



2024



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Discussion of International Tax Forms with Emphasis on FATCA/FBAR Reporting Requirements



Objectives

- Explain the purpose of the FATCA legislation to combat tax evasion by U.S. persons holding accounts and other financial assets offshore and the impact on compliance by U.S. persons.
- Summarize individual and financial institution requirements in reporting accounts and other financial assets offshore.
- Identify the international reporting forms and the associated reporting requirements by U.S. persons.
- Describe what to do if contacted by the IRS about FATCA reporting discrepancies.



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International Tax Forms: Background



FinCEN Form 114, Report of Foreign Bank and Financial Accounts ("FBAR")

FinCEN Form 114 (FBAR) Filing Requirements

- FBAR is filed electronically
- Key Elements
 1. U.S. Person
 2. Financial interest or signature authority
 3. Financial account in a foreign country
 4. Aggregate balance(s) exceed \$10,000



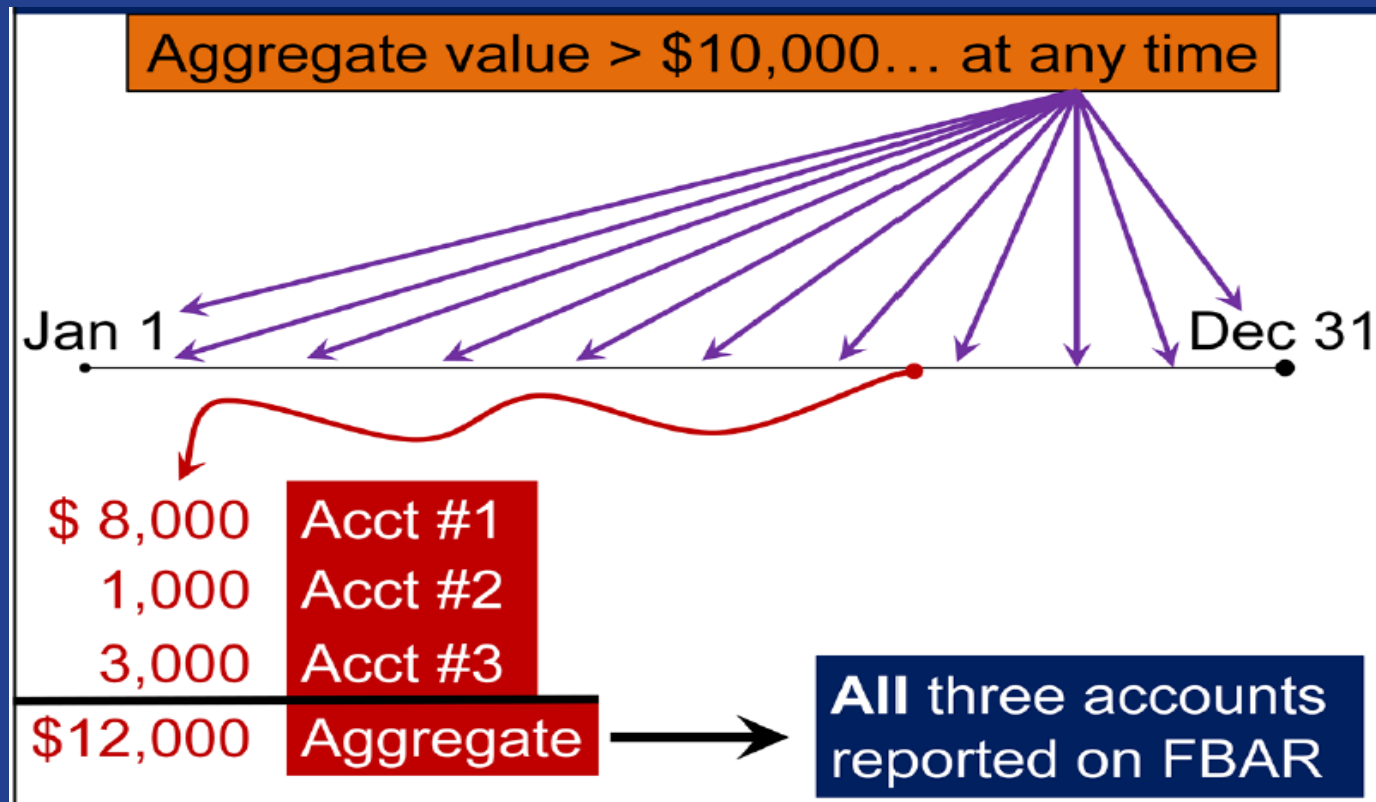
Threshold Amount

- An FBAR is required when:
 - Aggregate balances of all accounts
 - Exceed \$10,000
 - At any time during the calendar year





