

# NEW IRS GUIDANCE FOR OFFSHORE VOLUNTARY DISCLOSURES

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On June 18, 2014, the IRS announced a number of significant changes to the IRS Streamlined Program and the Off shore Voluntary Disclosure Program (OVDP). The IRS's goal is to encourage taxpayers to come forward under the programs by providing additional flexibility with respect to some of the key aspects of the programs. These latest changes provide welcome relief to many U.S. taxpayers who have failed to file U.S. tax returns and report their foreign accounts. In 2009, the IRS introduced the first off shore voluntary disclosure program. Since then, the IRS has made several changes to the process and has introduced other programs to encourage taxpayers to come forward. Since the first program was introduced in 2009, we have represented hundreds of U.S. citizens who have come forward to the IRS.

## EXPANSION OF THE IRS STREAMLINED PROCEDURE

The IRS has expanded the parameters of the Streamlined Program to include a much broader group of U.S. taxpayers. Notably, the IRS is modifying the eligibility criteria by eliminating the \$1,500 tax threshold and allowing U.S. resident taxpayers to enter the program. Thus, the streamlined procedures will now be available to both U.S. individual taxpayers residing outside the United States and U.S. individual taxpayers residing in the United States. However, U.S. resident taxpayers qualifying for this procedure must have already filed U.S. tax returns and will pay a penalty equal to 5% of their unreported off shore assets.

The IRS is also eliminating the risk assessment analysis and the questionnaire that taxpayers must complete in order to enter the Streamlined Program. Taxpayers will still be required to file 3 years of past U.S. federal tax returns and 6 years of past Foreign Bank Account Reports (FBARs). The full amount of the tax and interest due in connection with these filings must be remitted with the delinquent or amended returns.

Under the new guidance, in order to be eligible for the IRS Streamlined Foreign Off shore Procedures, taxpayers must: (1) meet an applicable non-residency requirement (for joint return filers, both spouses must meet the applicable non-residency requirement) and (2) have failed to report the income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) with respect to a foreign financial

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account, and such failures resulted from non-willful conduct.

Individual U.S. citizens or lawful permanent residents, or estates of U.S. citizens or lawful permanent residents will meet the applicable non-residency requirement if, in any one or more of the most recent three years for which the U.S. tax return due date (or properly applied for extended due date) has passed, the individual did not have a U.S. abode and the individual was physically outside the United States for at least 330 full days. Therefore, U.S. citizen snowbirds who consistently have spent their winters in warmer U.S. climates will not qualify as non-residents under the new guidelines. Also, U.S. citizens living close to the border who travel to the United States frequently will also not be classified as nonresidents.

Individuals who are not U.S. citizens or lawful permanent residents, or estates of individuals who were not U.S. citizens or lawful permanent residents will meet the applicable nonresidency requirement if, in any one or more of the last three years for which the U.S. tax return due date (or properly applied for extended due date) has passed, the individual did not meet the substantial presence test as defined in Internal Revenue Code section 7701(b)(3).

A taxpayer who has made a submission under the 2012 Streamlined Filing Compliance Procedures prior to July 1, 2014, and has not already been notified of a high or low risk determination will not receive correspondence related to their risk determination and the returns will be processed without regard to that risk assessment.

### MODIFICATIONS TO THE OVDP

The IRS has also revised the terms of the OVDP. The intent of this change is to cover those taxpayers whose failure to comply with the reporting requirements is considered willful in nature and to cover those who do not qualify for the Streamlined program. Furthermore, the changes to the OVDP will focus on taxpayers who are seeking certainty and relief from criminal prosecution.

Going forward, taxpayers who want to participate in the OVDP will have to provide more information than in the past, including the submission of all account statements at the time they apply to the program. The OVDP 27.5% penalty continues to apply in many cases. For certain voluntary disclosures filed on or after August 3, 2014, taxpayers will face a 50% penalty on the maximum value of unreported assets.

The foregoing changes are in part the result of feedback the IRS received from many tax practitioners and the National Taxpayer Advocate. The IRS discovered that there were many taxpayers for whom the existing program penalties were too harsh. Some taxpayers did not really need the protection from criminal prosecution offered by OVDP, but they also did not fit narrowly within the confines of the Streamlined Program criteria.

The IRS has warned taxpayers, however, that anyone who continues to willfully and aggressively evade the tax laws by hiding money overseas will have to pay a higher price for such noncompliance. Although the IRS is tightening up the components of the OVDP, it still believes it is a better deal than the alternative, warning taxpayers that if the IRS finds you first, you will face higher penalties and possibly criminal prosecution and jail time. The IRS has also warned taxpayers that they are continuing their efforts to track down individuals still out there who are hiding assets overseas. Notably, in light of the new reporting requirements under the Foreign Account Tax Compliance Act ("FATCA"), more banks around the world will be disclosing information on their U.S. customers beginning July 1. Thus, the IRS continues to warn taxpayers that the days of hiding assets in accounts overseas are coming to an end.