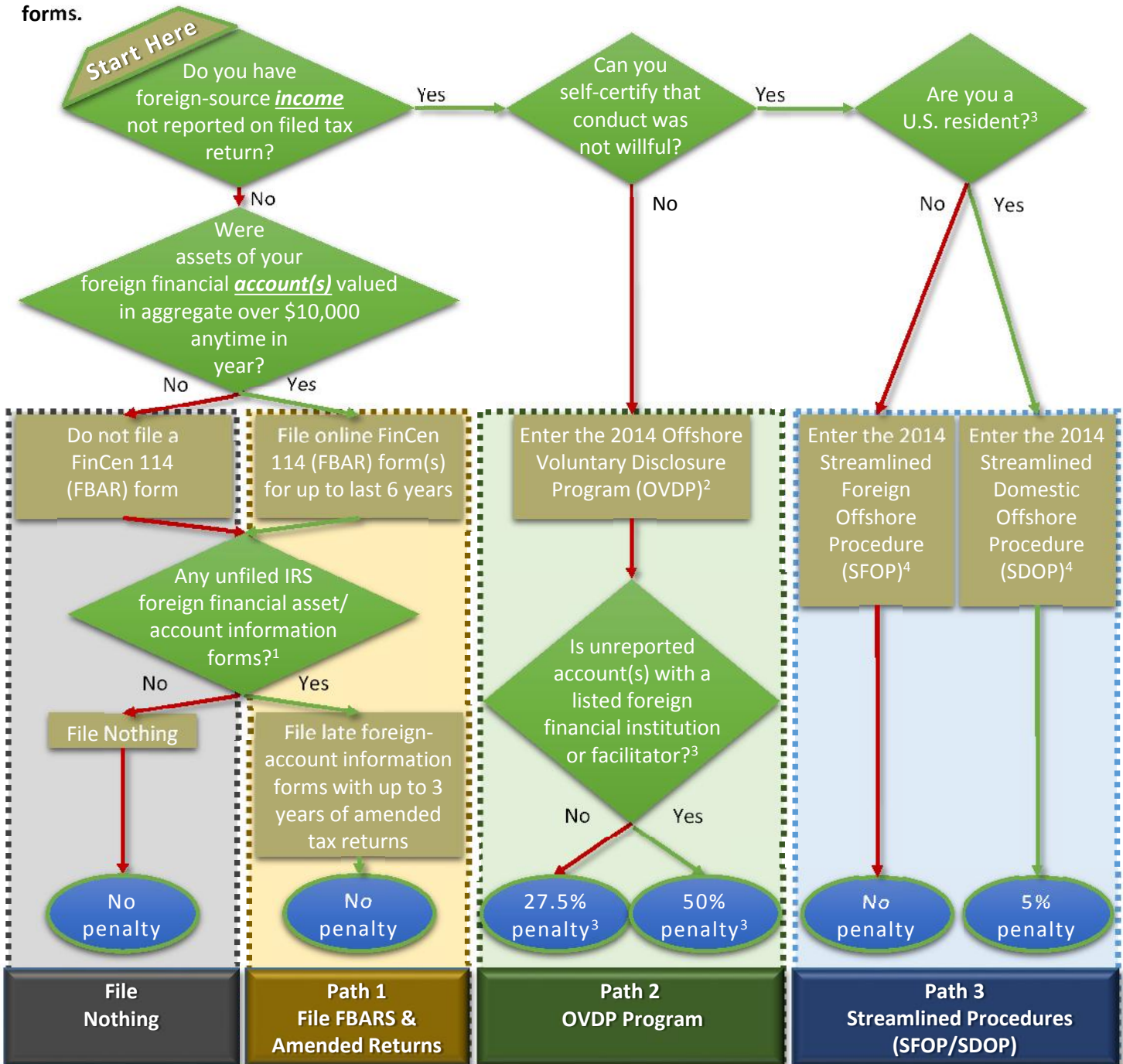


How to Disclose Foreign Financial Accounts When Filing Forms Late

IRS has several compliance programs for taxpayers who have not disclosed all their foreign financial accounts on tax-return forms and/or on the Department of Justice’s FinCen 114 (FBAR) forms. This page’s decision tree traces the typical paths for the late filing of forms related to foreign financial accounts and associated taxes. The next five pages provide more details on IRS filing program or procedures, U.S. and non-U.S. residency, and required forms.



