Form 8938 Reporting for Taxpayers With Foreign Assets: Integrating FATCA and Latest Enhancements

WEDNESDAY, DECEMBER 20, 2017, 1:00-2:50 pm Eastern

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Form 8938 Reporting for Taxpayers With Foreign Assets:

Dec. 20, 2017

Matthew D. Lee, Partner
Fox Rothschild, Philadelphia
mlee@foxrothschild.com

Jeffrey M. Rosenfeld, Esq.
Blank Rome, Philadelphia
rosenfeld@blankrome.com

Marc J. Strohl, CPA, Principal
Protax Consulting Services, New York
mstrohl@protaxconsulting.com
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Form 8938 Reporting for Taxpayers With Foreign Assets

December 20, 2017

Presented by Matthew D. Lee, Jeffrey M. Rosenfeld and Marc J. Strohl
Matthew D. Lee

Matthew D. Lee is a former U.S. Department of Justice trial attorney who concentrates his practice on all aspects of white collar criminal defense and federal tax controversies. He has extensive experience in advising clients on issues regarding foreign bank account reporting (FBAR) obligations, the Foreign Account Tax Compliance Act (FATCA), and the Internal Revenue Service’s 2009 Offshore Voluntary Disclosure Program, 2011 Offshore Voluntary Disclosure Initiative, and 2012 Offshore Voluntary Disclosure Program. He has represented hundreds of U.S. taxpayers with undisclosed foreign bank accounts. Mr. Lee has published numerous articles regarding the IRS voluntary disclosure programs and FBAR and FATCA reporting obligations and speaks frequently on these topics.

He has also represented clients in all stages of proceedings before the Internal Revenue Service, including audits, appeals, and collections, and Tax Court and district court litigation. Mr. Lee also has experience in conducting corporate internal investigations and advising clients as to corporate compliance issues involving the Bank Secrecy Act, the USA Patriot Act, FATCA, and anti-money laundering laws and regulations.

Mr. Lee has represented both corporations and individuals in criminal investigations involving tax, money laundering, health care, securities, public corruption, and fraud offenses, and has significant experience in handling all stages of federal litigation including trials and appeals.

Mr. Lee is the author of *Foreign Account Tax Compliance Act Answer Book 2015* (Practising Law Institute).
Jeffrey M. Rosenfeld concentrates his practice in the area of business tax law. Mr. Rosenfeld has significant experience counseling corporate clients and individuals regarding undeclared foreign bank accounts, including “FBAR” reporting obligations, and has represented numerous clients in the Internal Revenue Service’s Offshore Voluntary Disclosure Program. Mr. Rosenfeld frequently writes on issues related to the FBAR and FATCA rules and regulations and international tax compliance issues.

Mr. Rosenfeld also counsels public and private corporations, partnerships, and individuals in a broad array of tax matters including:

- domestic and international tax matters;
- state and local tax planning;
- tax-efficient structuring of domestic and international mergers, acquisitions, divestitures,
- reorganizations, spin-offs, redemptions and liquidations;
- formation, operation and acquisition of Subchapter S Corporations, partnerships and limited liability companies;
- federal, state, and local criminal and civil tax controversies, including audits, administrative appeals, and litigation; and,
- issuances of equity-based compensation.
Marc J. Strohl

Marc J. Strohl, CPA is a multi-state licensed Certified Public Accountant. He was awarded membership by the American Institute of Certified Public Accountants (AICPA), and was awarded membership in to the New York State Society of Certified Public Accountants (NYSSCPA). Marc earned a Master’s degree in Public Accountancy from the prestigious Canadian educational institution McGill University.

Additionally Marc is a member of the New York State Society of Certified Public Accountants’s (NYSSCPA): 1) International Taxation Committee and 2) Taxation of Individuals Committee and is a regular contributor to legislative changes at the CPA professional regulatory level.

Marc J. Strohl, CPA’s concise and informative, industry benchmark authoritative executive summary tax articles regarding US Expat or Expatriate and Foreign National-Nonresident and/ or Resident Alien tax are world renown. Often quoted and referred to by leading experts, many of Marc’s colleagues use his articles in their research and with their clients. Additionally Marc is sought out and featured internationally in industry publications including the critically acclaimed Thomson Reuters’ twice-monthly newsletter publication Practical International Tax Strategies, examining cross border tax developments for an audience of in-house tax counsel, tax directors and CFOs of Fortune 1000 companies. He is also featured on Thomson Reuters’ Checkpoint database- the leading electronic database for tax, accounting and legal professionals.
International Tax Compliance

• IRS/DOJ have intense focus on curtailing offshore tax avoidance
  – U.S. Tax Gap: $450 billion
  – U.S. Senate PSI Report (2/26/14): Offshore tax schemes cause $150 billion in lost tax revenue per year

• How?
  – using “carrot and stick” approach
The Carrot: Voluntary Disclosure Programs

• Major changes announced June 18, 2014
• 2014 Offshore Voluntary Disclosure Program (OVDP) which follows highly successful 2009, 2011, and 2012 amnesty programs
  – Provides participating taxpayers with amnesty from criminal prosecution by filing of amended tax returns and payment of taxes, interest, and penalties
  – 45,000 voluntary disclosures since 2009 (versus 100 annually under traditional voluntary disclosure program)
  – $6.5 billion in additional revenue collected to date
• Newly announced “Expanded Streamlined Filing Compliance Procedures” for non-willful taxpayers
The Stick: Unprecedented Enforcement

- "Pursuing international tax evasion is a priority area for IRS Criminal Investigation, and we will continue to follow the money here in the United States and around the world. I want to commend the special agents in IRS-Criminal Investigation for all of their hard work in this area and the close cooperation with the Department of Justice. Today’s guilty plea is another important milestone in ongoing law enforcement efforts to investigate the use of offshore accounts to evade taxes. People should no longer feel comfortable hiding their assets and income from the IRS.” (May 19, 2014)

- “Our focus on offshore tax evasion continues to produce strong, substantial results for the nation’s taxpayers . . . . As we’ve said all along, people need to come in and get right with us before we find you. . . . We are following more leads and the risk for people who do not come in continues to increase.” (January 9, 2012)

- “Combating international tax evasion is a top priority for the IRS. We have additional cases and banks under review. The situation will just get worse in the months ahead for those hiding assets and income offshore.” (February 8, 2011)

- “Tax secrecy continues to erode. . . . We are not letting up on international tax issues, and more is in the works. For those hiding cash or assets offshore, the time to come in is now. The risk of being caught will only increase.” (February 8, 2011)
Enforcement Efforts to Date

• UBS Deferred Prosecution Agreement (Feb. 2009)
• Approximately 150 investigations of offshore account holders are underway since 2009
  – Over 60 account holders have been criminally charged;
  – 55 guilty pleas have been entered;
  – 5 convictions after trial.
• A number of facilitators who helped clients hide assets offshore have been indicted, including 30 banking professionals
Enforcement Efforts To Date (continued)

• Indictment, guilty plea, and sentencing of Wegelin & Co. (Switzerland’s oldest bank)
  – DOJ Press Release: “This case represents the first time that a foreign bank has been indicted for facilitating tax evasion by U.S. taxpayers and the first guilty plea and sentencing of such a bank.”

