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Foreign Bank Accounts, IRS, FinCEN & Catch-22

Taxpayers with foreign accounts aggregating more than \$10,000 at any time during 2012 must file Treasury Form [TDF 90-22.1](#), also known as an [FBAR](#). FBARs must be filed electronically now. You can ask the Financial Crimes Enforcement Network ([FinCEN](#)) for an exemption, but apparently your lawyer or accountant can't do it for you. FinCEN hasn't published guidance on who qualifies for an exemption, so it may be difficult to get one.



Filing on paper can be important. After all, when you file FBARs electronically, how can you include an explanatory letter or even refer to one? You may need to explain that you are filing past due FBARs, didn't know they were required, and ask for no penalties. See [IRS Gives Big Break To Some Offshore Account Holders](#).

Yes, but updated [FAQ #17](#) says you should just keep your explanatory letter until requested. FinCEN is revising FBAR forms to create space for filers to provide reasons for late filing. The revised electronic FBAR will be available by September 30, 2013. See [FinCEN Introduces New Form for Authorizing FBAR Filing by Spouses and Third Parties](#). In the meantime, there is a new

form (as of August 1, 2013) that you can fill out to allow your adviser to file FBARs electronically on your behalf. See [FinCEN Form 114\(a\)](#).

Is that a good idea? It depends. For now, keeping an explanatory letter may give some level of protection. If the explanatory letter provides a basis for “reasonable cause” for failure to file FBARs, keeping the letter—and being ready to hand it over if asked—may be the best you can do at the moment. After the new FBAR form goes into effect September 30, 2013, you may be able to reference the explanatory letter and include a brief statement with the FBAR.

How does this interact with amended tax returns? After all, a failure to file FBARs will frequently be accompanied by a failure to file [IRS Form 8938](#). See [IRS Form 8938 Or FBAR?](#) This FATCA form, filed with tax returns, came into effect for 2011 and later returns. There may also be unreported income and an increased tax liability.

If you file amended tax returns to add a Form 8938, shouldn't an explanatory statement say why there should be no penalty? You would think so. Shouldn't the explanatory statement reference the FBARs too? You'd think so.

It seems important to explain the late FBAR filing. After all, the IRS frowns on “quiet disclosures,” although it has not defined them precisely. Surely not **any** disclosure outside of the Offshore Voluntary Disclosure Program is quiet. The IRS has sanctioned at least **some** disclosures outside of the OVDP. But it's hard to say where to draw the line and the stakes are high.

Before required electronic filing, an explanatory statement could help show you were making a good faith effort to come into compliance without making a disfavored “quiet disclosure.” Electronic filing of FBARs makes explaining anything tough. And explaining seems a good idea in many cases. The potential penalties can be severe.

Referencing your FBARs when filing amended tax return may be a substitute for submitting an explanatory statement with the FBARs. On the other hand, it's not clear that referencing FBARs in a statement with amended tax returns helps. FBARs go to FinCEN, and tax returns go to the IRS. And the IRS is saying that they don't want you to send FBAR explanatory statements now. Instead, keep them on hand in case the IRS or FinCEN asks.

It's all a little maddening. Until we see the new FBAR (September 30, 2013), the only alternative may be to follow FinCEN and IRS guidance. That is, file

FBARs electronically and keep your explanatory letter until they ask for it. Surely this will be solved. For the the time being, however, on top of the other tensions associated with these matters, you may have to put up with a little more uncertainty.

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.