

Mentoring at Scale

Form 8938 vs FBAR

*What the government is looking for,
when each form triggers, the decision matrix,
penalties, and the Streamlined
remediation path. Print edition, July 2026.*

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Form 8938 vs FBAR — Which Filing Applies (and When Both)

Form 8938 (FATCA) and FinCEN Form 114 (FBAR) are two different filings, with two different thresholds, two different filing agencies, two different penalty regimes, and two different definitions of "foreign financial account." Most US persons with any material foreign exposure file both. Some file only one. Some fail to file either and discover the problem when the IRS finds it first. This is the decision reference for which one applies to which fact pattern.

Snapshot: 2026-06-30 · **Applies to:** Any US person (citizen, green card holder, or resident alien) with a foreign financial account, foreign asset, or signature authority over one.

Why these two forms exist in the first place

What the government is actually looking for

The short answer: **yes, this is about hidden money in foreign bank accounts — but the two forms were created for two different eras of that problem, by two different agencies, targeting two different types of hidden money.** FBAR came out of the 1970 Bank Secrecy Act and was designed to catch money laundering, drug proceeds, organized crime, and later terrorist financing. Form 8938 came out of the 2010 HIRE Act (FATCA) and was designed specifically to catch *tax evasion* after the UBS Swiss-bank scandal made it politically impossible to ignore. The two forms overlap heavily but they were built for different purposes and are administered by two different agencies. This is why most US persons with any foreign exposure file both.

| Question | FBAR (FinCEN Form 114) | Form 8938 (FATCA) |
|-----------------------------------|--|---|
| Statute | Bank Secrecy Act of 1970 (31 U.S.C. §5314) | Foreign Account Tax Compliance Act — HIRE Act of 2010 (IRC §6038D) |
| Original purpose | Anti-money-laundering — catch drug proceeds, organized crime money, later sanctions evasion and terrorist financing moving through foreign banks | Anti-tax-evasion — catch US taxpayers hiding investment income in offshore accounts |
| Trigger event that made it happen | 1970s concern about US banks being used to launder criminal money offshore — Congress wanted a paper trail on any US person with a foreign account | UBS scandal (2007-2009) — investigation exposed ~4,450 US persons with undeclared Swiss accounts; UBS paid \$780M and turned over the names |
| Administering agency | FinCEN (Financial Crimes Enforcement Network) — part of Treasury, not IRS | IRS — attached to your Form 1040 |
| Where the data goes | FinCEN's BSA database — shared across DOJ, FBI, DEA, OFAC, and Treasury enforcement | IRS taxpayer file — primarily used for income-tax exam matching |
| The concept in one line | “Which US persons have a foreign account we might need to subpoena in a criminal case?” | “Which US persons might be hiding taxable investment income offshore?” |

What each form is actually looking for

| What the government wants to find | FBAR | Form 8938 |
|---|---|--|
| US persons with signature authority over foreign accounts — even accounts they don't own | Yes — central to the AML mission | No — only beneficial ownership |
| The account balances a criminal investigation might subpoena | Yes — the primary use case | Partial — but IRS route only |
| Undeclared interest, dividends, or capital gains in foreign brokerages | Indirectly (once IRS gets the FBAR data via inter-agency sharing) | Yes — primary purpose |
| Foreign entity holdings (partnerships, trusts, hedge funds, PE funds) | Only if held through a financial account | Yes — the broader “specified financial asset” definition |
| Money flows through foreign banks that might be drug proceeds, sanctions violations, or terrorist financing | Yes — the founding rationale | No — not the design purpose |
| Cryptocurrency held at a foreign exchange | FinCEN evolving (Notice 2020-2) | Yes (IRS current position since 2020) |

The honest framing for the practitioner and the client. Most US persons filing FBAR and Form 8938 are not the target. The target is the offshore tax evader with millions in a Swiss or Singaporean account, or the money launderer moving criminal proceeds. But the forms cast a very wide net — a US citizen living abroad with a local checking account, a dual citizen who inherited a foreign brokerage account, a US executive with signature authority over an employer's foreign treasury account — all of these people file the forms. The compliance is required for the many so the enforcement can reach the few. The penalties for missing the filing are severe (see below), which is why the compliance industry around these forms is disproportionate to the tax dollars at stake for any single ordinary taxpayer.

