

*February 7, 2012*

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## **FBAR and New Federal Form 8938**

**The initial offshore voluntary disclosure program** required U.S. taxpayers who owned a foreign bank account, brokerage account, mutual fund, unit trust, or other financial account to file a Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), if:

1. The taxpayer had financial interest in, signature authority, or other authority over one or more accounts in a foreign country, and
2. The aggregate value of all foreign financial accounts exceeded \$10,000 at any time during the calendar year.

The deadline for filing this return for taxpayers was June 30, 2011; with an extension to June 30, 2012, for persons who have only a signature authority over a qualified account.

**The IRS launched a second offshore voluntary disclosure initiative (OVDP) in 2011.** The IRS has reopened the offshore voluntary disclosure program (OVDP) to help people hiding offshore accounts get current with their taxes. The newest program is similar to the 2011 program in many ways, but with a few key differences. Unlike the 2011 program, there is no set deadline for people to apply. However, the terms of the program could change at any time going forward including penalty increases or ending the program entirely at any point.

The OVDP can be a significant benefit to affected taxpayers. Penalties outside the program can be onerous and can include, among others: penalties for failing to file the FBAR; civil penalties; penalties for failing to file a return; and accuracy related penalties. In addition, criminal prosecution may be a risk.

### **MORE NEW REPORTING BY U.S. TAXPAYERS HOLDING FOREIGN FINANCIAL ASSETS**

U.S. taxpayers holding foreign financial assets may be required to report certain information about those assets on a new form (**Form 8938**) to be attached to the taxpayer's annual tax return. Reporting applies for assets held in tax years beginning after March 18, 2010. With the issuance of additional regulations, FATCA may require reporting by specified domestic business entities. For now, only specified individuals are required to file Form 8938. For most individual taxpayers, Form 8938 should be filed with the 2011 tax return they file during the 2012 tax filing season.

*The new Form 8938 filing requirement does not replace or otherwise affect a taxpayer's obligation to file an FBAR.*

Form 8938 is required when the total value of specified foreign assets exceeds certain thresholds. Form 8938 instructions are available on the IRS website, [www.irs.gov](http://www.irs.gov).

A specified foreign financial asset is:

- Any financial account maintained by a foreign financial institution. This does not include a U.S. payer (such as a U.S. domestic financial institution), the foreign branch of a U.S. financial institution, or the U.S. branch of a foreign financial institution.
- Other foreign financial assets held for investment that are not in an account maintained by a U.S. or foreign financial institution, namely:

- Stock or securities issued by someone other than a U.S. person,
- Any interest in a foreign entity, and
- Any financial instrument or contract that has as an issuer or counterparty that is other than a U.S. person.

Failure to report foreign financial assets on Form 8938 will result in a penalty of \$10,000 (and a penalty up to \$50,000 for continued failure after IRS notification).

FATCA also requires foreign financial institutions (“FFIs”) to report information directly to the IRS about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.

**For more information, please contact Jeffrey J. Petrell, JD, CPA, Director of Tax Services for Carbis Walker LLP, at 412.635.6270, or [jpetrell@carbis.com](mailto:jpetrell@carbis.com).**

