



FBAR and Filing Options

Much has been written about FBAR and FATCA for the past six years and yet, there is still a great deal of confusion about reporting foreign bank accounts. Like a deer caught in the headlights, many are frozen with fears about potential FBAR penalties but lacked a concrete and manageable plan to deal with this issue.

On June 18, 2014, IRS commissioner John Koskinen said "...we have made important adjustments to provide opportunities for all U.S. taxpayers to come in, including those who are not willfully hiding assets." These adjustments include two Streamlined Filing Compliance Procedures ("SFCP") to eliminate or lower FBAR penalties.

Starting July 1, 2014, US taxpayers with undisclosed foreign bank accounts have four options:

1. Offshore Voluntary Disclosure Program ("OVDP")
2. Streamlined Filing Compliance Procedures ("SFCP")
3. Delinquent FBAR Submission Procedures
4. Delinquent International information return submission procedures

<http://www.irs.gov/Individuals/International-Taxpayers/Options-Available-For-U-S--Taxpayers-with-Undisclosed-Foreign-Financial-Assets>

1. Offshore Voluntary Disclosure Program ("OVDP")

OVDP is designed for those potentially facing criminal prosecution, as the IRS would consider their case to be willful. For those with more innocent explanations, option number 2 through 4 are available.

After August 5, 2014, if the Justice Department finds out about US taxpayers with foreign bank accounts, the penalty for failing to report foreign financial accounts is increased from 27.5% to 50%. In a classic carrots and stick approach, the IRS ease the treatment on innocent US taxpayers, who honestly did not know about the FBAR rules, while harshly dealing with those with willful intent to evade taxes.

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17918 Pioneer Blvd., Suite 200, Artesia, CA 90701 Tel: 562-865-2727 Fax: 562-865-2760 www.kagwllp.com
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US taxpayers, who are facing potential criminal prosecution, should consult with a tax attorney to get client-attorney privilege protection.

2. Streamlined Filing Compliance Procedures (“SFCP”)

SFCP is broken into two different procedures. One dealing with US taxpayers residing outside the US (Form 14653) and the other for US taxpayers residing in the US (Form 14654). A threshold requirement for participating in the SFCP is that the taxpayer cannot be under IRS examination.

In both SFCP programs, the taxpayers have to comply with the following requirements:

1. File delinquent original or amended US tax returns for the most recent three taxable years and all required international informational returns,
2. File delinquent FBARs, Form 114, for the most recent six years,
3. Certify that all required FBARS have now been filed, and that taxpayer’s prior failure to file tax returns, pay all tax and file FBARs was non-willful, and
4. Pay all tax and interest due on the tax returns submitted.

<http://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-Outside-the-United-States>

If these procedures are followed, then FBAR penalties will be waived on US taxpayers residing outside of the US, while the FBAR penalties are lowered to 5% for US taxpayers residing in the US.

<http://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-in-the-United-States>

Some of the commentaries by tax professionals on 2014 SFCP are as follow:

1. Difficulty in determining whether taxpayer’s tax return and FBAR noncompliance was non-willful,
2. Risk that IRS may obtain information from financial institutions and other sources that is inconsistent with taxpayer’s amended returns and taxpayer’s representation that his/her noncompliance was non-willful,
3. Taxpayer does not obtain a closing agreement in SFCP, and
4. Closed cases in OVDP are not eligible for the new SFCP.



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3. Delinquent FBAR Submission Procedures

If the US taxpayer is not under under IRS audit and has not already been contacted by the IRS about delinquent FBARs (Form 114), then he/she is eligible for delinquent FBARs. According to the IRS website, “the IRS will not impose penalty for failure to file the delinquent FBARs if you properly reported on your US taxpayers, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs...”
<http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures>

This is significant as it is a clear indication what IRS would consider to be non-willful cases. For the US taxpayers with unreported foreign financial accounts, they could now in compliance by first reporting worldwide income in the last three year’s US tax return. Once the worldwide income has been reported, then the delinquent FBARs can be submitted without any penalties.

4. Delinquent International information return submission procedures

Many of the international returns are information only forms. No taxes are paid with them. However failure to file these international forms, often as part of US income tax returns, carries stiff penalties. These penalties can be waived if they are submitted with amended tax returns (except for Form 3520 and 3520-A), along with a statement of reasonable cause. As part of the reasonable cause statement, taxpayers must also certify that any entity for which the information returns are being filed was not engaged in tax evasion.

<http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures>

Two key concepts that emerged from these options are:

1. Non-willful and
2. Reasonable cause.

Please consult with your tax advisors, if you have undisclosed foreign financial accounts, and see how these two concepts apply to you. The IRS will give you the benefit of doubts, until you get audited. If you are audited, then the IRS may view you as willfully evading US taxes, if you have undisclosed foreign financial accounts, potentially carrying criminal prosecution.



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