¹ See page 6 for a list of tax return forms that disclose foreign financial accounts including accounts where the taxpayer has signatory authority.
² OVDP has significant disclosure and documentation requirements, which are presented on page 3.
³ For listing of institutions and facilitators that may cause a taxpayer to pay the 50% rather than the 27.5% penalty, see <http://www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators>. Also see page 3 for further details.
⁴ See page 5 to determine whether to enter SDOP or SFOP procedures based on the “substantial presence” residency test under IRC § 7701.

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Three Paths for Disclosing Foreign Financial Assets

U.S. taxpayers, including U.S. citizens living abroad and U.S. resident aliens, are required to report and pay taxes on their *worldwide* income, including income from their foreign assets and foreign accounts.

The IRS has several compliance paths for taxpayers who have not previously disclosed all their foreign financial accounts for a particular tax year. The path chosen depends largely on how the taxpayer answers the following questions:

1. Did the taxpayer **file all required income tax returns** (even if some forms for disclosing foreign accounts were missing)?
2. Did the taxpayer **pay all required U.S. taxes** on foreign income?
3. If the taxpayer did not pay all the taxes owed, was it a result of **willful conduct or inaction**?
4. If the taxpayer did not file all the required foreign-account disclosure forms, did the taxpayer have a **reasonable reason for not filing them**?

Descriptions below and the chart on page 4 outline the requirements of the three major paths:

Path 1: When no tax is due, filing late forms with the IRS or DOJ in the same manner as timely filed forms;

Path 2: Filing under the Offshore Voluntary Disclosure Program; and

Path 3: Filing under the Streamlined Domestic (or Foreign) Offshore Procedures.

See <http://www.irs.gov/Individuals/International-Taxpayers/Options-Available-to-Help-Taxpayers-With-Offshore-Interests>.

Path 1: Filing of Delinquent Forms Outside the OVDP (Path 2) or Streamlined Procedures (Path 3)

Filing Late IRS Informational Forms When All Foreign Income was Reported and No Tax is Due

For taxpayers who failed to file with their tax returns one or more foreign account/asset information forms but reported all foreign income and paid the taxes due on that income, the taxpayers can submit under normal tax return procedures the amended tax returns along with the missing informational form(s) and a statement of facts establishing reasonable cause for the failure to file the required form(s). Although IRS guidance indicates that a taxpayer who reported all income and paid all owed taxes is unlikely to receive any penalty, the IRS could impose penalties if it does not accept the explanation of reasonable cause. See page 6 for a list of the forms used to report foreign financial accounts/assets.

Filing Late DOJ FinCen 114 (FBAR) Forms When All Foreign Income was Reported and No Tax is Due

A taxpayer should file the online Department of Justice FinCen 114 form (due June 30th annually) if:

1. The taxpayer has financial interest in or signature authority over a foreign financial account (i.e. bank account, brokerage account, mutual fund, trust, some retirement/pension accounts, or other type of foreign financial account); and
2. The aggregate value of taxpayer's foreign financial accounts exceeds \$10,000.

For each year's FBAR being filed late or being amended (up to six years), taxpayers must select a reason (from a pull-down list) for the late filing on the electronic form's cover sheet, which constitutes a fact statement establishing reasonable cause for the failure to file. Although IRS guidance indicates that a taxpayer who reported all income and paid all owed taxes is unlikely to receive any penalty, the IRS could impose penalties if it does not accept the explanation of reasonable cause when taxpayer's return is chosen for a later audit. See <http://bsaefiling.fincen.treas.gov/NoRegFBARFiler.html>.

See <http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures>.

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Three Paths for Disclosing Foreign Financial Assets (cont.)

