

FBAR vs. Form 8938

What to file if you have accounts abroad

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Learning Objectives

- Identify when a taxpayer has a foreign reporting obligation
- Recognize the overlap of reporting mandates stemming from regulations enacted decades apart
- Compile the information necessary to properly report foreign accounts & assets
- Implement best practices to help clients avoid penalties & potential criminal prosecution
- Understand the options available to those who have been non-compliant

We'll answer these questions...

- What's the difference between an FBAR & Form 8938?
- How are account & asset values determined?
- What can tax pros do to help?
- What about all those other FATCA forms?
- Where do we go from here?



Breaking News!

August 2013

DOJ introduces Swiss Bank Program allowing participating institutions to avoid criminal prosecution in exchange for full disclosure [84 have signed on]

- 1934: Swiss Banking Law prohibits disclosure of client info
- 2017: Switzerland signs intl info exchange agreement & shares details of 3.1 million bank accounts held by foreigners
- 2019: Switzerland receives financial data from 75 countries and shares data with 63 (81 countries starting in 2021).

May 2016

Panama Papers leaked

- 11.5 million files identifying international politicians, business leaders & celebrities involved in suspicious financial transactions

March 2021

141 countries have signed on to the Convention on Mutual Administrative Assistance (a.k.a. Global FATCA) to share tax & financial info

Running scared...

2015: Even the Vatican signed on!

- 62nd signatory to Treasury's intergovernmental agreement to implement FATCA



THE RESULT:

- ca. 56,000 US taxpayers have voluntarily disclosed hidden offshore accounts
- Paid > \$11 billion in back taxes





Foreign Bank Account Reporting

- FBAR
- Mandated by Bank Secrecy Act of 1970
- Later linked to counter-terrorism efforts
- US person must file annual report with US Treasury if at any time during calendar year he had:
 - A financial interest in or signature authority over
 - Foreign financial account(s)
 - With aggregate value > \$10,000



Foreign Asset Reporting

- FATCA
- Mandated by Foreign Account Tax Compliance Act of 2010
- US taxpayer must submit *Form 8938* with income tax return if the total value of specified foreign assets exceeds threshold amounts
- May be in addition to or in lieu of foreign account reporting

What's the difference?

- Regulatory Authority
 - FBAR: Dept. of Treasury
 - *Form 8938*: Internal Revenue Service [file with tax return]
- Privacy & Confidentiality:
 - FBAR is available to all law enforcement agencies
 - *Form 8938* is protected by IRC §6103
- Statute of Limitations
 - FBAR: Generally 6 years
 - *Form 8938*: 3 years if filed or 6 years if income associated with foreign asset omitted from return

FBAR mandated by Bank Secrecy Act of 1970
Form 8938 filing requirement enacted in 2010



Polling Question # 1

Foreign asset reporting was mandated under the Bank Secrecy Act of 1970.

- True
- False

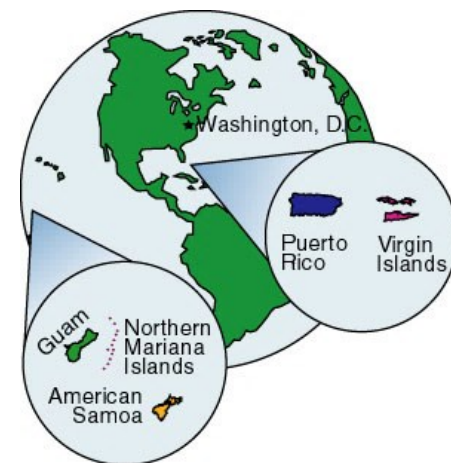
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FBAR: Definitions

- US person = US citizen or resident or any entity organized under US law
 - Corps, partnerships, LLCs, trusts & estates
 - Must file even if disregarded for tax purposes
- Signature authority grants control of account
- Financial interest if person holds title directly or indirectly, or is beneficial owner of the account
- Foreign account if held outside of the US
- Financial account incl. monetary & non-monetary assets but not real estate or personal property

FBAR if US Citizen or Resident

- 50 states & DC & Indian lands
- US Territories: Have own govt. & tax systems
 - American Samoa, Northern Mariana Islands, Puerto Rico, Guam and the US Virgin Islands
- US Possessions: Subject to US govt. & tax system
 - Midway & Palmyra Atolls; Baker, Howland, Jarvis, Johnston, Navassa & Wake Islands; Kingman Reef; Guantanamo Bay



FBAR if Resident Alien

- Resident Alien
 - Green Card or Substantial Presence (183 days)
 - Non-resident Alien (NRA) treated as Resident Alien (1st Year Election)
 - Accidental American (citizen by birth but lives abroad)
- NOT subject to FBAR filing:
 - NRA who files joint return with Spouse (Marriage Election)
 - Foreign diplomat if residing in sovereign embassy
- Dual Status (forgn citizen *and* US resdnt alien but living outside US)
 - Never filed *I-407* to abandon Green Card but did file *Form 8833* to claim **treaty position** to be treated as non-resident → no FBAR required
 - Never filed *I-407* but forfeited right to live in US by living **permanently** in country with no US tax treaty → FBAR required

