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FIFA Charges Showcase FBAR Penalties, Turbocharging Prison Time

FIFA has big problems, and not just limited to foreign bank account reporting. Yet many average Americans should watch at least one aspect of the FIFA criminal charges play out: the foreign account forms known as FBARs. Each U.S. citizen and permanent resident must report worldwide income to the IRS, even when paying taxes elsewhere. Moreover, you must file an annual FBAR (now called FinCEN Form 114) disclosing your foreign bank accounts if their aggregate value exceeds \$10,000 at any time during the year. The penalties for either failure are big, potentially criminal.

FBAR penalties are even worse than tax evasion. An FBAR violation that is non-willful is \$10,000 per account per year. Willful—but still civil—violations can be up to 50% of the value in a foreign account, again, *per year*. An FBAR violation that is criminal is even worse, carrying up to **10 years** in prison. You have to file FBARs even if you are only a signatory but not a beneficial owner.



It is easy for the IRS to find you. [FATCA](#), America's global tax enforcement law encourages banks worldwide to hand over American account details to the IRS. Some banks send [FATCA letters promising disclosure to IRS](#), while others just disclose with no warning. The IRS warns that it can pursue you even if you use a bank having no offices on U.S. soil. Moreover, the [courts have upheld FBAR penalties exceeding the offshore account balance](#). These are all reasons the IRS offshore voluntary disclosure programs have processed over 50,000 cases, raking in over \$7 billion. That could increase, as the chances of being caught with undisclosed accounts are going up.

The FBAR case of [Mr. Carl R. Zwerner](#) of Coral Gables, Florida, was another big victory for the feds in the fight over offshore accounts. The IRS wants taxpayers who failed to file [FBARs](#) and to declare all income to go into the Offshore Voluntary Disclosure Program, also known as the [OVDP](#). It involves reopening 8 tax years, and paying taxes, interest and penalties, but no prosecution.

But the penalties can be painful, especially the one equal to 27.5% of the highest balance in the offshore accounts. As a result, some people want to amend their taxes and file FBARs outside the OVDP. Some people are willing to pay the taxes they owe, but not the 27.5% penalty. The IRS calls this a "[quiet disclosure](#)" and says it will come after you if you try it.

That might include prosecution or large civil FBAR penalties. That's where Mr. Zwerner comes in. He tried to come forward in 2009 even before the IRS had a special program. You'd think that might immunize him, but it didn't.

The IRS went after Mr. Zwerner for \$3,488,609.33 in penalties for FBAR violations. How did it get to that huge number? It's 50% of the highest balance in the account each year. Mr. Zwerner fought the penalty in court, but a jury has upheld the IRS. The jury found Mr. Zwerner willful for 2004, 2005 and 2006, but not for 2007.

What was considered willful? Mr. Zwerner kept the accounts under two different entity names, and his tax return said "No" he didn't have any foreign accounts. Still, there were some sympathetic facts here.

Mr. Zwerner is [87 years old](#). He had his tax counsel in 2008 contact IRS Criminal Investigation and make a voluntary disclosure. Mr. Zwerner disclosed the existence of his offshore account (including income generated by the account) on his timely filed 2007 tax return and paid the taxes.

But it was not done perfectly. His former tax lawyer asked the IRS anonymously, so in IRS parlance, Mr. Zwerner didn't fully come forward. Still, he did file amended returns for 2004, 2005 and 2006 and FBARs. But in 2010, the IRS began an audit. Mr. Zwerner tried to join the 2011 IRS program called the OVDI. However, the IRS refused to allow him to participate because he was under audit. These are unusual facts, but should have helped Mr. Zwerner, not hurt him.

Remember, the government carries the burden of proving willfulness. Yet there may be little sympathy for someone with large financial resources who fails to inquire about reporting

requirements. Plus, willfulness can include conscious efforts to avoid learning about the FBAR reporting. It is sometimes called willful blindness.

Are these penalties excessive? Some say they are, noting that the Excessive Fines Clause of the [Eighth Amendment](#) suggests that a civil penalty may be unconstitutional if it is part punishment, and if the punishment is grossly disproportionate to the conduct. In the meantime, the IRS OVDP probably looks even more attractive than it did. Sure, a 27.5% penalty is high. But it is a lot better than paying a penalty exceeding 100% of the account balance.

For alerts to future tax articles, email 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.