

**Interests in assets held by grantor trust.** If you own any part of a grantor trust, other than a domestic bankruptcy liquidating trust or a domestic widely held fixed investment trust, you own an interest in any specified foreign financial assets held by that part of the trust.

**Interests in foreign estates and foreign trusts.** An interest in a foreign trust or a foreign estate is not a specified foreign financial asset unless you know or should have known of the interest. If you receive a distribution from the foreign trust or foreign estate, you are considered to know of the interest.

### **Reporting Period**

Unless an exception applies, the reporting period for Form 8938 is your tax year.

**Exception for partial tax years of specified individuals.** If you are a specified individual for less than the entire tax year, the reporting period is the part of the year that you are a specified individual.

**Example 1.** John is a calendar year taxpayer. The Form 8938 reporting period begins on January 1 and ends on December 31.

**Example 2.** Agnes was a single, calendar year taxpayer who died on March 6. The Form 8938 reporting period begins on January 1 and ends on March 6.

**Example 3.** George, a calendar year taxpayer, is not a U.S. citizen or married. George arrived in the United States on February 1 and met the conditions of the substantial presence test on August 2. The Form 8938 reporting period begins on George's U.S. residency starting date, February 1, and ends on December 31.

### **Figuring Maximum Value**

You must provide the maximum value during the tax year of each specified foreign financial asset reported on Form 8938. In most cases, the value of a specified foreign financial asset is its fair market value. In most cases, you can make a reasonable estimate of the asset's maximum fair market value during the tax year. An appraisal by a third party is not necessary to estimate the maximum fair market value during the year.

**Assets with no positive value.** If the fair market value of a specified foreign financial asset is less than zero, use a value of zero both to determine if the total value of all of your specified foreign financial assets is more than the appropriate reporting threshold and to report the maximum value of the asset on Form 8938.

**Foreign currency conversion.** If your specified foreign financial asset is denominated in a foreign currency during the tax year, the maximum value of the asset must be determined in the foreign currency and then converted to U.S. dollars. In most cases, you must use the U.S. Treasury Department's Financial Management Service foreign currency exchange rate for purchasing U.S. dollars. You can find this rate on [www.fms.treas.gov/intn.html](http://www.fms.treas.gov/intn.html). If no Financial Management Service exchange rate is available, you must use another publicly available foreign currency exchange rate for purchasing U.S. dollars and disclose the rate on Form 8938.

**Currency determination date.** Use the currency exchange rate on the last day of the tax year to figure the maximum value of a specified foreign financial asset or the value of a specified foreign financial asset for the purpose of determining the total value of your specified foreign financial assets to see whether you have met the reporting threshold. Use this rate even if you sold or otherwise disposed of the specified foreign financial asset before the last day of the tax year.

**Reporting the value of jointly owned assets.** If you own an asset jointly with one or more persons, you must report the asset's value as follows.

**Married specified individuals filing a joint income tax return.** If you are married and you and your spouse file a joint

income tax return, report any specified foreign financial asset that you jointly own only once and include the maximum value of the entire asset (and not just the maximum value of your interest in the asset). Also, you must report any specified foreign financial asset that either you or your spouse separately owns and include the maximum value of the entire asset. If you file Form 8814, you must report any specified foreign financial asset your child owns only once and include the entire value of the asset.

**Married specified individuals filing separate income tax returns.** If you are married, and you and your spouse are specified individuals who file separate income tax returns, both you and your spouse report any specified foreign financial asset that you jointly own on your separate Forms 8938, and both you and your spouse must include the maximum value of the entire asset on your separate Forms 8938. You also must report any specified foreign financial asset that you own individually on your separate Form 8938 and include the maximum value of the entire asset. If you file Form 8814, you must report any specified foreign financial asset your child owns and include the maximum value of the entire asset.

**Other joint ownership.** If you are a joint owner of a specified foreign financial asset and you cannot use one of the special rules for married individuals, you must report the specified foreign financial asset and include the maximum value of the entire asset.

