

To: Our Clients and Friends

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## Expanded US Tax Reporting and Anti-Abuse Provisions Designed to Discourage U.S. Persons from Hiding Income and Assets in Foreign Countries

The Foreign Account Tax Compliance Act (FATCA), enacted in 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act added Section 6038D to the Internal Revenue Code which requires any U.S. individual taxpayer ("Taxpayer") holding interests in "specified foreign financial assets", that exceed in the aggregate a certain value threshold, to attach newly issued IRS Form 8938 to the Taxpayer's annual income tax return. Reporting applies for assets held in taxable years beginning after March 18, 2010. For most taxpayers this will be the 2011 tax return they file during the 2012 tax filing season. Failure to report specified foreign financial assets on Form 8938 may result in a penalty of \$10,000 (and a penalty up to \$50,000 for continued failure after IRS notification). Further, underpayments of tax attributable to non-disclosed foreign financial assets will be subject to an additional substantial understatement penalty of 40 percent.

The new Form 8938 filing requirement is in addition to and does not replace or otherwise affect a taxpayer's obligation to file an FBAR (Report of Foreign Bank and Financial Accounts) which is due on June 30, 2012.

A "U.S. individual taxpayer" includes (i) residents under U.S. domestic law who claim to be non residents under a income tax treaty; and (ii) non resident aliens who file joint U.S. tax returns with their U.S. taxpayer spouses. It is anticipated that these rules will be expanded to require filing by various US entities but those rules will not take effect until the Form 8938 reporting is due for the 2012 tax year at the earliest.

For purposes of section 6038D, a specified foreign financial asset is any financial account maintained by a foreign financial institution and, to the extent not held in an account at a financial institution: (i) any stock or security issued by any person other than a United States person; (ii) any financial instrument or contract held for investment that has an issuer or counterparty that is not a United States person; and (iii) any interest in a foreign entity. For each custodial or depository account with a foreign financial institution, a Taxpayer is required to disclose the maximum value of the account, the name and address of the foreign financial institution and the account number of such account. For each stock or security, a Taxpayer is required to disclose the maximum value of the stock or security, describe the stock or security and disclose the name and address of the issuer of such stock or security. For other assets, the Taxpayer is required to disclose the maximum value

of such other asset, describe the asset and disclose the name and address of the issuers or counterparties, or both, to such other asset.

Assets used in a trade or business, rather than being held for investment, are not specified foreign financial assets. Moreover, stocks or securities held by a domestic financial institution are not specified financial assets and do not have to be reported on Form 8938. A beneficial interest in a foreign trust or a foreign estate is not a specified financial foreign asset of the Taxpayer unless the Taxpayer knows or has reason to know based on readily accessible information of the interest. Receipt of a distribution from the foreign trust or foreign estate is deemed for this purpose to be actual knowledge of the interest.

Form 8938 is required when the total value of specified foreign assets exceeds certain thresholds. For example, a married couple living in the U.S. and filing a joint tax return would not file Form 8938 unless their total specified foreign assets exceed \$100,000 on the last day of the tax year or more than \$150,000 at any time during the tax year. The thresholds for taxpayers who reside abroad are higher. For example in this case, a married couple residing abroad and filing a joint return would not file Form 8938 unless the value of specified foreign assets exceeds \$400,000 on the last day of the tax year or more than \$600,000 at any time during the year.

Form 8938 is not required of Taxpayers who do not have an income tax return filing requirement. In addition specified foreign financial assets that were properly reported on Form 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts," Form 3520-A, "Annual Information Return of Foreign Trust With a U.S. Owner," Form 5471, "Information Return of U.S. Persons With Respect To Certain Foreign Corporations," Form 8621, "Return by a Shareholder of a Passive Foreign Investment Company or a Qualified Electing Fund," Form 8865, "Return of U.S. Persons With Respect To Certain Foreign Partnerships," or Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans do not have to be reported on Form 8938, **although the Form 8938 itself must be filed by such Taxpayers to cross-reference the filing of the other forms.**

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To discuss this issue further, please speak to your Bryan Cave contact, or to:

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