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Update on Foreign Asset Reporting

By Diane Freda

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Information Reporting IRS Suspends Some Reporting Requirements For Foreign Financial Assets and Investments.

The Internal Revenue Service June 21 suspended the requirement for certain individuals to report foreign financial assets and passive foreign investments until IRS releases new Form 8938 and revised Form 8621 capturing that information.

Notice 2011-55 suspended the requirement for individuals reporting under new tax code Sections 6038D and 1298, for tax years beginning on or after March 18, 2010.

These taxpayers may have been required to attach a Form 8938, Statement of Specified Foreign Financial Assets, and the revised Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund, before those returns are available, the notice said.

“What this notice says in essence is, if you were subject to a 6038D disclosure by having to file Form 8938 which doesn’t yet exist, that’s OK, we are suspending the 8938 requirement until the year in which the form exists, and then you will be required to report, and the IRS will have three years from the date of the filing of that form to conduct an examination, assuming your disclosure is truthful and complete,” Sanford Millar, an attorney with the Law Offices of Sanford Millar in Los Angeles, told BNA June 21.

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IRS is acknowledging that it cannot expect people to file and provide the agency with information on forms that do not yet exist, he said. When they do exist, taxpayers will be allowed to attach them to the next income tax return that is required, so that existing returns do not have to be amended.

“They can go ahead and file the return today and then file the 6038D schedule when the forms come out, on the returns that are due next,” Millar said. There is no reason not to file returns now, if the rest of the required information is already in the taxpayer’s hands, he said. “It tells people that are on extension today that they do not need to worry about the completeness of their return because of a form that doesn’t yet exist.”

He noted that compliance with Sections 6038D and 1298(f) does not relieve a person of the responsibility to file a Report of Foreign Bank and Financial Accounts (FBAR), if that form is required. HIRE Act Adds New Requirements.

The Hiring Incentives to Restore Employment Act amended the Internal Revenue Code by adding the new code sections. Under Section 6038D, individuals with interests in foreign financial assets are required to attach information on each foreign financial asset if the aggregate value of all assets held exceeds \$50,000.

Under Section 1298(f), U.S. taxpayers who are shareholders of a passive foreign investment company are required to file an annual report containing whatever information the Treasury secretary requires.

Millar said perhaps the most important aspect of the notice is that it gives taxpayers and practitioners an opportunity to finally digest what needs to be disclosed and gather the information accordingly.

While U.S. investors may have the ability to get information from U.S. financial institutions quickly, dual nationals or expatriates can have accounts in foreign financial institutions, homes, or other assets that need to be disclosed, and valuation may be difficult. Retrieving the information is sometimes a problem, Millar said, in that some European banks can take months to provide the information, and hedge funds do not always report their holdings as rigorously as they should, he said.

“That is not the fault of the taxpayer,” he added.

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