

FATCA

**LEGAL RESOURCES TO AVOID
PENALTIES AND LOSING MONEY**



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FATCA Reporting Requirements for Individuals

❖ What is FATCA?

FATCA is the acronym for the Foreign Account Tax Compliance Act. Its provisions can be found in the Internal Revenue Code of 1986, as amended (the “Code”), Sections 1471, 1472 and 1473. It was added to the law in 2010, but many of its provisions have only recently become effective.

❖ What does FATCA do?

FATCA requires foreign financial companies to tell the IRS about U.S. taxpayers with foreign accounts. The IRS has been slowly forcing foreign banks to provide information about U.S. clients when requested. **Now all foreign financial institutions must routinely report U.S. investments to the IRS.**

The reporting requirements are substantial and they concern not just foreign banks. Now foreign brokers, foreign mutual funds and foreign hedge funds must report their U.S. customers to the IRS.

❖ What **else** does FATCA do for Individuals?

FATCA also imposes reporting requirements on U.S. taxpayers who own “specified foreign financial assets” to disclose the existence of these foreign assets on their annual U.S. income tax return. Disclosure is generally required if the aggregate value of such foreign assets exceeds the “FATCA Reporting Threshold” (or “Threshold”)

Individuals must now disclose an expanded list of foreign assets:

1. **Any foreign stock or security** issued by a foreign person;
2. **Any foreign financial instrument or contract** held for investment that has a counterparty that is a foreign person;
3. **Any interest in a foreign entity;**
4. **Any foreign life insurance policy with cash value;** and
5. **Any foreign financial account.**

❖ What is the FATCA Reporting Threshold?

The FATCA Reporting Threshold is the trigger for the requirement to disclose under FACTA. If the value of all Specified Foreign Financial Assets **exceeds the Threshold** an IRS Form 8938 must be filed and the ownership of the Specified Foreign Financial Assets disclosed.

There are two Thresholds for each calendar year. The first is the “Calendar End Threshold” and is determined on the last day of the calendar year. The second is the “Highest Day Threshold” and is determined based upon the day in the calendar year where the aggregate value of Specified Foreign Financial Assets has the highest value.

Thresholds depend upon the taxpayer’s filing status and physical residence. For example the Snapshot Threshold for a taxpayer living in the United States and filing single is \$50,000 while the Highest Day Threshold for the same person is \$75,000. The following table sets for the most common Thresholds.

Filing Status	Living in	Calendar End Threshold	Highest Day Threshold
Single	United States	\$50,000	\$75,000
Single	Abroad	\$200,000	\$300,000
Married	United States	\$100,000	\$150,000
Married	Abroad	\$400,000	\$600,000
Domestic Corporation*		\$50,000	\$75,000

* Pursuant to Notice 2013-10, domestic entities are not presently required to file IRS Form 8938. The IRS contemplates announcing future regulations that will require a domestic entity to file Form 8938 if the entity is formed or used to hold specified foreign financial assets and the total asset value exceeds the appropriate reporting threshold.

❖ Who is Considered Living Abroad under FATCA?

A taxpayer is considered to live abroad if the taxpayer is a U.S. citizen whose tax home is in a foreign country and the taxpayer has been present in a foreign country or countries for at least 330 days out of a consecutive 12-month period. These are also the requirements under Code Section 911 for the foreign earned income exclusion.

FATCA TRAPS and WATCH OUTS

1. No Asset Too Small. If the Threshold is reached for the aggregate of all Specified Foreign Financial Assets, all such Specified Foreign Financial Assets must be disclosed, even if the value is less than zero (an asset with a liability greater than its value).
2. FBAR reporting is not enough. One of the Specified Foreign Financial Assets is a foreign bank account. Foreign Bank Accounts are required to be reported on the Report of

Foreign Bank Account or “FBAR” required to be filed by June 30th of each calendar year. IF a FATCA disclosure must be made, it should include all of the assets reportable on the FBAR in most situations. Having reported an asset on a current or prior FBAR will not prevent a FATCA penalty for failure to include the asset on the IRS Form 8938.

3. FBAR assets are included in the Threshold for FATCA disclosure. A single individual living in the United States with a \$50,000 foreign bank account, is required to report a \$10 share of stock in a foreign corporation. Failure to do so could result in a \$10,000 penalty.

