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New FATCA Reporting Obligation May Affect Global US Employees' 2011 Tax Returns

Background

Multinational corporations often have mobile employees as part of their global workforce participating in non-US retirement, deferred compensation and equity compensation plans. US taxpayers participating in such non-US retirement plans should be aware of potential new obligations to report those interests on IRS Form 8938, beginning with their individual tax returns for 2011.

Due to the complexity of these rules, the substantial penalties associated with noncompliance for the participant, and the reputational risk for the employer, counsel for multinational corporations may wish to consider:

- Alerting mobile executives of this new obligation.
- Preparing the administrators of their non-US benefit plans to respond to executives (and their advisors) who may be asking them for the required information.
- Reminding affected employees that tax compliance is their individual responsibility, and they should consult their own tax advisors.

Where does this new obligation come from?

This new obligation derives from the 2010 Foreign Account Tax Compliance Act ("FATCA") legislation, which added a new section 6038D to the Internal Revenue Code. This generally requires US taxpayers holding foreign financial assets with an aggregate value in excess of certain dollar thresholds to report those when they file their US income tax return, generally effective beginning with their 2011 return. The report is made on new Form 8938, Statement of Specified Foreign Financial Assets.

The IRS recently posted Q&As on its website confirming the applicability of FATCA reporting to foreign pension or deferred compensation plans.

Who is required to file Form 8938?

Generally, an individual is required to file Form 8938 if he or she is a "specified individual," who holds an interest in a "specified foreign financial asset" and meets the applicable filing threshold. If the individual is not required to file a US income tax return, then he or she is also exempt from filing a Form 8938. Substantial penalties are imposed for failure to file a Form 8938.

"Specified individuals" include:

- US citizens
- Resident aliens of the US for any part of a year
- Nonresident aliens who make an election to be treated as resident aliens for purposes of filing a joint income tax return, and
- Nonresident aliens who are bona fide residents of American Samoa or Puerto Rico.

What interests in retirement, deferred compensation and equity compensation plans are required to be disclosed on Form 8938?

The definition of "specified foreign financial assets" is broad, and in many cases does not require that the asset be held in an account maintained by a financial institution. For example, it includes any stock or security issued by a person other than a United States person (for example, stock in a foreign corporation), and any option or other derivative instrument with respect to such stock or security that is entered into with a foreign counterparty or issuer.

The Instructions to the Form 8938 require taxpayers to report their interests in foreign pension and deferred compensation plans at their fair market value as of the last day of the tax year. If a taxpayer does not know or have reason to know (based on readily accessible information) the fair market value of his or her interest a foreign pension and/or deferred compensation plan, then the value to be included is the fair market value, determined on the last day of the tax year, of the cash and other property distributed to the individual during the tax year. If the taxpayer received no distributions during the tax year and does not know or have reason to know (based on readily accessible information) the fair market value of his or her interest in a foreign pension and/or deferred compensation plan, then the taxpayer must still report the interest in the plan on the Form 8938, but may use a value of zero for the interest.

There are exceptions for certain Canadian registered plans reported on a Form 8891 and for interests in a social security, social insurance, or other similar program of a foreign government.

What are the dollar filing thresholds?

For unmarried taxpayers, or married filing separately who live in the US, the filing threshold (aggregating all foreign accounts) is $50,000 on the last day of their tax year or more than $75,000 at any time during their tax year. For married taxpayers filing jointly, the threshold is $100,000 on the last day of their tax year or more than $150,000 at any time during their tax year.

For an individual who is a US citizen whose tax home is in a foreign country and is either (i) a bona fide resident of a foreign country or countries for an uninterrupted period that includes the entire tax year, or (ii) a US citizen or resident who during a period of 12 consecutive months ending in their tax year, is physically present in a foreign country or countries at least 330 days, the thresholds are $200,000 on the last day of the tax year or $300,000 at any time during the year if they do not file a joint income tax return, and $400,000 on the last day of the tax year or $600,000 at any time during the year if they file a joint tax return.

Comments to the IRS and questions – Groom can help.

Although the Form 8938 has been finalized and must be filed beginning for 2011, it is understood that the IRS is still taking comments on the application of FATCA reporting to foreign retirement plans and deferred compensation. If you have concerns regarding the application of FATCA to particular facts and circumstances, Groom Law Group can advise and also, if desired, assist with seeking clarifications from and providing comments to the IRS.