EXAMPLES: Authority & Interest

- Individual has power to direct how account is invested but *cannot withdraw* funds
 - ➔ no FBAR since no “signature authority”
- US resident has PoA over parents’ reportable accounts in Thailand
 - ➔ must file FBAR whether or not PoA exercised
- US citizen infant has foreign accounts
 - ➔ parent must file for baby since FBAR *applies to all ages*
(even if infant does not have a US income tax filing requirement)
- Duchess of Sussex (Meghan Markle) children Archie Harrison & Lilibet Diana Mountbatten-Windsor
 - ➔ have filing requirements until US citizenship renounced

Financial Accounts

Reportable

- Bank accounts
- Brokerage accounts (stocks, bonds, futures & options)
- Mutual funds
- Annuities
- Insurance policies with cash value
- Online gambling accounts
- (Bitcoin)



NOT Reportable

- Government entity accounts (e.g. state college or govt. benefit plan)
- International financial institutions (e.g. World Bank & IMF)
- US military banking facilities (regardless of location)
- Correspondent accts (a.k.a nostro accts that handle nominee trxn)
- IRAs and tax-qualified plans (if participant or beneficiary)

EXAMPLES: Financial Accounts

- Individual owns Canadian RRSP & TFSA accounts (similar to IRA & ROTH accounts in US)
 - must file FBAR since IRA exemption applies only if US account

Form 8891 no longer required since US taxpayers now automatically qualify for tax deferral [Rev Proc 2014-55]

- US citizen has foreign account that holds certificates representing an interest in gold bullion
 - must file FBAR since reportable whether cash or non-monetary assets

Valuation

- Each account must be valued separately at *highest value* during calendar year
 - Based on monthly or quarterly statements issued by financial institution
- Convert to US currency using exchange rate on December 31st
 - Use historical Treasury rate or any accepted currency converter
- Aggregate all computed values to determine if reporting threshold satisfied

EXAMPLE 1

Mark closes \$8K account at Bank A; transfers entire balance to Bank B

➔ no FBAR since assets are not double-counted

EXAMPLE 2

Mary has \$8K at Bank A which she transfers to Bank B

Mary has another account with \$4K at Bank C

➔ must file FBAR since aggregate value of accounts at Bank A [later Bank B] *and* Bank C exceed reporting threshold

Joint Accounts

- Spouses may file combined FBAR if *all* accounts are jointly held; otherwise must file separate reports which *each* include *entire* account value
- Joint accounts with non-spouses will be reported on multiple FBARs & thus reported more than once
- Entities may file consolidated reports
- Truncated filing permitted if > 25 accounts



Exempt from Filing

- Participants/beneficiaries of qualified retirement plans
BEWARE: Most foreign retirement accts are not “qualified” → subject to reporting
- Trust beneficiary if trust has filed
- US entity named in a consolidated FBAR
- Officer/employee of bank or SEC-regulated financial institution if account is owned by the financial institution



Polling Question # 2

To determine if the FBAR reporting threshold has been met, each account is valued separately at its maximum value and then aggregated with all other accounts.

- True
- False

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Filing the FBAR

- FBAR now known as *FinCEN 114*
- Due dates
 - 4/15 → 6-month *automatic* extension
 - 6/15 if living abroad → 4-month *automatic* extension
- Mandatory e-file
 - Tax pros may use e-file software available with tax prep program
 - Tax pros & individual filers may use BSA E-Filing System available at bsaefiling.fincen.treas.gov
- Tax pros must keep signed e-file auth Form 114a on file for 5 years

BSA = Bank Secrecy Act

FinCEN = Financial Crimes Enforcement Network



Report of Foreign Bank and Financial Accounts

Version Number: 1.0

FinCEN Form 114 OMB No. 1506-0009 Effective October 1, 2013

The FBAR must be received by the Department of Treasury on or before June 30th of the year immediately following the calendar year being reported. The June 30th filing date may not be extended.

IMPORTANT : After you have completed this FBAR, you must **Sign the Form** and **Save** in order to activate the **Ready to File** button, which will direct you to a page where you can attach and submit your report. Click **Validate** to identify missing or incorrectly formatted data at any time during preparation of this report. Click **Print** to print a copy of this report for record keeping purposes.

Filing name (e.g. SMITH FBAR 2013)

Sign the Form

Save

Validate

Print

Ready To File

Report of Foreign Bank and Financial Accounts

Home

Filer Information

Financial Account Owned Separately/Jointly

No Financial Interest Account Information

Consolidated Report

Signature Information

Part II Information on Financial Account(s) Owned Separately 1 of 1



15 Maximum account value

15a Maximum account value unknown

16 Type of account

17 Financial institution name

18 Account number or other designation


19 Address

20 City

21 State

22 Foreign postal code

23 Country/Region

<p>Form 114a</p> <p>Department of the Treasury Financial Crimes Enforcement Network (FinCEN)</p> <p>May 2015</p>	<h2 style="margin:0;">Record of Authorization to Electronically File FBARs</h2> <p style="margin:0;">(See instructions below for completion)</p> <p style="margin:0;"><u>Do not send to FinCEN. Retain this form for your records.</u></p> <p style="margin:0;">The form 114a may be digitally signed</p>	
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Part I **Persons who have an obligation to file a Report of Foreign Bank and Financial Account(s)**

1. Owner last name or entity's legal name	2. Owner first name	3. Owner M. I.
4. Spouse last name (if jointly filing FBAR - see instructions below)	5. Spouse first name	6. Spouse M. I.