4. Jointly owned assets count twice. Any person who owns a Specified Foreign Financial Asset jointly must report the full value of the asset on his or her Form 8938 and count the full value in determining whether or not the Threshold for disclosure has been crossed. An exception applies to married individuals filing a joint return, but not if they file married filing separately. A special rule may provide relief if the individuals are considered to be living abroad for FATCA purposes.

5. Change in Reporting Canadian Registered Retirement Plans. Beginning with tax years ending after December 31, 2013, Canadian Registered Retirement Plans must be reported on IRS Form 8938 under FATCA. Prior to this change, reporting such plans on IRS Form 8891 was sufficient to avoid the FATCA requirement.

❖ How is the FATCA required disclosure made?

The disclosure is made on an IRS Form 8938 filed with the annual federal income tax return.

❖ FATCA Penalties

The basic penalty is \$10,000 per year. Fortunately, the penalty is for failure to file a proper return. Therefore the penalty should not increase based upon the omission of each additional omitted Specified Foreign Financial Asset. The IRS has not announced any minimum omission that would escape a penalty.

❖ Reasonable Cause for Failure to Comply with FATCA

FATCA penalties may be excused if the taxpayer can demonstrate reasonable cause for failure to file. The reasonable cause standard as interpreted by the IRS is a difficult standard to meet. Commentators requested that certain safe harbors be provided to taxpayers making it easier to show reasonable cause for failure to comply. The IRS refused to provide these safe harbors in the final regulations.

The IRS has not adopted a policy of providing relief for failure to file a proper Form 8938 on the basis that the failure to disclose an asset on the Form is already penalized under another provision such as the requirements of Form 5471, or the FBAR penalties. The IRS

position is that the legislation does not permit the IRS alter the penalty under FATCA on this basis.

❖ Who Must Comply with FATCA?

1. Any U.S. resident taxpayer must comply.
2. There is no exception for visa holders. Persons present in the United States under a non-immigrant H, L, or E visa must comply with the disclosure requirements.
3. Even if a person owes no U.S. income tax, if he or she is required to file a U.S. income tax return, then the FATCA disclosure must be made.

❖ What is Excluded from the FATCA Filing Requirement?

1. Foreign Social Security. An interest in a foreign government program for social security, social insurance, or other similar program is not a Specified Foreign Financial Asset. A foreign private pension account is not exempt, nor is a foreign retirement account that is exempt from foreign tax, if it is privately held rather than a government program.
2. U.S. Payer Accounts. An investment in a foreign asset that is held in an investment account with a U.S. financial institution does not have to be reported.
3. Duplicative Reporting. You don't have to report any asset on Form 8983 that you report on another certain IRS tax forms filed with your tax return for the year, such as:
 - trusts and foreign gifts reported on Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;
 - foreign corporations reported on Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations;
 - passive foreign investment companies reported on Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund; or
 - foreign partnerships reported on Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships.

Nonetheless, the value of these items counts towards the Applicable Threshold Amount. Note that you must report Foreign Bank Accounts twice, because the FBAR is not on the list of the exempt forms.

The value of the foreign financial assets reported on these forms is included in determining the total value of assets for the reporting threshold, but you do not have to list the

assets on Form 8938. In this situation, identify on Form 8938 which and how many of these form(s) report the specified foreign financial assets.

4. Certain Dual Citizens are exempt from FATCA reporting if they are treated under a U.S. income tax treaty as a non resident of the United States and file proper U.S. income tax filings to claim such treaty status.

❖ FATCA Checklist

1. Are you required to file a U.S. federal income tax return as a tax resident of the U.S.?

- Yes, then continue with checklist.
- No, then you are not required to disclose specified foreign financial assets under FATCA.

2. Do you own any “Specified Foreign Financial Assets”?

Specified Foreign Financial Assets include the following:

- a) Any foreign financial account;
(This includes, bank accounts, brokerage accounts, mutual funds, hedge funds and other financial accounts)
- b) Any foreign stock or security issued by a foreign person that is not held in a foreign financial account;
(This includes an ownership interest in a foreign entity no matter what form the interest takes.)
- c) Any interest in a foreign entity that is not held in a foreign financial account;
(This includes foreign business entities not treated as corporations, such as foreign partnerships and other forms of business)
- d) Any foreign life insurance policy with a cash value that is not held in a foreign financial account; and
(This is a new item that has not been widely discussed or noted.)
- e) Any foreign financial instrument or contract held for investment that has a counterparty that is a foreign person, that is not held in a foreign financial account.

