

## IRS develops new offshore voluntary compliance protocol

**T**he IRS has issued new guidance on how taxpayers with hidden money offshore can come clean. The new procedures replace the nearly 10-year old offshore voluntary disclosure program, which the IRS terminated last fall.

Certain taxpayers can still receive the benefits of the IRS's "streamlined" voluntary compliance program, if they are eligible.

The pre-2019 iteration of the IRS voluntary compliance program traces back to the late aughts when Brad Birkenfeld, a UBS banker, blew the whistle on the American's use of Swiss bank secrecy to avoid US taxes. Birkenfeld earned the largest whistleblower award in IRS history, but spent 40 months in federal prison for his role in tax crimes, which included smuggling a client's diamonds in a toothpaste tube. As part of the investigation, the UBS and the IRS entered into a settlement in which UBS paid \$780 million to the IRS and agreed to disclose the identity of its U.S. clients. As the developments reverberated around the industry, the foundation of Swiss bank secrecy began to crack—and then crumble.

To entice U.S. citizens who had assets overseas to come clean, the IRS announced an offshore voluntary disclosure program in 2009. This program, designed to bring tax cheats out from the shadows, offered a reduced offshore penalty of 20% of highest value of the undisclosed foreign assets. By participating in the program, taxpayers could resolve all civil and criminal liability associated with past non-compliance.

In 2011, 2012, and 2014, the IRS announced replacement programs for or made revisions to the program, eventually increasing the penalty to 50% for taxpayers at certain financial institutions with compliance issues. These programs were a phenomenal success, with over 56,000 taxpayers participating and paying a total of \$11.1 billion in back taxes, interest and penalties.

At the same time, the IRS instituted other measures to enforce offshore compliance,



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such as the Foreign Account Tax Compliance Act (FATCA) and intergovernmental agreements with many jurisdictions. These were designed to obtain information on assets of U.S. persons held offshore.

Last fall, after a six-month notice period, the IRS closed the voluntary disclosure program. The IRS announced that the number of participants had slowed to a trickle. However, as documents such as the Panama Papers have revealed, offshore tax evasion is still out there. The OVDP may have just become too punitive, or the pool of individuals willing to come into the system may simply have dried up.

Now that the OVDP has concluded, there are two options available for taxpayers: the "streamlined" OVDP, and the IRS's regular voluntary compliance procedures applicable to all taxpayers.

The streamlined OVDP, which was announced as part of the 2014 changes to the OVDP, has survived the termination of the OVDP. However, this program differs from the OVDP in many significant respects.

Importantly, the streamlined program is only available to taxpayers who can certify that their compliance was non-willful. Because the conduct was not willful, penalties are much less severe than under the OVDP. Taxpayers living in the US pay a 5% penalty based on the highest value of their foreign accounts, and penalties are waived for taxpayers living abroad.

However, the benefits differ significantly from the OVDP. The taxpayer is not issued a closing letter finally resolving tax liabilities and the taxpayer does not receive immunity from criminal prosecution.

Despite these drawbacks, this program is very useful. In my experience, many clients—such as immigrants with continuing ties to their home countries and Americans living permanently overseas—have made minor missteps in tax compliance with respect to overseas accounts that the program is able to help them clean up. In these cases, the lack of finality as to criminal liability and tax due under this program is a non-issue.

New procedures promulgated late last year provide an alternative. On Nov. 20, 2018, the IRS issued a memo promulgating the new procedures for offshore and domestic voluntary disclosures.

Taxpayers generally receive protection from potential criminal prosecution. But the penalties are steep. A 75% civil fraud penalty will generally apply to the year with the highest liability, but can be extended to other years based on the circumstances.

The combination of the foreign program and domestic program is also significant. It standardizes practices and penalties across different types of non-compliance.

To enter the program, taxpayers first submit a preclearance request on a new form. This form was issued in the spring. The form is designed to determine whether the taxpayers can qualify for the program before providing information on the details of non-compliance. Taxpayers are required to answer a number of specific questions and provide a narrative on the taxpayer's non-compliance, background, and professional advisors.

In announcing its decision to end the OVDC, IRS made clear that offshore non-compliance and evasion are still a top priority of the IRS. The IRS's ability to mine data to find hidden assets is ever increasing, and there are still significant benefits to making a disclosure before getting caught. Affected taxpayers should consult their advisors about how to respond to the changing legal landscape.

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