

# American Citizens Abroad

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## The FBAR SCAM

### Executive Summary

ACA is calling for all Americans who are bona fide overseas residents to be exempted from filing the Foreign Bank Account Report (FBAR) as this reporting requirement specifically discriminates against Americans residing and working overseas. ACA also recommends that Congress reduce the FBAR filing penalties and eliminate civil and criminal penalties for past FBAR filing noncompliance for bona fide overseas residents. The IRS administration of the FBAR has led to a scam, and ACA recommends a GAO review of IRS programs and procedures related to the FBAR.

Under the Bank Secrecy Act of 1970, Title 31 U.S.C. §5314, any American with financial interest in, or signatory authority over, foreign financial accounts exceeding \$10,000 must file the FBAR with the U.S. Department of Treasury. FBAR is only an informational reporting and is not linked to tax filing. In fact, it was largely ignored by the Department of Treasury, tax preparers and tax filers for more than 30 years. Its fundamental usefulness in tracking down criminals, money launderers and terrorists – the original purposes of the law - can even be called into question.

For very obvious reasons of convenience and practicality, most people do their banking business and hold their financial assets in their country of residence. Probably all Americans resident in Germany, for instance, have a bank account there. This is not, in and of itself, a cause for suspicion of fraud or tax evasion, no more than a resident of Missouri banking in St Louis.

Since the IRS took over the administration of the FBAR filing in 2003, it has turned the FBAR into a revenue raising mechanism for the U.S. Treasury. Current IRS regulations assume that everyone holding financial assets outside of the United States is guilty of tax evasion, even if they are working overseas or are a bona fide resident of another country. The burden of proof of innocence is on the person living overseas. Guilty until proven innocent has become the new rule. This is evidenced by the fact that FBAR penalties for non-willful errors and omission to report begin at \$10,000. Willful non-filing carries potential penalties of \$100,000 or 50% of the value of overseas assets, whichever is larger. For U.S. citizens residing in the United States, penalties on tax filing "omissions" are nowhere near this level. One could argue that these confiscatory penalties are in direct violation of the 8th Amendment of the Constitution.

In its campaign to track down wealthy tax evaders hiding money in foreign bank accounts and to help close the "tax gap", the IRS has used a combination of scare tactics, by publicizing its successes in criminal prosecution, and voluntary disclosure programs, the 2009 OVDP and 2011 OVDI, to encourage

Americans to come forth without criminal prosecution. The IRS lured Americans abroad into its program with a statement that, under no circumstances, would a taxpayer be required to pay a penalty greater than he or she would otherwise be liable for under existing statutes, i.e. \$10,000 for non-willful noncompliance. However at a later date, on a retroactive basis, IRS changed the rules and systematically imposed penalties based on asset value, 20% under OVDP and 25% under OVDI. Among the 30,000 participants in the two voluntary programs, a great many were honest tax-paying middle-class Americans living overseas who simply had ignored the need to file the FBAR and did not owe any U.S. tax because they pay taxes in their country of residence and claim foreign tax credits against any U.S. income tax liability. Today, they face financial ruin and severe emotional stress as a consequence of FBAR, as multiple testimonies received by ACA attest.

The IRS has twisted the law to turn the FBAR into a disguised form of tax on assets of Americans resident abroad. Yet the United States only has authority to tax income, not assets. In fact, in September 2011, the IRS proudly announced that the two voluntary programs had already yielded \$2.7 billion and that more would come in. In its search for additional revenue and its well-publicized campaign against tax evasion, the IRS has made no distinction between wealthy U.S. residents evading taxes through hidden accounts abroad and honest Americans residing overseas with legitimate accounts in their country of residence. Since Americans residing overseas must have foreign financial accounts to live normal lives, they are being unjustly discriminated and penalized.

Today, about 6 million Americans are living overseas, mostly for professional or marriage reasons, mostly on a long-term or permanent basis, mostly in countries with income tax rates higher than the U.S. They are in the middle of a raging crossfire between the IRS and tax evaders, domestically resident, with money hidden in foreign bank accounts. But they are not part of the issue!

ACA is thus calling for all bona fide overseas residents to be exempted from FBAR reporting. The ACA position paper can be found at <http://www.aca.ch/fbarscam.pdf>.

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