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A Broader Perspective
Bulletin

Private Client Group

To: Our Clients and Friends December 2011

Treasury Issues Temporary Regulations for Reporting Interests in Specified Foreign Financial Assets

The FATCA provisions of the HIRE Act included a new annual information reporting requirement applicable beginning 1st January 2011 (for calendar year taxpayers). On 19th December 2011 the Treasury issued temporary regulations and the related Form 8938 and instructions in final.

Reporting is required by individual taxpayers who hold interests in "specified foreign financial assets" the aggregate value of which exceeds certain thresholds. The definition of "specified foreign financial asset" includes (i) any financial account maintained by a foreign financial institution, (ii) any asset not held in an account at a foreign financial institution if it is (a) stock or a security issued by a non-US person, (b) any financial instrument or contract held for investment that has an issuer or a counterparty that is a non-US person and (iii) any interest in a foreign entity (including any interest in a foreign trust, estate or pension plan).

Key points are:

- An individual who is not required to file a US Federal income tax return for a calendar year is exempt from filing Form 8938 for that year. This should eliminate annual Form 8938 filing requirements for many minor US taxpayer beneficiaries of foreign trusts because often such minors do not have sufficient gross income to require the minor to file a US Federal income tax return.
- A beneficiary does not have a reportable interest in a foreign trust or estate "unless you know or should have known of the interest".
- "In most cases" a beneficiary who has a reportable interest in a foreign trust or estate is not in addition treated as having a reportable interest in the specified foreign financial assets owned by that trust or estate. So although an individual who is entitled to all income of a foreign trust must include on his or her annual "Report of Foreign Bank and Financial Accounts" all of the foreign financial accounts held directly or indirectly by the trust, the draft instructions for Form 8938 indicate that such a beneficiary would not be required to report the specified foreign financial assets of the trust on Form 8938 (but the beneficiary must file Form 8938 with respect to the trust interest itself).
- An individual who files a Form 3520 for a calendar year is not required to complete Form 8938 fully to report his interest in the foreign trust or estate reported on Form 3520, however, he does have to complete a portion of Form 8938 to identify the number of Forms 3520 filed by the taxpayer for that calendar year.

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- Although there is no specific reference to the position of a taxpayer who is a beneficiary of a foreign trust that is a "grantor" trust to a foreign individual, the manner in which "an interest" in a foreign entity is defined leads to the conclusion that such an individual is not treated as having an "interest" in a trust that is a grantor trust to another individual.
- The definition of "an interest in a specified foreign financial asset" leaves unresolved the question of whether a US taxpayer who could benefit from a foreign trust in future but is not an object of trustee discretion during the calendar year of reporting is considered to have a reportable interest.
- A number of detailed rules are provided for valuing and reporting directly held interests in foreign financial accounts, foreign issued stock, securities and financial interests not held in a foreign financial account and interests in foreign partnerships or other entities including rules applicable to joint accounts and differing value reporting thresholds depending on whether the individual reporting lives in the United States or outside the United States.
- Only individuals are required to comply with Form 8938 filing requirements for calendar year 2011; US "domestic entities" are exempted from the reporting requirement until future regulations or other guidance impose such a reporting requirement on domestic entities.
- Reporting is required by individuals who are US citizens regardless of where resident, aliens who are resident in the United States for US income tax purposes (including individuals resident under US domestic law who claim non-residence under an applicable Treaty) and non-resident aliens who elect to file a joint US income tax return with their US citizen/resident spouses.

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