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Big IRS Changes for Late Filers



[IRS Makes Changes to Offshore Programs - Revisions Ease Burden and Help More Taxpayers Comply with FATCA, FBAR and Other IRS Reporting Requirements](#)

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For late or non-filers to get compliant, addressed below are recent changes to the IRS' voluntary disclosure programs. Note: In this article we refer to U.S. citizens, dual citizens and green-card holders (U.S. Persons) as "taxpayers" even though, because of treaty agreements between the U.S. and Germany and other countries, no U.S. tax may actually be due on their foreign worldwide income. Most, of course, are still required to file U.S. returns and/or Foreign Bank and Financial Account Reports (FBARs).

How can non-filing taxpayers get compliant?

By simply sending in overdue U.S. tax returns (so-called "quiet disclosure"), such taxpayers risk being audited and potential criminal prosecution.

To eliminate or limit such consequences and penalties, the IRS strongly encourages delinquent taxpayers to come forward under one of their voluntary disclosure programs. As of 2012, there have been two available: *Streamlined Filing Compliance Procedures (Streamlined Procedures)* for non-resident taxpayers with a low compliance risk; and, for all others, the *Offshore Voluntary Disclosure Program (OVDP)*. The latter is generally aimed at taxpayers with exposure to potential criminal liability and/or substantial civil penalties due to a willful failure to report foreign financial assets and pay all the tax due in respect to those assets.

On June 18, 2014, the IRS modified the terms for both programs.

STREAMLINED PROCEDURES EXPANDED

Often viewed as a friendlier and less costly option, the *Streamlined Procedures* program was initially available only to non-resident non-filer taxpayers.

Its main changes include:

- expanding the 2012 Streamlined Procedures into two programs - one for non-residents (*Streamlined Foreign Offshore Procedures*); and, the other for U.S. residents (*Streamlined Domestic Offshore Procedures*);
- for non-residents, elimination of requirement to have lived outside the U.S. since January 1, 2009;

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- elimination of the per tax year \$1,500 tax liability limit; and,
- elimination of the risk assessment process associated with the 2012 Streamlined Procedures.

And, for eligible (non-willful) U.S. taxpayers filing using the new *Streamlined Procedures*:

- if residing outside the U.S., all tax penalties will be waived;
- if residing in the U.S., the only penalty will be a miscellaneous offshore penalty equal to 5% of the foreign financial assets that gave rise to the tax compliance issue; and,
- the IRS will not assess any failure to file FBAR penalties.

Regarding these options and compliance, it is important to know four things: (i) at any time, the IRS could end or change the terms of its voluntary disclosure programs; (ii) should the IRS find the taxpayer first, “voluntary” disclosure may no longer be an option; (iii) for failure to file their tax returns, expat taxpayers may lose their right to elect the foreign earned income exclusion (up to \$97,600 in 2013); and, (iv) penalties for failure to file FBARs are high, i.e. if non-willful, up to \$10,000 (per violation year); if willful, up to the greater of \$100,000 or 50% of account balances; criminal penalties may also apply.

In addition to data mining between the various U.S. agencies, including passport renewal, the Foreign Account Tax Compliance Act (FATCA) now requires foreign financial institutions (FFIs) to report directly to the IRS certain information about financial accounts held by U.S. Persons - all make it much easier for the IRS to identify non-filing taxpayers even those living outside the U.S.

What might all this mean to late filers? This is the time to get into compliance. The *Streamlined Procedures* require such taxpayers to file the last 3 years of back tax returns and 6 years of FBARs. In addition, taxpayers will be required to certify that the failure to report all income, pay all tax and file returns or submit FBARs, was due to non-willful conduct (defined by the IRS as conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law).

Especially for simple returns, most expat tax preparers have very reasonable rates and also charge less for multiple year filings.

OFFSHORE VOLUNTARY DISCLOSURE PROGRAM CHANGES

Although changes to the OVDP were supposed to make it easier for the non-compliant taxpayer to come forward, some actually augment some of the requirements and penalties.

Its main changes include:

- requiring additional information from taxpayers applying to the program;
- eliminating the existing reduced penalty percentage for certain non-willful taxpayers; and,
- increasing the offshore penalty percentage (from 27.5% to 50%) if, before the taxpayer’s OVDP pre-clearance request is submitted, it becomes public that a financial institution where the taxpayer holds an account or another party facilitating the taxpayer’s offshore arrangement is under investigation by the IRS or Department of Justice.

Streamlined Procedures or the OVDP?

Someone not sure whether they qualify for *Streamlined Procedures* should consult a knowledgeable tax attorney to help them decide which voluntary disclosure program is the right one for their situation. This is especially important as, once a submission is made under the *Streamlined Procedures*, the taxpayer may not participate in the *OVDP*; and, similarly, a taxpayer who applied for *OVDP* on or after July 1, 2014

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is not eligible to participate in the *Streamlined Procedures* unless they have not yet signed closing agreements. Someone should also seek professional tax help if they need to amend their tax returns to include Form 8938 (Statement of Specified Foreign Financial Assets), include foreign interest and dividends on their returns (Schedule B), and/or other required forms.

And, what if the taxpayer has timely filed all U.S. tax returns (if required) and reported all taxable income (if any) but only recently learned that they should have also been filing FBARs?

Instead of going through a voluntary disclosure program such taxpayers should simply file delinquent FBARs for the past 6 years. For non-wilful non-compliance, the IRS will not impose a failure to file penalty if there are no unreported tax liabilities and if they have not previously contacted the taxpayer. It is also possible to amend an FBAR to include additional foreign accounts or other information, e.g. add signatory accounts.

Statute of Limitations

For the FBAR it is 6 years. However, the statute of limitations for tax assessments does not begin to run until a tax return is filed. Therefore, the statute remains open on any tax year for which a tax return has not been filed.

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In applying the provisions of this and any other tax article, it is important to understand the impact of applicable tax laws will vary between individual taxpayers. Please consult your tax adviser to determine how the tax laws discussed may affect your particular U.S. tax situation.

References:

<http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures>
<http://www.irs.gov/uac/Newsroom/IRS-Makes-Changes-to-Offshore-Programs;-Revisions-Ease-Burden-and-Help-More-Taxpayers-Come-into-Compliance>
<http://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-Outside-the-United-States>
<http://www.irs.gov/Businesses/Corporations/Summary-of-Key-FATCA-Provisions>
<http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers>