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NEW FOREIGN REPORTING REQUIREMENTS FOR U.S. TAXPAYERS LIVING ABROAD

Effective with the 2011 tax filings, U.S. taxpayers (citizens, green card holders or residents) who have foreign financial assets have an increased compliance burden thanks to the Foreign Account Compliance Tax Act ("FACTA"). These new requirements are fulfilled by filing Form 8938, "*Statement of Foreign Financial Assets*" as part of their personal U.S. income tax return. This form is required in addition to Form TD F 90-22.1. "*Report of Foreign Bank and Financial Accounts*" (FBAR), though in many cases the information may be the same with respect to certain assets. The filing of Form 8938 does not alleviate the need to timely file an FBAR.

For many clients, this requirement will significantly increase the time required to complete their filings. Clients may wish to consider either (i) moving into U.S. based investment assets or (ii) consolidating their foreign investment holdings (fewer accounts). Clients should consult with their advisors before taking any action.

Form TD F 90-22.1

This form is required when a U.S. person has a direct interest in, signing authority or any authority over non-U.S. financial accounts, where the aggregate value, of all such accounts, exceeded US \$10,000 at any time during the calendar year. This form must be filed by June 30th (no extensions available) with the U.S. Department of The Treasury in Detroit, MI.

Form 8938 - Statement of Foreign Financial Assets

This form expands the requirement in that all foreign financial assets, not just foreign financial accounts, must now be reported. Unless an exception applies, a taxpayer must file Form 8938 if he is a specified person that has an interest in specified foreign financial assets and the value of those assets is more than the applicable reporting threshold.



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Who is a specified person?

With respect to a natural person, you are a specified person if you are

- a U.S. citizen;
- a U.S. green card holder;
- a U.S. resident under the substantial presence test;
- a non-resident alien who elects to be a U.S. resident under IRC §6013(g) or IRC §6013(h); or
- a non-resident alien who is a bona fide resident of American Samoa or Puerto Rico.

You must file the form if you are a U.S. resident ***even if you elect to file as a non-resident pursuant to a U.S. Income Tax Treaty.***

Applicable Reporting Threshold

The filing threshold depends on your filing status and whether you are a U.S. resident or not. You may exceed either the year end balance or the balance at any time in the year. The thresholds are as follows (in U.S. dollars).

<u>Year</u>		<u>End of Year</u>	<u>Any time During</u>
Living in U.S.	- Single	\$50,000	\$75,000
Living in U.S.	- Married Filing Joint	\$100,000	\$150,000
Living in U.S.	- Married Filing Separate	\$50,000	\$75,000
Living Abroad	- Single	\$200,000	\$300,000
Living Abroad	- Married Filing Joint	\$400,000	\$600,000
Living Abroad	- Married Filing Separate	\$200,000	\$300,000



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Duplicative Reporting

Form 8938 does not have to be filed with respect to foreign financial assets that have already been reported on the following timely filed forms:

- 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, "*Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*"
- Form 8865, "*Return of U.S. Persons With Respect to Certain Foreign Partnerships*"
- Form 8891, "*U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans*"

Instead, you must identify on Form 8938, the form(s) on which you have reported the foreign financial asset and how many of these forms you have filed.

What is a Specified Foreign Financial Asset?

Specified Foreign Financial Assets include:

- Financial Accounts maintained by a foreign financial institution (in most cases, this will be the same information reported on an FBAR)
- The following foreign financial assets if they are held for investment and **ARE NOT** in an account maintained by a foreign financial institution (in many cases, this information will be in addition to that disclosed on any FBARs)
 - a) Non U.S. stock or securities
 - b) Any interest in a foreign entity



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c) Any financial instrument or contract that has an issuer or counterparty that is not a U.S. person.

Some examples would include:

- Stock issued by a non-U.S. corporation
- A capital or profits interest in a non-U.S. partnership
- A note, bond or debenture, or other form of indebtedness issued by a non-U.S. person,
- An interest in a non-U.S. estate or trust,
- 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 arrangement with a non-U.S. counterpart;
- 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 non-U.S. counterparty or issuer.

Note, however, that an interest in a non-U.S. social security system **IS NOT** a foreign financial asset. For Canadian residents, your interest in the Canada Pension Plan and Canadian Old Age Security is not reportable.

What is an Interest in a Specified Foreign Financial Asset?

- *Interests held 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* - In general, a joint owner of an asset has an interest in the entire asset. If you are married and you and your spouse file a joint income tax return, report any foreign financial asset that you jointly own only once and include the maximum value of the entire asset. If you are married and you and your spouse file separate income tax returns, both you and your spouse must



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report any foreign financial asset that you jointly own on your separate Form 8938 and both you and your spouse must include the maximum value of the entire asset on your separate Form 8938.

- *Interests in assets held in financial accounts* - If you have an interest in a financial account (i.e., a brokerage account) that holds a specified foreign financial assets (i.e., non-U.S. shares), you do not have to separately report the assets held in the account.
- *Interests in assets generating certain unearned income of children* - If you file Form 8814, "Parents' Election to Report Child's Interest and Dividends," 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 you being a partner, shareholder, or a beneficiary.
- *Interests in assets held by grantor trusts* - If you are considered the owner under the grantor trust rules of any part of a trust, you have an interest in any specified foreign financial asset held by that part of the trust that you are considered to own.
- *Interests in foreign estates and foreign trusts* - An interest in a foreign estate or foreign trust is not a specified foreign financial asset unless you know or have reason to know based on readily accessible information of the interest. If you receive a distribution, you are considered to know of the interest.
- *Interests in foreign pension plans and foreign deferred compensation plans* - If you have an interest in a foreign pension plan or a foreign deferred compensation plan you must report that interest. You do not, however, need to report the assets held by the plan(s).

Interaction with FACTA Legislation Aimed at Foreign Financial Institutions (FFI)

Another part of the FACTA legislation deals with the requirement for FFIs to disclose their U.S. clients to the Internal Revenue Service (IRS). Under the legislation, FFIs



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are encouraged to enter into an agreement with the IRS to disclose their U.S. clients to the IRS. That is, effective January 1, 2014, those FFIs that have entered into such an agreement, will disclose to the IRS their U.S. clients and the income earned by those U.S. clients in foreign financial accounts. Those FFIs that do not enter into such an agreement will have their U.S. source income subject a 30% non-resident withholding tax. Since most FFIs will not want to pay the tax themselves, a significant number of FFIs may enter into such agreements. As a result of this legislation, however, many non-U.S. financial institutions are no longer accepting U.S. citizens as clients due to the increased compliance burden.

The reporting of FFIs will be matched against your tax return to ensure that you have properly disclosed your foreign financial assets and any income generated thereon. As such, it is highly recommended that you disclose all foreign financial accounts and report any associated income.

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The information contained in this Notice is meant to be general in nature. Readers are cautioned that they should not rely strictly on this Notice in terms of addressing any specific tax needs or questions. Readers are encouraged to contact their local tax advisor.