Aggregate Balance – at ANY time



FBAR Failure to File Penalties

Civil penalties for FBAR violations:

- Non-willful violations
 - For **each** non-willful violation, a penalty may be imposed **up to** the \$10,000 penalty amount under 31 USC 5321(a)(5)(B)(i), adjusted for inflation.
 - Reasonable cause may be considered





FBAR Failure to File Penalties – cont.

Civil penalties for FBAR violations:

- **Non-willful violations**
 - For **each** non-willful violation, a penalty may be imposed **up to** the \$10,000 penalty amount under 31 USC 5321(a)(5)(B)(i), adjusted for inflation.
 - Reasonable cause may be considered



FBAR Resources

- 31 U.S.C. § 5314
- 31 C.F.R. § 1010.350
- FinCEN.gov
 - [Report Foreign Bank and Financial Accounts | FinCEN.gov](#)
- IRS.gov
 - [Report of Foreign Bank and Financial Accounts \(FBAR\) | Internal Revenue Service \(irs.gov\)](#)
 - Publication 4161 – Do you have a foreign Financial Account
 - Publication 5569 – Report of Foreign Financial Accounts (FBAR) Reference Guide



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Swiss Banks Program

Swiss Banks Program

Under the program, banks are required to:

- Make a complete disclosure of their cross-border activities;
- Provide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest;
- Cooperate in treaty requests for account information;
- Provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed;
- Agree to close accounts of accountholders who fail to come into compliance with U.S. reporting obligations; and
- Pay appropriate penalties.





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Emergence of FATCA

Emergence of FATCA (1 of 3)

- The Foreign Account Tax Compliance Act (FATCA) was enacted in March 2010 as part of the HIRE Act.
 - January 2013 FATCA regulations were finalized.
 - July 2014 FATCA became in effect.
- FATCA applies to sections 1471-1474 of the Code (Chapter 4).
- FATCA is intended to increase transparency for the IRS with respect to U.S. taxpayers holding assets in non-U.S. financial accounts and non-U.S. entities.
- The overall purpose is to detect, deter and discourage offshore tax abuses through increased transparency, enhanced reporting and strong sanctions.



Emergence of FATCA (2 of 3)

- FATCA generally requires that foreign financial Institutions (FFIs) and certain other non-financial foreign entities (NFFEs) report on the foreign assets held by their U.S. account holders.
- FFIs and NFFEs report information about their U.S. account holders on Form 8966, *FATCA Report*
- Entities that do not comply with the requirements of FATCA are subject to 30% withholding tax on certain withholdable payments made to them.
 - The goal of FATCA is to collect information on U.S. accounts, not withholding tax.
 - Withholding is used to encourage this reporting.