• Other banks under criminal investigation in Switzerland, Israel, India, and the Caribbean

• U.S.-Switzerland amnesty program for banks: 106 banks applied for admission as of 12/31/13
Credit Suisse Guilty Plea
May 19, 2014

• Credit Suisse and its subsidiaries engaged in an extensive and wide-ranging conspiracy to help U.S. taxpayers evade taxes.
• The bank actively helped its account holders to deceive the IRS by concealing assets and income in illegal, undeclared bank accounts.
• These secret offshore accounts were held in the names of sham entities and foundations.
• This conspiracy spanned decades.
• Hundreds of Credit Suisse employees, including at the manager level, conspired to help tax cheats dodge U.S. taxes.
• Credit Suisse will pay a total of $2.6 billion
  – $1.8 billion to the Department of Justice for the U.S. Treasury
  – $100 million to the Federal Reserve and
  – $715 million to the New York State Department of Financial Services.
What’s Next After Credit Suisse?

- Singapore, Cook Islands, India, Israel, Luxembourg, Liechtenstein, Cayman Islands, and other Caribbean countries
- “We expect to get from the Swiss banks a wealth of information that will lead us to the rest of the world, and that information will be fueling our investigations for some time into the future. The ultimate goal is to make this a crime that is foolish to commit. It’s going to be harder and harder to engage in this conduct. There’s going to be fewer and fewer places in the world where a taxpayer can attempt this crime, and they will be less and less trusty places.” -- Assistant Attorney General Kathryn Keneally
- HSBC and UBS (again) under investigation
United States v. Zwerner Jury Verdict
May 28, 2014

• Zwerner failed to file FBARs for Swiss bank account with balance of $1.4 million

• Jury found Zwerner liable for willfully failing to file FBARs for 2004, 2005, and 2006

• Potential penalty: 50% of balance of account for each year (total 150% penalty)

• Even though he filled out a tax organizer provided by his accountant, every year, Zwerner answered “no” to questions asking whether “you have an interest in or signature authority over a financial account in a foreign country, such as a bank account, securities account or other financial account” and whether “you have any foreign income or pay any foreign taxes.”
Bank Leumi Settles for $400 Million
December 22, 2014

• The Justice Department files a conspiracy charge against Bank Leumi, but agreed to defer prosecution for two years.

• Bank admitted it unlawfully helped clients hide assets from the Internal Revenue Service.

• The bank will pay the U.S. government a total of $270 million and the New York state department will receive $130 million.
Foreign Account Tax Compliance Act (FATCA)
Foreign Account Tax Compliance Act (FATCA)

• “The Foreign Account Tax Compliance Act (FATCA) is an important development in U.S. efforts to improve tax compliance involving foreign financial assets and offshore accounts.” (www.IRS.gov)

• “FATCA was enacted in 2010 by Congress to target non-compliance by U.S. taxpayers using foreign accounts. FATCA requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.” (www.treasury.gov)
Two Primary FATCA Requirements

• Foreign financial institutions are annually required to report directly to the U.S. government information about financial accounts held by U.S. taxpayers, or held by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

• U.S. taxpayers with specified foreign financial assets that exceed certain thresholds must report those assets to the IRS annually on an information return.
FATCA Policy in Context of U.S. Tax Laws

• U.S. taxpayers’ investments have become increasingly global in scope
• Recognition that foreign financial institutions (FFIs) are in best position to identify and report with respect to their U.S. account holders
• Absent reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts
• “To prevent this abuse of the U.S. voluntary tax compliance system and address the use of offshore accounts to facilitate tax evasion, it is essential in today’s global investment climate that reporting be available with respect to both the onshore and offshore accounts of U.S. taxpayers.” (Preamble to Final Regulations)
FATCA Requires Reporting of Foreign Assets by U.S. Taxpayers

• U.S. taxpayers with “specified foreign financial assets” that exceed certain thresholds must now report those assets to the IRS.

• A specified foreign financial asset includes (1) financial accounts maintained by foreign financial institutions and (2) other foreign financial assets held for investment such as foreign stocks or securities, interests in a foreign entity, any financial instrument or contract that has as an issuer or counterparty that is other than a U.S. person, foreign pensions and deferred compensation plans, and certain foreign trusts and estates

• Form 8938, “Statement of Foreign Financial Assets,” must be filed with the tax return.
Overview of IRC Section 6038D

• New Internal Revenue Code provision enacted as part of 2010 HIRE Act
• Requires reporting of specified foreign financial assets if aggregate value exceeds certain thresholds
• Applies to tax years beginning after March 18, 2010
• Requires that new information return be attached to a taxpayer’s U.S. income tax return
IRC Section 6038D, continued

• Form 8938 “Statement of Foreign Financial Assets” with instructions has been finalized
• Temporary Regulations issued on December 14, 2011 and effective December 19, 2011. Final regulations effective December 12, 2014.
• Individual taxpayers must file Form 8938 beginning with their 2011 Form 1040s.
• Filing by domestic entities has been deferred temporarily. See Notice 2013-10.
Form 8938 (revised Dec. 2014)

Statement of Specified Foreign Financial Assets

For calendar year 20__ or tax year beginning __, 20__ and ending __, 20__

If you have attached continuation statements, check here □ Number of continuation statements

Name(s) shown on return TIN

OMB No. 1545-2195
Attachment Sequence No. 175
Who Is Required to File Form 8938?

You must file Form 8938 if:

1. You are a “specified individual.”
   AND

2. You have an interest in “specified foreign financial assets” required to be reported.
   AND

3. The aggregate value of your specified foreign financial assets is more than the reporting threshold that applies to you.
Who is a “Specified Individual”? 

A specified individual is:

• A U.S. citizen
• A resident alien of the United States for any part of the tax year (see Pub. 519 for more information)
• A nonresident alien who makes an election to be treated as 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 for definition of a bona fide resident)
What is a “Specified Foreign Financial Asset”?

A specified foreign financial asset (SFFA) is:

• Any financial account maintained by a foreign financial institution
  – Foreign bank accounts
  – Foreign mutual funds
  – Foreign hedge funds
  – Foreign private equity funds
  – Certain foreign insurance products
What is a SFFA? (continued)

• Other foreign financial assets held for investment that are not in an account maintained by a U.S. or foreign financial institution, namely:
  – Stock or securities issued by someone other than a U.S. person
  – Any interest in a foreign entity
  – Any financial instrument or contract that has as an issuer or counterparty that is other than a U.S. person
  – Foreign pensions and deferred compensation plans
  – Foreign trusts and estates (if “specified individual” is aware of its existence)
**Form 8938 – Part I (summary)**

<table>
<thead>
<tr>
<th></th>
<th>Foreign Deposit and Custodial Accounts Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Number of Deposit Accounts (reported on Form 8938)</td>
</tr>
<tr>
<td>2</td>
<td>Maximum Value of All Deposit Accounts</td>
</tr>
<tr>
<td>3</td>
<td>Number of Custodial Accounts (reported on Form 8938)</td>
</tr>
<tr>
<td>4</td>
<td>Maximum Value of All Custodial Accounts</td>
</tr>
<tr>
<td>5</td>
<td>Were any foreign deposit or custodial accounts closed during the tax year?</td>
</tr>
</tbody>
</table>

- | Yes | No |
**Part V** Detailed Information for Each Foreign Deposit and Custodial Account Included in the Part I Summary
(see instructions)

If you have more than one account to report, attach a continuation statement for each additional account (see instructions).

<table>
<thead>
<tr>
<th></th>
<th>Type of account</th>
<th>Account number or other designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Check all that apply</th>
<th></th>
<th>Account opened during tax year</th>
<th>Account closed during tax year</th>
<th>Account jointly owned with spouse</th>
<th>No tax item reported in Part III with respect to this asset</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Maximum value of account during tax year</th>
<th></th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Did you use a foreign currency exchange rate to convert the value of the account into U.S. dollars?</th>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>If you answered “Yes” to line 5, complete all that apply.</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(a) Foreign currency in which account is maintained  
(b) Foreign currency exchange rate used to convert to U.S. dollars  
(c) Source of exchange rate used if not from U.S. Treasury Financial Management Service

<table>
<thead>
<tr>
<th></th>
<th>Name of financial institution in which account is maintained</th>
<th></th>
<th>Reserved</th>
</tr>
</thead>
<tbody>
<tr>
<td>7a</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Mailing address of financial institution in which account is maintained. Number, street, and room or suite no.</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>City or town, state or province, and country (including postal code)</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td></td>
</tr>
</tbody>
</table>
### Other Foreign Assets Summary

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Number of Foreign Assets (reported on Form 8938)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Maximum Value of All Assets</td>
<td>$</td>
</tr>
<tr>
<td>3</td>
<td>Were any foreign assets acquired or sold during the tax year?</td>
<td>Yes/No</td>
</tr>
</tbody>
</table>
### Part VI

**Detailed Information for Each "Other Foreign Asset" Included in the Part II Summary** (see instructions)

**Note.** If you reported specified foreign financial assets on Forms 3520, 3520-A, 5471, 8621, 8865, or 8891, you do not have to include the assets on Form 8938. You must complete Part IV. See instructions.

If you have more than one asset to report, attach a continuation statement for each additional asset (see instructions).

<table>
<thead>
<tr>
<th></th>
<th>Description of asset</th>
<th>2</th>
<th>Identifying number or other designation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>3</strong></td>
<td>Complete all that apply. See instructions for reporting of multiple acquisition or disposition dates.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>a</strong></td>
<td>Date asset acquired during tax year, if applicable</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>b</strong></td>
<td>Date asset disposed of during tax year, if applicable</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>c</strong></td>
<td>Check if asset jointly owned with spouse</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>d</strong></td>
<td>Check if no tax item reported in Part III with respect to this asset</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>4</strong></td>
<td>Maximum value of asset during tax year (check box that applies)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>a</strong></td>
<td>$0 - $50,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>b</strong></td>
<td>$50,001 - $100,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>c</strong></td>
<td>$100,001 - $150,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>d</strong></td>
<td>$150,001 - $200,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>e</strong></td>
<td>If more than $200,000, list value</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>5</strong></td>
<td>Did you use a foreign currency exchange rate to convert the value of the asset into U.S. dollars?</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>6</strong></td>
<td>If you answered “Yes” to line 5, complete all that apply.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| **a** | Foreign currency in which asset is denominated |
| **b** | Foreign currency exchange rate used to convert to U.S. dollars |
| **c** | Source of exchange rate used if not from U.S. Treasury Financial Management Service |

**7** If asset reported on line 1 is stock of a foreign entity or an interest in a foreign entity, enter the following information for the asset.

<table>
<thead>
<tr>
<th></th>
<th>Name of foreign entity</th>
<th><strong>b</strong></th>
<th>Reserved</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>c</strong></td>
<td>Type of foreign entity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td>Partnership</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>Corporation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(3)</td>
<td>Trust</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(4)</td>
<td>Estate</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>d</strong></td>
<td>Mailing address of foreign entity. Number, street, and room or suite no.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>e</strong></td>
<td>City or town, state or province, and country (including postal code)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**8** If asset reported on line 1 is not stock of a foreign entity or an interest in a foreign entity, enter the following information for the asset.

**Note.** If this asset has more than one issuer or counterparty, attach a continuation statement with the same information for each additional issuer or counterparty (see instructions).

<table>
<thead>
<tr>
<th></th>
<th>Name of issuer or counterparty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a</strong></td>
<td>Check if information is for</td>
</tr>
<tr>
<td>(1)</td>
<td>Issuer</td>
</tr>
<tr>
<td>(2)</td>
<td>Counterparty</td>
</tr>
<tr>
<td><strong>b</strong></td>
<td>Type of issuer or counterparty</td>
</tr>
<tr>
<td>(1)</td>
<td>Individual</td>
</tr>
<tr>
<td>(2)</td>
<td>Partnership</td>
</tr>
<tr>
<td>(3)</td>
<td>Corporation</td>
</tr>
<tr>
<td>(4)</td>
<td>Trust</td>
</tr>
<tr>
<td>(5)</td>
<td>Estate</td>
</tr>
<tr>
<td><strong>c</strong></td>
<td>Check if issuer or counterparty is a</td>
</tr>
<tr>
<td>(1)</td>
<td>U.S. person</td>
</tr>
<tr>
<td>(2)</td>
<td>Foreign person</td>
</tr>
<tr>
<td><strong>d</strong></td>
<td>Mailing address of issuer or counterparty. Number, street, and room or suite no.</td>
</tr>
<tr>
<td><strong>e</strong></td>
<td>City or town, state or province, and country (including postal code)</td>
</tr>
</tbody>
</table>
Common Questions

• Cash/foreign currency?
• Real estate? Leasehold interest?
• Precious metals?
• Art and collectibles?
• Foreign stocks and securities?
• Safe deposit box?
• Foreign pension/deferred comp/foreign “social security”? 
• Foreign life Insurance?
Determining Whether a “Specified Individual” Has An “Interest” in a SFFA

• “Specified Individual” generally has an interest if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the SFFA would be reportable on the individual’s tax return.

• Individual owner of a disregarded entity is treated as having an interest in any SFFA owned by the entity.

• “Specified Individual” who is treated as owner of a foreign trust is treated as having an interest in any SFFA held by the trust.

• “Specified Individual” NOT treated as having an interest in any SFFA held by partnership, corporation, trust, or estate solely as a result of the individual’s status as partner, shareholder, or beneficiary.
What are the reporting thresholds for domestic taxpayers?