Do not count any Specified Foreign Financial Assets you own through an account with a U.S. taxpayer such as a U.S. brokerage firm, a U.S. based mutual fund, or an asset owned by a domestic corporation that is taxed as a separate taxpayer.

Any Specified Foreign Financial Asset that is held in a Foreign Financial Account is counted in determining the value of the Foreign Financial Account and is not counted

twice. If the Specified Foreign Financial Asset is held outside of a Foreign Financial Account then it is treated as a “directly held” asset and must be reported.

Foreign real estate is not a Specified Foreign Financial Asset. Nor is ownership of a precious metal such as gold or silver that is held in a foreign country treated as a Specified Foreign Financial Asset.

- Yes, then continue with checklist
 - No, then you are not required to disclose specified foreign financial assets under FATCA.
3. Are any of your Specified Foreign Financial Assets used in, or held for use in, the conduct of your trade or business?
- Yes, then exclude the trade or business assets from the aggregate value of your Specified Foreign Financial Assets and continue with the checklist.
 - No, then continue with the checklist.
4. Did the aggregate value of your Specified Foreign Financial Assets exceed the applicable FATCA Reporting Threshold amount for the tax year?

Filing Status	Living	Calendar End Threshold	Highest Day Threshold
Single	In United States	\$50,000	\$75,000
Single	Abroad	\$200,000	\$300,000
Married	In United States	\$100,000	\$150,000
Married	Abroad	\$400,000	\$600,000

- Yes, then continue the checklist.
 - No, then you are not required to disclose specified foreign financial assets under FATCA.
5. File a Form 8938 with your annual U.S. federal income tax return and disclose the Specified Foreign Financial Assets as required on the return.

❖ FATCA Resource List

Additional information concerning FATCA is available from the following resources:

General Information for the Public

<http://www.irs.gov/Businesses/Corporations/FATCA-Information-for-Individuals>

<http://www.irs.gov/Businesses/Corporations/Summary-of-FATCA-Reporting-for-U.S.-Taxpayers>

<http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>

<http://www.irs.gov/Businesses/Corporations/Basic-Questions-and-Answers-on-Form-8938>

<http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx>

Technical Resource

Internal Revenue Code, of 1986, as amended, Section 6038D Information With Respect to Foreign Financial Assets.

T.D 9706, 2014-53 I.R.B. 980 (December 11, 2014). Preamble and Final Regulations under section 6038D of the Code.

IRS Notice 2013-10, provides that domestic entities will not be required to report specific foreign financial assets before the date specified in final regulations under section 6036D, which will modify the effective date of Prop. Reg §1.6038D-6. T.D. 9706 did not finalize the regulations relating to the reporting of domestic entities, so reporting is not yet required.

T.D. 9567, 2012-1 C.B. 395 (December 19, 2011). Temporary regulations under section 6036D.

About Paul Wigg-Maxwell, ESQ.

Paul Wigg-Maxwell established his practice in 1994 with an emphasis on matters relating to international business, tax, business, and estates and trust planning.

Mr. Wigg-Maxwell provides sophisticated legal representation you would expect from a large firm combined with the close personal attention of a solo practice.

Wigg-Maxwell, Esq. **designs and defends the most *tax efficient*** strategies for each client. His specialized knowledge of U.S. and international tax laws allows him to design tax efficient positions with predictive outcomes.

Mr. Wigg-Maxwell represents businesses in the business tax matters controversies and tax litigation. He is particularly well versed in dealing with involving international or cross border transactions.

Much of our work comes from other lawyers, accountants, professionals and client referrals. The trust of these referral sources makes the firm work and is deeply appreciated.

Professional Organizations and Affiliations

Mr. Wigg-Maxwell is member of several professional organizations including: the American Bar Association, the New Jersey Bar Association and the New York City Bar Association. He is the past chair of the International Organizations and Law Section of the New Jersey Bar Association.

Mr. Wigg-Maxwell has published articles and lectured on tax and trust and estate issues. Mr. Wigg-Maxwell is active in professional organizations including the tax sections of the American Bar Association and the Bar Associations of New York and New Jersey and various local bar associations.

Mr. Wigg-Maxwell has a J.D. from Columbia University (1986) and an LL.M. in Taxation (1990) from New York University. He is admitted to practice in New Jersey and New York.

Mr. Wigg-Maxwell founded a discussion group of small firm attorneys focusing on the practice of Trusts and Estates and Tax matters.

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