

Alert for Non-U.S. Issuers and Their U.S. Affiliates: Consider ASAP Notice to U.S. Employees re FATCA

A new and obscure tax reporting requirement under FATCA¹ requires that certain U.S. individual taxpayers disclose – on Form 8938 to their 1040s due April 15, 2012 – interests in specified foreign financial assets which include their equity holdings and awards received from non-U.S. entities. Interests in non-U.S. defined contribution plans, and distributions from non-U.S. defined benefit plans, are also potentially reportable. While failure to file penalties of up to \$10,000 would fall on employees, officers, and directors who are U.S. taxpayers, it is nonetheless wise for employers to act ASAP to consider providing a simple heads-up notice to those who are at risk due to their employer-provided stock awards and employee benefits.

Who needs to worry?

Here is a table presenting trip-points that could require a U.S. taxpayer to file Form 8938:

Filing Status	The Total Value of Your “Specified Foreign Assets” – as of:	
	Any time during year	Year End
Unmarried living in U.S.	\$75,000	\$50,000
Married filing jointly, and living in U.S.	\$150,000	\$100,000
Married filing separately and living in the U.S.	\$75,000	\$50,000
Living abroad: <ul style="list-style-type: none">• Single or Married filing separately• Married filing joint	\$300,000 \$600,000	\$200,000 \$400,000

What are “Specified Foreign Assets”?

This term includes any financial account in a “foreign financial institution” (as defined in FATCA regulations) as well as:

- Stock or securities of a non-U.S. company.
- Stock awards, including stock options of a non U.S. company.

- Benefit distributions from non-U.S. defined benefit plans.
- Accruals credited to accounts under non-U.S. defined contribution, cash balance, or deferred compensation plans.

How do we determine the value of stock and stock awards?

Temporary FATCA regulations essentially require fair market value determinations. That is easier said than done due to a bizarre combination of (1) no published advice about valuing stock options² or handling unvested awards, and (2) complex rules for identifying maximum value during the year. For instance, taxpayers may value their stock and awards based on year-end values or based on periodic account statements, in each case unless there is reason to know that higher values occurred during the year. Given the lack of any advice on the implications to filing Form 8938, and the uncertainty with the application of many of the rules including the valuation, taxpayers may wish to err conservatively and file Form 8938. Interestingly, if a Form 8938 filing is required, it must report a particular Specified Foreign Asset even if it has a zero value.

What should employers do ASAP?

Non-U.S. payors of compensation or benefits (or their U.S. affiliates) may want to provide a FATCA notice now to their employees who are U.S. taxpayers. Our experience with Code Section 409A, under which tax penalties legally fall only on employees, finds that employers often assist employees with compliance and step forward to voluntarily correct violations. The same dynamic could unfold for FATCA violations, with the best strategy being to position for compliance at the front end, starting with April 15, 2012. That being noted, employers should be sensitive to providing FATCA information in a way that minimizes their liability risks, including those arising under any applicable securities disclosure laws (e.g., a prospectus presenting a tax disclosure for equity awards).



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

Andy Short
1.212.318.6018
andrewshort@paulhastings.com

Washington, D.C.

Eric Keller
1.202.551.1770
erickeller@paulhastings.com

Mark Poerio
1.202.551.1780
markpoerio@paulhastings.com

¹ The Foreign Account Tax Compliance Act, enacted in 2010 as part of the HIRE Act.

² We have heard from a Treas. Dept. source that stock options may reasonably be valued based on their in-the-money value.