



Utilising the IRS streamlined compliance programme to manage US tax risk



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United States (US) taxpayers living abroad who have not filed US tax returns should take steps now to minimise their tax risk before it is too late. Presently, the Internal Revenue Service (IRS) provides various options to correct one's taxes in the form of disclosure initiatives. The opportunity to use one of these options may soon be ending. IRS Commissioner Charles Rettig has recently indicated that available programmes may soon expire.

BY

Michel Stein,
Steven Toscher and
Sandra Brown

**Hochman Salkin
Toscher Perez P.C.**

US citizens abroad have filing obligations whether they know it or not

Some US citizens, born in the US to foreign parents or born outside the US to US citizen parents, may be unaware of their obligation to file US tax returns. US citizens, regardless of whether they live in the US or abroad, are required to report their worldwide income, even though it has no connection to the US. Failure to properly report can subject a taxpayer to very large penalties and potentially criminal prosecution.

Available options for the non-compliant taxpayer living abroad

Taxpayers living abroad who are not in compliance with their reporting regarding undeclared interests in foreign financial accounts, foreign trusts and other assets should consider various options to come into compliance, including those outlined below.

Streamlined procedures for non-wilful violations. The IRS maintains streamlined procedures designed to encourage non-wilful taxpayers to come into compliance. Taxpayers using either the Streamlined Foreign Offshore Procedures (for those who live more than 330 days outside the US during any relevant year) or the Streamlined Domestic Offshore Procedures (for those who spend more than 35 days in the US for all relevant years) are required to certify that their failure to report all income, pay all tax and submit all required information returns, including Foreign Bank Account Reports (FBARs), was due to 'non-wilful' conduct. For these streamlined procedures, 'non-wilful conduct' has been specifically defined 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".

The significant benefit of the streamlined programme is that it allows the non-wilful person the opportunity to come clean for all past non-compliance years without any penalties (or vastly reduced penalties for domestic discloses). This is an important benefit that should not be overlooked.

Delinquent submission procedures. Taxpayers who do not need the streamlined filing compliance procedures to file delinquent or amended tax returns to report and pay additional tax, but who have reasonable cause for not filing a required FBAR or other international disclosure forms including Forms 3520-A and 3520, should consider filing the delinquent FBARs or other delinquent forms, along with a statement of all facts establishing reasonable cause for the failure to file. FBARs or delinquent information returns will not be automatically subject to audit but may be selected for audit through the existing IRS audit selection processes that are in place for any tax or information returns.

The benefit of the delinquent filing procedure is that it allows those whose failed to file information returns to file past reports without penalties (if reasonable cause exists), avoiding the more extensive

filing obligations of the streamlined proceedings. These filings commence the statute of limitations allowing for a finite period of time for IRS penalty exposure, while such limitation would be otherwise unavailable absent the delinquent filings.

Formal voluntary disclosure. On 28 November 2018, the IRS released a memorandum addressing the process for all voluntary disclosure (domestic and foreign) following the closing of the 2014 Offshore Voluntary Disclosure Program (OVDP). For all voluntary disclosures received after that date, the IRS will examine a six-year disclosure period. Examiners will determine applicable taxes, interest and penalties, including a fraud penalty (75 percent) for the highest year and a wilful FBAR penalty (up to 50 percent) will be asserted. Penalties for failure to file other information returns, including Forms 3520-A and 3520, could also be imposed. Under the voluntary disclosure practice, taxpayers are required to promptly and fully cooperate during civil examinations.

Formal voluntary disclosures are designed for taxpayers with exposure to potential criminal liability or substantial civil penalties due to a wilful failure to report foreign financial assets and pay all tax due in respect of those assets. The programme provides taxpayers with such exposure potential protection from criminal liability and terms for resolving their civil tax and penalty obligations.

The formal voluntary disclosure is generally not suitable for US taxpayers living abroad who either were not aware of their US obligations or who negligently or mistakenly failed to appropriately file. It primarily remains an important option for those who the IRS could consider to have intentionally evaded US taxation.

New relief provisions for expatriates

In September 2019, the IRS announced procedures for certain persons who have relinquished, or intend to relinquish, their US citizenship and who wish to come into compliance with their US income tax. These procedures may only be used by taxpayers whose failure to file required tax returns (including income tax returns, applicable gift tax returns, information returns and FBARs) and pay taxes and penalties for the years at issue was due to non-wilful conduct.

Under the Relief Procedures for Certain Former Citizens, the IRS provides an alternative means for satisfying the tax compliance certification process for citizens who expatriate after 18 March 2010. These procedures are only available to US citizens with a net worth of less than \$2m, and an aggregate tax liability of \$25,000 or less for the taxable year of expatriation and the five prior years. If these individuals submit information and meet the requirements of the procedures, they will not be 'covered expatriates', nor will they be liable for any unpaid taxes and penalties for these years or any previous years. The IRS continues to remind taxpayers that the IRS is sending notices to expatriates who have not complied with the rules.

Options available for correcting non-compliance may be more limited in the future. US persons not in compliance should immediately consult a professional with experience and expertise with these matters. The options available to taxpayers have never been better.

Michel Stein, Steven Toscher and Sandra Brown are principals at Hochman Salkin Toscher Perez P.C. Mr Stein can be contacted on +1 (310) 281 3248 or by email: stein@taxlitigator.com. Mr Toscher can be contacted on +1 (310) 281 3200 or by email: toscher@taxlitigator.com. Ms Brown can be contacted on +1 (310) 281 3200 or by email: brown@taxlitigator.com.

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