

## Foreign Account Compliance Memo

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This is primarily old law, but there are new enacted provisions. U.S. taxpayers, whether residing in the U.S. or outside of the U.S. have reporting obligations regarding foreign assets.

1. FinCEN Form 114, (FBAR) Report of Foreign Bank and Financial Accounts.
2. Form 8938, Statement of Specified Foreign Financial Assets.

**(A)** For purposes of FinCEN Form 114, a United States person has a financial interest in a foreign financial account for which:

1. The United States person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the United States person or for the benefit of another person; or
2. The owner of record or holder of legal title is one of the following:
  - a. An agent, nominee, attorney, or a person acting in some other capacity on behalf of the United States person with respect to the account;
  - b. A corporation in which the United States person owns directly or indirectly: (i) more than 50 percent of the total value of shares of stock or (ii) more than 50 percent of the voting power of all shares of stock;
  - c. A partnership in which the United States person owns directly or indirectly: (i) an interest in more than 50 percent of the partnership's profits (e.g., distribute share of partnership income taking into account any special allocation agreement) or (ii) an interest in more than 50 percent of the partnership capital;
  - d. A trust of which the United States person: (i) is the trust grantor and (ii) has an ownership interest in the trust for United States federal tax purposes. See 26 U.S.C. sections 671-679 to determine if the grantor has an ownership interest in a trust;
  - e. A trust in which the United States person has a greater than 50 percent present beneficial interest in the assets or income of the trust for the calendar year; or
  - f. Any other entity in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of equity interest or assets, or interest in profits.

If the individual was required to file the FBAR for earlier year, he or she should file the delinquent FBAR and attach a statement explaining why it is filed late.

If the failure to file was due to reasonable cause, no penalty is assessed. Absent reasonable cause, the individual can be subject to either a willful or no willful civil penalty.

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The civil penalty for willfully failing to file an FBAR can be up to the greater of \$100,000 or 50% of the total balance of the foreign account at the time of the violation.

- No willful violations that the IRS determines are not due to reasonable cause are subject to a penalty of up to \$14,489 per violation.

A new law requires U.S. taxpayers who have an interest in certain specified foreign financial assets with an aggregate value exceeding \$50,000 on the last day of the tax year or \$75,000 at any time during the tax year to report those assets to the IRS. This reporting is required beginning in 2012. Taxpayers who are required to report must submit Form 8938, Statement of Specified Foreign Financial Assets, with their tax return. The requirement to file Form 8938 is separate from FBAR requirements and does not relieve the taxpayer from filing FinCEN Form 114 if required.

**(B)** For purposes of Form 8938, specific foreign financial assets generally include the following:

1. Financial accounts maintained by a foreign financial institution.
2. The following foreign financial assets if they are held for investment and not held in an account maintained by a financial institution:
  - a. Stock or securities issued by someone that is not a U.S. person,
  - b. Any interest in a foreign entity, and
  - c. Any financial instrument or contract that has an issuer or counterparty that is not a U.S. person.

**(C)** Filing Information:

**When and Where to File.** The FBAR is an annual report and must be filed on or before April 18<sup>th</sup> with an automatic extension to October 16<sup>th</sup> of the year following the calendar year being reported. The FBAR must be filed electronically through FinCEN's BSA E-Filing System. The application to file electronically is available at <http://bsae filing.fincen.treas.gov/>.

**Record Keeping Requirements.** Persons required to file an FBAR must retain records that contain the name in which each account is maintained, the number or other designation of the account, the name and address of foreign financial institution that maintains the account, the type of account, and the maximum account value of each account during the reporting period. The records must be retained for a period of 5 years from April 15<sup>th</sup> of the year following the calendar year reported and must be available for inspection as provided by law. Retaining a copy of the filed FBAR can help to satisfy the record keeping requirements.

An officer or employee who files an FBAR to report signature authority over an employer's foreign financial account is not required to personally retain records regarding these accounts.

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### **(D) Exceptions to Filing Requirement**

Exceptions to the FBAR reporting requirements can be found in the FBAR instructions. There are filing exceptions for the following United States persons or foreign financial accounts:

- Certain foreign financial accounts jointly owned by spouses.
- United States persons included in a consolidated FBAR.
- Correspondent/nostro accounts.
- Foreign financial accounts owned by a governmental entity.
- Foreign financial accounts owned by an international financial institution.
- IRA owners and beneficiaries.
- Participants in and beneficiaries of tax-qualified retirement plans.
- Certain individuals with signature authority over, but no financial interest in, a foreign financial account.
- Trust beneficiaries (but only if a U.S. person reports the account on an FBAR filed on behalf of the trust).
- Foreign financial accounts maintained on a United States military banking facility.

### **Comparison of Form 8938 and FBAR Requirements**

The new Form 8938 filing requirement does not replace or otherwise affect a taxpayer's obligation to file FinCEN Form

114 (Report of Foreign Bank and Financial Accounts). Individuals must file each form for which they meet the relevant reporting threshold. Please see the link below for more information.

<https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements>