



INTERNATIONAL TAX COMPLIANCE INFORMATION REPORTING

COMMON INTERNATIONAL INFORMATION RETURNS (Individuals & Entities)

- **FinCEN Form 114** (FBAR)
- **Form 8938** (specified foreign financial assets) §6038D
- **Form 5471** (U.S. persons with respect to foreign corporations) §6038 & 6046
- **Form 5472** (25% foreign owned U.S. corporation) §6038A & C
- **Form 926** (transfers to foreign corporations) §6038B
- **Form 8865** (U.S. persons with respect to foreign partnerships) §6038, 6038B, 6046A
- **Form 3520** (foreign trusts transactions/gifts/inheritances) §6048 & §671-679
- **Form 3520-A** (foreign grantor trusts) §6048(b) & §671-679
- **Form 8621** (PFICS/QEFs) §1295 & §1298(f)
- **Form 8858** (foreign DRE)
- **Form 1042 & 1042-S** (source withholding)

Form 3520-A – Foreign Grantor Trusts:

- Who must file?
Foreign Trusts with U.S. owner:
 - Form provides information on foreign trust, U.S. beneficiaries & any U.S. person treated as owner of foreign trust under the grantor trust rules of §671-679
- Filing deadline – 3/15 not 4/15
- U.S. owners & beneficiaries are to be provided with foreign grantor trust owner & beneficiary statements

FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

Information Reporting, Compliance & Withholding Regime
to Combat Tax Evasion by U.S. Taxpayers with Foreign Accounts & Ownership

Individuals

Specified Individuals:

- U.S. Citizens & Residents
- Certain Non-Resident Individuals
- Doesn't include domestic entities

File Form 8938 (unless excepted):

- to report specified foreign financial assets
- based on certain thresholds
 - e.g. if single, if aggregate values exceed \$50K
 - higher thresholds for married taxpayers & those living abroad
- attach to taxpayers timely filed Form 1040 (including extensions)

Exceptions to Form 8938 Reporting:

- If no Form 1040 filing requirement
- No duplicative reporting if disclosed in Part IV & on below timely filed forms
 - Forms 3520/3520-A
 - Form 5471
 - Form 8621
 - Form 8865

Foreign Financial Institutions (FFIs) Non-Financial Foreign Entities (NFFEs)

FATCA **Chapter 4** §1471-1474 added
by 2010 HIRE Act, requires:

- Purpose: to ensure that FFIs & NFFEs comply with U.S. reporting requirements with respect to U.S. persons' foreign holdings
- Threat of withholding regime against U.S. source payments to FFIs & NFFEs to encourage reporting compliance
- FFIs to identify U.S. account holders & report them to the IRS
- NFFEs to report their substantial U.S. owners (>10% U.S. shareholders)
- U.S. persons are required to pay a 30% withholding tax on U.S. source **Withholdable Payments** made after June 30, 2014 to FFIs & NFFEs if they fail to provide **Documentation** for being **Exempt from FATCA Withholding**
- Not eligible for reduced rate under an income tax treaty - either 30% or zero

PRE-2010 HIRE ACT LAW

Non-Resident Aliens & Foreign Entities

Chapter 3 §1441-1464

- Purpose: to ensure that U.S. persons collect & remit a deemed U.S. tax on U.S. Fixed, Determinable, Annual or Periodical (FDAP) payments to foreign persons
- Historic withholding/FDAP regime
- Generally, U.S. source payments made to foreign persons of FDAP income are subject to a 30% U.S. withholding tax, if payee fails to provide **Documentation** for being **Exempt from Withholding**
- Eligible for exemption or reduced rate under an income tax treaty
- Chapter 3 exemption is a separate & distinct test from Chapter 4 exemption
- No Chapter 3 withholding applies if Chapter 4 withholding was made on identical payment

Form 3520 – Foreign Trusts & Gifts:

- Who must file?
U.S. Persons (& executors of U.S. decedents) with:
 - Transfers to/obligations from foreign trusts
 - Ownership of foreign trusts under grantor trust rules of §671-679
 - Distributions from foreign trusts
 - Receipts of large gifts or bequests from certain foreign persons
 - >\$100,000 from non-resident alien or foreign estate, or
 - >\$15,601 from foreign corporations or partnerships
- Filing deadline – due date of income tax return (incl. extensions), but filed separately from income tax return