I/we declare that I/we have provided information concerning _____ (enter number of accounts) foreign bank and financial account(s) for the filing year ending December 31, _____ to the preparer listed in Part II; that this information is to the best of my/our knowledge true, correct, and complete; that I/we authorize the preparer listed in Part II to complete and submit to the Financial Crimes Enforcement Network (FinCEN) a Report of Foreign Bank and Financial Accounts (FBAR) based on the information that I/we have provided; and that I/we authorize the preparer listed in Part II to receive information from FinCEN, answer inquiries and resolve issues relating to this submission. I/we acknowledge that, notwithstanding this declaration, it is my/our legal responsibility, not that of the preparer listed in Part II, to timely file an FBAR if required by law to do so.

7. Owner signature (Authorized representative if entity)	8. Date MM DD YYYY	9. Owner or entity TIN	10. TIN type a <input type="checkbox"/> EIN b <input type="checkbox"/> SSN/ITIN c <input type="checkbox"/> Foreign
11. Spouse signature	12. Date MM DD YYYY	13. Spouse TIN	14. TIN type a <input type="checkbox"/> EIN b <input type="checkbox"/> SSN/ITIN c <input type="checkbox"/> Foreign

Part II **Individual or Entity Authorized to File FBAR on behalf of Persons who have an obligation to file.**

15. Preparer last name	16. Preparer first name	17. Preparer M.I.	18. Preparer PTIN
19. Address	20. City	21. State	22. ZIP/postal code
23. Country code	24. Preparer's (item 15) employer's (Entity) name	25. Employer EIN	26. Preparer's signature

Instructions for completing the FBAR Signature Authorization Record



Polling Question # 3

The due date of FinCEN 114 is April 15th of the year following the reportable calendar year but is automatically extended to June 30th.

True

False

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Filing Tips

- To amend: Open saved file, check “Amendment” box at top of form, enter corrections, save & re-submit electronically
- Income generated by foreign accounts *must* be included on tax return (Schedule B)
 - Checkboxes in Part III must be marked
 - Courts have held that signing a tax return with Schedule B attached constitutes knowledge of FBAR requirements

		Yes	No
Part III Foreign Accounts and Trusts <small>(See instructions on back.)</small>	7a At any time during 2014, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions		
	If “Yes,” are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements		
	b If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located ▶		
	8 During 2014, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If “Yes,” you may have to file Form 3520. See instructions on back		

For Paperwork Reduction Act Notice, see your tax return instructions. Cat. No. 17146N Schedule B (Form 1040A or 1040) 2014

FBAR Penalties



- Unintentional failure to file – max. \$10K/account*
- Willful violation – greater of \$100K* or 50% of acct value computed on *per-year basis* AND possible criminal sanctions (\$250K max + 5 yrs jail)
 - Govt must prove voluntary, conscious & intentional act
 - Supreme Ct: “willful” requires knowledge of reporting req. & specific intent to commit crime
 - IRS Manual: “willful” if made conscious effort to avoid learning about filing req.

* Inflation adjusted (effctv 1/24/22): \$14,489 for non-willful & \$144,886 for willful violations

EXAMPLES

- Hyatt funneled \$1.6 million from the sale of duty-free alcohol & tobacco to Panamanian account
→ \$855K penalty (= 50% of highest balance) + jail
- Horsky (bus. prof.) invested in start-up companies over 15 years & hid \$200 million in Swiss accts
→ \$100 million civil penalty + \$13 million taxes owed + \$250K criminal penalty + 7 months jail
- Paul Manafort failed to report 31 overseas accounts valued > \$61 million but sentenced for only *one* FBAR violation b/c prosecutors could not prove that he controlled all accounts
→ 47 months jail

FBAR Penalties 2.0

As per IRS Memo (2015)

- Penalty for non-willful limited to \$10K *per year* [not per account]
- May be waived for reasonable cause if taxpayer has taken corrective action
- Penalty for willful violations over multiple years is limited to 50% of highest-ever aggregate balance & allocated on pro-rata basis to each year of failure

EXAMPLE

Taxpayer did not report foreign accounts: \$200K in 2021, \$100K in 2020, \$50K in 2019

➔ maximum penalty = \$100K (= 50% of \$200K) allocated:

- \$57,143 for 2021 (= $\$200K \div \$350K \times \$100K$)
- \$28,571 for 2020 (= $\$100K \div \$350K \times \$100K$)
- \$14,286 for 2019 (= $\$50K \div \$350K \times \$100K$)



Penalties: Misc Rules

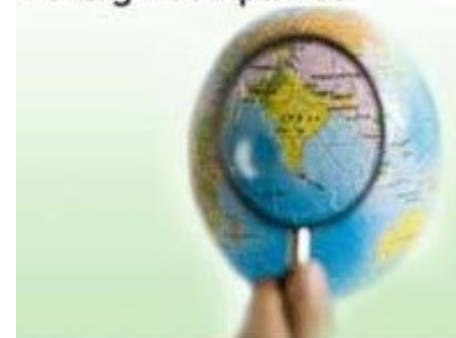
- Safe Harbor: If foreign income reported (Schedule B) and tax paid (Form 1040), IRS will not impose penalty when missing FBARs voluntarily filed
- Penalty assessed independently to each account co-owner based on ownership percentage
- Executor liable for decedent's delinquent filings (cannot request discharge for FBAR)
- Statute of Limitations: 6 years from due date of FBAR, whether or not filed