- **Unmarried taxpayers living in the U.S.**: The total value of specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year.

- **Married taxpayers filing a joint income tax return and living in the U.S.**: The total value of specified foreign financial assets is more than $100,000 on the last day of the tax year or more than $150,000 at any time during the tax year.

- **Married taxpayers filing separate income tax returns and living in the U.S.**: The total value of specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year.
What are the reporting thresholds for taxpayers living abroad?

• Taxpayers living abroad. You are a taxpayer living abroad if:
  – You are a U.S. citizen whose tax home is in a foreign country and you are either a bona fide resident of a foreign country or countries for an uninterrupted period that includes the entire tax year, or
  – You are a U.S. citizen or resident, who during a period of 12 consecutive months ending in the tax year is physically present in a foreign country or countries at least 330 days.

• A taxpayer living abroad must file if:
  – You are filing a return other than a joint return and the total value of your specified foreign assets is more than $200,000 on the last day of the tax year or more than $300,000 at any time during the year; or
  – You are filing a joint return and the value of your specified foreign asset is more than $400,000 on the last day of the tax year or more than $600,000 at any time during the year.
Form 8938 Requires Disclosure of Tax Items Attributable to SFFAs

• Part III of Form 8938 requires that filers must summarize tax items attributable to SFFAs
• Individuals must identify specific tax items (interest, dividends, gains/losses, deductions, credits, etc.) that correspond to SFFAs
• Individuals must also list the form, schedule, and line upon which these tax items are reported
### Part III

**Summary of Tax Items Attributable to Specified Foreign Financial Assets** (see instructions)

<table>
<thead>
<tr>
<th>(a) Asset Category</th>
<th>(b) Tax item</th>
<th>(c) Amount reported on form or schedule</th>
<th>Where reported</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>(d) Form and line</td>
</tr>
<tr>
<td><strong>1 Foreign Deposit and Custodial Accounts</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1a Interest</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>1b Dividends</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>1c Royalties</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>1d Other income</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>1e Gains (losses)</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>1f Deductions</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>1g Credits</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td><strong>2 Other Foreign Assets</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2a Interest</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>2b Dividends</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>2c Royalties</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>2d Other income</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>2e Gains (losses)</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>2f Deductions</td>
<td></td>
<td>$</td>
<td></td>
</tr>
<tr>
<td>2g Credits</td>
<td></td>
<td>$</td>
<td></td>
</tr>
</tbody>
</table>
Other Rules for Form 8938

• 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 assets is more than the appropriate reporting threshold.

• If you are required to file Form 8938, you do not have to report financial accounts maintained by:
  – a U.S. payor (such as a U.S. domestic financial institution),
  – the foreign branch of a U.S. financial institution, or
  – the U.S. branch of a foreign financial institution.
No Duplicative Reporting Required

• If you are required to file a Form 8938 and you have a specified foreign financial asset reported on Form 3520, Form 3520-A, Form 5471, Form 8621, Form 8865, or Form 8891, you do not need to report the asset on Form 8938. However, you must identify on Part IV of your Form 8938 which and how many of these form(s) report the specified foreign financial assets.

• Even if a specified foreign financial asset is reported on a form listed above, you must still include the value of the asset in determining whether the aggregate value of your specified foreign financial assets is more than the reporting threshold that applies to you.

• NOTE: FBAR must still be filed
No Duplicative Reporting Required (continued)

- **Form 3520** – Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
- **Form 3520-A** – Annual Information Return of Foreign Trust With a U.S. Owner
- **Form 5471** – Information Return of U.S. Persons With Respect to Certain Foreign Corporations
- **Form 8621** – Information Return by a Shareholder of a PFIC or Qualified Electing Fund
- **Form 8865** – Return of U.S. Persons With Respect to Certain Foreign Partnerships
Form 8938 – Part IV

**Part IV  Excepted Specified Foreign Financial Assets** (see instructions)

If you reported specified foreign financial assets on one or more of the following forms, enter the number of such forms filed. You do not need to include these assets on Form 8938 for the tax year.

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Number of Forms 3520</td>
<td>2. Number of Forms 3520-A</td>
<td>3. Number of Forms 5471</td>
</tr>
<tr>
<td>4. Number of Forms 8621</td>
<td>5. Number of Forms 8865</td>
<td>6. Number of Forms 8891</td>
</tr>
</tbody>
</table>

- Dual Resident making an election under a treaty to be treated as a non-resident for U.S. income tax purposes, is not required to file a Form 8938.
- Employee that is transferred “restricted property” in connection with the performance of personal services is first considered to have a Form 8938 reportable interest in the property on the date that the property is vested, or on the date that an 83(b) election is made for the property.
- Person that owns a disregarded entity (whether domestic or foreign) that, in turn, owns specified foreign financial assets must include the value of those assets on Form 8938.
Notable New Changes from 2014 Final Regulations (T.D. 9706) (Dec. 11, 2014) (continued)

• Joint Owners (Not Married) - Each joint owner must include the full value of the asset (rather than only the value of the specified person's interest in the asset) in determining whether the applicable reporting thresholds are met, and each joint owner must report the full value of the asset Form 8938.

• Joint Owners (Married) - Each joint owner must report the full value of the asset (rather than only the value of the specified person's interest in the asset) on the individual's Form 8938, but only the value of the individual’s interest in the asset is considered in determining the applicable reporting thresholds.
Notable New Changes from 2014 Final Regulations (T.D. 9706) (Dec. 11, 2014) (continued)

• Retirement and pension accounts and certain non-retirement savings accounts are reportable on a Form 8938 regardless of whether the account is maintained in a jurisdiction treated as having in effect a Model 1 IGA or Model 2 IGA (IGAs will be discussed later in this presentation).

• Foreign financial assets include stock, securities, financial instruments, and contracts issued by a person organized under the laws of a U.S. possession.

• The maximum fair market value for a specified foreign financial asset with no positive value during the year is treated as zero. Thus, a negative value cannot offset a positive value for purposes of determining whether the reporting threshold is met.
(continued)

• A specified person may rely upon periodic account statements that are provided at least annually by or on behalf of a financial institution maintaining an account, including the foreign currency conversion reflected in those statements, to determine the financial account's maximum value.

• Certain taxpayers who do not need to file Forms 5471 or 8865 because of the duplication exemptions set forth in those regulations also will not be required to file Form 8938 with respect to those assets.
Guidance for Valuing SFFAs

- The regulations provide that the appropriate value of specified foreign financial assets for purposes of Form 8938 reporting is each such asset’s highest fair market value during the year, and must be reported in U.S. dollars. If the asset is denominated in foreign currency, the maximum value is first determined in the foreign currency and is then converted to U.S. dollars at the taxable year-end spot rate for converting that currency. Specific guidelines are provided for which exchange rate should be used.

- For financial accounts, a reasonable estimate of the maximum value is allowed. Periodic account statements provided at least annually may be relied on to determine the maximum value, provided that the taxpayer does not have reason to know that the statement does not reflect the maximum value. For other financial assets, the fair market value on the last day of the taxable year can be used, unless the taxpayer knows that this is not a reasonable estimate (for example, if the taxpayer knows that the asset value declined during the year).