- Form 8938 failure to file penalty
 - \$10K, unless reasonable cause exception applies
- Statute of Limitations (SOL) for tax year may remain open
 - 3 years from date of proper reporting and filing [§6501(c)(8)]
- Extended SOL
 - 6 years after filing if gross income omits >5K from specified foreign financial asset
- Form 8938 does NOT relieve FBAR, Forms 3520 or 5471 filing requirements

More significant penalty regime for F3520, F5471, FBAR & other information returns

FATCA implementation warrants raised awareness & immediate priorities for U.S. tax and information reporting obligations on non-U.S. investments

4 Options available for taxpayers with previous failures to comply with U.S. tax & information return obligations:

- 1) Delinquent FBAR submission procedures
- 2) Delinquent info return submission procedures (e.g. Forms 3520, 5471, others)
- 3) Streamlined filing compliance procedures
- 4) 2014 Offshore Voluntary Disclosure Program (OVDP) effective July 1, 2014

Option 1: Delinquent FBARs

- Replaced old FAQ #17 of 2012 OVDP
- Available for taxpayers who:
 - have unfiled FBARs
 - have reported all income on 1040
 - are not under exam or contacted by IRS
- File: 6 years of FBARs with reasonable cause explanation
- No offshore penalties. No audit protection granted.

What are Withholdable Payments?

- For Chapter 4 Only
(Subject to specific exceptions)
- FDAP payments of certain U.S. source income
 - Payments of gross proceeds from sale or disposition of property that can produce U.S. source FDAP income
 - Foreign pass-through payments

What Documentation is required to determine Payee Status?

- For Chapters 3 & 4
- Withholding Certificates
 - IRS Form W-9, or
 - IRS Forms W-8
 - Other documentary evidence reliably associated with payment

Which Payments are Exempt from Withholding?

- For Chapters 3 & 4
- Payments effectively connected with U.S. trade or business (ECI)
 - Numerous others – see 2015 IRS Pub. 515, *Income Subject to Withholding*, page 23

Reporting By

- Withholding agents for Chapters 3 & 4
 - Form 1042 Withholding tax return filed with IRS by 3/15
 - Form 1042-S Foreign Person's U.S. source income return filed by 3/15 with Copy A for IRS, Copies B, C, D for recipient & Copy E for withholding agent
 - Caution: U.S. persons are often the intended withholding agent
- Withholding agents & certain foreign entities for Chapter 4
 - Form 8966 FATCA Report
 - Caution: U.S. persons are often the intended withholding agent



Option 2: Delinquent Information Return

- Replaced old FAQ #18 of 2012 OVDP
- Available for taxpayers who:
 - have one or more unfiled info returns
 - even have unreported income or unpaid tax
 - are not under exam or contacted by IRS
- File: Amended 1040s & all delinquent information returns, with reasonable cause explanation
- No offshore penalties. No audit protection granted.



Option 3: Streamlined Filing Compliance Procedures

- Domestic & Foreign programs available for U.S. and non-U.S. residents respectively
- Taxpayers must certify, under penalties of perjury, that failure to report all income, pay tax and submit all required information returns including FBARs was due to non-willful conduct
- Only available to individuals (or estates)
- Returns will be processed by Service Center, will not be acknowledged nor result in the signing of a Closing Agreement with the IRS
- E.g.: Under Domestic Program:
 - Citizens and resident aliens would file 3 years of 1040Xs and Information Returns, 6 years of FBARs, Certify non-willful violation, pay tax and interest (but no tax penalties) plus a 5% offshore penalty



Option 4: 2014 OVDP (Principal Points)

- Generally 8 years of tax & information returns
- Accuracy or deficiency penalties
- Interest
- Offshore penalty – 27.5% or 50%

Notable subject areas not covered by this Practice Aid include:

- Transfer Pricing Regime/BEPS
- Foreign Currency Translations
- Foreign Investment In Real Property Tax Act (FIRPTA) §1445 Withholding
- Publicly Traded Partnerships (PTP) §1446 Withholding
- Foreign Tax Credits
- Foreign Earned Income Exclusion
- Interest Charge Domestic International Sales Corporation (IC-DISC)
- Expatriation
- Non-Resident Alien (NRA) U.S. filings
- BE-10 Reporting