Foreign Asset Reporting

- Must file *Form 8938* with US tax return if specified foreign financial assets exceed certain thresholds
 - US citizens & resident aliens
 - NRA who claims Marriage Election [**REMINDER:** *Not* req'd to file FBAR]
 - NRAs if bona fide resident of American Samoa or Puerto Rico [**REMINDER:** *Also* subject to FBAR filing req.]
 - Dual Status for the “resident” part of the year
 - Specified entities (domestic corp, partnership or trust)
- *Form 8938* not required if also filing
 - *Form 926* (transfers of property to foreign corp)
 - *Form 3520* (foreign trusts & gifts)
 - *Form 5471* (officers & directors of foreign corp)
 - *Form 5472* (related party transactions with foreign corp)
 - *Form 8621* (passive foreign investment companies)
 - *Form 8865* (foreign partnerships)
- Due date for TY'21 *Form 8938* is April 15th
(NO 8938 due if no 1040 req'd)

Foreign Companies



Specified Assets

- Depository or custodial accounts
- Stocks & securities
- Foreign pension & deferred compensation plans (e.g., Canadian Registered Retirement Savings Plans)
- Financial instruments & investments
- Any interest in a foreign entity
- Gold certificates

Exempt Assets

- Foreign real estate
- Foreign currency
- Mutual fund that owns foreign stocks & securities
- Account at US branch of foreign financial institution
- Account at foreign branch of US financial institution
- Foreign social security
- Collectibles if held directly

NOTE: Gold *certificates* are reportable



FBAR vs. 8938

	Reportable on FBAR	Reportable on Form 8938
Acct at foreign branch of US financial instn	Yes	No
Account with signature authority	Yes	No
Indirect interest through an entity	Yes (if >50% interest)	No
Foreign securities not in financial acct	No	Yes
Foreign partnership interest	No	Yes
Foreign hedge funds & private equity funds	No	Yes



Polling Question # 4

Specified foreign financial assets for Form 8938 reporting include all but

- Foreign pension accounts.
- Foreign social security benefits.
- Foreign brokerage accounts.
- Ownership in a foreign partnership.

Filing Thresholds

	Single or MFS	MFJ
Domestic – living in the US	\$50K on 12/31 OR \$75K at any time	\$100K on 12/31 OR \$150K at any time
Foreign – living outside of the US	\$200K on 12/31 OR \$300K at any time	\$400K on 12/31 OR \$600K at any time

Valuation

- Asset value is based on highest fair market value of *each* account during calendar year

NOTE: If assets are transferred between accounts, each account must be independently valued & then aggregated with all others to determine if threshold is met → as a result, assets could be double-counted

EXAMPLE

Domestic spouses have \$90K in Account A & \$5K in Account B

→ no filing requirement

BUT if \$80K transferred from A to B

→ must file since highest value of each account (\$90K + \$85K) exceeds threshold

- Converted to US dollar at applicable rate *at year-end*
- Use Treasury Dept. Financial Management Service rate at [fiscal.treasury.gov](https://www.fiscal.treasury.gov) or any accepted currency converter (e.g., OANDA)

Form **8938**

(Rev. December 2014)
Department of the Treasury
Internal Revenue Service

Statement of Specified Foreign Financial Assets

Information about Form 8938 and its separate instructions is at www.irs.gov/form8938.
Attach to your tax return.

OMB No. 1545-2106

Attachment
Sequence No. 175

For calendar year 20 or tax year beginning 20 and ending 20

If you have attached continuation statements, check here Number of continuation statements _____

Name(s) shown on return

TIN

Part I Foreign Deposit and Custodial Accounts Summary

- 1 Number of Deposit Accounts (reported on Form 8938) _____
- 2 Maximum Value of All Deposit Accounts \$ _____
- 3 Number of Custodial Accounts (reported on Form 8938) _____
- 4 Maximum Value of All Custodial Accounts \$ _____
- 5 Were any foreign deposit or custodial accounts closed during the tax year? Yes No

Part II Other Foreign Assets Summary

- 1 Number of Foreign Assets (reported on Form 8938) _____
- 2 Maximum Value of All Assets \$ _____
- 3 Were any foreign assets acquired or sold during the tax year? Yes No

Part III Summary of Tax Items Attributable to Specified Foreign Financial Assets (see instructions)

(a) Asset Category	(b) Tax item	(c) Amount reported on form or schedule	(d) Where reported	
			(d) Form and line	(e) Schedule and line
1 Foreign Deposit and Custodial Accounts	1a Interest	\$		
	1b Dividends	\$		
	1c Royalties	\$		
	1d Other income	\$		
	1e Gains (losses)	\$		
	1f Deductions	\$		
	1g Credits	\$		
2 Other Foreign Assets	2a Interest	\$		
	2b Dividends	\$		
	2c Royalties	\$		
	2d Other income	\$		
	2e Gains (losses)	\$		
	2f Deductions	\$		
	2g Credits	\$		

Part IV Excepted Specified Foreign Financial Assets (see instructions)

If you reported specified foreign financial assets on one or more of the following forms, enter the number of such forms filed. You do not need to include these assets on Form 8938 for the tax year.

- 1. Number of Forms 3520 _____
- 2. Number of Forms 3520-A _____
- 3. Number of Forms 5471 _____
- 4. Number of Forms 8621 _____
- 5. Number of Forms 8865 _____
- 6. Number of Forms 8891 _____

Part V Detailed Information for Each Foreign Deposit and Custodial Account Included in the Part I Summary (see instructions)

If you have more than one account to report, attach a continuation statement for each additional account (see instructions).