The enforcement history — why the penalties are so severe

| Year | Event | What it did |
|--------------|---|--|
| 1970 | Bank Secrecy Act | Created FBAR — but for its first 30 years enforcement was minimal |
| 2001 | USA PATRIOT Act | Massively expanded FBAR data-sharing to DOJ, FBI, DEA, terrorism task forces |
| 2008-09 | UBS deferred prosecution | UBS admitted helping ~19,000 US persons hide accounts; paid \$780M; turned over 4,450 names; kicked off the modern FBAR criminal enforcement wave |
| 2010 | HIRE Act — FATCA passes | Created Form 8938 and forced foreign financial institutions to report US-person account holders directly to the IRS or face 30% withholding on US-source payments — ended Swiss / Cayman / Hong Kong bank secrecy for US persons in practice |
| 2013-16 | Swiss Bank Program | 80+ Swiss banks paid ~\$1.4B collectively to avoid prosecution; disclosed account holders; the “last chance” window for Swiss holders closed |
| 2013-present | Individual FBAR criminal cases | Dozens of high-profile prosecutions of US persons with undeclared foreign accounts — often at Swiss, Israeli, or Panamanian banks — typically resulting in criminal fines plus 50%-of-account-balance FBAR willful penalties |
| 2023 | Bittner v. United States (US Supreme Court) | Clarified that non-willful FBAR penalty is per form, not per account — a rare taxpayer win, but only on the non-willful branch |

The pattern the enforcement history shows: FBAR’s teeth grew after 9/11 (anti-terrorism financing), and Form 8938 was born directly out of the UBS scandal. Both forms sit downstream of specific enforcement events, and the penalty regimes reflect Congress’s view that hiding foreign

money is a serious offense — whether the hiding is tax evasion, money laundering, or sanctions evasion.

The two forms side by side

What each form does — the one-page summary

| Attribute | FBAR (FinCEN Form 114) | Form 8938 |
|----------------|--|--|
| What it is | Anti-money-laundering disclosure | Tax return attachment |
| Filed with | FinCEN (not IRS) | IRS — attached to Form 1040 |
| Filed how | FinCEN BSA E-Filing System | Included in 1040 e-file |
| Trigger | \$10,000 aggregate at any point during year across all reportable foreign accounts | \$50K – \$600K depending on filing status and US-vs-abroad residence (see table below) |
| Reports | Foreign financial accounts you own or have signature authority over | “Specified foreign financial assets” you own — broader than FBAR |
| Due date | April 15, automatic extension to October 15 (no filing required to extend) | With Form 1040; extended when 1040 is extended |
| Penalty regime | Bank Secrecy Act — harsh, including willful penalty up to 50% of account balance | Internal Revenue Code — \$10,000 initial + \$10,000 per 30-day continued failure, cap \$50,000 |

The threshold matrix

When each form actually triggers

| Filing | Living where | Filing status | Year-end trigger | Any-time trigger |
|-----------|--------------|---------------|------------------|------------------|
| FBAR | US or abroad | Any | — | \$10,000 |
| Form 8938 | US | Single | \$50,000 | \$75,000 |
| Form 8938 | US | MFJ | \$100,000 | \$150,000 |
| Form 8938 | Abroad | Single | \$200,000 | \$300,000 |
| Form 8938 | Abroad | MFJ | \$400,000 | \$600,000 |

The most common case: A US-resident taxpayer with any foreign account crossing \$10,000 at any point during the year files FBAR. The same taxpayer files Form 8938 only if their aggregate foreign financial assets also exceed \$50,000 at year-end or \$75,000 at any point (single filer). Many taxpayers file FBAR without needing Form 8938. Very few file Form 8938 without also owing FBAR.

What counts as reportable

Different definitions of "foreign account"

The two forms define what is reportable somewhat differently. FBAR captures **financial accounts** narrowly — bank accounts, securities accounts, and specific insurance and pension arrangements held at a foreign financial institution or held by a US person with signature authority over the account. Form 8938 captures a broader set of **specified foreign financial assets**, including all FBAR items plus additional items such as:

— Directly-held stock or securities issued by a foreign person (not through a foreign account) — Foreign partnership interests and beneficial interests in foreign trusts — Contracts issued by a foreign person including certain life insurance and annuity contracts — Foreign hedge funds and private equity funds — Foreign real estate is NOT reportable on Form 8938 if held directly by the individual (but the underlying entity holding real estate is reportable) — Cryptocurrency held at a foreign exchange is reportable on Form 8938 under current IRS guidance but the FBAR treatment remains under FinCEN evaluation as of the snapshot date.

The penalty regime

Why FBAR penalties are more feared than Form 8938 penalties

FBAR non-willful penalties: \$10,000+ per year, per unfiled form (per taxpayer, per year, not per account — a 2023 Supreme Court decision in *Bittner v. United States* clarified this). Escalates for continued non-compliance.

FBAR willful penalties: the greater of \$100,000 (indexed for inflation) or 50% of the balance in the account, per violation. Willfulness includes reckless disregard, not just intentional evasion. Willful FBAR violations can also generate criminal exposure.

Form 8938 penalties: \$10,000 initial for failure to file, plus \$10,000 for each 30-day period of continued failure after IRS notice, up to \$50,000 per return. Additional 40% accuracy-related penalty on any underpayment attributable to undisclosed foreign financial assets.

