

# LAW OFFICES OF SANFORD I. MILLAR

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## FBAR Willful Failure to File Post August 31, 2011

August 21, 2011

On August 31, 2011 the opportunity for taxpayers to enter the Second Supplemental Offshore Voluntary Disclosure Program (OVDI) offered by the [IRS](#) ends, absent specific individually granted extensions. What does that mean for taxpayers who have not yet applied to enter the OVDI program? Does it mean that their failure to act by August 31, 2011 now makes their conduct “willful” and if so what does that mean? Frequently Asked Question 5 published by the [IRS](#) may provide some insight.

FAQ 5 states: “A penalty for failing to file the Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, commonly known as an “FBAR”). United States citizens, residents and certain other persons must annually report their direct or indirect financial interest in, or signature authority (or other authority that is comparable to signature authority) over, a financial account that is maintained with a financial institution located in a foreign country if, for any calendar year, the aggregate value of all foreign accounts exceeded \$10,000 at any time during the year. Generally, the civil penalty for willfully failing to file an FBAR can be as high as the greater of \$100,000 or 50 percent of the total balance of the foreign account per violation. See 31 U.S.C. § 5321(a)(5). Non-willful violations that the [IRS](#) determines were not due to reasonable cause are subject to a \$10,000 penalty per violation.”

The risk calculus comes down to this. Will the [IRS](#) asset a penalty based upon willful or non-willful conduct if the taxpayer is found after August 31, 2011 to have failed to file FBAR’s? The answer is it may very well depend upon the reasons for the non-filing. It likely will be much harder to avoid the willfulness penalty base post August 31, 2011, because of the publicity given the OVDI program and the time allowed to apply. Not all hope is lost, however, if there is no tax liability for the years in which FBAR’s are unfiled, and the failure to file was due to a “reasonable cause” then the non-willful penalty base may still be applied. This is going to be a “facts and circumstances” test applied by the [IRS](#) but if

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a taxpayer has no unreported income then the approach should be considered. The case where the taxpayer has unreported income will be much more complex, but steps can still be taken to minimize the penalties.

The very worst scenario will be to wait to be discovered, for under the Foreign Account Tax Compliance Act, (IRC§1471-1474) financial institutions globally will begin reporting to the [IRS](#) in 2013/14 and enforcement action, including criminal actions surely will follow.

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