- 1 Type of account Deposit Custodial
- 2 Account number or other designation
- 3 Check all that apply:
 - a Account opened during tax year
 - b Account closed during tax year
 - c Account jointly owned with spouse
 - d No tax item reported in Part III with respect to this asset
- 4 Maximum value of account during tax year \$ _____
- 5 Did you use a foreign currency exchange rate to convert the value of the account into U.S. dollars? Yes No
- 6 If you answered "Yes" to line 5, complete all that apply.

(a) Foreign currency in which account is maintained	(b) Foreign currency exchange rate used to convert to U.S. dollars	(c) Source of exchange rate used if not from U.S. Treasury Financial Management Service
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For Paperwork Reduction Act Notice, see the separate instructions.

Cat. No. 37753A

Form **8938** (Rev. 12-2014)



Part V Detailed Information for Each Foreign Deposit and Custodial Account Included in the Part I Summary
(see instructions) (continued)

7a Name of financial institution in which account is maintained **b** Reserved

8 Mailing address of financial institution in which account is maintained. Number, street, and room or suite no.

9 City or town, state or province, and country (including postal code)

Part VI Detailed Information for Each "Other Foreign Asset" Included in the Part II Summary (see instructions)

Note. If you reported specified foreign financial assets on Forms 3520, 3520-A, 5471, 8621, 8865, or 8891, you do not have to include the assets on Form 8938. You must complete Part IV. See instructions.

If you have more than one asset to report, attach a continuation statement for each additional asset (see instructions).

1 Description of asset	2 Identifying number or other designation
3 Complete all that apply. See instructions for reporting of multiple acquisition or disposition dates.	
a Date asset acquired during tax year, if applicable	
b Date asset disposed of during tax year, if applicable	
c <input type="checkbox"/> Check if asset jointly owned with spouse d <input type="checkbox"/> Check if no tax item reported in Part III with respect to this asset	
4 Maximum value of asset during tax year (check box that applies)	
a <input type="checkbox"/> \$0 - \$50,000 b <input type="checkbox"/> \$50,001 - \$100,000 c <input type="checkbox"/> \$100,001 - \$150,000 d <input type="checkbox"/> \$150,001 - \$200,000	
e If more than \$200,000, list value \$	
5 Did you use a foreign currency exchange rate to convert the value of the asset into U.S. dollars? <input type="checkbox"/> Yes <input type="checkbox"/> No	
6 If you answered "Yes" to line 5, complete all that apply.	
(a) Foreign currency in which asset is denominated	(b) Foreign currency exchange rate used to convert to U.S. dollars
(c) Source of exchange rate used if not from U.S. Treasury Financial Management Service	
7 If asset reported on line 1 is stock of a foreign entity or an interest in a foreign entity, enter the following information for the asset.	
a Name of foreign entity b Reserved	
c Type of foreign entity (1) <input type="checkbox"/> Partnership (2) <input type="checkbox"/> Corporation (3) <input type="checkbox"/> Trust (4) <input type="checkbox"/> Estate	
d Mailing address of foreign entity. Number, street, and room or suite no.	
e City or town, state or province, and country (including postal code)	
8 If asset reported on line 1 is not stock of a foreign entity or an interest in a foreign entity, enter the following information for the asset.	
<i>Note.</i> If this asset has more than one issuer or counterparty, attach a continuation statement with the same information for each additional issuer or counterparty (see instructions).	
a Name of issuer or counterparty	
Check if information is for <input type="checkbox"/> Issuer <input type="checkbox"/> Counterparty	
b Type of issuer or counterparty	
(1) <input type="checkbox"/> Individual (2) <input type="checkbox"/> Partnership (3) <input type="checkbox"/> Corporation (4) <input type="checkbox"/> Trust (5) <input type="checkbox"/> Estate	
c Check if issuer or counterparty is a <input type="checkbox"/> U.S. person <input type="checkbox"/> Foreign person	
d Mailing address of issuer or counterparty. Number, street, and room or suite no.	
e City or town, state or province, and country (including postal code)	

Penalties

- \$10K for failure to disclose or file timely
- \$10K additional penalty per month after IRS issues 90-day failure to disclose notice
- Maximum penalty = \$50K

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Statute of Limitations

- SOL for *Form 1040* remains open until 3 years after associated *Form 8938* has been properly filed

Even if just one asset omitted from 8938,
entire tax return remains at risk!

- If failure to file *Form 8938* was due to reasonable cause, SOL on *Form 1040* will be limited only to related items
 - IRS requires that taxpayer exercised business care and prudence
 - Taxpayer cannot claim lack of knowledge or exclusive reliance on pro advisers
- SOL extended to 6 years if failure to report gross income > \$ 5,000 (even if *Form 8938* was filed) → 40% accuracy-related penalty may be assessed

State Conformity

- Most states do not (yet ?) conform to FATCA filing requirements
BUT...
- Anyone with CA filing requirement, must attach federal *Form 8938* to state income tax return
 - CA conforms to federal penalty structure → may pay double!
 - CA does not have own voluntary compliance initiative but often mirrors federal determination
 - Does not conform with FBAR mandate





Polling Question # 5

All states conform to the FATCA mandate.

