



Primer on International Forms

An Overview of the Reporting Requirements for Taxpayers With International Activities

- Types of international forms
- Penalties for failure to file
- Challenging penalties for failure to file



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International Tax Forms for Individuals



FinCen Form 114 - FBAR

- FinCen Form 114, Report of Foreign Bank and Financial Accounts (“FBAR”)
- Required under the Bank Secrecy Act of 1970
 - Must be filed electronically (PDF form now available)
- When required:
 - U.S. person had a financial interest or signatory authority over a financial account located outside the United States; and
 - The aggregate value of the account exceeds \$10,000 at any time during the tax year reported.
- Penalties
 - For willful violations, the greater of \$100,000 or 50% of the account balance; cannot be challenged via CDP procedures



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Forms 1116 & 1118, *Foreign Tax Credit*

- A credit for qualifying foreign taxes (paid or accrued) can be claimed under I.R.C. § 901.
- Generally, Form 1116, *Foreign Tax Credit*, or Form 1118, *Foreign Tax Credit – Corporations*, must be filed to claim the foreign tax credit.
 - Estate may claim a credit under I.R.C. § 2014 for foreign death taxes paid by filing Form 706-CE, *Certificate of Payment of Foreign Death Tax*
- Who may file?
 - U.S. citizens and resident aliens (Form 1116), corporations (Form 1118), or estates (Form 706-CE)
 - Carryover for a corporation may be claimed on Form 1118 (Schedule K), *Foreign Tax Carryover Reconciliation Schedule*
- When to file?
 - Attach to income tax return by due date (with extension)
- Penalties apply to same extent as return (reasonable cause available)



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Forms 2555 & 2555-EZ,

Foreign Earned Income Exclusion

- U.S. citizens and resident aliens taxed on worldwide income unless enumerated exclusion applies
 - These taxpayer may elect to exclude foreign earned income or the cost of housing under I.R.C. § 911
- When and how to file?
 - Attach Form 2555, *Foreign Earned Income*, or Form 2555-EZ, *Foreign Earned Income Exclusion*, to income tax return by due date (with extension)
- Foreign earned income exclusion - \$100,800 for 2015



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Forms 8621 & 8621-A, PFICs

- Gains and losses in PFICs generally recognized each year
- Who must file?
 - U.S. persons (individuals, corporations, and pass-through entities) who are direct or indirect shareholders in a PFIC
- When to file?
 - Attach to shareholder's tax return by due date (with extension)
- How to file?
 - Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*
 - Form 8621-A, *Return by a Shareholder Making Certain Late Elections to End Treatment as a Passive Foreign Investment Company*
- Penalty (I.R.C. § 6038)
 - \$10,000 penalty for failure to file each Form 8621, but not 8621-A; reasonable cause defense not available; can be challenged in CDP



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Form 8802, *Residency Certification*

- Many U.S. treaty partners require the IRS to certify that the person claiming treaty benefits or a VAT exemption is a U.S. resident for federal tax purposes.
 - The IRS provides this residency certification on a Form 6166, *Certification of U.S. Tax Residency*
- Taxpayers can request a Form 6166 (i.e., a letter of U.S. residency certification) by filing with the IRS Form 8802, *Application for United States Residency Certification*
- When and how to file?
 - File with the IRS in Philadelphia Form 8802, *Application for United States Residency Certification*, along with an \$85 user fee.
 - Application, along with the user fee, should be filed at least 45 days before the date the taxpayer needs the Form 6166.



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Form 8833, *Treaty Positions*

- If a taxpayer takes the position that a treaty overrides or modifies an internal revenue law, the taxpayer must disclose such position on a return or if no return, on such form as the Commissioner prescribes. I.R.C. § 6114
 - Common for dual resident taxpayers (I.R.C. § 7701(b))
- When and how to file?
 - Attach Form 8833, *Treaty-Based Position Disclosure Under Section 6114 or 7701(b)*, to income tax return by due date (with extension)
- Penalties (I.R.C. § 6712)
 - For each failure, \$1,000 or \$10,000 for a corporation; reasonable cause available

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Form 8891, *Canadian Plans*

- U.S. citizens and resident aliens used to be required to report (1) contributions to Canadian registered retirement savings plans (“RRSPs”) and registered retirement income funds (“RRIFs”), (2) undistributed earnings in RRSPs and RRIFs, and (3) distributions from RRSPs and RRIFs.
- On October 7, 2014, the IRS eliminated Form 8891 and stated that taxpayers no longer need to file Form 8891.
 - However, to the extent taxpayers own an interest in RRSPs or RRIFs, they are still subject to the reporting requirements under the Bank Secrecy Act and I.R.C. § 6038D (i.e., they must disclose such accounts on an FBAR or Form 8938, *Statement of Specified Foreign Financial Assets*).