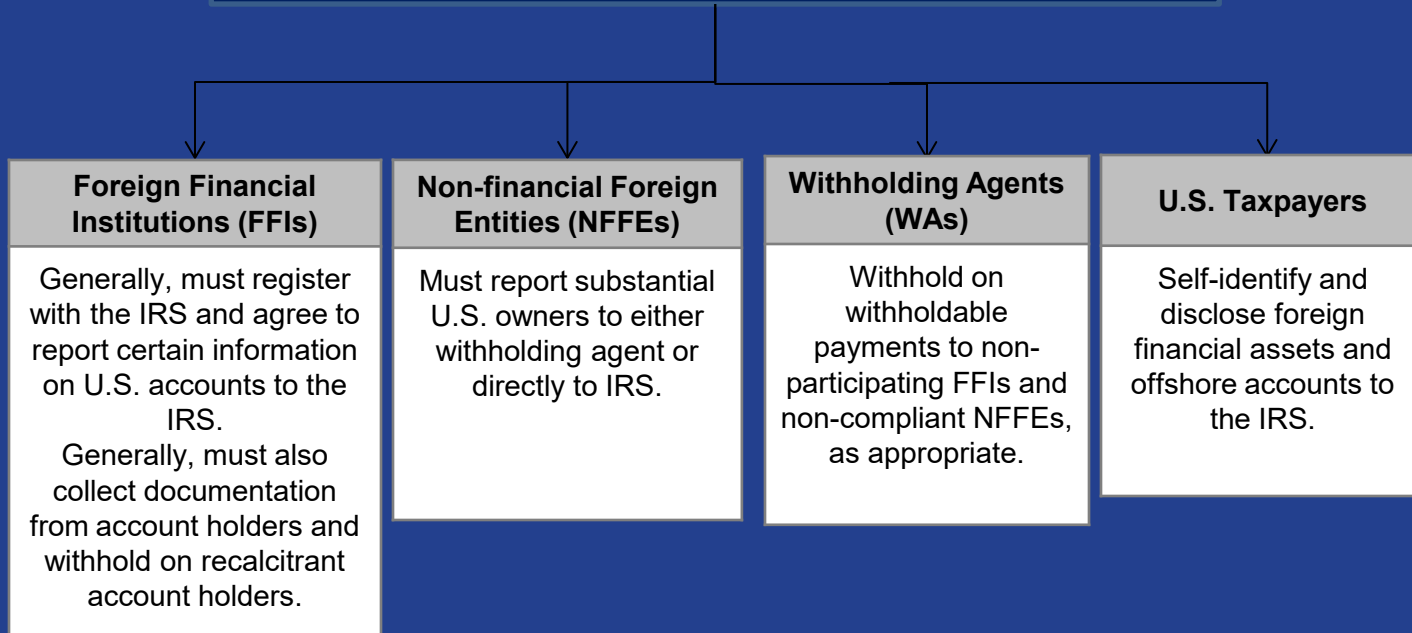
Emergence of FATCA (3 of 3)

- FATCA added Code section 6038D which requires U.S. persons to self-report their foreign financial accounts and interests in foreign entities on Form 8938, *Statement Of Specified Foreign Financial Assets*.
- Form 8938 is filed in addition to the FBAR.
 - Form 8938 and FBARs have different reporting thresholds.
- If a taxpayer does not have a Form 1040 filing requirement, they are not required to file a Form 8938.



Who is subject to FATCA?

FATCA's Primary Players





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Implementation of FATCA: Individual Filing Requirements

Form 8938 – Overview

Filing required under IRC § 6038D for:

- U.S. Specified Individual and/or Domestic Entity
- Interest in any “specified foreign financial assets”
- Exceed applicable reporting thresholds
- Attached to annual income tax return
 - If annual return is not required to be filed, then the Form 8938 is not required to be filed.





Form 8938 – Reporting Thresholds

Taxpayer	Living Inside the U.S.	Living Outside the U.S.
Married, filing joint U.S. income tax return	>\$100,000 on the last day of the tax year, or >\$150,000 at any time during the tax year	>\$400,000 on the last day of the tax year, or >\$600,000 at any time during the tax year
Unmarried individual, Married filing separate, or other	>\$50,000 on the last day of the tax year, or >\$75,000 at any time during the tax year	>\$200,000 on the last day of the tax year or >\$300,000 at any time during the tax year



Form 8938 – Example

Form 8938
(Rev. November 2021)
Department of the Treasury
Internal Revenue Service

Statement of Specified Foreign Financial Assets
► Go to www.irs.gov/Form8938 for instructions and the latest information.
► Attach to your tax return.

OMB No. 1545-2196
Attachment Sequence No. 938

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

If you have attached additional statements, check here ☐ Number of additional statements _____

1 Name(s) shown on return **2** Taxpayer identification number (TIN)

3 Type of filer
a ☐ Specified individual **b** ☐ Partnership **c** ☐ Corporation **d** ☐ Trust

4 If you checked box 3a, skip this line 4. If you checked box 3b or 3c, enter the name and TIN of the specified individual who closely holds the partnership or corporation. If you checked box 3d, enter the name and TIN of the specified person who is a current beneficiary of the trust. (See instructions for definitions and what to do if you have more than one specified individual or specified person to list.)
a Name **b** TIN

Part I Foreign Deposit and Custodial Accounts Summary

5 Number of deposit accounts (reported in Part V) _____
6 Maximum value of all deposit accounts _____ \$
7 Number of custodial accounts (reported in Part V) _____
8 Maximum value of all custodial accounts _____ \$
9 Were any foreign deposit or custodial accounts closed during the tax year? ☐ Yes ☐ No

Part II Other Foreign Assets Summary

10 Number of foreign assets (reported in Part VI) _____
11 Maximum value of all assets (reported in Part VI) _____ \$
12 Were any foreign assets acquired or sold during the tax year? ☐ Yes ☐ No