Yes

No

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Non-compliance

- Failure to file requisite returns is costly
- Penalty relief may be available
- Programs are complex & rife with legal minutiae

Tax pro should NOT advise
Taxpayer should seek legal counsel



Privilege

- Client enjoys only *limited* privilege with tax practitioner
 - Non-criminal matters only
- Attorney-client privilege can be extended to tax practitioner via Kovel Letter
 - Accountant hired by legal firm held in contempt of court when he refused to comply with grand jury subpoena → overturned on appeal
 - Privilege is extended if communications made for the purpose of obtaining legal advice from attorney

Willfulness

- Intentional disregard or deliberate conduct
- NOT negligence, inadvertence, mistake or good faith misunderstanding
- Willful is a LEGAL term
 - Interpreted different by IRS & courts



Examples: Non-willful

- US immigrant with long-time foreign bank accts used OTC software to prepare returns and was unaware of FBAR/FATCA filing reqs.
- US citizen received large inheritance from foreign parent and relied on tax pro's assertion that no filing was required
- US resident alien was unaware that foreign grandparent had set up a "UTMA" account long before child reached age of majority

Examples: Willful

- US citizen with Swiss bank accounts did not inform foreign banker of US citizenship, did not provide foreign account info to tax pro & checked “No” on Schedule B
- Courts have held that questions 7a & b and 8 on Schedule B are presumptive of awareness of filing req.
 - Check "Yes" if you had financial interest in or signature authority over foreign financial account
 - Enter name of foreign country if you are required to file FinCEN Form 114
 - You may have to file *Form 3520* if you received distribution from a foreign trust





Polling Question # 6

US citizens living here and abroad are subject to the same Form 8938 filing thresholds:

- Yes
- No

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Form **14654**
(September 2017)

Department of the Treasury - Internal Revenue Service

Certification by U.S. Person Residing in the United States

OMB Number
1545-2241

NOT WILLFUL: Streamlined Filing

- For individuals & estates (resident & non-resident)

- Must certify non-willfulness

- False certification subject to civil fraud penalties

Certification

I am providing amended income tax returns, including all required information returns, for each of the most recent 3 years for which the U.S. tax return due date (or properly applied filing date) has passed. I previously filed original tax returns for these years. The tax and interest due for each year are as follows:

- Submit 3 years *Form 1040* (& attachments)

- 6 years FBARs

(list years in order)

- Pay tax + interest due

Amount of Tax I Owed
Shown On Form 1040

Interest

Total

\$0.00

\$0.00

\$0.00

\$0.00

- Max penalty = 5% of highest aggregate balance during 6 years

- No accuracy-related, information return or FBAR penalties

NO penalty if taxpayer lived abroad in any of most recent 3 years



NOT WILLFUL: Delinquent Submission

- Use only if all foreign income previously reported on *Form 1040*
 - Or, no reportable foreign income received
- Submit missing FBAR or *Form 8938*
 - Include statement of explanation
 - Submission of 8938 starts the SOL clock on the associated 1040
- IRS may assess statutory penalties



Amended U.S. Individual Income Tax Return

OMB No. 1545-0074

(Rev. January 2020)

Go to www.irs.gov/Form1040X for instructions and the latest information.

This return is for calendar year 2017. Other year: (check one) calendar year (month/year):

NOT WILLFUL: Quiet Disclosure

- Discreetly amend previously filed Form 1040 to include unreported foreign income

- Pay tax, penalties & interest

- NO guarantee that IRS will not assess civil fraud penalties



NOT WILLFUL: Relief for Certain Former Citizens

- Only available to expatriates
 - Renounced citizenship after May 2010
- Eligible if:
 - Net worth < \$2 million
 - Back taxes owed for 6 years < \$25K
- Must submit *Form 1040 + 8938* & FBARS (if applicable) for 6 years



NO tax & NO penalty!

NOT WILLFUL: Reasonable Cause Stmt.

- Submit request for penalty waiver or abatement
- Make persuasive argument that taxpayer exercised ordinary business care & prudence
- May be granted if equitable & administrative efficacy



WILLFUL (?): Non-disclosure

- Say nothing
- Do nothing
- Wait...
- Risk eventual audit, penalty assessment & criminal prosecution



WILLFUL: Offshore Voluntary Disclosure

- New program replaced v.4 in late 2018
- Must self-disclose before IRS discovers non-compliance
 - Submit pre-clearance request to Criminal Investigations
 - If accepted, CI will forward file to Intl. Unit for examination
- Must submit 6 years of all returns & FBARs (maybe more?)
- Taxpayer must “cooperate”
 - Has right to appeal but will be deemed not cooperative
- 50% penalty on offshore assets + 75% civil fraud penalty
 - Also FBAR penalties
 - Additional civil & criminal penalties (at IRS discretion)



Summary of Relief Options

Program/Procedure	Willful?	FBAR	Form 8938	Form 1040	Penalty
Streamlined Filing					
a. Domestic	NO	6	3	3	5% of highest balance
b. Foreign (if >330 days abroad)	NO	6	3	3	\$0 penalty
Relief for Former Citizens	NO	6	3	6	\$0 tax & \$0 penalty
Delinquent Submissions					
a. FBAR	NO	6	N/A	No 1040X due	Yes
b. 8938	NO	N/A	3	No 1040X due	Closes SOL on 1040
Quiet Disclosure	NO	N/A	N/A	1040 or 1040X	Late filing & payment
Reasonable Cause	NO	6	3	All	Request penalty waiver (abatement)
Non-disclosure	???	N/A	N/A	N/A	Civil & criminal (if caught)
Offshore Voluntary Disclosure	YES	6	6	6	75% civil fraud + 50% FBAR



Polling Question # 7

Failure to file a required Form 8938 or disclose income received from all reportable assets may expose the associated Form 1040 to an audit...