**Valuing financial accounts.** You may rely on periodic account statements for the tax year to report a financial account's maximum value unless you know or have reason to know that the statements do not reflect a reasonable estimate of the maximum account value during the tax year.

**Valuing other specified foreign financial assets.** In most cases, you may use the value of a specified foreign financial asset other than a financial account as of the last day of the tax year, unless you know or have reason to know that the value does not reflect a reasonable estimate of the maximum value of the asset during the tax year.

**Example.** *I have publicly-traded foreign stock not maintained in a financial account that has a fair market value as of the last day of the tax year of \$100,000, although based on daily price information that is readily available, the 52-week high trading price for the stock results in a maximum value of the stock during the tax year of \$150,000.* If you are required to file Form 8938, the maximum value of the foreign stock to be reported is \$150,000, based on your knowledge of the stock's maximum value during the tax year.

**Valuing interests in trusts.** If you are a beneficiary of a foreign trust, the maximum value of your interest in the trust is the sum of the following amounts.

- If you receive distributions at the discretion of the trustee, the value of all of the cash or other property distributed during the tax year from the trust to you as a beneficiary, and
- If you receive mandatory distributions, the value using the valuation tables under section 7520.

**Valuing interests in estates, pension plans, and deferred compensation plans.** If you have an interest in a foreign estate, foreign pension plan, or foreign deferred compensation plan, the maximum value of your interest is the fair market value of your beneficial interest in the assets of the estate, pension plan, or deferred compensation plan as of the end of the tax year. If you do not know or have reason to know the fair market value, the maximum value is the fair market value, determined as of the end of the tax year, of the cash and other property distributed during the tax year to you as a beneficiary or participant.

#### **Exceptions to Reporting**

You are not required to report a financial account or other specified foreign financial asset if one of the following exceptions applies.

**Excepted financial accounts.** The following financial accounts are not specified foreign financial assets and do not have to be reported on Form 8938.

1. A financial account that is maintained by a U.S. payer, such as a domestic financial institution. In general, a U.S. payer also includes a domestic branch of a foreign bank or foreign insurance company and a foreign branch or foreign subsidiary of a U.S. financial institution.
2. Accounts maintained by dealers or traders in securities or commodities if all of the holdings in the account are subject to the mark-to-market accounting rules for dealers in securities or an election under section 475(e) or (f) is made for all of the holdings in the account.

#### **Other Specified Foreign Financial Asset Exceptions**

You are not required to report a specified foreign financial asset if one of the following exceptions applies.

- You report the asset on certain other forms that you file with the IRS for the tax year. See *Duplicative reporting* and *Foreign grantor trusts*, later.
- You are treated as an owner of any part of a domestic bankruptcy liquidating trust or a widely held fixed investment trust, and the trust holds the asset. See *Certain trusts*, later.
- You are a bona fide resident of a U.S. possession and the asset has certain ties to the possession of which you are a resident. See *Bona fide resident of a U.S. possession*, later.
- Other specified foreign financial assets do not include any asset that is subject to the mark-to-market accounting rules for dealers in securities or commodities or for which an election under section 475(e) or (f) is made for the asset.

**Duplicative reporting.** You do not have to report a specified foreign financial asset on Form 8938 if you report it on one or more of the following forms that you file with the IRS for the same tax year.

- Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.
- Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations.
- Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund.
- Form 8865, Return of U.S. Persons With Respect To Certain Foreign Partnerships.
- Form 8891, Beneficiaries of Certain Canadian Registered Retirement Plans.

Instead, you must identify on Form 8938 the form(s) on which you reported the specified foreign financial asset and the number of these forms that you filed. See *Part IV, Excepted Specified Foreign Financial Assets*, later.

#### CAUTION

*You must include the value of the assets reported on these forms in determining whether you satisfy the reporting threshold that applies to you. See Determining the Reporting Threshold That Applies to You, earlier.*

**Foreign grantor trusts.** If you are treated as an owner of all or any part of a foreign grantor trust, you do not have to report any of the specified foreign financial assets held by the foreign trust if you satisfy the following conditions.