- Joint owners of a SFFA generally each include the full value of the asset for determining whether threshold is met (except for married taxpayers filing jointly).
Penalties for Non-Filing of Form 8938

• Failure to file Form 8938 may result in a $10,000 civil penalty as well as an additional $10,000 continuation penalty for each 30 day period after the taxpayer is notified by the IRS of the failure to file (not to exceed $50,000)
• Exception if failure to file is due to reasonable cause and not due to willful neglect
• The fact that a foreign jurisdiction would impose a civil or criminal penalty for disclosing the required information is NOT reasonable cause
• Criminal penalties may also apply
• Failure to file Form 8938 or certain assets on Form 8938 may keep the statute of limitations open for ALL items on a return until 3 years after Form 8938 is filed.
Section 6038D filing by domestic entities

• The new rules are effective for tax years beginning after December 31, 2015.

• Section 6038D provides that a “specified domestic entity” that has any interest in a “specified foreign financial asset” during the taxable year must attach Form 8938 to its tax return.
Section 6038D filing by domestic entities

• What is a “specified domestic entity”?  
  – any  
    • domestic corporation,  
    • domestic partnership, or  
    • domestic trust  
  – formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets.
• The determination as to whether a domestic corporation, a domestic partnership, or a domestic trust is a “specified domestic entity” is to be made on an annual basis
Section 6038D filing by domestic entities

• In the case of corporations and partnerships, such entities are considered to have been “formed or availed of” for purposes of holding specified foreign financial assets if
  – (1) the entity is “closely held” by a specified individual and
  – (2) at least 50 percent of the entity’s gross income for the taxable year is passive income or at least 50 percent of the assets held by the entity for the taxable year are assets that produce or are held for the production of passive income.

• Percentage of passive assets held by a corporation or partnership for a taxable year is the weighted average percentage of passive assets (weighted by total assets and measured quarterly), and the value of assets of a corporation or partnership is the fair market value of the assets or the book value of the assets that is reflected on the corporation’s or partnership’s balance sheet (as determined under either a U.S. or an international financial accounting standard).
Section 6038D filing by domestic entities

- In the case of corporations and partnerships, such entities are considered to have been “formed or availed of” for purposes of holding specified foreign financial assets if:
  1. The entity is “closely held” by a specified individual and
  2. At least 50 percent of the entity’s gross income for the taxable year is passive income or at least 50 percent of the assets held by the entity for the taxable year are assets that produce or are held for the production of passive income.

- Percentage of passive assets held by a corporation or partnership for a taxable year is the weighted average percentage of passive assets (weighted by total assets and measured quarterly), and the value of assets of a corporation or partnership is the fair market value of the assets or the book value of the assets that is reflected on the corporation’s or partnership’s balance sheet (as determined under either a U.S. or an international financial accounting standard).

- Corporation or partnerships may be required to substantiate their determination of the passive asset percentage upon request by the IRS.
Section 6038D filing by domestic entities

• “Closely Held”
  – A domestic corporation is deemed to be “closely held” by a specified individual if at least 80 percent of the total combined voting power of all classes of stock of the corporation entitled to vote, or at least 80 percent of the total value of the stock of the corporation, is owned, directly, indirectly, or constructively, by a specified individual on the last day of the corporation’s taxable year.
  – A domestic partnership is deemed to be “closely held” by a specified individual if at least 80 percent of the capital or profits interest in the partnership is held, directly, indirectly, or constructively, by a specified individual on the last day of the partnership’s taxable year.
  – Constructive ownership rules of IRC § 267(c) apply in making the determination of whether a corporation or partnership is “closely held” by a specified individual. The Final Regulations further specify that the constructive ownership rules apply as if the family of an individual includes the spouses of the individual’s family members.
Section 6038D filing by domestic entities

• “Passive Income and Assets”
  – Dividends, including substitute dividends;
  – Interest;
  – Income equivalent to interest, including substitute interest;
  – Rents and royalties, other than rents and royalties derived in the active conduct of a trade or business conducted, at least in part, by employees of the corporation or partnership;
  – Annuities;
  – Capital gains from the sale or exchange of property giving rise to passive income in the form of dividends, interest, income equivalent to interest, and rents and royalties.
  – Capital gains from commodities transactions (including futures, forwards, and similar transactions) subject to certain exceptions;
  – The excess of foreign currency gains over foreign currency losses attributable to any IRC § 988 transaction; and
  – Net income from notional principal contracts.

• The Final Regulations provide an exception applicable to a corporation or partnership that regularly acts as a dealer in property that gives rise to passive income, forward contracts, option contracts, or similar financial instrument
Section 6038D filing by domestic entities

- **Special rule for related entities**
  - All domestic corporations and domestic partnerships that are closely held by the same specified individual and that are connected through stock or partnership interest ownership with a common parent corporation or partnership are treated as owning the combined assets and receiving the combined income of all members of that group.
  - For purposes of this rule, assets relating to any contract, equity, or debt existing between members of such a group, as well as any items of gross income arising under or from such contract, equity, or debt, are eliminated.
  - A domestic corporation or a domestic partnership is considered connected through stock or partnership interest ownership with a common parent corporation or partnership if stock representing at least 80 percent of the total combined voting power of all classes of stock of the corporation entitled to vote or of the value of such corporation, or partnership interests representing at least 80 percent of the profits interests or capital interests of such partnership, in each case other than stock of or partnership interests in the common parent, is owned by one or more of the other connected corporations, connected partnerships, or the common parent.
Section 6038D filing by domestic entities

- **Excepted Domestic Entities**
  - any corporation the stock of which is regularly traded on an established securities market,
  - any corporation which is a member of the same “expanded affiliated group” as a corporation the stock of which is regularly traded on an established securities market,
  - any organization exempt from taxation under IRC § 501(a) or an individual retirement plan,
  - the United States government or any wholly owned agency or instrumentality thereof,
  - any State, the District of Columbia, any possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing,
  - any bank (as defined in section 581),
  - any real estate investment trust (as defined in section 856),
  - any regulated investment company (as defined in section 851),
  - any common trust fund (as defined in section 584(a)), and
  - any trust which is exempt from tax under section 664(c), or is described in section 4947(a)(1).
Section 6038D filing by domestic entities

• **Excepted Domestic Trusts**
  
  – A domestic trust provided that the trustee:
    
    • has supervisory authority over or fiduciary obligations with regard to the specified foreign financial assets held by the trust;
    
    • timely files (including any applicable extensions) annual returns and information returns on behalf of the trust; and
    
    • is (1) a bank that is examined by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the National Credit Union Administration; (2) a financial institution that is registered with and regulated or examined by the Securities and Exchange Commission; or (3) a domestic corporation whose stock is regularly traded on an established securities market or is a member of the same expanded affiliated group as a corporation whose stock is regularly traded on an established securities market.