Path 2: OVDP Program for “Willful” Taxpayers Who Failed to Pay Tax and File Necessary Forms

The 2014 Offshore Voluntary Disclosure Programs (OVDPs) is intended for taxpayers who 1) owe tax on foreign income in previous tax years; 2) did not timely report offshore assets on the appropriate tax-return and/or FBAR forms; and 3) may have been willful in not disclosing foreign financial accounts and/or assets.

A miscellaneous offshore penalty of 27.5% or 50% may be assessed in lieu of multiple penalties such as late-to-file, late-to-pay and accuracy-related penalties that can add up to more than the entire value of the foreign accounts. The 50% penalty is applicable if at the time the taxpayer submits OVDP preclearance letter, a public disclosure already has been made about:

1. IRS or DOJ investigation of foreign financial institution where account is held or of facilitator who assisted in taxpayer’s offshore arrangement in connection with account;
2. Foreign financial institution or other facilitator cooperating in such investigation; ***or***
3. Foreign financial institution or other facilitator identified in related court-approved summons.

Extensive OVDP requirements include but are not limited to: submitting 8 years of amended tax returns with informational forms and schedules previously omitted or previously filed original or amended returns if no change needed; several OVDP forms and sets of questions regarding the foreign financial institutions, institutions’ contact persons, up to 8 years of foreign account/asset statements; penalty computation worksheet; full payment of tax, interest, and various penalties (or proposed payment arrangement); agreement to extend the period of time to assess tax (including tax penalties) and to assess FBAR penalties (for up to 8 years). **Consulting a qualified tax professional is highly advised due to OVDP’s complexity, as well as the seriousness of the civil penalties and possible criminal prosecution for noncompliance.**

A current list of foreign financial institutions or facilitators is at:

<http://www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators>.

See <http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised>.

Path 3: Streamlined Disclosure Procedures for Nonwillful* Taxpayers Who Failed to File Necessary Forms

The 2014 streamlined procedures allow reduced penalties for U.S. individual or joint taxpayers who did not report offshore assets on the appropriate returns and did not pay all tax due but whose conduct was not willful: 0% penalty for U.S. taxpayers abroad and 5% "miscellaneous offshore penalty" for domestic U.S. taxpayers. **The new procedures clarify that the penalty for the Streamlined Domestic Offshore Procedures (SDOP - for U.S. resident taxpayers) and Streamlined Foreign Offshore Procedures (SFOP – for non-resident U.S. taxpayers) would be assessed on only foreign financial accounts/assets that are not reported on the FBAR form or Form 8938 (see page 6 for descriptions of the forms).** See page 5 for how to determine on whether a taxpayer should file under the SDOP or SFOP, which is based on the taxpayer’s residency.

***Non-willful conduct** is defined as conduct that is due to negligence, inadvertence or mistake, or conduct that is the result of a good faith misunderstanding of the requirements of the law.

See <http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures>.

