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THE TAX LAWYER

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### Should You File FBAR For The First Time?

As June 30 gets closer, should you file your **first** FBAR? An FBAR, or Report of Foreign Bank and Financial Accounts, Treasury Form [TDF 90-22.1](#), has emerged from the dusty stacks of federal form oblivion onto the front page. If you have foreign bank accounts holding more than \$10,000 in the aggregate any time during 2010, you can face big penalties or even jail if you fail to file by June 30, 2011.

If you haven't disclosed your foreign account on your tax return and haven't **previously** filed FBARs, **should** you? If you are in the process of coming clean with your foreign accounts under the [OVDI](#), the answer appears to be **yes**. Even if you've only done a pre-clearance, you should probably still file your FBAR. See [FAQ 23](#).

But what if you won't make a voluntary disclosure under the OVDI? First, examine your assumptions. It may be shortsighted not to join the OVDI. The deadline is August 31, 2011, but many are extending until November 29, 2011. See [IRS Updates Voluntary Disclosure Amnesty: What You Should Know](#).

Second, consider the alternatives and your facts. Starting to file FBARs now can appear to be a "**quiet disclosure**," something the IRS discourages. See [FAQ 15](#). Here are some variables:

**Did You Report All Income?** If you reported all income from your foreign account(s) or wouldn't have had to pay additional U.S. tax even if you had (for example, because of foreign tax credits), filing an FBAR is less risky. In fact, the [2011 FAQs](#) explicitly states that such filers are not

required to enter the OVDI. See [FAQ 17](#). In that case your tax returns might not have to be amended.

Arguably your sole failure was to file FBARs, so starting to file now makes sense. The IRS could assess penalties for your past failure to file FBARs, but you could explain and dispute the penalties. Alternatively, you could explain with your first FBAR that you previously were not aware of filing requirements.

**Did You Check the Foreign Account Box?** Another variable is whether you previously disclosed the *existence* of your foreign account on your tax return, even though you didn't file FBARs. If you did and you wouldn't owe more tax because you included the foreign income, you shouldn't need to file amended tax returns. Your sole failure was to file FBARs so you should start filing them now.

It's less clear what to do if you checked the "no" box on [Schedule B](#) to your tax return saying you *don't* have any foreign accounts, or if you didn't check *either box*. That makes your returns inaccurate and gives you more exposure. Most advisers would probably say that if you *still* wouldn't owe more U.S. tax, you should file the current year FBAR.

Not wanting to be discovered is a poor excuse for continuing to ignore the rules. If you reported all the foreign income—or wouldn't owe more tax even if you had—your big failure was the FBARs. You probably should start filing now, even though it could mean you'll face a dispute about penalties.

If you didn't disclose the account on your tax returns and owe tax from the past, you face a tough choice. Staying hidden forever seems unlikely and is highly risky. But if you file your first FBAR and the IRS asks for past FBARs and asks questions about your past returns, you can't lie. The choices are tough enough that you should clearly get advice from an experienced tax lawyer.

For the basic rules of FBAR filings, see [Are You Getting Enough FBAR?](#)

For more, see:

[IRS To Let Some Bow Out Of Swiss Account Disclosure Program](#)

[The IRS Grills Taxpayers on Offshore Accounts](#)

[Latest Foreign Account Prosecution Fuels Fears](#)

[Still Have A Foreign Bank Account?](#)

[What To Do If Your Foreign Account Is A PFIC](#)

[Still More Foreign Account Worries!](#)

[Six Questions About Secret Foreign Bank Accounts](#)

[Ten Things To Know About Offshore Bank Accounts](#)

[Sacre Bleu! The Foreign-Account Penalty](#)

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