

IRS Changes Streamlined OVDP Reducing FBAR Penalty Exposure!

By Charles P. Rettig


Charles Rettig discusses the significant changes to the offshore voluntary compliance programs.

U.S. taxpayers with previously undisclosed interests in foreign financial accounts and assets continue to analyze and seek advice regarding the most appropriate methods of coming into compliance with their U.S. filing and reporting obligations. Many are pursuing participation in the IRS offshore voluntary disclosure program (the OVDP, which began in 2012—modeled after similar programs in 2009 and 2011).

In IR-2014-73,¹ the IRS recently announced significant changes regarding the offshore voluntary compliance programs, providing new options to help both taxpayers residing overseas and those residing in the United States. The changes are anticipated to provide thousands of people a new avenue to come into compliance with their U.S. tax obligations.

Changes to the IRS OVDP include the possibility of transitioning to the revised Streamlined Filing Compliance Procedures. Generally, people currently participating in an OVDP who meet the eligibility requirements for the streamlined procedures should consider requesting transitional treatment if they are comfortable and have a sufficient factual basis to appropriately certify their “non-willful” status under penalties of perjury. The IRS has indicated it will look at each of the non-willful certifications to decide if there’s any reason for further inquiry. If the facts supporting the non-willful certification are less than accurate, the certification form indicates that the government might “open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even referral to Criminal Investigation.”²

Before transitional treatment will be afforded from the OVDP, the IRS must agree that the taxpayer is eligible for transitional treatment and must agree that the available information is consistent with the taxpayer’s certification of non-willful conduct. These changes do not apply to anyone who has received a counter-signed



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IRS Closing Agreement. If the case is closed it remains closed and the IRS will not issue refund.

The government may have or subsequently receive information that does not support such status. The IRS, working closely with the U.S. Department of Justice, continues to investigate foreign financial institutions that may have assisted U.S. taxpayers in avoiding their tax filing

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and payment obligations. In addition, on July 1, 2014, the new information reporting regime resulting from the Foreign Account Tax Compliance Act (FATCA) went into effect. Thousands of foreign financial institutions will be reporting foreign accounts held by U.S. taxpayers to the IRS. Since the launch of the first OVDP in 2009, more than 45,000 taxpayers have come into compliance voluntarily, paying about \$6.5 billion in taxes, interest and penalties.³

Revised Streamlined Procedures

The original streamlined procedures (outside the OVDP) announced in 2012 were only available to nonresident, non-filers. Taxpayer submissions were subject to different degrees of review based on the amount of the tax due and the taxpayer's response to a "risk" questionnaire. The expanded streamlined procedures are intended for U.S. taxpayers whose failure to disclose their offshore assets was "non-willful."

The expanded 2014 streamlined procedures are available to a wider population of U.S. taxpayers living outside the country and, for the first time, to certain U.S. taxpayers residing in the United States. The changes include:

- eliminating a requirement that the taxpayer have \$1,500 or less of unpaid tax per year;
- eliminating the required risk questionnaire; and
- requiring the taxpayer to certify that previous failures to comply were due to non-willful conduct.

The streamlined procedures require the filing of original (for nonresidents) or amended (for residents) tax returns. Such tax returns must not only report whatever foreign source income was generated in each of the applicable tax years but must also properly report any U.S. source income

and deductions for each of the applicable tax years. For eligible U.S. taxpayers residing outside the United States, all penalties will be waived. For eligible U.S. taxpayers residing in the United States, the only offshore related penalty will be a miscellaneous offshore penalty equal to five percent of the foreign financial assets that gave rise to the tax compliance issue (all income tax related penalties associated with the non-U.S. source income will be waived).

The streamlined procedures do not limit the civil penalties otherwise associated with the reporting of U.S. source income. IRS Offshore Voluntary Disclosure Program (OVDP) Frequently Asked Question 7.1 provides, "The offshore penalty structure only resolves liabilities and penalties related to offshore noncompliance. Domestic portions of a voluntary disclosure are subject to examination." Further, the streamlined procedures do not provide protection from a possible criminal prosecution referral from the IRS.

Eligibility for the Streamlined Procedures

Taxpayers using either the Streamlined Foreign Offshore Procedures⁴ or the Streamlined Domestic Offshore Procedures⁵ will be required to execute an IRS form certification under penalties of perjury that their failure to report all income, pay all tax, and submit all required information returns, including FBARs (FinCEN Form 114, previously Form TD F 90-22.1), was due to "non-willful" conduct.

Transitional treatment under the OVDP will allow taxpayers currently participating in the OVDP who meet the eligibility requirements for the expanded Streamlined Procedures, an opportunity to remain in the OVDP while requesting consideration of the more favorable penalty structure of the expanded streamlined procedures.

A taxpayer will be considered to be currently participating in an OVDP for purposes of receiving transitional treatment if: (1) before July 1, 2014, they mailed to IRS Criminal Investigation their OVDP voluntary disclosure letter and attachments as described in OVDP FAQ 24, and (2) as of July 1, 2014, either: (a) remained in OVDP but had not yet completed the OVDP certification process where a Form 906 Closing Agreement has been fully executed by the IRS, or (b) opted out of OVDP, but had not yet received a letter initiating an examination and enclosing an IRS Notice 609. A taxpayer who, as of July 1, 2014, completed the OVDP certification process where a Form 906 Closing Agreement has been fully executed by the IRS will not be considered currently participating in an OVDP and thus will not be eligible for transitional

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