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

(a) Asset category	(b) Tax item	(c) Amount reported on form or schedule	Where reported	
			(d) Form and line	(e) Schedule and line
13 Foreign deposit and custodial accounts	a Interest	\$		
	b Dividends	\$		
	c Royalties	\$		
	d Other income	\$		
	e Gains (losses)	\$		
	f Deductions	\$		
	g Credits	\$		
14 Other foreign assets	a Interest	\$		
	b Dividends	\$		
	c Royalties	\$		
	d Other income	\$		
	e Gains (losses)	\$		
	f Deductions	\$		
	g Credits	\$		

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.

15 Number of Forms 3520 _____ **16** Number of Forms 3520-A _____ **17** Number of Forms 5471 _____
18 Number of Forms 8621 _____ **19** Number of Forms 8865 _____

For Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 37753A Form **8938** (Rev. 11-2021)

Form 8938 – Specific Individual

- U.S. Citizen
- Resident alien of the United States
- Nonresident alien for whom an election under 6013(g) or (h) is in effect
- Nonresident alien who is a bona-fide resident of American Samoa or Puerto Rico



Form 8938 – Specified Domestic Entity

- Corporations or partnerships:
 - Closely held by a specified individual **and**
 - At least 50 percent of the entity's gross income is passive income, or at least 50 percent of its assets produce or are held for the production of passive income.
- Trusts as defined under IRC 7701(a)(30)(E)



Specified Foreign Financial Assets

- Financial account maintained by a foreign financial institution
- Any of the following assets **not** held in an account maintained by a foreign financial institution:
 - Stock or security issued by a person other than a U.S. person
 - Financial instrument or contract held for investment – issuer/counter party is foreign
 - Any interest in a foreign entity





Common Specified Foreign Financial Assets

- Deposit and custodial accounts
- Foreign mutual funds, hedge funds or private equity funds
- Foreign Life Insurance or Annuity with cash-value
- Foreign Pension Plans
- Foreign stock or securities not held in a financial account
- Foreign partnership interests

Not Specified Foreign Financial Assets

- Financial account maintained by U.S. Payor
 - Accounts at foreign branch of U.S. financial institution (but it is required to be reported on an FBAR)
 - Accounts at U.S. branch of foreign financial institution
- Foreign real estate
- Directly held foreign currency, precious metals and tangible assets for investment



Form 8938 – Failure to File Penalty

- Initial Penalty
 - \$10,000 initial per form
- Continuation Penalty
 - \$10,000 per 30-day period starting 90 days after notice
 - Maximum continuation penalty of \$50,000
- Total cumulative penalty of up to \$60,000
- Reasonable cause could apply





Comparison Form 8938 and FBAR

Comparison of Form 8938 and FBAR Requirements

Individuals

Businesses and Self-Employed

Small Business and Self-Employed

Large Business

Corporations

Partnerships

Charities and Nonprofits

International Taxpayers

Governmental Liaisons

Federal State Local Governments

Indian Tribal Governments

Tax Exempt Bonds

The Form 8938 filing requirement does not replace or otherwise affect a taxpayer's obligation to file FinCEN Form 114 (Report of Foreign Bank and Financial Accounts). Unlike Form 8938, the FBAR (FinCEN Form 114) is not filed with the IRS. It must be filed directly with the office of Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, separate from the IRS.

Individuals and domestic entities must check the requirements and relevant reporting thresholds of each form and determine if they should file Form 8938 or FinCEN Form 114, or both. Form 8938 and Instructions can be found at [About Form 8938](#). FinCEN Form 114 and Instructions can be found through [FinCen's BSA E-Filing System](#).

	Form 8938, Statement of Specified Foreign Financial Assets	FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR) ↗
Who Must File?	Specified individuals and specified domestic entities that have an interest in specified foreign financial assets and meet the reporting threshold - Specified individuals include U.S. citizens, resident aliens, and certain non-resident aliens - Specified domestic entities include certain domestic corporations, partnerships, and trusts	U.S. persons, which include U.S. citizens, resident aliens, trusts, estates, and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold
Does the United States include U.S. territories?	No	Yes, resident aliens of U.S. territories and U.S. territory entities are subject to FBAR reporting
Reporting Threshold (Total Value of Assets)	Specified individuals living in the US: - Unmarried individual (or married filing separately): Total value of assets was more than \$50,000 on the last day of the tax year, or more than \$75,000 at any time during the year. - Married individual filing jointly: Total value of assets was more than \$100,000	Aggregate value of financial accounts exceeds \$10,000 at any time during the calendar year. This is a cumulative balance, meaning if you have 2 accounts with a combined account balance greater than \$10,000 at any one time, both accounts would have to be reported.

