

## Part 4 | International Tax Series

### Reporting Obligations of Superannuation Accounts

By Renuka Somers

**In this Part 4, we consider some IRS forms that may need to be included with your U.S. Tax Return.**

The reporting obligations can depend on the balance of the account, residency, U.S. tax filing status, whether the superannuation fund is self-managed (an SMSF), and the underlying assets of the fund. Failing to file forms can result in non-compliance with U.S. tax and reporting obligations and significant IRS penalties and interest. Being non-compliant with IRS reporting can create delays for the U.S. People seeking to expatriate can also significantly delay the probate of a deceased's estate and the distribution of assets to beneficiaries.

**IRS Form 8938 – Statement of Specified Foreign Financial Assets: 1**

This form generally must be submitted by U.S. people with significant foreign financial assets, depending on the balance of that account, and U.S. tax filing status. For example, the reporting requirement applies to unmarried taxpayers if the balance of the specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$75,000 during the tax year. For married taxpayers who file jointly, the requirement applies if the balance of those assets is more than \$100,000 on the last day of the tax year or more than \$150,000 during the tax year.

Form 8938 requires, several foreign assets to be reported, including:

- Overseas bank accounts with foreign banks
- Interests in foreign pension plans
- Interest in foreign trusts and foreign estates
- Stock and securities in foreign corporations
- Foreign financial instruments, including loans with foreigners

**Report of Foreign Bank and Financial Accounts (FBAR): 2**

This form must be submitted by U.S. people with foreign financial accounts where the balance exceeded US \$10,000 in the tax year.

**Financial Accounts can include: 3**

- Bank accounts such as savings and checking accounts, and time deposits
- Securities accounts, such as brokerage accounts, securities derivatives accounts, or other financial instruments accounts
- Derivatives accounts
- Insurance or annuity policies with a cash value
- Mutual funds
- Foreign retirement accounts

**IRS Form 3520 4 Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts**

IRS Form 3520 is required for reporting transactions with foreign trusts, ownership of foreign trusts under the grantor trust rules of IRC sections 671-679, and reporting receipts of large gifts or bequests from certain foreign people.

In Part 3, the IRS treats superannuation funds as foreign trusts.<sup>6</sup> The Internal Revenue Code states that a trust is a foreign trust unless it meets the “Court Test” and the “Control Test”.<sup>7</sup> A trust will meet the Court test if “a court within the United States is able to exercise primary supervision over the administration of the trust”.<sup>8</sup> A trust meets the Control Test if “one or more United States persons have the authority to control all substantial decisions of the trust with no other person having the power to veto any of the substantial decisions”.

In the superannuation context, this form may have to be filed to report:

Transfers (contributions) to a superannuation fund

Ownership of any part of a foreign trust during the tax year

Distributions from a superannuation fund

Ownership of a foreign trust may be considered to occur where the U.S. grantor trust rules 10 is triggered. These rules could apply to an SMSF if the members of the SMSF are seen to “control” and “own” the trust fund of the SMSF. As the members of an SMSF are usually husband and wife, with both

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being the members and trustees of the fund, they are seen to control the fund – making all decisions in relation to the fund, without the approval or consent of a party adverse to them.

**IRS Form 3520-A - Annual Information Return of Foreign Trust with a U.S. Owner 12**

This form is required where a foreign trust has a U.S. owner.

A U.S. citizen or a green card holder who is a member of an SMSF could be regarded as a U.S. owner of a foreign trust. In such instances, the U.S. owner may need to file form 3520-A yearly to provide information about:

the SMSF its U.S. beneficiaries (members), and themselves – as a U.S. person who is treated as an owner of any part of the foreign trust.

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

This form must be filed by U.S. people with a direct or indirect shareholder interest in a passive foreign investment company (PFIC). The PFIC rules usually apply to foreign companies and mutual funds that derive over 75% of their income from passive sources, such as capital gains and dividends. The rules are exceedingly complex and require reviewing the underlying assets and income of the PFIC.

Completion of the IRS forms requires careful consideration of a taxpayer's individual circumstances. Failure to file forms can result in significant penalties of \$10,000 (or greater) and even criminal penalties.

The ensuing discussion is for general informational purposes only. It is not intended to constitute tax or legal advice, or a recommended course of action, and does not create an attorney-client relationship between the reader and Altman & Associates, a division of Frost Law.

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