

FATCA Letters About Your Foreign Accounts?

by Robert W. Wood

If you have a bank account outside the U.S., chances are you will receive a letter saying that your bank must hand over the details of any American accounts, including yours. In fact, chances are that you have already received one or much such letters. The letters vary by country and by individual institutions.

But the overall message is that the IRS is about to get your information. As unnerving as this is, FATCA is real, and ignoring offshore accounts isn't wise. You might think your accounts are not big enough to be noticed, but it is not worth the risk.

Many American citizens and Green Card holders are receiving letters (and in some cases even phone calls) from their banks about their American status. Some ask for your U.S. tax ID, and ask you to verify that you are fully tax compliant with the IRS. Some don't require a response, and just say your information will be sent. Some say the bank will close your account if you don't respond favorably. But what if you aren't up to snuff with the IRS?

FATCA - the Foreign Account Tax Compliance Act - is America's global disclosure law. It was passed way back in 2010. But it took about 5 years to be implemented and ramped up, both by the banks and by the U.S. and foreign governments. At its core, FATCA penalizes foreign banks if they do not hand over Americans. The vast majority of foreign countries and their banks comply, so don't count on bank secrecy anywhere.

On top of FATCA, the U.S. has a treasure trove of data from more than 50,000 voluntary disclosures, whistleblowers, banks under U.S. government investigation and cooperative witnesses. So the smart money suggests that you should assume that any secret account you have is actually no longer secret. That suggests she should try to resolve your issues. You can have money and investments anywhere in the world as long as you disclose them.

You must report worldwide income on your U.S. tax return. If you have a foreign bank account, you must check "yes" on Schedule B. You may also need to file an IRS Form 8938 with your Form 1040 to report foreign accounts and assets. Yet tax return filing alone isn't enough. U.S. persons with foreign bank accounts exceeding \$10,000 in the aggregate at any time during the year must file an FBAR - now rebranded as a FinCEN Form 114 - 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. Filing a false return? Three years and a \$250,000 fine.



Failing to file FBARs can be criminal too. Fines can be up to \$500,000 and prison can be up to ten years. Even civil FBAR cases are scary, with non-willful violations drawing a \$10,000 fine. For willful FBAR violations, the penalty is the greater of \$100,000 or 50% of the amount in the account for each violation. Each year you didn't file is a separate violation. Those numbers can add up fast and easily be much worse than the 27.5% or 50% penalty that generally applied under the IRS Offshore Voluntary Disclosure Program.

With the range of potential penalties, it is sensible to consider reacting to a FATCA letter carefully. For example, you might at first be tempted to tell the bank that you are compliant even if you are not. However, this seems dangerous. The bank or the IRS will find out, maybe not right away, but eventually. And any action of this sort can be viewed as evidence of willfulness by the IRS or prosecutors.

You also might consider failing to respond or just closing your account. Again, though, this is dangerous. Banks routinely turn over the names of closed accounts, so that hardly solves the problem. Plainly, joining one of the IRS amnesty programs and telling

your bank you've done it is the safest choice. For ten years, the IRS primary program was the Offshore Voluntary Disclosure Program (OVDP), or its similar predecessors.

The OVDP was safe and predictable, provided that you were willing to pay the penalties. You paid back taxes and penalties, but would not be prosecuted. But the OVDP ended in late 2018. So, if you did not enter it in time, it is now too late. Another program is the IRS's Streamlined program, and it remains open.

The Streamlined program can apply not only to overseas Americans but also to those living in the U.S. The Streamlined program is far less expensive than the OVDP if you qualify. Although the Streamlined program does not have the certainty of the OVDP, this IRS Offshore Amnesty Program may be right for you. Most notably, you cannot enter the Streamlined Program if you were willful.

Your view and the IRS view of willfulness might well be different, so care and professional advice is required. Finally, with the closing of the OVDP, there is another IRS avenue, the new voluntary disclosure procedures. That is worth considering too.

For disclosures that should not be made under the Streamlined program because of willfulness risks, the latest IRS program was announced in December 2018 in this IRS [memorandum](#). The new rules are effective for all disclosures after September 28, 2018. The penalties can be higher or lower than the OVDP, depending on the facts. But the new program is certainly less predictable. See [New IRS Offshore Account Policy, Bigger Penalties For Secret Accounts](#).

Filing amended tax returns and FBARs outside of the IRS programs is considered a "quiet" disclosure, and the IRS warns against it. Just filing properly on a prospective basis is also not the best choice. After all, there is a risk your past non-compliance will be noticed. Don't take any action without considering your profile, facts, numbers, actions and risk tolerance. Although the chance of a terrible result might be fairly small, terrible in this case really can mean terrible. Get some advice and try to get your situation resolved in a way that makes sense for your facts, risk profile, and pocketbook.