- for up to 3 years.
- until an amended return has been filed.
- for up to 3 years after an amended return has been filed.



Department of the Treasury
Internal Revenue Service▶ Go to www.irs.gov for more information.

2019

Form 3520

Note: All information must be in English. Show all amounts in U.S. dollars. File a separate Form 3520 for each foreign trust.

For calendar year 2019, or tax year beginning _____, 2019, ending _____, 20

A Check appropriate boxes: Initial return Initial return (extension filed) Final return Amended return

B Check box that applies to person filing return: Individual Partnership Corporation Trust Executor

C Check if any excused specified foreign financial assets are reported on this form (see instructions)

Check all applicable boxes:

- US persons must report:
 - Creation of foreign trusts & all reportable events
 - Gifts & bequests in excess of \$100K received from abroad
- “Trusts” include most foreign retirement accounts
- Must file *Form 3520* whether or not tax return is due
 - Due April 15th (plus extensions)
 - Due with *Form 706* (plus extensions) if filing for decedent

1a Name of U.S. person(s) with respect to whom this return is being filed (see instructions)

b Identification number

- Penalties
 - Failure to file: 35% of gross reportable amount (min. \$10K)
 - Failure to report gift is 5% per month (max. 25%)

Form 3520-A

Note: All information must be in English. Show all amounts in U.S. dollars.

For calendar year 2019, or tax year beginning 2019, ending 20

Check appropriate boxes. Initial return Final return Amended return

- Filed annually to provide trust's Income Stmt & Balance Sheet to IRS

Part I General Information (see instructions)

1a Name of foreign trust b(1) Employer identification number

- Due 15th day of 3rd month after end of trust's tax year

c Number, street, and room or suite no. (if a P.O. box, see instructions) b(2) Reference ID number (see instructions)

- Use Form 7004 to request 6-month extension

d City or town e State or province f ZIP or foreign postal code g Country

- Filer must provide US owners & beneficiaries with:

2 Did the foreign trust appoint a U.S. agent (defined in the instructions) who can provide the IRS with all the relevant information? Yes No

- Foreign Grantor Trust Owner Statement (page 3) AND
- Foreign Grantor Trust Beneficiary Statement (page 4)

NOTE: If trust does not provide requisite stmts, US owner must attach substitute Form 3520-A to Form 3520 to avoid penalty assessment

	Yes	No	Previously	Attached
a Have you attached a copy of:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
b The trust instrument?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
c Memoranda or letters of wishes?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____
d Subsequent variances to original trust documents?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	_____

- Failure to file penalty = 5% of gross trust assets at yr-end (min \$10K)

3a Name of U.S. agent b Identification number

Information Returns

Form 5471, Information Return of US Persons with Respect to Certain Foreign Corporations

- Use to report acquisition/disposition of foreign stock
- Attach to individual's tax return

Form 5472, Information Return of a 25% Foreign-Owned US Corporation or a Foreign Corporation Engaged in a US Trade or Business

- Use to report related party transactions with foreign-owned US corp
- Attach to corporate return

Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund

- Use to report distributions & gain recognition by US shareholder of PFIC (incl. most foreign mutual funds)
- Attach to individual's tax return

Information Returns (cont'd.)

Form 926, Return by a US Transferor of Property to a Foreign Corporation

- Use to report liquidation of corporation or subsidiary, transfer to or distribution of controlled corp, exchange of stock in reorganization, & non-recognition of gain or loss
- Attach to individual's or entity's income tax return

Form 8858, Information Return of US Persons with Respect To Foreign Disregarded Entities

- Use to report US ownership of foreign disregarded entity
- Attach to individual's or entity's income tax return

Form 8865, Return of US Persons with Respect to Certain Foreign Partnerships

- Use to report acquisitions, dispositions & changes in foreign partnerships
- Attach to individual's or entity's income tax return



Withholdings

Form W-8BEN

- NRAs must provide form to payers of wages, interest, dividends, rents, royalties, annuities & other investment income to ensure 30% withholdings on all US-sourced income

Form W-8IMY

- Foreign entity must certify that it is a qualified intermediary which will comply with 30% withholdings for NRA receiving payments from a flow-through entity

Form 1042-S

- Filed by w/h agent & provided to foreign payee to report amount of tax withheld on US-sourced periodic income [due March 15th] → file even if income is treaty-exempt

Form 1042

- Used to submit withholdings to IRS on behalf of NRAs, foreign partnerships, corporations, estates & trusts [due March 15th + 6-month xtn with *Form 7004*]



Polling Question # 8

An NRA may file Form W-4 in lieu of Form W-8BEN to notify payers that he is subject to the 30% withholding requirement on US-sourced income.