*<https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements>

Form 8938 Resources

- IRC §6038D
- About Form 8938, Statement of Specified Foreign Financial Assets | Internal Revenue Service (irs.gov)
<https://www.irs.gov/forms-pubs/about-form-8938>
- Comparison of Form 8938 and FBAR requirements | Internal Revenue Service (irs.gov)
<https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements>





Implementation of FATCA: Financial Institution Filing Requirement



Implementation of FATA – Financial Institutions Filing Requirements

- FATCA generally requires that foreign financial Institutions (FFIs) and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders.
- Entities that do not comply with the requirements of FATCA are subject to 30% withholding tax on certain withholdable payments made to them.
 - The goal of FATCA is to collect information on U.S. accounts, not withholding tax.
 - Withholding is used to encourage this reporting.

FFI Reporting

- FATCA requires foreign financial institutions (FFIs) and certain non-financial entities to report annually on Form 8966, “FATCA Report”, to report information about certain U.S. accounts and account holders.
 - Certain entities can elect to report on Forms 1099 in lieu of filing Forms 8966.





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FATCA Reporting



FATCA Reporting

- The IRS is in possession of records that identify taxpayers with transactions or accounts at offshore private banks.
- FATCA records can be reconciled with U.S. domestic reporting.
- This includes but is not limited to:
 - identifying omissions
 - identifying account holders from records received with missing information
 - identifying account holders from records received from pooled reporting under Model 2 IGAs.

Compliance Initiative

- The IRS is engaged in campaigns to ascertain FATCA compliance
- Scope of the campaigns
 - Perform data filtering and analysis
 - Identify variances in reported data
 - Address potential non-compliance



FATCA Campaigns

- Campaign on FFI FATCA compliance (FATCA Filing Accuracy)
 - Failure to report U.S. accounts and reporting errors
- Campaign on U.S. persons FATCA compliance (Offshore Private Banking)
 - Failure to report foreign account(s) or mismatches in data reported



Offshore Private Banking Campaign

- FATCA records will be reconciled with U.S. domestic reporting.
- This includes but is not limited to:
 - Identifying omissions
 - Identifying account holders from records received with missing information
 - Identifying account holders from records received from pooled reporting under Model 2 IGAs
- Goal is to identify and address non-compliance



FATCA Reporting Discrepancy (1 of 3)

- What can cause a discrepancy between a Form 8966 filing and a Form 8938 filing and trigger IRS contact (e.g., soft letter)?
 - Taxpayer did not have a Form 1040 filing requirement; but FFI filed a Form 8966. Reporting Thresholds to report specified foreign financial assets are found under Treasury Reg 1.6038D-2.
 - Taxpayer met and checked the Part IV exception on Form 8938 (e.g., timely filed a Form 3520, 3520-A, 5471, 8621, or 8865) and did not have to report the details and value of the account in Part V of Form 8938 due to duplicative reporting; but the FFI filed a Form 8966 reporting a value for the account.



FATCA Reporting Discrepancy (2 of 3)

- FFI filed 2 Forms 8966 for same account, one for each spouse; but taxpayer filed only one Form 8938 reporting the joint account – which might give the impression the account value is 2X its actual value because of the 2 Forms 8966 filed for the same account.
- FFI filed 3 separate Forms 8966 for the 3 account holders on the same account, reporting 100% value of account for each account holder; but the 3 account holders only reported 1/3 of the account value on their Forms 8938.
- Different conversion rates were used for Form 8966 and 8938 reporting.





FATCA Reporting Discrepancy (3 of 3)

- The placement of decimal points used by the FFI may differ from comma used in U.S. to separate dollars from cents. (For ex. \$16.2B may actually be \$16.2M)
- Duplicate, sub, or rolling accounts reflected on Form 8966 can lead to discrepancies.

What Should You Do (1 of 2)

- What should you do if contacted by IRS about a FATCA reporting discrepancy?
 - Taxpayer should review relevant information to Form 8938 to ensure all required U.S. filings are current, complete, and correct.
 - Respond to contact letter and state why you think you are compliant.
 - File delinquent or amended returns if deemed applicable.



