8938- NEW IRS FILING REQUIREMENT,
ALSO FOR U.S. EXECUTIVES WITH NON-U.S. COMPENSATION

The U.S. Foreign Account Tax Compliance Act ("FATCA") has as its principal goal the prevention of tax evasion by U.S. taxpayers who hold non-U.S. assets. Unfortunately, the rules implementing this goal have a very broad reach and may require many U.S.-taxpayer executives with compensation awards based on foreign company stock or guaranteed or provided by a foreign company to file a new form with the Internal Revenue Service ("IRS") as part of their 2011 tax returns, which are generally due on April 15, 2012. The new form is **IRS Form 8938**. The potential penalties for failures to file are up to $10,000 plus up to an additional $50,000 for failures to file after receipt of notice from the IRS, subject to a "reasonable cause" exception. Specifically, the Instructions provide that "foreign financial assets" include any "note, bond, debenture, or other form of indebtedness issued by a foreign person" and "any stock issued by a foreign corporation [or] . . . option or other derivative instrument" with respect to such stock, if not used or held for use in the conduct of a trade or business and not held in a financial account. As a result, compensation arrangements that may subject U.S.-taxpayer executives to the new reporting requirements include the following common types of arrangements, subject to the minimum value thresholds described below:

• Equity compensation awards, including restricted stock, stock options, restricted stock units and phantom stock, of (or relating to stock of) a non-U.S. entity that is the employer or a parent of the employer;

• Deferred compensation arrangements for which the obligor is a non-U.S. entity;

• Certain non-U.S. pension programs.

For these purposes, "U.S.-taxpayer executives" includes U.S. citizens and U.S. resident aliens.

There are reporting thresholds set forth in the Instructions. For example, married taxpayers filing joint returns and living in the U.S. are not required to file Form 8938 if the total value of their "foreign financial assets" (generally, the types of awards described above plus amounts held in accounts at foreign financial institutions) is $100,000 or less on the last day of the tax year and $150,000 or less on each day of the tax year. For married taxpayers filing joint returns and living outside the U.S., the equivalent thresholds are $400,000 and $600,000, respectively. For single taxpayers, the corresponding thresholds are $50,000 and $75,000 for those living in the U.S., and $200,000 and $300,000 for those living outside the U.S.
The value of compensation awards for these purposes is generally defined only as the "fair market value" of the awards. No guidance is given concerning the treatment of vesting conditions, or the appropriate method for the valuation of options or other similar rights. There are special rules for the valuation of deferred compensation accounts and pension entitlements set forth in the instructions.