- You report the trust on a Form 3520 filed with the IRS for the tax year.
- The trust files Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner, with the IRS for the tax year.

Instead, you must identify on Form 8938 the form on which you reported the assets and the number of these forms that you filed. See *Part IV, Excepted Specified Foreign Financial Assets*, later.

**Certain trusts.** If you are treated as an owner of any part of a domestic bankruptcy liquidating trust or a widely held fixed investment trust, you do not need to report on Form 8938 any specified foreign financial asset held by the trust.

**Bona fide resident of a U.S. possession.** If you are a bona fide resident of a U.S. possession (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands) who is required to file Form 8938, you do not need to report the following specified foreign financial assets on Form 8938.

- A financial account maintained by a financial institution organized under the laws of the U.S. possession of which you are a bona fide resident.
- A financial account maintained by a branch of a financial institution not organized under the laws of the U.S. possession of which you are a bona fide resident, if the branch is subject to the same tax and information reporting requirements that apply to a financial institution organized under the laws of the U.S. possession.
- Stock or securities issued by an entity organized under the laws of the U.S. possession of which you are a bona fide resident.
- An interest in an entity organized under the laws of the U.S. possession of which you are a bona fide resident.
- A financial instrument or contract held for investment, provided each issuer or counterparty that is not a U.S. person is either an entity organized under the laws of the U.S. possession of which you are a bona fide

resident or a bona fide resident of the U.S. possession of which you are a bona fide resident.

### **Penalties**

You may be subject to a penalty if you fail to file a correct Form 8938 on time, or if you have an understatement of tax or omission of income relating to a specified foreign financial asset.

#### **Failure-to-File Penalty**

If you are required to file Form 8938 but do not file a complete and correct Form 8938 by the due date (including extensions), you may be subject to a penalty of \$10,000.

**Continuing failure to file.** If you do not file a correct and complete Form 8938 within 90 days after the IRS mails you a notice of the failure to file, you may be subject to an additional penalty of \$10,000 for each 30-day period (or part of a period) during which you continue to fail to file Form 8938 after the 90-day period has expired. The maximum additional penalty for a continuing failure to file Form 8938 is \$50,000.

**Married taxpayers filing a joint income tax return.** If you are married and you and your spouse file a joint income tax return, the failure to file penalty applies as if you and your spouse were a single person. You and your spouse's liability for all penalties is joint and several.

**Presumption of maximum value.** If the IRS determines that you have an interest in one or more specified foreign financial assets and asks you for information about the value of any asset, but you do not provide enough information for the IRS to determine the value of the asset, you are presumed to own specified foreign financial assets with a value of more than the reporting threshold that applies to you. See *Determining the Reporting Threshold That Applies to You*, earlier. In such case you are subject to the failure to file penalties if you do not file Form 8938.

**Reasonable cause exception.** No penalty will be imposed if you fail to file Form 8938 or to disclose one or more specified foreign financial assets on Form 8938 and the failure is due to reasonable cause and not to willful neglect. You must affirmatively show the facts that support a reasonable cause claim.

**Effect of foreign jurisdiction laws.** The fact that a foreign jurisdiction would impose a civil or criminal penalty on you if you disclose the required information is not reasonable cause.

#### **Accuracy-Related Penalty**

If you underpay your tax as a result of a transaction involving an undisclosed specified foreign financial asset, you may have to pay a penalty equal to 40 percent of that underpayment.

**Examples.** Examples of underpayments due to transactions involving an undisclosed specified foreign financial asset include the following.

- You do not report ownership of shares in a foreign corporation on Form 8938 and you received taxable distributions from the company that you did not report on your income tax return.
- You do not report ownership of shares in a foreign company on Form 8938 and you sold the shares in the company for a gain and did not report the gain on your income tax return.
- You do not report a foreign pension on Form 8938 and you received a taxable distribution from the pension plan that you did not report on your income tax return.

#### **Fraud**

If you underpay your tax due to fraud, you must pay a penalty of 75 percent of the underpayment due to fraud.

