FATCA vs. FBAR: Form 8938 vs. Form 114

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I've noticed over the years that many people tend to confuse these two concepts. I don't know if it's the fact that they both start with "F" (stands for Foreign, by the way), or if it is simply that they both tend to disclose similar information regarding foreign financial accounts/assets. However, it is important to understand the differences between these concepts, because not understanding can cost you thousands in penalties or even criminal accusations. That is not said to scare you; it is simply the truth. In the past several years, the IRS and FINCEN have taken compliance with these concepts more and more seriously.

History:

FBAR (Foreign Bank Account Reporting): This first became law with the Bank Secrecy Act in the early 1970's and is administered by the Treasury. It used to have a different form number, but is now reported only via BSA e-filing as Form 114. The Bank Secrecy Act (BSA) is the same act which requires financial institution to report all transfers of more than $10,000. It was intended to help track criminals who were money laundering and moving money from the USA to offshore accounts. While the law has been in effect for a long time, it has been more vigorously enforced over the last several years. The minimum penalty for failure to file or inaccuracy for each year for each account is $10,000. As you can imagine, the penalties can quickly add up to more than the original balance in the account(s). Because of this, I believe the Treasury has been reluctant to impose these penalties unless the filer is already under investigation. In 2017, for the first time, the deadline for filing Form 114 was changed from June 30th to coincide with the Form 1040 filing deadline and the filing could be automatically extended for 6 months, making the true deadline Oct 15th.

FATCA (Foreign Account Tax Compliance Act): Passed as part of the HIRE Act in 2010, FATCA requirements were delayed a few times, but finally came into effect in July 2014. Although as its title states, it is a tax regulation, it does not involve taxing. It is, however, a way of reporting taxable income which is foreign-source with one's tax return. Penalties are similar to those for the FBAR, and since the two forms report similar information it is like being penalized twice for the same information (or lack thereof). So, it's important to get the information right, or you may find yourself reporting wrongly in two places. However, there are important differences that need to be considered.

Reporting:

FBAR: The form is required when the sum of the highest balances during a calendar year of one's foreign financial *accounts* exceed USD 10,000 at any point during the calendar year. It doesn't matter whether the highest balances contain the same money due to a transfer between the accounts.

FATCA: The form is required when the sum of the highest balances during a calendar year of one's foreign financial *assets* exceed a threshold based on whether you are filing separately or jointly and whether you reside in the USA or outside the USA. The threshold is per person (or entity) filing and is $50,000 (on last day of the calendar year) or $75,000 (any time throughout the calendar year) if filing domestically or $200,000 (last day) or $300,000 (throughout the year) if filing from abroad. So, for those filing jointly, these limits are doubled.

Specific issues:

Matters	FBAR (Form 114)	FATCA (Form 8938)
Who must file?	US persons: US citizens, resident aliens, trusts, estates, and domestic entities that have an interest in foreign financial accounts and meet the reporting threshold.	Specified individuals and domestic (US) entities that have an interest in specified foreign financial assets. Specified individuals and domestic entities are: US citizens, resident aliens, and certain non-resident aliens. Specified domestic entities include domestic corporations, partnerships, and trusts.
Does the US include US territories?	Yes, resident aliens of US territories and US territory entities are subject to FBAR reporting.	No.
When do you have an interest in an account or asset?	<u>Financial interest:</u> 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. <u>Signature authority:</u> you have authority to control the disposition of the assets in the account by direct communication with the financial institution maintaining the account.	If any income, gains/losses, deductions, credits, gross proceeds, or distributions from holding companies or disposing of the account or asset are or would be required to be reported, included, or otherwise reflected on your income tax return. Accounts for which you have only a signatory authority, but no personal interest, need not be reported.
What is reported?	Maximum value of each financial **account** maintained by a financial institution physically located in a foreign country. Financial accounts are: - those holding cash and foreign stocks, securities (including mutual funds, ETFs, REITs), held at foreign financial institutions or a foreign branch of a US institution for which you have financial interest **or** signature authority.	Maximum value of each specified foreign financial **asset**, which includes financial account with foreign financial institutions and certain other foreign non-account investment assets. Foreign financial assets include: - accounts containing cash or foreign stocks & securities (including foreign mutual funds, hedge funds, private equity funds, ETFs, REITs), held at foreign financial institution; - foreign stocks or securities not held in an institution (eg. Bearer bonds), - foreign partnership interests,

	- foreign financial assets held by foreign entities of which you have more than a 50% interest. - foreign **accounts** held by grantor trust (foreign or domestic) for which you are grantor - foreign-based life insurance or annuity contract with a cash value.	- foreign accounts and foreign non-account investment assets held by a foreign or domestic grantor trust for which you are the grantor, - foreign issued life insurance or annuity contract with a cash-value, - any foreign entity interest (maximum value must include real estate value where applicable).
How are maximum account or asset values determined and reported?	Use periodic account statements to determine the maximum value in the currency of the account, then convert to US dollars using the end of year Treasury exchange rate and report in US dollars.	Use fair market value in US dollars (for financial assets this is the information reported on the account statement) in accord with Form 8938 instructions (for assets), converting to US dollars using the Treasury end of year (or IRS taxable year) exchange rate.
Where to file and when due?	Must be filed electronically through FINCEN's BSA E-filing system and received by April 15^{th} or with automatic extension by Oct 15^{th}).	File with income tax return pursuant to instructions for filing the return and on the due date of the return, including any applicable extensions.
Penalties?	Civil monetary penalties are adjusted annual for inflation. For civil penalty assessment prior to 1 Aug 2016, if non-willful, up to $10,000; if willful, up to the greater of $100,000 or 50% of account balances (whichever is higher); and criminal penalties may also apply.	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 and criminal penalties may also apply.

Foreign = non-USA

Items which do not need to be reported in either form are:

- Social security-type program benefits provided by a foreign government
- Personal property held directly such as art, antiques, jewelry, cars & other collectibles
- Precious metals held directly (but if physically held by an institution or your neighbor's safe, they are reportable).
- Foreign real estate held by a foreign entity (but for Form 8938, you need to report the foreign entity itself and its maximum value includes the value of the real estate)
- Foreign real estate held directly
- Domestic mutual fund investing in foreign stocks & securities (these are already reported via the Form 1099 which you report elsewhere on your return)
- Foreign account held at a US branch of a foreign financial institution (again, these must use the standard Form 1099 to report income, which you report elsewhere on your tax return)