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Form 8938, *Statement of Foreign Assets*

- Specified individuals and certain entities must report interests in specified foreign financial assets for tax years after March 18, 2010
- Who must file?
 - “Specified persons” with “specified foreign financial assets” greater than \$50,000 at year-end or \$75,000 at any point during the year
- When & how to file?
 - Attach Form 8938, *Statement of Specified Foreign Financial Assets*, to tax return by due date (with extension)
- Penalties (I.R.C. § 6038D)
 - Generally, \$10,000, but may increase up to \$50,000 for failure after notice; reasonable cause defense available
 - Able to be reviewed in CDP proceedings



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Form 8938, *Statement of Foreign Assets*

- Treasury Regulations under I.R.C. § 6038D finalized on Dec. 12, 2014, adopt a number of changes to Form 8938:
 - Dual resident taxpayers now exempt from filing Form 8938 if, in essence, the individual qualifies as a nonresident alien and claims treaty benefits;
 - Definition of “financial account” now excludes certain accounts that are subject to the reporting requirements of a Model 1 or Model 2 intergovernmental agreement;
 - Jointly owned specifies foreign financial assets must now report the entire value of each jointly owned asset (regardless of marital status); and
 - Nonvested property rights under I.R.C. § 83 must be reported as of the first date the property is substantially vested in the person, unless an I.R.C. § 83(b) election is made, in which case, it must be reported as of the date the property is transferred.



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International Tax Forms for Partnerships & Corporations



Form 926, *Foreign Corp. Transfers*

- U.S. citizens, corporations, and estates and trusts must report certain transfers of property and cash to foreign corporations.
 - I.R.C. § 332 liquidation; I.R.C. § 351 incorporation; I.R.C. § 361 reorganizations; I.R.C. § 355 spin-offs; I.R.C. § 367(d) and (e) transactions
- When and how to file?
 - U.S. transferor must file Form 926, *Return by a U.S. Transferor of Property to a Foreign Corporation*, with return for year of transfer.
- Penalties & sanctions
 - Penalty generally equal to 10% of FMV of transferred property; 40% penalty for understatement resulting from undisclosed foreign financial assets; sanctions; reasonable cause defense available



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Schedule N to Form 1120

- Corporations that had assets or operated a business in a foreign country at any time may have to file Schedule N, *Foreign Operations of U.S. Corporations*.
 - Includes DREs, interests in a CFC, 10% interest in a foreign p' ship, distributions from/to a foreign trust, and interests in a foreign financial account in a foreign currency
- When to file?
 - Attach to income tax return by due date (with extension)
- Penalties apply to same extent as return
 - Reasonable cause available



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Form 5471, *Foreign Corps.*

- Certain U.S. citizens and residents who are officers, directors, or shareholders in certain foreign corporations must file Form 5471, *Information Return of U.S. Persons With Respect to Certain Foreign Corporations*. See I.R.C. § § 6038, 6046.
 - Officer director, 10%-shareholder by vote or value, control person in a CFC for at least 30 days; acquisition of shares and after the acquisition owns more than 10%. Numerous exceptions.
- When to file?
 - Attach to timely filed return of the affected person
- Penalties (I.R.C. § § 6038(b); 6038B(c))
 - \$10,000 per foreign corporation plus a \$10,000 continuation penalty
 - Reasonable cause defense available; must show current compliance
 - Able to be reviewed in CDP proceedings



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Form 5472, 25% Foreign Owned Corp.



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- Corporations with reportable transactions between a related party must file Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*. See I.R.C. § § 6038A, 6038C.
 - Many reportable transactions; examples include: sales & purchases of tangible & intangible; rents & royalties paid; loans. See Treas. Reg. § 1.6038A-2(b)(3).
- When to file?
 - Attach to timely filed return of the reporting corporation
- Penalties (I.R.C. § 6038A(d))
 - *\$10,000 per reportable transaction plus a \$10,000 continuation penalty*
 - Reasonable cause defense available; must show current compliance
 - Able to be reviewed in CDP proceedings



Form 8858, *Foreign DREs*

- Certain U.S. citizens & residents who own a foreign disregarded entity must file Form 8858, *Information Return of U.S. Persons With Respect to Foreign Disregarded Entities*. I.R.C. § 6038B.
 - A foreign DRE is an entity that is not created or organized in the U.S. and is disregarded as an entity separate from its owner for U.S. tax purposes.
- When to file?
 - Attach to timely filed return of the owner of the foreign DRE
- Penalties (I.R.C. § 6038(b))
 - \$10,000 per foreign disregarded entity plus a \$10,000 continuation penalty. Also, subject to a 10% reduction of the available foreign tax credit
 - Reasonable cause defense available; must show current compliance
 - Able to be reviewed in CDP proceedings



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Form 8865, *Foreign Partnerships*

- Certain U.S. persons who own or engage in transactions with certain foreign partnerships must file Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*. See I.R.C. § § 6038, 6038B, 6046.
 - U.S. person who, at any time: directly owned more than 50% interest in partnership's capital, profits, or losses; indirectly owned a 10% or greater interest in partnership's capital, profits, or losses; or contributes, acquires, disposes, or has a substantial change in proportionate interest. Numerous exceptions.
- When to file?
 - Attach to timely filed return of the affected person
- Penalties (I.R.C. § § 6038(b); 6038B(c))
 - *\$10,000 per foreign partnership plus a \$10,000 continuation penalty*
 - Reasonable cause defense available; must show current compliance
 - Able to be reviewed in CDP proceedings



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International Tax Forms for Estates, Gifts, & Trusts



Form 3520, *Foreign Trusts & Gifts*



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- Grantors or beneficiaries with reportable transactions with foreign trusts or estates must file Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*. See I.R.C. § § 679(c), 6048.
 - Many reportable transactions; examples include: formation of a foreign trust; transfer of property to a foreign trust; the receipt of any distribution by a U.S. beneficiary; aggregate gifts or bequests from foreign person or estate greater than \$100,000; loans to a foreign trust.
- When to file?
 - Due with tax return for the U.S. grantor or beneficiary (separately filed)
- Penalties (I.R.C. § § 6662(j), 6677)
 - 35% of the gross value of the distribution received from or transferred to a foreign trust; 5% per month for the amount of certain foreign gifts, up to 25%
 - Reasonable cause defense available; reviewable in CDP proceedings



Form 3520-A, *Foreign Trusts - U.S. Owner*

- A foreign trust with a U.S. owner must file Form 3520-A, *Annual Information of Foreign Trusts With a U.S. Owner*. See I.R.C. § § 679(c), 6048.
 - Many reportable transactions; examples include: formation of a foreign trust; transfer of property to a foreign trust; the receipt of any distribution by a U.S. beneficiary; aggregate gifts or bequests from foreign person or estate greater than \$100,000; loans to a foreign trust.
- When to file?
 - Attach to timely filed return of the reporting corporation
- Penalties (I.R.C. § § 6662(j), 6677)
 - \$10,000 per reportable transaction plus a \$10,000 continuation penalty
 - Reasonable cause defense available; must show current compliance
 - Able to be reviewed in CDP proceedings



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International Tax Forms for Withholding



Forms 1042, 1042-S & 8805, *Withholding*

Unless an exception applies, all withholding agents (domestic or foreign) must report payments of amounts subject to withholding.

– Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*

- Used to report tax withheld on foreign persons, including NRAs, foreign partnerships, foreign corporations, foreign estates, and foreign trusts.
- FTF penalties under I.R.C. § 6651(a)(1); reasonable cause available

– Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*

- Used to report income subject to withholding, amounts withheld under FATCA, and distributions of income by a nominee or publicly traded partnership.
- FTF penalties (I.R.C. § 6721(a)) are \$100 per return, max. of \$1.5m, and may be reduced for prompt correction or small businesses.

– Form 8805, *Foreign Partner's Information Statement of Section 1446 Withholding Tax*

- Every foreign partner must file to claim withholding credit under I.R.C. § 1446



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Form 8288 & 8288-A, *USRPI*

I.R.C. § 1445 imposes a withholding obligation on a buyer or other transferee whenever a U.S. real property interest is acquired from a foreign person.

- The withholding obligation under I.R.C. § 1445 is reported, and the withheld amount transmitted to the U.S. Treasury, on Form 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*
 - Amount subject to withholding: Withholding tax is generally equal to 10% of the amount realized on the disposition. I.R.C. § 1445(a).
 - Where and when to file? Form 8288 and tax owed is due 20 days after the transfer of property.
 - Penalties: Withholding agent becomes liable for the tax. I.R.C. § 1461.
- Buyers and transferees report a disposition of a U.S. real property interest on Form 8288-A, *Statement of Withholding on Disposition by Foreign Persons of U.S. Real Property Interests*



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Forms W-8BEN & W-8BEN-E



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- Under I.R.C. § § 1441 and 1442, a withholding agent must withhold 30% of any payment of an amount subject to FATCA withholding made to a payee that is a foreign person unless the agent can associate the payment with documentation upon which it is permitted to rely to treat the payment as made to (a) a payee that is a U.S. person, or (b) a beneficial owner that is a foreign person entitled to a reduced rate of or exemption from withholding. The two most common forms are:
 - W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*; and
 - Form W-8BEN-E, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*



Form W-9, *Requests for TIN*

- FATCA requires participating foreign financial institutions to report all U.S. account holders that are specified U.S. persons.
- Individuals or entities who are required to file information returns with the IRS must obtain each account holder's correct taxpayer identification number. This request is made on Form W-9, *Request for Taxpayer Identification Number and Certification*



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I.R.C. § 6751(b)



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- I.R.C. § 6751(b)(1) provides:

“No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.”
- Per I.R.C. § 6751(b)(2), does not apply to:
 - Additions to tax under I.R.C. §§ 6651, 6654, or 6655; or
 - Any other penalty calculated through electronic means.
- The term “penalty” means “any additional tax or any additional amount. I.R.C. § 6751(c). Applies to penalties in this outline.
- “The managerial review and approval [required by I.R.C. § 6751] must be documented in writing and retained in the case file.”
I.R.M., pt. 20.1.1.2.3 (Aug. 5, 2014).



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Questions?

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