#### **Criminal Penalties**

In addition to the penalties already discussed, if you fail to file Form 8938, fail to report an asset, or have an underpayment of tax, you may be subject to criminal penalties.

#### **Statute of Limitations**

If you fail to file Form 8938 or fail to report a specified foreign financial asset that you are required to report, the statute of limitations for the tax year may remain open for all or a portion of your income tax return until 3 years after the date on which you file Form 8938.

**Extended statute of limitations for failure to include income.** If you do not include in your gross income an amount

relating to one or more specified foreign financial assets, and the amount you omit is more than \$5,000, any tax you owe for the tax year can be assessed at any time within 6 years after you filed your return.

For this purpose, specified foreign financial assets include any specified foreign financial assets in which you have an interest without regard to the reporting threshold that applies to you, and regardless of whether the specified foreign financial asset is excepted from reporting because it was reported on certain other forms filed by you with the IRS or held by certain trusts of which you are an owner. See *Other Specified Foreign Financial Asset Exceptions*, earlier.

### Specific Instructions

**Before you begin.** If you reported all of your specified foreign financial assets on Forms 3520, 3520-A, 5471, 8621, 8865, or 8891, you do not need to report them on Form 8938. Instead, enter your name, identifying number, and address at the top of the form, and complete Part IV only. See the instructions for Part IV if you reported only a part of your specified foreign financial assets on one of these forms.

**Additional sheets.** If you have more than one account or asset to report in Part I or II, or more than one issuer or counterparty to report in Part II, copy as many blank Parts I and/or II as you need to complete and attach them to Form 8938. Check the “If you have attached additional sheets, check here” box at the top of the form.

### Identifying Information

Enter your name(s), identifying number, address, and tax year as shown on the annual return you are filing with Form 8938.

#### TIP

*If you are a specified individual (see Specified Individual, earlier) for less than the entire tax year, you only need to report the information for the part of the year that you are a specified individual.*

**Identifying number.** Enter the first social security number (SSN) or taxpayer identification number (ITIN) on your income tax return.

**Type of filer.** Check the box that shows the type of filer you are. If you are not a married individual filing a joint income tax return, check the “Other individual” box.

**Form 8938 for previously filed annual return.** Check this box if this Form 8938 is an original, amended, or supplemental Form 8938 that relates to a previously filed return.

If you are filing two Forms 8938 for the current tax year because you were eligible for the transitional rule for tax years beginning after March 18, 2010, check this box on the Form 8938 you are filing for the prior tax year. See *Transitional rule for 2011*, earlier, for more details.

### Part I. Foreign Deposit and Custodial Accounts

Use Part I to report information for foreign deposit and custodial accounts. If you have more than one account, attach a continuation sheet with the required information for each additional account and check the “If you have attached additional sheets, check here” box at the top of the form.

**Lines 1 through 9.** Enter the following information for each foreign deposit or custodial account.

**Line 1.** Check the box to indicate if this is a depository or a custodial account.

**Line 2.** Enter the account number of the account or other specific identifying information for the account if there is no account number.

**Line 3.** Check one or more boxes to indicate if any of the following applies.

- The account was opened during the tax year.
- The account was closed during the tax year.
- The account was jointly owned with your spouse.
- You did not report any tax item in Part III for this asset.

**Line 4.** Enter the maximum value of the account for the tax year.

#### TIP

**Maximum value.** See Figuring Maximum Value, earlier, for information on determining the maximum value of the

account.

**Joint interests.** Use the following rules to determine the maximum value to report.

**Spouses filing a joint return.** You and your spouse report the maximum value of a jointly held account only once on the single Form 8938 filed with your joint income tax return.

**Spouses filing separate returns.** You and your spouse each report the maximum value of a jointly held account on your separate Forms 8938 filed with your separate income tax returns.

**Other joint owners.** Report the maximum value of the entire jointly held account on your Form 8938 filed with your income tax return, regardless of the value of your separate interest in the account.

**Lines 5 and 6.** If you used a foreign currency exchange rate to convert the value of the account into U.S. dollars, check the “Yes” box on line 5 and go to line 6. Otherwise, check the “No” box and go to line 7.

