

**III. The “Delinquent FBAR Submission Procedures.”** The New Procedures for filing delinquent FBARs where there is no omission of offshore taxable income are no longer a part of OVDP FAQ 17, as set forth above. Instead, the filing of delinquent FBARs is set out as a separate submission procedure.

A. Delinquent FBAR Submission Procedures. The Delinquent FBAR Procedures are described as follows (See <http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-submission-Procedures>):

**“Delinquent FBAR Submission Procedures**

Taxpayers who do not need to use either the OVDP... or the Streamlined Filing Compliance Procedures...to file delinquent or amended tax returns to report and pay additional tax, but who:

- (1) have not filed a required Report of Foreign Bank and Financial Accounts (FBAR) (FinCEN Form 114, previously Form TD F 90-22.1),
- (2) are not under a civil examination or a criminal investigation by the IRS, and
- (3) have not already been contacted by the IRS about the delinquent FBARs should file the delinquent FBARs according to the FBAR instructions and include a statement explaining why the FBARs are filed late. All FBARs are required to be filed electronically at FinCen. On the cover page of the electronic form, select the reason for filing late....”

The IRS will not impose a penalty for the failure to file the delinquent FBARs if you properly reported on your U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs and you have not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted.

FBARs will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.”

B. Delinquent FBAR procedures Compared to 2012 Submissions Under FAQ 17.

The New Procedures expressly state that FBARs submitted pursuant to the New Procedures “may be selected for audit” whereas under 2012 FAQ 17, the IRS did not mention audits or examinations. Whether there is a meaningful difference is not clear, because under the New Procedures as under the prior procedures, if there are no under-reported tax liabilities and if the taxpayer has not been contacted by the IRS regarding delinquent returns, there will be no penalties—whether or not an examination is conducted.

C. Further thoughts as to Impact of Filing Delinquent FBARS Under New Procedures. As with the procedures under 2012 FAQ 17, the reason for the late filing is required; however, only recently has the FinCen Form 114 contained a line which requests the reason for the late filing. (FinCen Form 114, is the electronic FBAR form which has replaced the FBAR, Form 90.22-11 and which must be submitted). Since any omission of income will negate the qualification for submission under the New Procedures, it is important that the “reason for late filing” be considered carefully since any “willful” omission would require penalties to be considered under the “willful” standard, outside of the OVDP and outside of the Streamlined Procedures.

1. FinCen Form 114 Reasons for Late Filing. Form 114 requests reasons for the late filing, and provides the following reasons to select from:

- “1. Did not know that I had to file.
2. Thought account balance was below reporting threshold.
3. Did not know my account qualifies as foreign.
4. Account statement not received in time.
5. Account statement lost (replacement requested).
6. Late receiving missing required account information.
7. Unable to obtain joint spouse signature in time.
8. Unable to access BSA E-filing system.
9. Other (Please provide explanation).”

2. Thoughts on Reasonable Cause Statement. The late filing reasons provided on the FinCen electronic form all are reasons which seemingly could fall into a category of “non-willful” or “willful” depending upon the definition of each. See discussion herein in Part VI. Therefore, any explanation for the late filing should be considered carefully, as if omitted income is later discovered or if the IRS can reject a filing on examination of the submission if it disagrees with the reasonable cause statement, then penalties could apply and the taxpayer would have to contest them.

D. Conclusion As to Delinquent FBAR Submission Procedures. A submission will not qualify for the Delinquent FBAR filing procedures if : (1) there was any omission of income from the offshore account (even one (\$1.0) dollar) or, (2) if there is an ongoing IRS civil or criminal exam.

Unlike under 2012 OVDP FAQ 17 regarding delinquent FBAR procedures, the New Delinquent FBAR Procedures do not provide an assurance that submissions thereunder will not result in penalties even if there has been no omitted taxable income from the accounts for which FBARs weren’t filed. Rather, the Delinquent FBAR procedures make it clear that if a delinquent FBAR submission is examined by the IRS, civil FBAR penalties and even criminal prosecution may result.

As a result, taxpayers considering filing under the New Delinquent FBAR procedures should consider obtaining a “pre-clearance” from Criminal Investigation to assure that they are not under examination and are therefore eligible to so file.

Taxpayers should carefully consider their “reasonable cause” for late filing statement since it may be important if an examination results.

Finally, for taxpayers who are not certain whether they have omitted income from their offshore accounts, rather than taking a chance that they qualify under the New Delinquent FBAR procedures, they should consider filing pursuant to the Streamlined Procedures, the OVDP, or under the voluntary disclosure procedures in IRM 9.5.11., as discussed in Part V herein.