

Temporary Relief from Certain HIRE Act Reporting Requirements

June 29, 2011

On June 21, 2010, the U.S. Internal Revenue Service (the “IRS”) issued Notice 2011-55 (the “Notice”), providing temporary relief from certain information reporting requirements imposed under the Hiring Incentives to Restore Employment Act (the “HIRE Act”).^{[\[1\]](#)} The Notice suspends, until such time as the IRS releases forms containing necessary modifications, the statutory requirements that (1) taxpayers report information concerning interests in certain foreign financial assets and (2) shareholders in a passive foreign investment company (“PFIC”) report certain information on an annual basis. The Notice further announces that the Treasury Department intends to promulgate regulations implementing these provisions, although no information about the possible content of such regulations, or of the revised forms and instructions, is included in the Notice. The terms of the Notice require affected taxpayers to file this information for all taxable years for which these reporting requirements are suspended once revised forms are released, but taxpayers will be treated as though such reports were filed on the same date as the original tax returns for those taxable years, assuming compliance with the terms of the Notice.

Wholly separate from the statutory requirements covered by the Notice, a U.S. person that has a financial interest in or signature authority over foreign financial accounts must file a "Report of Foreign Bank and Financial Accounts" ("FBAR") on Treasury Department Form TD F 90-22.1, if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year. The FBAR filing requirements are not identical to the reporting obligations required under the HIRE Act covered by the Notice and, notwithstanding the Notice, U.S. persons may be required to file an FBAR for the 2010 calendar year. The Notice has no effect on whether or not, or by what date, any person is required to file an FBAR. If a U.S. person is not eligible for an extension granted under recent guidance, a U.S. person who is required to file an FBAR for the 2010 calendar year must arrange for such FBAR to be delivered to the Treasury Department at the address specified in the FBAR instructions by June 30, 2011. For a further discussion of the FBAR requirement, please see our client alerts dated June 8, 2010: [FBAR Redux: Upcoming Deadline for Pension Plans](#), March 14, 2010: [FinCEN Issues Final Rules on FBAR](#) and June 16, 2011: [Delayed FBAR Filing For Signatory Authority](#).

For further information about the Notice, these filing requirements, or any other issues related to foreign asset disclosure requirements generally (including FBAR-related matters), please contact any of the attorneys listed on this client alert, or the Proskauer attorney with whom you normally consult on these matters.

Background

In March 2010, Congress enacted the HIRE Act, which contains (among other provisions) substantial new withholding and information reporting requirements with respect to U.S. persons' foreign bank accounts and financial assets (sometimes referred to as "FATCA," short for the Foreign Account Tax Compliance Act, which was the original legislative vehicle proposing these rules). To date, the IRS has issued two major notices with respect to the implementation of the vast reporting and recordkeeping requirements that these provisions of the HIRE Act impose, and further guidance and substantial regulations are expected.^[2]

Among other provisions, the HIRE Act imposes a reporting requirement on individuals with respect to "specified foreign financial assets" ("SFFAs"), codified at Section 6038D, ^[3] as well as an annual reporting requirement on U.S. persons who hold stock of a PFIC, codified at Section 1298(f). These reporting requirements are effective for taxable years beginning after March 18, 2010.

Reporting by Individuals in Respect of Specified Foreign Financial Assets

Section 6038D requires that, if any U.S. individual^[4] holds an interest in any SFFA during the taxable year and such SFFAs exceed \$50,000 in aggregate value,^[5] such individual must report on his or her annual tax return all such SFFAs. For this purpose, an SFFA is:

- a "financial account" at a "foreign financial institution";

OR any of the following assets:

- stocks or securities issued by foreign persons,
- any other financial instrument or contract held for investment that is issued by or has a counterparty that is not a U.S. person, and
- any interest in a “foreign entity”;

provided, in the case of the last three categories, that such asset is not held in an account maintained by a “financial institution.”[\[6\]](#)

The Notice announces that individuals subject to Section 6038D will be required to file new IRS Form 8938, “Statement of Specified Foreign Financial Assets.” [The IRS released a draft of Form 8938 on June 22, 2011](#) but the draft form contains several references to the instructions, which the IRS has not released. The draft Form 8938 is subject to change and should not be relied upon or filed until a final version is released. Once Form 8938 is finalized and instructions are released, affected taxpayers will be required to complete and attach a Form 8938 for each taxable year in which filing was suspended by the Notice (a “Suspended Year”) to their next tax or information return filed with the IRS (the “Catch-Up Requirement”). If an affected taxpayer complies with the Catch-Up Requirement, the terms of the Notice provide that Suspended Year forms filed will be treated as having been filed on the same date as the original tax return for the Suspended Year for purposes of the statute of limitations, a result favorable to taxpayers.

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