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Offshore Bank Letters, FATCA, & IRS Penalties---Are Any Choices Left?

With the impending [FATCA](#) compliance rollout and the U.S. Justice Department deal for Swiss banks, there are lots of letters and phone calls being made to account holders with American indicia. American citizens, residents—even people with a U.S. address or phone number—should be prepared. Possible American status means proving you’re compliant with the IRS or proving you’re not American after all.

Some people react like a deer in the headlights. But the bank’s letter or call is unlikely to evaporate. Failing to respond in any way is likely to mean the bank will close your account, if it isn’t closed already. Banks routinely turn over the names of closed accounts, and may even be more likely to disclose closed accounts than active ones..

Swiss banks are the most serious, since they are trying to get better penalty categories for themselves. But FATCA, the Foreign Account Tax Compliance Act, is also taking some blame. The U.S. can penalize foreign banks if they don’t hand over Americans.



(Photo credit: CCFoodTravel.com)

Bank secrecy *anywhere* is fast becoming a thing of the past. Americans can have money and investments anywhere, but tax returns must report [worldwide income](#). Some must file IRS [Form 8938](#) and many must file a separate FBAR by each June 30.

Tax return and FBAR violations are dealt with harshly. Tax evasion can mean five years in prison and a \$250,000 fine. A false return earns three years and a \$250,000 fine.

Failing to file FBARs can be criminal with prison up to ten years and fines up to \$500,000. Even non-willful civil FBAR violations draw a \$10,000 fine. Willful—but civil—FBAR violations are most controversial with the potential to exceed your account. The penalty is the greater of \$100,000 or 50% of the account for each year you fail to file.

Those numbers can add up and be much worse than the 27.5% Offshore Voluntary Disclosure Program penalty. Recently, [Mr. Carl R. Zwerner](#) failed to get out of civil FBAR penalties that were 150% of his Swiss account. See [Court Upholds Record FBAR Penalties. Exceeding Offshore Account Balance](#). Tax lawyers expect the IRS to be bolder now with FBAR penalties, and more reluctant to reduce or waive penalties once assessed.

Meanwhile, the IRS Offshore Voluntary Disclosure Program or OVDP looks even more attractive than it did before. In the OVDP, you pay back taxes and penalties but you will not be prosecuted. Taxes on previously unreported income, interest, and a 20% penalty are palatable, and at the end of the case, you pay 27.5% of the highest account balance over 8 years.

A certain 27.5% is far more attractive than the risk of 150% or even more. Many taxpayers seem to assume that the feds can't and won't prosecute everyone. That may be true, yet it is still a serious gauntlet to run.

And while a quiet disclosure—filing amended tax returns and FBARs—is verboten according to the IRS, the risk of big civil FBAR penalties must now be counted as a distinct possibility. For anyone facing a bank letter, a quiet disclosure or mere prospective compliance is unlikely to be enough.

Although the chance of prosecution or big civil penalties may still be uncertain, it is increasingly looking like Russian roulette.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.