

Updates on Offshore Voluntary Disclosure Initiative (OVDI), Foreign Bank Account Report (FBAR), Form 8938 Specified Foreign Financial Assets

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FBAR- Reporting Requirement

- U.S. persons holding any financial interest in, or authority over, bank or other financial accounts in a foreign country must report these accounts
- Form TD F 90-22.1
 - Must be received by June 30 following year in which aggregate account balance exceeds \$10,000
 - Beginning with 2013 tax year, electronic filing mandatory
- No extensions of time to file
- Bank Secrecy Act (Title 31)
- FinCEN delegated enforcement duties to IRS in 2003



FBAR- Persons Who Must File

- U.S. person
 - U.S. citizen or resident
 - Non-resident under treaty tie-breaker must still file FBAR
 - An entity formed under laws of U.S. (corporations, partnerships, LLCs, estates, trusts)



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FBAR- Financial Accounts

- Financial accounts include bank or securities accounts, insurance and annuity policies with a cash value, mutual funds or similar pooled funds
- Exceptions-
 - Bonds, notes, stock certificates
 - hedge funds, currently (but see FATCA)



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FBAR- Foreign Country

- Any geographic area outside of the United States
- Situs of the account, not the situs of the institution is determinative
 - Account with a foreign bank at a branch in US is not a foreign account
 - Account with a US bank at a branch outside US is a foreign account



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FBAR- Financial Interest

- A U.S. person has a financial interest in account if owner of record is
 - Such U.S. person
 - Person acting on behalf of the U.S. person
 - An entity majority owned by the U.S. person
 - A grantor trust where U.S. person is owner
 - A trust in which U.S. person has majority present beneficial interest



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FBAR- Signature or Other Authority

- An individual has signature or other authority if he has authority (alone or in conjunction with another) to control funds or other assets in a financial account by direct communication (whether in writing or otherwise) to the person maintaining the account
- The test is whether the financial institution will act upon a direct communication from the individual regarding the *disposition* of assets in the account (*i.e.* investment authority excluded)



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FBAR- Exceptions from Filing

- Officers/employees as to company accounts of following:
 - Banks subject to U.S. financial regulation
 - Publicly traded companies
 - Financial institutions subject to SEC
 - Companies with securities registered under §12(g) of the SEA
 - Companies with more than \$10M in assets and more than 500 shareholders
- Officers/employees of foreign company, and who reside in foreign country must only complete identification portion of form
- Corporations or other entities that own majority interest in other entity can file consolidated report



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FBAR- Exceptions from Filing (Cont'd)

- Persons with financial interest or authority over 25 or more accounts need only report the number of accounts and certain basic information
 - Identifying information
 - Accounts being reported
- Report by filing spouse satisfies requirement of non-filing spouse over all joint accounts



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FBAR- Penalties

- Penalties for failure to file:
 - Willful violation- greater of \$100k or 50% of highest balance in account
 - It is possible that penalties may exceed the account balance
 - Non-willful violation- \$10,000
 - Penalty can be avoided for reasonable cause if income from account was reported
- Criminal penalties:
 - Willful violation- \$250,000 and/or 5 years prison
 - Willful violation while violating another law or pattern of illegal activity- \$500,000 and/or 10 years prison



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FBAR- Voluntary Disclosure

- OVDP 2009
 - 20% in lieu of penalty highest account balance
 - Expired October 15, 2009
 - May petition for reduced penalties offered under 2011 program
- OVDI 2011
 - 25% in lieu of penalty
 - Reduced penalties
 - 12.5% for accounts with less than \$75k
 - 5% for limited circumstances (unopened by taxpayer; minimal withdrawal, taxes paid)
 - Expires August 31, 2011



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FBAR- Voluntary Disclosure (Cont'd)

- OVDP 2012
 - 27.5% in lieu of penalty
 - Highest account balance for latest 8 years
 - Assets acquired with unreported income
 - Assets producing unreported income
 - Reduced penalties
 - 12.5% for accounts with less than \$75k
 - 5% for limited circumstances (unopened by taxpayer; minimal contact, limited withdrawal, taxes paid)
 - Open indefinitely; program can terminate anytime
 - Consider withdrawal



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Form 8938- Statement of Specified Foreign Financial Assets

- Super FBAR
- Section 6038D
- Individual taxpayers
 - Starting in 2011
- Domestic entities:
 - Notice 2013-10
 - Effective by the specified date from final regulation after 12/31/2012



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Form 8938- Who Must File

- *Individual* US taxpayers who are required to file an income tax return must file Form 8938
- Thresholds:
 - Single living in US: \$50K at 12/31 or \$75k during year
 - Married living in US: \$100K at 12/31 or \$150k during year
 - Single living abroad: \$200K at 12/31 or \$300k during year
 - Married living abroad: \$400K at 12/31 or \$600k during year



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Form 8938- What Must Be Reported

- Financial accounts (savings, checking, brokerage, CDs)
- Stocks and bonds
- Partnership interests
- Insurance contracts
- Beneficiary interests in estate or trust



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Form 8938- What is Excluded from Reporting

- Real estate
- Currency
- US mutual funds, brokerage accounts, IRAs, 401k invested in foreign securities
- Indirect interests held through entities



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Form 8938- Duplicative Filing

- Specified foreign financial assets reported on forms 3520, 3520A, 5471, 8621, 8865, or 8891 (new in 2012) need not be reported on Form 8938
- Form 8938 must still be filed to complete part IV

Part IV Excepted Specified Foreign Financial Assets (see instructions)

If you reported specified foreign financial assets on the following forms, check the appropriate box(es). Indicate number of forms filed. You do not need to include these assets on Form 8938 for the tax year.

<input type="checkbox"/> 3520	Number of forms _____	<input type="checkbox"/> 3520-A	Number of forms _____	<input type="checkbox"/> 5471	Number of forms _____
<input type="checkbox"/> 8621	Number of forms _____	<input type="checkbox"/> 8865	Number of forms _____	<input type="checkbox"/> 8891	Number of forms _____

Form 8938 (11-2012)



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Form 8938- Penalties

- Penalties for failure to file:
 - \$10,000
 - Additional \$10,000 up to maximum of \$50,000 if failure continues after having been notified by IRS



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2011, 2012 Filing Seasons

- Confusions on what to disclose on Form 8938
- Plan ahead on value reported if one is to expatriate from USA



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Comparison Chart of Form 8938 vs. FBAR



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	Form 8938, Statement of Specified Foreign Financial Assets	Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR)
Reporting Threshold (Total Value of Assets)	\$50,000 on the last day of the tax year or \$75,000 at any time during the tax year (higher threshold amounts apply to married individuals filing jointly and individuals living abroad)	\$10,000 at any time during the calendar year
When do you have an interest in an account or asset?	If any income, gains, losses, deductions, credits, gross proceeds, or distributions from holding or disposing of the account or asset are or would be required to be reported, included, or otherwise reflected on your income tax return	Financial interest: you are the owner of record or holder of legal title; the owner of record or holder of legal title is your agent or representative; you have a sufficient interest in the entity that is the owner of record or holder of legal title. Signature authority: you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account.
How are maximum account or asset values determined and reported?	Fair market value in U.S. dollars in accord with the Form 8938 instructions for each account and asset reported Convert to U.S. dollars using the end of the taxable year exchange rate and report in U.S. dollars.	Use periodic account statements to determine the maximum value in the currency of the account. Convert to U.S. dollars using the end of the calendar year exchange rate and report in U.S. dollars.
Penalties	Up to \$10,000 for failure to disclose and an additional \$10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of \$60,000; criminal penalties may also apply	If non-willful, up to \$10,000; if willful, up to the greater of \$100,000 or 50% of account balances; criminal penalties may also apply



Types of Foreign Assets and Whether They are Reportable		
Financial (deposit and custodial) accounts held at foreign financial institutions	Yes	Yes
Financial account held at a foreign branch of a U.S. financial institution	No	Yes
Financial account held at a U.S. branch of a foreign financial institution	No	No
Foreign financial account for which you have signature authority	No, unless you otherwise have an interest in the account as described above	Yes, subject to exceptions
Foreign stock or securities held in a financial account at a foreign financial institution	The account itself is subject to reporting, but the contents of the account do not have to be separately reported	The account itself is subject to reporting, but the contents of the account do not have to be separately reported
Foreign stock or securities not held in a financial account	Yes	No
Foreign partnership interests	Yes	No
Indirect interests in foreign financial assets through an entity	No	Yes, if sufficient ownership or beneficial interest (i.e., a greater than 50 percent interest) in the entity. See instructions for further detail.
Foreign mutual funds	Yes	Yes
Domestic mutual fund investing in foreign stocks and securities	No	No
Foreign accounts and foreign non-account investment assets held by foreign or domestic grantor trust for which you are the grantor	Yes, as to both foreign accounts and foreign non-account investment assets	Yes, as to foreign accounts



Types of Foreign Assets and Whether They are Reportable		
Foreign-issued life insurance or annuity contract with a cash-value	Yes	Yes
Foreign hedge funds and foreign private equity funds	Yes	No
Foreign real estate held directly	No	No
Foreign real estate held through a foreign entity	No, but the foreign entity itself is a specified foreign financial asset and its maximum value includes the value of the real estate	No
Foreign currency held directly	No	No
Precious Metals held directly	No	No
Personal property, held directly, such as art, antiques, jewelry, cars and other collectibles	No	No
'Social Security'- type program benefits provided by a foreign government	No	No



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Tax Practitioner / AICPA Coordination (FBAR)

- Comment letter submitted to FinCEN and IRS in early 2013 on simplifying duplication and encourage compliance
- Box for Direct or indirect ownership
- Define joint account



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Tax Practitioner / AICPA Coordination (FBAR)

- FinCEN mandatory e-filing after June 30, 2013.
- Coordination and improvement of software
- Signature section to include spouse



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Tax Practitioner / AICPA Coordination (8938)

- Define how to value an asset
- Clarify foreign rental contracts if taxpayers own property directly (is it specified foreign financial asset)



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