  – Also exempt is domestic grantor trusts owned by one or more specified persons.
Section 6038D filing by domestic entities

• Valuation
  – The value of any specified foreign financial asset which is reported on one Forms 3520, 5471, 8621, 8865, and 8891 is excluded for purposes of determining the domestic entity’s aggregate value of specified foreign financial assets.
  – A specified domestic entity that is a corporation or partnership and that has an interest in any specified foreign financial asset is treated as owning all the specified foreign financial assets held by all domestic corporations and domestic partnerships that are closely held by the same specified individual.
Specified Domestic Entity Analysis

- DC1, DC2 and DP are each are specified domestic entities
- DC1, DC2 and DP are closely held by a specified individual
- DC1 and DC2 are considered related entities that are connected through stock ownership with a common parent corporation (80%).
- DC1 and DC2 each meet passive asset requirements (each considered to own each other’s assets)
- DP is not a related entity with DC1 and DC2 because DC1 and DP are not related through a common parent corporation or partnership.
- DP nonetheless meets passive asset requirement itself
Section 6038D filing by domestic entities

Reporting Requirement Analysis

- DC1 is not treated as owning the specified foreign financial assets held by DC2 and DP because DC1 does not have an interest in any specified foreign financial assets. DC1 is not required to file Form 8938 because DC1 does not satisfy the reporting threshold.
- DC2 and DP each has an interest in specified foreign financial assets. For purposes of applying the reporting threshold, DC2 is treated as owning in addition to its own assets the assets of DP, and DP is treated as owning in addition to its own assets the assets of DC2.
- DC2 and DP each satisfies the reporting threshold because the value of the specified foreign financial assets each is considered as owning is $105,000 on October 12, Year X, which exceeds DC2’s and DP’s $75,000 reporting threshold.
- DC2 and DP must each file Form 8938 to report their respective specified foreign financial assets in which they have an interest and disclose their maximum values ($15,000 in the case of DC2 and $90,000 in the case of DP).
Section 6038D filing by domestic entities

Specified Domestic Entity Analysis

• DC1 and DC2 are not specified domestic entities
• DP is a specified domestic entity
• DC1 and DC2 are closely held by a specified individual
• DC1 and DC2 are considered related entities that are connected through stock ownership with a common parent corporation (80%).
• DC1 and DC2 do not meet passive asset requirements (each considered to own each other’s assets) (40% passive)
• DP is not a related entity with DC1 and DC2 because DC1 and DP are not related through a common parent corporation or partnership.
• DP nonetheless meets passive asset requirement itself
Section 6038D filing by domestic entities

Reporting Requirement Analysis

- No 8938 for DC1 and DC2
- DP Must file an 8938
- DP is treated as owning in addition to its own assets the assets of DC2 for purposes of determining reporting threshold.
- As a result, DP satisfies the reporting threshold because the value of the specified foreign financial assets it is considered to is $105,000, which exceeds DP’s $75,000 reporting threshold.
- DP must file Form 8938 for Year X to report the specified foreign financial assets in which it has an interest and disclose their maximum values as provided in §1.6038D-4, which is $90,000.
What Does FATCA Require of FFIs?

• FATCA requires Foreign Financial Institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. In order to avoid withholding under FATCA, a participating FFI will have to enter into an agreement with the IRS to:
  – Identify U.S. accounts,
  – Report certain information to the IRS regarding U.S. accounts, and
  – Withhold a 30 percent tax on certain U.S.-connected payments to non-participating FFIs and account holders who are unwilling to provide the required information.
International Coordination and Model Intergovernmental Agreements

• Treasury is collaborating with foreign governments to develop two alternative model intergovernmental agreements that facilitate the effective and efficient implementation of FATCA.

• Model 1 IGA: FFIs in jurisdictions that have signed Model 1 IGAs report the information about U.S. accounts required by FACTA to their respective governments who then exchange this information with the IRS.

• Model 2 IGA: A partner jurisdiction signing an agreement based on the Model 2 IGA agrees to direct its FFIs to register with the IRS and report the information about U.S. accounts required by FATCA directly to the IRS.
International Coordination (continued)

• To date, over 100 countries have either signed IGAs or are actively in negotiations with United States

• Including Bermuda, Canada, Cayman Islands, Chile, Costa Rica, Denmark, Finland, France, Germany, Guernsey, Honduras, Hungary, Ireland, Isle of Man, Italy, Japan, Jersey, Luxembourg, Malta, Mauritius, Mexico, the Netherlands, Norway, Spain, Switzerland, and United Kingdom

• In addition, over 80,000 foreign financial institutions (FFIs) have registered with the IRS to become FATCA-compliant.
FBAR Reporting Requirements
Foreign Bank Accounting Reporting

• Required as part of Bank Secrecy Act since 1970s
• U.S. taxpayers with foreign accounts have two obligations
  – Answer question “yes” on Form 1040, Schedule B, Part III (due April 15 or due date of extended return) or other applicable tax return
Form 1040, Schedule B

Part III
Foreign Accounts and Trusts
(See instructions on back.)

7a  At any time during 2013, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions.

If “Yes,” are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), formerly TD F 90-22.1, to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements.

b  If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located.

8  During 2013, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If “Yes,” you may have to file Form 3520. See instructions on back.

Yes  No
Form 1120 and 1120-S

SCHEDULE N
(Form 1120)

Foreign Operations of U.S. Corporations

Attachment Information

Attach to Form 1120, 1120-C, 1120-IC-DISC, 1120-L, 1120-PC, 1120-REIT, 1120-RIC, or 1120S.

Information about Schedule N (Form 1120) and its instructions is available at www.irs.gov/form1120.

Name

Employer identification number (EIN)

Foreign Operations Information

6a At any time during the 2013 calendar year, did the corporation have an interest in or a signature or other authority over a financial account (such as a bank account, securities account, or other financial account) in a foreign country?

See the instructions for exceptions and filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR) (formerly Form TD F 90-22.1).

b If “Yes,” enter the name of the foreign country.
**Foreign Bank Account Reporting**

**Form 1065**

<table>
<thead>
<tr>
<th>Schedule B</th>
<th>Other Information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>10</strong></td>
<td>At any time during calendar year 2013, did the partnership have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)? See the instructions for exceptions and filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR) (formerly TD F 90-22.1). If “Yes,” enter the name of the foreign country. ▶</td>
</tr>
</tbody>
</table>
Foreign Bank Account Reporting
Form 706

<table>
<thead>
<tr>
<th>Part 4—General Information (continued)</th>
</tr>
</thead>
<tbody>
<tr>
<td>If you answer “Yes” to any of questions 9–16, you must attach additional information as described in the instructions.</td>
</tr>
<tr>
<td>14 Did the decedent have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?</td>
</tr>
</tbody>
</table>
Form 990

Part V  Statements Regarding Other IRS Filings and Tax Compliance

4a  At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?

b  If “Yes,” enter the name of the foreign country:  

FinCEN 114 (FBAR)

- New form and instructions issued July 2013
- Past filing period - Required to be filed annually by June 30
- New rule – April 15 filing period
- All forms are required to be filed **electronically**
- Previously, no extensions of deadline are available
- New rule – extensions are available
- If filing on behalf of client, retain a FinCEN authorization form (Form 114a)
- Form TD F 90-22.1 is now obsolete.
FinCEN 114(FBAR) (continued)

• Must register with BSA to access online filing system.
• To register, go to: http://bsaefiling.fincen.treas.gov/Enroll.html
• Good news is that FinCEN 114 is almost identical to TD F 90-22.1
FinCEN Form 114 OMB No. 1506-0009 Effective October 1, 2013

The FBAR must be received by the Department of Treasury on or before June 30th of the year immediately following the calendar year being reported. The June 30th filing date may not be extended.