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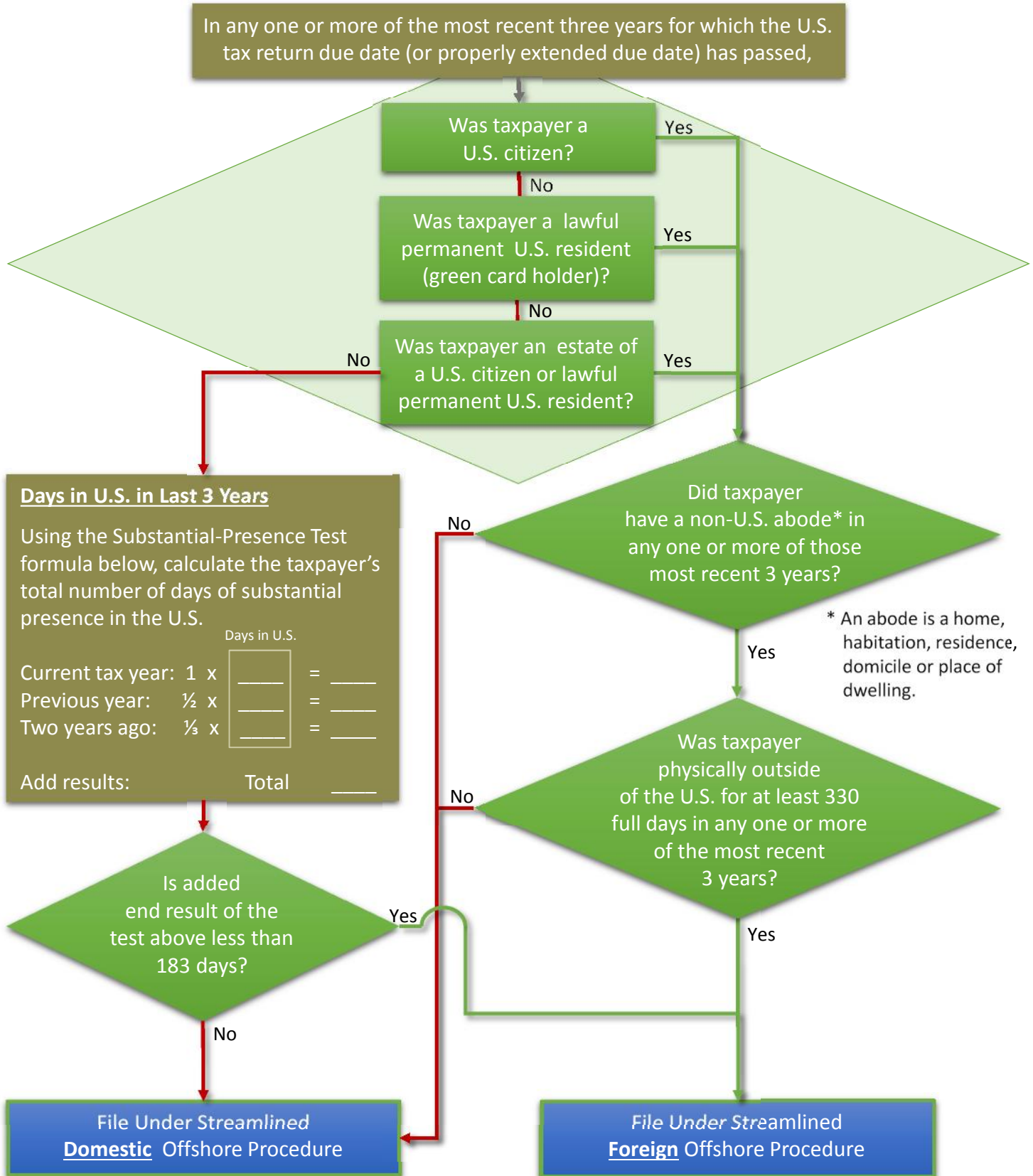
Choosing the Right Path for Disclosing Foreign Financial Assets

Questions to Answer	Path 1:		Path 2:	Path 3:	Path 3:
	Delinquent FinCen 114 DOJ FBARS	Delinquent Information Forms	Offshore Voluntary Disclosure Program (OVDP)	Streamlined Domestic Offshore Procedure (SDOP)	Streamlined Foreign Offshore Procedure (SFOP)
Who may participate?	Taxpayer not owing income tax	Taxpayer not owing income tax	Individual and business taxpayers owing income tax	U.S.-resident individual /joint taxpayers owing income tax	Non-resident individual/joint taxpayers owing income tax
Eligible if willfully failed to report?	No	No	Yes	No	No
Requires all tax returns to have been filed?	Yes and must have paid income tax	Yes and must have paid income tax	No	Yes (yet some forms may have been omitted)???	No
Still eligible if under IRS audit or criminal investigation?	Yes, if not contacted by IRS about income-tax audit or un-filed forms	Yes, if not contacted by IRS about income-tax audit or un-filed forms	No, even if taxpayer was unaware of audit or investigation	No, even if taxpayer was unaware of audit or investigation	No, even if taxpayer was unaware of audit or investigation
Must taxpayer self-certify nonwillfulness	No	No	No	Yes	Yes
What is applicable penalty?	None, if not contacted about delinquency	None, if not contacted about delinquency	27.5% or 50% of highest aggregate value over 8-yr period in lieu of multiple penalties	5% of highest aggregate value of undisclosed foreign financial accounts over 6-yr period	None, but applicable interest on late payment may apply
What are the required filings?	6 yrs of FinCen 114 (FBAR) forms with reason why late	3 yrs of amended tax returns with added forms and reason why late	Original or amended tax returns (8 yrs), FBARS (8 yrs) and other forms	Original or amended tax returns (3 yrs), FBARS (6 yrs)	Original or amended tax returns (3 yrs), FBARS (6 yrs)
Any opt-in/opt-out provision?	n/a	n/a	Yes, may opt out	No (cannot opt into OVDP)	No (cannot opt into OVDP)