Practitioner note: The FBAR penalty regime is materially harsher than the Form 8938 regime because FBAR is administered by FinCEN under a Bank Secrecy Act framework rather than the IRS under an income tax framework. Taxpayers with unreported historical foreign accounts should

generally prioritize the FBAR compliance path (Streamlined Filing Compliance Procedures if eligible, or the Delinquent FBAR Submission Procedures) before addressing income tax reporting.

The decision matrix

Which one you file (and when)

| Fact pattern | FBAR? | Form 8938? | Notes |
|--|--------------------|------------|---|
| US-resident single filer, \$15k in one foreign bank account at year-end, no other foreign assets | Yes | No | Above FBAR threshold, below Form 8938 threshold |
| US-resident single filer, \$60k in a foreign brokerage account at year-end | Yes | Yes | Above both thresholds |
| US-resident MFJ, \$80k combined across two foreign accounts at year-end | Yes | No | Above FBAR; below MFJ Form 8938 \$100k threshold |
| US person with signature authority over \$100k employer account but no beneficial ownership | Yes | No | FBAR captures signature authority; Form 8938 does not |
| Green card holder abroad, \$250k in foreign stocks held directly (not in an account) | No | Yes | Directly-held foreign stock is Form 8938 but not FBAR |
| US person with \$150k in gold coins stored in a foreign vault (no institution) | No | No | Personal property is neither Form 8938 nor FBAR |
| US person with \$500k in a foreign real estate LLC | Yes | Yes | Interest in foreign entity holding real estate is both |
| US person, \$30k in foreign cryptocurrency exchange at year-end | Unclear (evolving) | Yes | Crypto at foreign exchange currently Form 8938 reportable; FBAR treatment under FinCEN evaluation |

Deadlines

When each is due

FBAR: Due April 15 with an automatic extension to October 15 (no separate extension request required). Filed electronically through the FinCEN BSA E-Filing System — not through the IRS e-file system.

Form 8938: Due with the taxpayer's federal income tax return (Form 1040), including any extension. Filed as an attachment to Form 1040, so the extension of the 1040 automatically extends the 8938.

If you missed a prior year

The Streamlined Filing Compliance Procedures — the primary remediation path

A taxpayer who discovers historical non-compliance with FBAR or Form 8938 filings has three general paths: do nothing (accepting escalating exposure), enter the Streamlined Filing Compliance Procedures, or pursue a full Voluntary Disclosure. For non-willful taxpayers, the Streamlined path is almost always the correct choice.

Streamlined Domestic Offshore Procedures (SDOP): For US residents. Requires 3 years of amended returns, 6 years of FBAR filings, a certification of non-willful conduct, and a 5% miscellaneous offshore penalty computed against the highest year-end account balance in the 6-year period.

Streamlined Foreign Offshore Procedures (SFOP): For US persons living abroad. Requires 3 years of amended returns, 6 years of FBAR filings, and a certification of non-willful conduct. *No penalty* if the taxpayer qualifies under the foreign-residence test.

Practitioner note: Both Streamlined programs require the taxpayer to certify under penalty of perjury that prior non-compliance was *non-willful*. Willfulness disqualifies the taxpayer and directs them toward the IRS Voluntary Disclosure Practice or the Delinquent FBAR Submission Procedures depending on facts. Willfulness assessment is fact-specific and includes reckless disregard, not just intentional evasion. Do not certify non-willfulness without qualified tax counsel review.

Cryptocurrency

The evolving rule on foreign-exchange-held crypto

Cryptocurrency held at a foreign exchange is one of the most frequently misunderstood categories in FBAR and Form 8938 analysis, and it is one of the categories the IRS and FinCEN are still refining guidance on.

Form 8938 (IRS position, current): Cryptocurrency held at a foreign financial exchange is a reportable specified foreign financial asset for Form 8938 purposes if the aggregate value crosses the applicable threshold. This position has been the IRS view since 2020 and appears in the Form 8938 instructions.

FBAR (FinCEN position, evolving): FinCEN indicated in Notice 2020-2 that it was intending to amend the FBAR regulations to explicitly include foreign-exchange-held virtual currency, but as of the snapshot date the FBAR regulations have not been amended. Practitioners generally take one of two positions: (1) file FBAR on crypto out of caution (protective filing), or (2) do not file FBAR on crypto and monitor for FinCEN rulemaking. There is no clear IRS or FinCEN penalty exposure for the protective-filing approach.

Practitioner takeaway: When in doubt, file FBAR on foreign-exchange-held crypto. There is no penalty for filing FBAR on assets that turn out not to require it; there is a penalty for failing to file when required. Form 8938 reporting is clear.

Cross-references

Where to read next

The applied companion: The Baratelli International Tax & Cross-Border Wealth guide covers the full FBAR / FATCA compliance framework, including the Streamlined Filing Compliance Procedures for taxpayers correcting historical non-compliance.

Print edition: Download the Form 8938 vs FBAR print PDF.

Educational reference. Not tax, legal, or investment advice. Consult a qualified professional for your specific situation.

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