Steps to Submit: Complete the report in its entirety with all requested or required data known to the filer. Click “Validate” to ensure proper formatting and that all required fields are completed. Sign with PIN. Click “Save”; filers may also “Print” a paper copy for their records. Click “Submit”.

Filing name: John Doe FBAR

By providing my PIN, I acknowledge that I am electronically signing the BSA report submitted.

This PDF is intended for testing purpose only. Please do not use it in a production environment.

If this report is being filed late, select the reason for filing late:
**Report of Foreign Bank and Financial Accounts**

Part II  Information on Financial Account(s) Owned Separately 1 of 1

<table>
<thead>
<tr>
<th>15 Maximum account value</th>
<th>16 Type of account</th>
<th>17 Financial Institution name</th>
<th>18 Account number or other designation</th>
<th>19 Address</th>
<th>20 City</th>
<th>22 Foreign postal code</th>
<th>21 State</th>
<th>23 Country</th>
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</thead>
<tbody>
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<td>100000000</td>
<td>212 Foreign Bank Ave.</td>
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</tbody>
</table>
FinCEN 114

**Part III  Information on Financial Account(s) Owned Jointly 1 of 1**

### Account Information

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Maximum account value</td>
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<tr>
<td>16</td>
<td>Type of account</td>
</tr>
<tr>
<td>17</td>
<td>Financial institution name</td>
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<tr>
<td>18</td>
<td>Account number or other designation</td>
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<td>Address</td>
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<td>23</td>
<td>Country</td>
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<tr>
<td>24</td>
<td>Number of joint owners</td>
</tr>
</tbody>
</table>

### Principal Joint Owner Information

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
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FinCEN 114

**Signature** 44a Click here □ If this report is completed by a third party preparer, complete the third party preparer section.

44 Filer signature  

Please return to the Home tab to sign with PIN.

45 Filer title  

46 Date of signature □ (Date of signature will be auto-populated when the report is signed.)

**Third Party Preparer Use Only**

47 Preparer’s last name  

48 First name  

49 Middle name/initial  

50 Check □ If self employed

51 Preparer’s TIN  

51a TIN type  

52 Contact phone number  

52a Extension  

53 Firm’s name  

54 Firm’s TIN  

54a TIN type  

55 Address  

56 City  

57 State  

58 ZIP/postal code  

59 Country
Who is required to file an FBAR?

• An FBAR must be filed if all of the following requirements are satisfied:
  – The filer is a U.S. Person;
  – The U.S. Person has a financial account;
  – The financial account is in a foreign country;
  – The U.S. Person has a financial interest in, or signature or other authority over, the financial account; and
  – The aggregate account balance of all such foreign accounts exceed $10,000 (in U.S. dollars) at any time during the calendar year
Who is a “U.S. Person”?

• A U.S. Person includes:
  – A citizen of the U.S.,
  – A resident alien of the U.S., and
  – A U.S. corporation, partnership, trust, limited liability company, or other type of business entity

• Generally includes: expatriates, U.S. citizens and residents residing abroad, certain foreign citizens who are working and paying taxes in the U.S., and individuals that are required to file FBARs annually even if they maintain joint accounts with a non-U.S. spouse
What is a reportable financial account?

- “Account” is broadly defined to include any foreign “bank, securities, or other financial accounts”
- “Bank accounts” include savings deposits, demand deposits, checking accounts, and any other accounts maintained with a person engaged in the business of banking
- “Securities accounts” include accounts maintained with a person in the business of buying, selling, holding, or trading stock or other securities
- “Other financial accounts” include:
  - An account with a person that is in the business of accepting deposits as a financial agency;
  - An account that is an insurance policy with a cash value or an annuity policy;
  - An account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; or
  - An account with a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions (does NOT include hedge funds)
What is a reportable financial account?

• Bitcoin
  – Informal guidance from an IRS official suggests that Bitcoin did not need to be reported on a 2013 FBAR. Cautioned that this position is subject to change.

• Online Poker Accounts
  – Poker accounts held by a foreign entity should be included on an FBAR. See United States v. Hom, 2014 U.S. Dist. LEXIS 77489 (N.D. CA 2014)
What is a “financial interest”? 

• An individual has a “financial interest” in a foreign account if he or she is the owner of record of, or has legal title to, the account, regardless of whether the account is maintained for his or her own benefit or for the benefit of others.

• A U.S. person also has a reportable financial interest in a foreign bank account if the account is held by:
  – An agent, nominee, or attorney on behalf of the U.S. Person;
  – A corporation in which the U.S. Person owns more than 50% of the voting power or the total value of the shares;
  – A partnership in which the U.S. Person owns directly or indirectly more than 50% of the interest in profits or capital;
What is a “financial interest”? (continued)

– Any other entity in which the U.S. Person owns directly or indirectly more than 50% of the voting power, total value of the equity interests or assets, or interest in profits;

– A trust, if the U.S. Person is the trust grantor and has an ownership interest in the trust for U.S. tax purposes; and

– A trust in which the U.S. Person either has a **present** beneficial interest in more than 50% of the assets or from which such person receives more than 50% of the current income.
What is “signature authority”?

• Broadly defined as the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication to the person with whom the financial account is maintained.

• The test for determining whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account.