**Line 6.** If you answered “Yes” on line 5, enter the following information.

1. The foreign currency in which the account is denominated.
2. The foreign currency exchange rate used to convert the value of the account into U.S. dollars.
3. If the U.S. Treasury Financial Management Service did not provide an exchange rate, enter the source of the foreign currency exchange rate that you used.

#### CAUTION

*You must use the foreign currency exchange rate on the last day of the tax year, even if you closed or disposed of the account before the last day of the tax year.*

**Lines 7 through 9.** Enter the name and mailing address of the financial institution in which you maintain this account.

## Part II. Other Foreign Assets

Use Part II to report information for specified foreign financial assets not held in a foreign financial account. If you have more than one asset, attach a continuation sheet with the same information for each additional asset and check the “If you have attached additional sheets, check here” box at the top of the form.

**Lines 1 through 8.** Enter the following information for all specified foreign financial assets not held in a foreign financial account. For examples of these foreign assets, see *Other specified foreign financial assets*, earlier.

**Line 1.** Enter a description of the asset. If the asset is stock or securities, include the class or issue of the stock or securities.

**Example 1.** You own 100 shares of XYZ Company, an Italian S.A. A sufficient description is “100 Class A shares of XYZ Company, S.A.”

**Example 2.** You own a bond issued by AB GmbH, a German GmbH. A sufficient description is “Bond of AB GmbH, maturing on December 31, 2015.”

**Line 2.** Enter the identifying number or other information identifying the asset.

**Line 3.** Enter the following information about the asset, if required.

1. If the asset was acquired or disposed of during the year, enter the date of acquisition and/or disposition.
2. If you own the asset jointly with your spouse, check the box on line 3c.
3. If you did not report any income, gain, loss, deduction, or credit for this asset on your tax return or any schedule or form attached to your income tax return filed for the tax year, check the box on line 3d.

**Line 4.** Check the box for the value range that represents the maximum value of the asset during the tax year. If the maximum value is more than \$200,000, enter the exact value on line 4e.

**Joint interests.** Use the following rules to figure the maximum value to report.

**Spouses filing a joint return.** You and your spouse report the maximum value of an asset held jointly by you and your spouse only once on the single Form 8938 filed with your joint income tax return.

**Spouses filing separate returns.** You and your spouse each report the maximum value of an asset held jointly by you and your spouse on your separate Forms 8938 filed with your separate income tax returns.

**Other joint owners.** Report the maximum value of the entire jointly held asset on your Form 8938 filed with your income tax return, regardless of the value of your separate interest in the asset.

**Lines 5 and 6.** If you used foreign currency exchange rate to convert the value of the asset into U.S. dollars, check the “Yes” box on line 5 and go to line 6. Otherwise, check the “No” box and go to line 7.

**Line 6.** If you answered “Yes” to line 5, enter the following information.

1. The foreign currency in which the asset is denominated.
2. The foreign currency exchange rate used to convert the value of the account into U.S. dollars.
3. If the U.S. Treasury Financial Management Service did not provide an exchange rate, enter the source of the foreign currency exchange rate that you used.

**CAUTION**

*You must use the foreign currency exchange rate on the last day of the tax year, even if you sold or disposed of the asset before the last day of the tax year.*

**Lines 7a through 7e.** If the asset you reported on line 1 is stock of a foreign entity or an interest in a foreign entity, complete lines 7a through 7e.

**Line 7a.** Enter the name of the foreign entity.

**Line 7b.** Check the box on line 7b to indicate the type of foreign entity.

**Line 7c.** If the foreign entity is a passive foreign investment company, check the box on line 7c.

**Line 7d and 7e.** Enter the mailing address of the foreign entity.

**Lines 8a through 8e.** If the asset you reported on line 1 is not stock of a foreign entity or an interest in a foreign entity, complete lines 8a through 8e.

**Note.** If this asset has more than one issuer or counterparty, copy page 2 as many times as you need to and complete a separate line 8 for each issuer or counterparty. Check the “If you have attached additional sheets, check here” box at the top of the form.

**Line 8a.** Enter the name of the issuer or counterparty and check the appropriate box to indicate if you are reporting for an issuer or a counterparty.

**Line 8b.** Check the appropriate box to indicate the type of issuer or counterparty.

**Line 8c.** Check the box to indicate if the issuer or counterparty is a U.S. person or a foreign person.

**Lines 8d and 8e.** Enter the mailing address of the issuer or counterparty. If the issuer or counterparty has a mailing address in the United States, you can enter the U.S. mailing address.

**Part III. Summary of Tax Items Attributable to Specified Foreign Financial Assets**

Enter the total income, gain or loss, deductions, or credits for your specified foreign financial assets, and the schedule, form, or return on which you reported the item. Enter the totals separately for all of the assets reported in Part I and Part II. Report the information for the following items separately.

- Interest.
- Dividends.
- Royalties.
- Gains or (losses).
- Deductions.
- Credits.

If you did not report any tax item for a specified foreign financial asset on any form or schedule for the tax year, check the box in line 3d of the Part I or Part II in which you reported the account or asset.

**Part IV. Excepted Specified Foreign Financial Assets**

If you reported a specified foreign financial asset on certain other forms listed below for the same tax year, you may not need to report it on Form 8938. However, you must identify the form where you reported the asset and indicate the number of forms you filed. For more information, see *Duplicative reporting*, earlier. If you reported a specified foreign financial asset on one or more of the following forms, check the box(es) to identify the form(s) where you reported the

asset and enter the number of forms filed.

- Form 3520.
- Form 3520-A.
- Form 5471.
- Form 8621.
- Form 8865.
- Form 8891.

**Form 8891.** If you filed Form 8891 instead of Form 3520 to report an interest in a Canadian retirement plan, check the box for Form 3520 and enter the number of Forms 8891 (and Forms 3520) you filed.

**Foreign grantor trusts.** If you are treated as an owner of any portion of a foreign grantor trust, you may be required to file Form 8938 to report specified foreign financial assets held by the trust. If you are also a beneficiary of the foreign trust, you may be required to file Form 8938 to report your interest in the trust. You do not have to report on Form 8938 any specified foreign financial asset held by the trust or your interest in the trust if you report the trust on a Form 3520 filed for the tax year and the trust files Form 3520-A for the tax year.

**Paperwork Reduction Act Notice**

We ask for the information on this form to carry out the Internal Revenue laws of the United States. Section 6038D requires certain individuals and entities to report information about interests held in specified foreign financial assets. Form 8938 is used to comply with this reporting requirement.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file the following forms will vary depending on individual circumstances. The estimated average times are: 1 hour and 5 minutes.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form and related schedules simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.

**Index**

**D**

Determining the Reporting Threshold that Applies to You:

Married taxpayers filing a joint income tax return and living in the United States	2
Married taxpayers filing separate returns and living in the United States	2
Taxpayers living abroad .....	2
Unmarried taxpayers living in the United States .....	2

Determining the Total Value of Your Specified Foreign Financial Assets:

Asset with no positive value .....	2
Foreign currency conversion exchange rate .....	2
Joint interests .....	2

**E**

Exceptions to Reporting:

Excepted financial accounts .....	5
-----------------------------------	---

**F**

Figuring Maximum Value:	
Assets with no positive value .....	4
Foreign currency conversion .....	4
Reporting value of jointly owned assets .....	4
Valuing financial accounts .....	4
Valuing interests in estates, pension plans, and deferred compensation plans .....	4
Valuing interests in trusts .....	4
Valuing other specified foreign financial assets .....	4
Foreign currency conversion:	
Currency determination date .....	4

---

## G

General Instructions:	
Determining the Reporting Threshold that Applies to You .....	1
Determining the Total Value of Your Specified Foreign Financial Assets .....	1
Figuring Maximum Value .....	1
Purpose of Form .....	1
Reporting Period .....	1
Specified Foreign Financial Assets .....	1
Specified Foreign Financial Assets Required to be Reported .....	1
What's New .....	1
When and How to File .....	1
Who Must File .....	1