- True
- False

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Cash Transactions

FinCEN 104, Currency Transaction Report

- Fnl institutions must report all currency transactions > \$10K within 15 calendar days

FinCEN 105, Report of International Transportation of Currency or Monetary Instruments

- Individual must file within 15 days if he receives/distributes non-US currency or other monetary instrument > \$10K NOTE: Transfers through banks are exempt

Form 8300, Report of Cash Payments over \$10,000 Received in a Trade or Business

- File w/i 15 days after biz receives cash > \$10K whether (in single or related trxn)

Form 8300 may also be used to report suspicious activities

EXAMPLE: Snoop Dogg (Calvin Boradus) did not declare \$422K in his luggage

→ ½ was seized even though cash obtained legally as payment for concerts



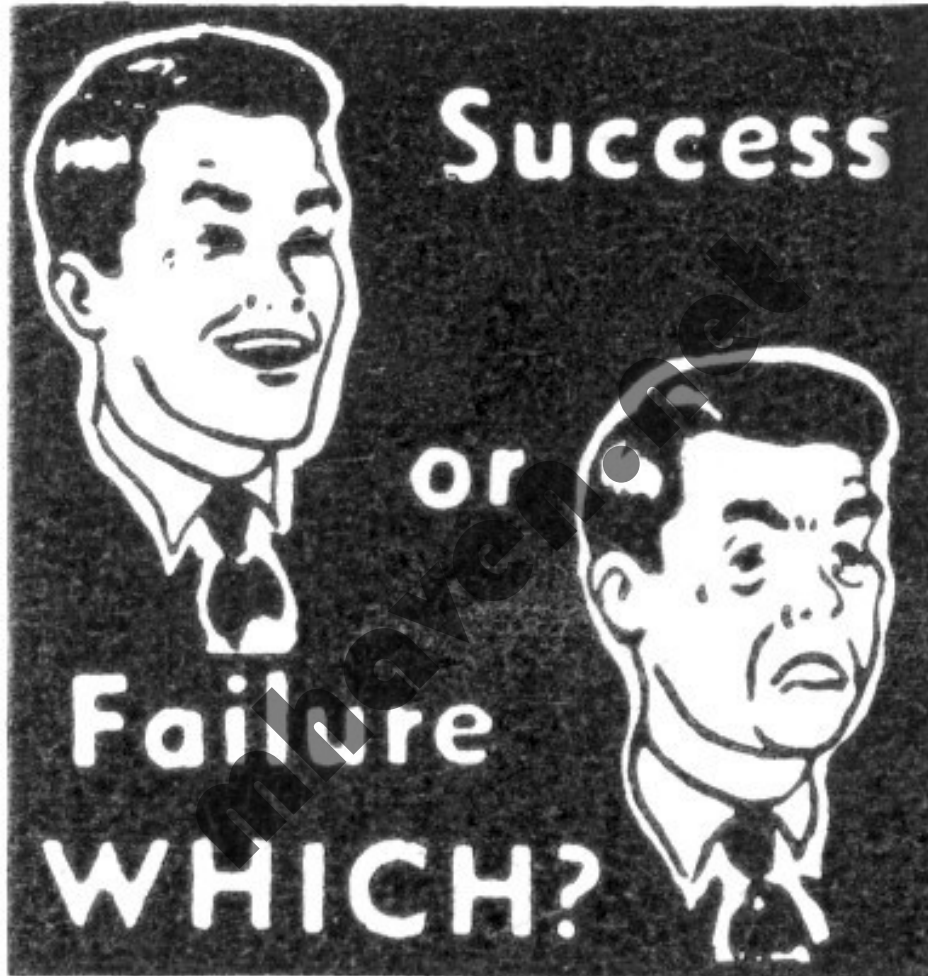
Structuring

- Arranging transactions to fall just below thresholds to avoid reporting
- Govt. may seize assets
 - In civil forfeiture case, the *property* (not the owner) is the defendant
 - Require lesser standard of proof
 - No presumption of innocence
 - No criminal charges need be filed
 - Taxpayer First Act (2019): IRS must show probable cause & offer post-seizure hearing



EXAMPLE

Convenience store owner in NC deposited cash revenues in chunks < \$10K based on advice of bank which wanted to avoid paperwork → IRS seized owner's bank account even though he reported *all* income on his tax returns & paid his liabilities *in full*



Is it working?

- US estimates > \$100 billion annual revenues lost to offshore tax evasion
 - IRS brags that it has collected \$11 billion since offshore compliance programs instituted in 2009 (= \$1.1 B/year)
 - Compliance costs to financial institutions estimated at \$8 B/year!
- Yet, more countries join fight to curb offshore tax evasion
 - 113 countries have signed intergovernmental agreements (IGAs)
 - Germany, France & Belgium have launched their own Swiss Bank Program
 - Switzerland has agreed to end bank secrecy & share info with 36 member countries of Organization for Economic Cooperation and Development countries



Department of the Treasury
Internal Revenue Service

Foreign Financial Institutions

If you are filing paper Form 8966, check the appropriate box below.
(see instructions)

Check if report is being corrected, amended, voided, or there are no accounts to report:

- FFI's register with IRS

1a Name of filer

- Promise to disclose info about American clients on *Form 8966*

2

- In exchange for exemption from 30% withholding on US-source income

3a City or town

- 300 intl. banks participating

4 Global intermediary identification number (GIIN)

- Info-sharing agreement btw Canada & US (in lieu of FFI reporting)

7 Number, street, and room number of P.O. box, post office, or other mailing address

- Provide info re Canadian residents potentially subj to US taxation due to US birth

8a City or town

8b State, province, or region

8c Country, including postal code

9 GIIN

- Sent 150K records to US in 2014; 900K in 2019





Unintended Consequences

- Capital flight – foreign divestiture from US assets
- Extraterritoriality – imposition of regulatory costs & penalties on foreign financial institutions which might otherwise have no dealings with US
- Lack of reciprocity – some foreign govts not committed & US banks not (yet) required to provide similar info on non-US clients to foreign govts
- ID Theft – security issues have not been adequately addressed
- American pariahs – US citizens living abroad unable to open bank accounts → citizenship renunciations

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