• The final regulations also exempt certain individuals with signature or other authority over, but no financial interest in, foreign accounts.
FBAR Filing Exemptions

• Certain accounts jointly owned by spouses (only one FBAR required)
• Consolidated FBAR for certain entities
• Correspondent/nostro accounts owned by banks
• U.S. government accounts
• IRA owners and beneficiaries
• Participants/beneficiaries of tax-qualified retirement plans
FBAR Filing Exemptions (continued)

• Individuals with signature authority only in the following situations:
  – Officer/employee of a federally-regulated bank
  – Officer/employee of a financial institution regulated by SEC or CFTC
  – Officer/employee of Authorized Service Provider with respect to registered investment company
  – Officer/employee of publicly-traded company (or its subsidiary)

• Certain trust beneficiaries

• Accounts maintained at U.S. military banking facilities
FBAR Penalties for Non-Compliance

• Criminal penalties for willful violations:
  – Up to 5 years imprisonment and $250,000 fine

• Civil penalties
  – Non-willful violation: Up to $10,000 for each violation
  – Willful violation: Greater of $100,000 or 50 percent of the balance in the account at the time of the violation

• Both civil and criminal penalties can be imposed together.
Options for U.S. Taxpayers with Undisclosed Foreign Bank Accounts
Option 1 – Streamlined Domestic Offshore Procedures

• Penalty of 5%.
• Look back period of three years for amended returns and six years for FBARs.
• Penalty is on assets which are reportable on FBAR or Form 8938 during the relevant lookback period.
  – Includes value of foreign bank accounts, foreign securities accounts, foreign stock, etc.
  – Does not include signature authority accounts or assets not reportable on FBAR or 8938 (e.g., income producing real estate).
• Best Option For:
  – U.S. residents for last three years; and
  – Filed U.S. income tax returns last three years; and
  – Need to pick up taxable income on an amended return from a foreign asset; and
  – Needs to file an FBAR, 8938 or other information return; and
  – Acted non-willfully.
How to Determine Willfulness

• Unreported income in the offshore account;
• Use of structure/entity to hold offshore account;
• Use of non-U.S. identification to open account;
• Checking the box “no” on Schedule B;
• Failing to advise return preparer of existence of offshore account;
• Transferring offshore funds to another institution or safe deposit box to avoid detection;
• Sophistication of taxpayer;
• Hold mail instruction;
• Willful blindness to tax/FBAR reporting obligations.
Required Certification of Non-Willfulness

• “My failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct. I understand that non-wilful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.”

• “I recognize that if the Internal Revenue Service receives or discovers evidence of wilfulness, fraud, or criminal conduct, it may open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even referral to Criminal Investigation.”

• “Under penalties of perjury, I declare that I have examined this certification and all accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.”
Option 2 – Streamlined Foreign Offshore Procedures

• No Penalty.
• Look back period of three years for amended returns and six years for FBARs.
• Best Option For:
  – U.S. taxpayer who was a non-resident for one of the last three years; and
  – Needs to pick up taxable income on an amended return from a foreign asset; and
  – Needs to file an FBAR, 8938 or other information return; and
  – Acted non-willfully.
OPTION 3 – Offshore Voluntary Disclosure Program

- Penalty between 27.5% and 50% - depends on where the taxpayer banked and whether the taxpayer acted willfully.
- Look back period of 8 years.
- Penalty is on non-compliant assets (e.g., foreign accounts, income producing real estate, artwork purchased with funds escaping U.S. taxation, foreign businesses, etc.)
- Best Option for:
  - Willful taxpayers with “bad facts”.
  - FBARs and information returns not filed.
  - Significant taxable income to pick up.
OVDP – 50% Penalty

50% penalty in OVDP if foreign financial institution is:

• (1) under investigation by the IRS or Department of Justice,
• (2) cooperating with the IRS or Department of Justice in connection with accounts beneficially owned by a U.S. person, or
• (3) has been identified in a court-approved issuance of a summons seeking information about U.S. taxpayers who may hold financial accounts (a “John Doe summons”) at the foreign financial institution.
Foreign Banks/Facilitators Under Investigation

• UBS AG
• Credit Suisse AG, Credit Suisse Fides, and Clariden Leu Ltd.
• Wegelin & Co.
• Liechtensteinische Landesbank AG
• Zurcher Kantonalbank
• swisspartners Investment Network AG, swisspartners Wealth Management AG, swisspartners Insurance Company SPC Ltd., and swisspartners Versicherung AG
• CIBC FirstCaribbean International Bank Limited, its predecessors, subsidiaries, and affiliates
• The Hong Kong and Shanghai Banking Corporation Limited in India (HSBC India)
• The Bank of N.T. Butterfield & Son Limited (also known as Butterfield Bank and Bank of Butterfield), its predecessors, subsidiaries, and affiliates
• AND MORE!
Transitioning from Prior OVDP to Streamlined Compliance Procedures

- Taxpayers “currently participating in the OVDP,” but who have not yet completed the program, may be eligible to transition into the streamlined penalty structure.
OPTION 4 - Delinquent FBAR Submission Procedures

- No Penalty
- No designated look back period; recommended to file 6 years of FBARs.
- To use this procedure, taxpayers should file the delinquent FBARs according to the FBAR instructions and include a statement explaining why the FBARs are filed late.
- Designed for taxpayers who picked up all income but failed to file FBARs.
- FBARs will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

Best option for:

- Taxpayer properly reported on U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs; and
- Taxpayer has not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted; and
- Taxpayers have no taxable income that is required to be picked up on an amended return.
OPTION 5 - Delinquent International Information

Return Submission Procedures

• No penalty
• No designated look back period; recommended look back period will depend on the facts and circumstances of the case.
• Designed for taxpayers who have reported all foreign income, but failed to file certain international information returns.
• Best option for:
  – Taxpayer properly reported on U.S. tax returns, and paid all tax on, all foreign income; and
  – Taxpayer has not previously been contacted regarding an income tax examination or a request for delinquent information returns for the; and
  – Taxpayers have no taxable income that is required to be picked up on an amended return.
OPTION 6 – QUIET DISCLOSURE?

- Subject to penalties on failing to file FBARs, 8938s and other information returns
  - Non-willful up to $10,000 per account per year for FBAR. 5471 and 8938 have separate penalties as well.
  - Willful penalty up to 50% of account value per year. See Zwerner.

- No designated look back period; recommended look back period will depend on the facts and circumstances of the case.

- Best option for:
  - Highly fact dependent, and only occasionally recommended. Certainly the taxpayer will need to have acted non-willfully.
Risks of “Quiet Disclosure”

• FAQ 15: “Taxpayers are strongly encouraged to come forward under the OVDP to make timely, accurate, and complete disclosures. Those taxpayers making ‘quiet’ disclosures should be aware of the risk of being examined and potentially criminally prosecuted for all applicable years.”

• FAQ 16: “The IRS is reviewing amended returns and could select any amended return for examination. The IRS has identified, and will continue to identify, amended tax returns reporting increases in income. The IRS will closely review these returns to determine whether enforcement action is appropriate. If a return is selected for examination, the 27.5 percent offshore penalty would not be available. When criminal behavior is evident and the disclosure does not meet the requirements of a voluntary disclosure under IRM 9.5.11.9, the IRS may recommend criminal prosecution to the Department of Justice.”

• Note: *United States v. Michael A. Schiavo* (D. Mass. 2011)
OPTION 7 – DO NOTHING?

- See FATCA Discussion.
- Rarely, if ever, a good idea.
Questions?

Matthew D. Lee
Fox Rothschild LLP
(215) 299-2765
MLee@FoxRothschild.com

Jeffrey M. Rosenfeld
Blank Rome LLP
(215) 569-5752
rosenfeld@BlankRome.com

Marc J. Strohl
Protax Consulting Services Inc
(212) 714-1805
mstrohl@protaxconsulting.com