**INFORMATION RETURN CHECKLIST & COMPLIANCE OPTIONS**

Individuals who have foreign income, foreign assets, or foreign transactions should be mindful that there are many disclosures required when filing their U.S. income tax returns. Each of these information returns have its own penalties when there is a failure to file these forms or a failure to substantially comply with these requirements. Below is a checklist of some common information reporting forms an individual with foreign income, foreign assets, or foreign transactions may be required to file. However, an individual should not attempt to prepare these information returns without engaging a return preparer with experience dealing with these situations. If there an individual failed to file one or more of these forms in prior tax years, the individual should consult with a tax attorney with a focus on international tax law to discuss his/her compliance options. To schedule a consultation with our office, please contact us at (925)202-2922.

**COMMON INFORMATION REPORTING FORMS**

* Foreign Bank Account Reporting Form – FinCen 114 (FBAR)

Used for reporting foreign financial accounts when the aggregate account balance that a U.S. person has a financial interest in and/or signatory authority over exceeds $10,000 during any day of the calendar year. Foreign financial accounts include foreign financial products, such as foreign life insurance policies with cash surrender value. Financial interest may include ownership of the account through other entities. The penalty for noncompliance is up to $10,000 per year in a nonwillful situation and the greater of $100,000 or 50% of the account balance at the time of violation in a willful situation.

* Form 8938

Used for reporting “specified foreign financial assets,” which are generally foreign financial accounts, foreign financial products, interests in foreign entities, etc. The reporting requirement is triggered when the aggregate value/account balance exceeds a certain threshold. The threshold is dependent on whether the individual is filing as a single person or jointly with a spouse and whether the person lives in the U.S. or abroad. The penalty for noncompliance is $10,000 initially. Upon notification by the IRS and continued noncompliance after 90 days, the IRS can impose additional penalties of $10,000 per month up to $50,000. The maximum penalty per year is $60,000.

* Form 5471

Used for reporting a taxpayer’s interest in a foreign company. The reporting requirement is triggered in various scenarios, including ***but not limited to*** when the individual directly, indirectly, or constructively (i) controls a foreign company, (ii) owns 10% or more of the foreign company’s stock if the company is controlled by “U.S. shareholders,” or (iii) acquires 10% or more of a foreign company’s stock and is an officer or director of the foreign company. Depending on how the reporting requirement is triggered, the penalty is the same as Form 8938 and can result in the reduction of foreign tax credits.

* Form 8621

Used for reporting a taxpayer’s direct or indirect interest in foreign companies known as “passive foreign investment companies” (PFIC). PFICs are generally foreign companies in which (i) 75% or more of its income is passive income or (ii) 50% or more of the company’s assets produce passive income or are held for the production of passive income. Most foreign mutual funds are PFICs. There is no specific penalty associated with this form.

* Form 926

Used for reporting certain transfers to a foreign corporation, including contribution to capital and liquidating distributions. The penalty is 10% of the fair market value of the property transferred - capped at $100,000 unless the failure is due to willful neglect.

* Form 3520

Used for reporting certain transactions with foreign trusts and the receipt of large gifts or bequests from a foreign person. As to large gifts or bequests, the reporting requirement is triggered when the amount is over $100,000 from a foreign individual or foreign estate or over $15,797 from a foreign company or foreign partnership. The penalty for the failure to file Form 3520 depends on the event triggering the reporting requirement. For example, the penalty could be a minimum of $10,000, 35% of the gross value of the property transferred to the foreign trust, or 5% of the gift for each month of continued noncompliance up to 25%.

* Form 3520-A

Used by foreign trusts for reporting when a U.S. person is treated as the owner of the trust asset/income pursuant to U.S. tax law and for providing information to U.S. beneficiaries. The penalty imposed on the U.S. owner is the greater of $10,000 or 5% of the gross value of the foreign trust’s assets treated as owned by the U.S. person.

**ADDITIONAL CONSEQUENCES OF NONCOMPLIANCE**

* Statute of Limitations
* Other than the FBAR, the statute of limitations for assessing penalties for the failure to file an accurate information reporting form does not begin until three years after the form is filed.
* As to the failure to file certain information returns, e.g. Form 8938 and Form 5471, the statute of limitations remains open on the ***entire*** income tax return until three years after the information return is filed.
* Increased Penalty on Income Tax Deficiency

When a taxpayer files an inaccurate return and there is a tax deficiency, the penalty is generally 20% of the tax deficiency. Where the tax deficiency is attributed to certain foreign assets, the penalty is

increased to 40%.

**OPTIONS FOR COMING INTO COMPLIANCE**

* Offshore Voluntary Compliance Program

This program is typically reserved for taxpayers whose noncompliance is willful or criminal. As part of participating in the program, the taxpayer is generally required to:

* file/amend up to eight years (disclosure period) of income tax returns, associated information returns, and FBARs;
* pay any resulting deficiency for the disclosure period, 20% penalty on the deficiency, late payment or late filing penalty, and interest on the deficiency;
* 27.5% or 50% penalty based on the highest maximum value of noncompliant foreign assets during the disclosure period on the failure to file various information returns in lieu of the separate penalties for each form each year; and
* provide various documents as part of the submission.

This program will be closed on September 28, 2018.

* Streamlined Filing Compliance Procedure

This program is reserved for taxpayers whose noncompliance is not willful. As part of participating in the program, the taxpayer is generally required to:

* file or amend up to three years of income tax returns, associated information returns;
* file or amend six years of FBARs,
* pay any resulting tax deficiency with interest for the years for which income tax returns are filed/amended; and
* 0%-5% penalty based on the year-end value/balance of noncompliant assets during the six-year period.
* Delinquent Submission
* As to FBARs, this program is reserved for taxpayers who do not need to participate in the OVDP or Streamlined Filing Compliance Procedure because the taxpayer does not have unreported income or unpaid tax. There is no penalty when the submission is processed and accepted by the IRS. However, the IRS reserves the right to re-examine the issue upon an audit.
* As to other information return, the program is reserved for taxpayers who have “reasonable cause” for the noncompliance. “Reasonable cause” requires the taxpayer to exercise ordinary care and prudence. There is no penalty if reasonable cause is established and accepted by the IRS. However, the IRS reserves the right to re-examine the issue upon an audit.

Disclaimer: The information above is provided for information only and does not include many details which may affect an individual’s tax situation. The information above does not constitute an attorney-client relationship or provision of advice by an attorney. Individuals should consult a qualified tax attorney to evaluate their specific situation.

Please contact our office at (925)202-2922 if you wish to schedule a consultation to discuss your situation.

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Ms. Lin has been practicing tax law since obtaining her juris doctor degree in 2000 from U.C. Berkeley, Boalt Hall School of Law. She is one of about four hundred attorneys certified as a tax specialist by the State Bar of California Board of Legal Specialization.

Ms. Lin has authored several articles published by the bar and is a frequent speaker on a variety of topics. Ms. Lin has been Chair, Vice Chair, Secretary and a member of the Executive Committee of the Tax Section of the Bar Association of San Francisco. She is also a member of the Society of Trust & Estate Practitioners.

Her practice primarily focuses on cross-border tax planning for individuals and businesses, including:

* Representing taxpayers in the Offshore Voluntary Disclosure Program;
* Representing taxpayers in IRS or FTB audit appeals or litigation;
* Tax planning for outbound individuals and businesses;
* Tax planning for inbound individuals and investments, such as pre-immigration tax planning, U.S. real estate and syndicated fund targeting foreign investors;
* International estate planning for foreign individuals with U.S. beneficiaries; and
* International estate planning for U.S. individuals with foreign assets.