---

## I

Identifying Information:	
Address .....	7
Identifying number .....	7
Name(s) .....	7
Tax year .....	7
Type of filer .....	7
Type of Form 8938 .....	7

---

## J

Joint interests:	
Examples .....	2
Joint ownership with someone other than a spouse .....	2
Joint ownership with spouse filing joint income tax return .....	2
Joint ownership with spouse filing separate income tax return .....	2

---

## O

Other Specified Foreign Financial Asset exceptions:	
Bona fide resident of a U.S. possession .....	5
Certain trusts .....	5
Duplicate reporting .....	5
Foreign grantor trusts .....	5

---

<b>P</b>	
Paperwork Reduction Act Notice .....	8
Part I. Foreign Deposit and Custodial Accounts: Joint interests ....	7
Line 1 .....	7
Line 2 .....	7
Line 3 .....	7
Line 4 .....	7
Lines 5 and 6 .....	7
Lines 7 through 9 .....	7
Part II. Other Foreign Assets: Joint interests .....	7
Line 1 .....	7
Line 2 .....	7
Line 3 .....	7
Line 4 .....	7
Line 7b .....	7
Line 7c .....	7
Line 8a .....	7
Line 8b .....	7
Line 8c .....	7
Lines 5 and 6 .....	7
Lines 7a through 7e .....	7
Part III. Summary of Tax Items Attributable to Specified Foreign Financial Assets	8
Part IV. Excepted Specified Foreign Financial Assets:	
Foreign grantor trusts .....	8
Form 3520 .....	8
Form 3520-A .....	8
Form 5471 .....	8
Form 8621 .....	8
Form 8865 .....	8
Form 8891 .....	8
Penalties:	
Continuing failure to file. ....	6
Failure-to-File Penalty .....	6
Married individuals filing a joint return .....	6
Presumption of maximum value .....	6
Reasonable cause exception.:	
Effect of foreign jurisdiction laws. ....	6
Penalties Criminal .....	6
Penalty Fraud .....	6
Penalty-Accuracy-Related:	
Examples of underpayments .....	6
Purpose of Form .....	1

---

**R**

Reporting Period:	
Examples .....	4
Exception for partial tax years of specified individuals .....	4
Reporting the value of jointly owned assets:	
Married specified individuals filing a joint income tax return .....	5
Married specified individuals filing separate income tax returns ...	5
Other joint ownership .....	5
<hr/>	
<b>S</b>	
Specific Instructions:	
Additional sheets. ....	7
Before you begin. ....	7
Specified Foreign Financial Assets:	
Assets held for investment .....	3
Financial account .....	3
Foreign financial institution .....	3
Other specified foreign financial assets .....	3
Specified Foreign Financial Assets Required to be Reported:	
Assets generating unearned income of children (Kiddie tax election)	4
Assets held by disregarded entities .....	4
Assets held by entities that are not disregarded entities .....	4
Assets held by grantor trust .....	4
Assets held in financial accounts .....	4
Interests in foreign estates and foreign trusts .....	4
Jointly owned assets .....	4
Specified individual.:	
Nonresident alien bona fide resident of American Samoa or Puerto Rico	1
Nonresident alien electing to be treated as a resident alien .....	1
Resident alien of the United States .....	1
U.S. citizen .....	1
Statute of Limitations:	
Statute of limitations extended .....	6
<hr/>	
<b>T</b>	
Transitional rule for 2011.:	
Filing Form 8938 for a prior year .....	1
<hr/>	
<b>V</b>	
Valuing other specified foreign financial assets.:	
Example .....	5
<hr/>	
<b>W</b>	
What's New:	
New failure-to-file and accuracy-related penalties .....	1
New reporting requirements .....	1
Statute of limitations .....	1

When and How to File:  
    Transitional rule for 2011 ..... 1

Who Must File:  
    Exception if no income tax return required ..... 1  
    Special rules for resident aliens ..... 1  
    Specified domestic entity ..... 1  
    Specified individual ..... 1

---