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Determining Residency for Streamlined Domestic/Foreign Offshore Procedures



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Forms for Disclosing Foreign Financial Assets/Accounts

Form	Description	Possible Failure-to-File Penalty (per each failure for each tax return)
FBAR	DOJ online FinCen 114 form to report any interest in foreign financial accounts if their aggregate value is \$10,000 or more at any time during year.	Willfully failing to file an FBAR (due June 30 th annually) penalized as high as \$10,000 per violation (i.e. per year).
3520	To report foreign gifts, foreign inheritances, or payments from foreign trusts.	Greater of \$10,000 or 35% of gross reportable amount, except for returns reporting gifts, where penalty is 5% of gift per month late in reporting (maximum 25% of gift value).
3520-A	To report on a taxpayer's foreign grantor trust information.	Greater of \$10,000 or 5% of the portion of the trust assets' gross value owned by taxpayer.
5471	For officer, director or shareholder to report a controlled foreign corporation (CFC).	\$10,000 + \$10,000 added for each month late beginning 90 days after IRS delinquency notification (maximum \$50,000).
5472	To report transactions of a 25% foreign-owned U.S. corporation or foreign corporation engaged in U.S. trade or business and to report on related parties as required by IRC §§ 6038A and 6038C.	Or failure to keep certain records on reportable transactions, \$10,000 plus \$10,000 for each month late beginning 90 days after IRS delinquency notice (maximum \$50,000).
926	To report transfers of property to foreign corporations and other information required to be disclosed under IRC § 6038B.	10% of transferred property value up to \$100,000, with no limit in penalty if willful failure to file.
8621	To report ownership in a Passive Foreign Investment Company (PFIC). Note that foreign mutual funds are usually PFICs.	\$10,000 + \$10,000 for each month late beginning 90 days after IRS delinquency notice, maximum \$50,000 and 10% of any non-reported transferred property (maximum \$100,000).
8865	For partner to report a foreign partnership or joint venture.	\$10,000 + \$10,000 each month late beginning 90 days after IRS delinquency notice (maximum \$50,000) + 10% of unreported transferred property (maximum \$100,000).
8891	To report interest in a Canadian retirement plan and to defer tax on undistributed income under treaty. Form is discontinued after 2014. Beginning in 2015, a taxpayer who has not received a distribution from his or her Canadian Registered Retirement Savings Plan (RRSP) is deemed to have elected under a U.S.-Canadian Treaty to defer income tax on RRSP funds until later distribution. (California taxes such accounts.)	
8938	To report foreign financial accounts if aggregate value exceeds certain thresholds. (See below.) Includes accounts with taxpayer's signatory authority.	\$10,000 plus \$10,000 for each month late beginning 90 days after IRS delinquency notification and thereafter an additional \$10,000 for each 30-day period (maximum \$50,000).
8938 Thresholds	<input type="checkbox"/> Single* resident U.S. taxpayer – value over \$50,000 on last day of year or over \$75,000 at any time during year. <input type="checkbox"/> Joint-filing resident U.S. taxpayers – value over \$100,000 on last day of year or over \$150,000 at any time during tax year. <input type="checkbox"/> Single* non-resident U.S. taxpayer – value over \$200,000 on last day of year or over \$300,000 at any time during year. <input type="checkbox"/> Joint-filing non-resident U.S. taxpayers – value over \$400,000 on last day of year or over \$600,000 at any time during year. *or married filing separately	

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