What Should You Do (2 of 2)

- Request to participate in the voluntary disclosure practice if there are any concerns that non-compliance was criminal. (www.irs.gov/vdp)
- Request to participate in the streamlined filing procedures if error in reporting was not willful. (www.irs.gov/streamlined)
- More information about the reporting of foreign income, foreign entities, and foreign financial assets can be found at www.irs.gov/forms





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Other International Forms



Overview of International Information Returns

IRS Form	Reporting Obligation	IRC Section
Form 3520	Gratuitous transfers to foreign trusts; U.S. owners of foreign trusts; Distributions received by U.S. persons from foreign trusts	§ 6048(a), (b), (c)
Form 3520	U.S. person receiving gifts from nonresident alien individual or a foreign estate exceeding \$100,000 or \$10,000 in the case of a gift from a foreign corporation or foreign partnership (\$10,000 adjusted annually for cost of living)	§ 6039F
Form 3520-A	Foreign Trusts owned by a U.S. person	§ 6048(b)
Form 5471	U.S. persons who control foreign corporation; US persons who are an officer, director or shareholder of a foreign corporation to report acquisitions and dispositions of interests in such foreign corporation.	§ 6038 § 6046



Overview of International Information Returns

IRS Form	Reporting Obligation	IRC Section
Form 926	U.S. persons transfer of certain property to foreign corporation.	§ 6038B
Form 8865	U.S. persons who control foreign partnerships; US persons to report acquisitions and dispositions of interests in such foreign partnership; U.S. person transfers property to a foreign partnership	§ 6038 § 6046A § 6038B(a)(1)(B)
Form 8621	U.S. person who is a shareholder of a PFIC	§ 1298(f)*
Form 8938	U.S. person to report their interest in any specified foreign financial assets (which includes any interest in a foreign entity).	§ 6038D*

* Effective for tax years beginning after 3/18/2010



Overview of International Information Returns

Penalty Section	Description	Amount
I.R.C. Sec. 6677 (a)	Failure to File Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.	Greater of \$10,000 or 35% of Gross Reportable Amount
I.R.C. Sec. 6039F(c)		\$10,000 for each 30-day period (or fraction thereof) beginning 90 days after notification of failure of filing requirement not to exceed gross reportable amount Gifts – 5% of the gift per month up to 25%
I.R.C. Sec. 6677(b)	Failure to File Form 3520-A , Annual Information Return of Foreign Trust With a U.S. Owner	5% of the gross value of trust assets determined to be owned by the U.S. person at the close of the year. \$10,000 for each 30-day period (or fraction thereof) beginning 90 days after notification of failure of filing requirement not to exceed gross reportable amount
I.R.C. Sec 6038 I.R.C. Sec. 6679	Failure to File Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations.	\$10,000 per failure with additional \$10,000 for each 30-day period (or fraction thereof) beginning 90 days after notification of failure of filing requirement not to exceed \$50,000 per return



International Information Return Penalties

Penalty Section	Description	Amount
I.R.C. Sec. 6038B	Failure to File Form 926, Return by a U.S. Transferor of Property to a Foreign Corp.	10% of the value of the property transferred up to a maximum of \$100,000 per return with no limit if the failure to report was intentional
I.R.C. Sec 6038 I.R.C. Sec 6679 I.R.C. Sec 6038B	Failure to File Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships.	\$10,000 per failure with additional \$10,000 for each 30-day period (or fraction thereof) beginning 90 days after notification of failure of filing requirement not to exceed \$50,000 per return. 10% of the value of the property transferred up to a maximum of \$100,000
I.R.C. Sec. 6038D(d)	Failure to file Form 8938, Statement of Specified Foreign Financial Assets	\$10,000 per failure with additional \$10,000 for each 30-day period (or fraction thereof) beginning 90 days after notification of failure of filing requirement not to exceed \$50,000 per return



Summary

- Participants are now able to explain the purpose of the FATCA legislation to combat tax evasion by U.S. persons holding accounts and other financial assets offshore and the impact on compliance by U.S. persons.
- Participants are now able to summarize individual and financial institution requirements in reporting accounts and other financial assets offshore.
- Participants are now able to identify the international reporting forms and the associated reporting requirements by U.S. persons.
- Participants are now able to describe what to do if contacted by the IRS about FATCA reporting discrepancies.