

## Streamlined FBAR Procedures Might Have Narrow Application

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Keeping to its promised September 1 effective date, the IRS on August 31 issued a questionnaire and instructions for streamlined filing compliance procedures for previously unreported offshore accounts held by U.S. taxpayers who present little risk of noncompliance.

Practitioners, however, told Tax Analysts that the criteria for determining low-risk status are so narrow that few taxpayers are likely to qualify, and that the program may in effect be restricted to those taxpayers who have Canadian registered retirement savings plans (RRSPs).

### How It Will Work

The IRS said in the instructions that the streamlined process “is designed for taxpayers that present a low compliance risk.” Qualifying low-risk taxpayers will have their submissions for becoming compliant with their U.S. reporting and tax obligations expedited, “and the IRS will not assert penalties or pursue follow-up actions,” the agency said. (For the instructions and questionnaire, see *Doc 2012-18430* or *2012 TNT 171-55*. For prior coverage, see *Tax Notes*, July 2, 2012, p. 23, *Doc 2012-13625*, or *2012 TNT 124-1*.)

According to the instructions, the new procedures are available for nonresident U.S. taxpayers who have lived outside the United States since January 1, 2009, and who have not filed a U.S. tax return during that period.

A taxpayer using the procedures will be required to file delinquent returns with appropriate related information returns for the past three years, the IRS said, citing as examples Form 3520, “Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts,” and Form 5471, “Information Return of U.S. Persons With Respect to Certain Foreign Corporations.”

The taxpayer must also file delinquent foreign bank account reports for the prior six years. Payment of tax and interest, if applicable, is due with the submission, which must include the completed questionnaire. Amended returns will not be accepted. The submission should be sent to the IRS’s service center in Austin, Texas, with the first page of each tax return marked “Streamlined.”

### Low Risk Factors

The streamlined program is open only to those taxpayers who pose a low risk of noncompliance, which the IRS will determine based in part on the taxpayer’s responses to the questionnaire. “Low

risk will be predicated on simple returns with little or no U.S. tax due," the IRS said. "Absent any high risk factors, if the submitted returns and application show less than \$1,500 in tax due in each of the years, they will be treated as low risk and processed in a streamlined manner."

The level of risk rises if any of the returns claims a refund, if there is material economic activity in the United States, if the taxpayer is under audit or investigation by the IRS, if FBAR penalties have previously been assessed against the taxpayer, if the taxpayer has received an FBAR warning letter, or if there is U.S.-source income, among other factors.

Amended returns will be treated as high risk and subject to examination, except for those filed for the sole purpose of submitting late-filed Forms 8891, seeking relief for failure to timely elect deferral of income from RRSPs, the IRS said.

### Relief for RRSPs?

Practitioners said the streamlined procedures bar numerous potential applicants to the program.

Some U.S. taxpayers living abroad, as well as dual citizens and Canadians with U.S. tax obligations, have long complained that the procedures already in place under the offshore voluntary disclosure program (OVDP) have been burdensome and posed the risk of high penalties to taxpayers. In December 2011 the IRS promised guidance that would minimize penalties on dual U.S. and Canadian citizens living in Canada. (For prior coverage, see *Doc 2011-25282* or *2011 TNT 233-9*.)

Of particular concern to those taxpayers has been the income tax treatment of RRSPs. Income from those plans is not taxable in the United States as long as the taxpayer timely files a tax return and attaches Form 8891, "U.S. Information Return for Beneficiaries of Certain Canadian Registered Retirement Plans," to report the account. (For prior coverage, see *Tax Notes*, Sept. 3, 2012, p. 1113, *Doc 2012-18254*, or *2012 TNT 169-1*.)

Barbara T. Kaplan of Greenberg Traurig LLP said that in its new procedures, the IRS has carved out a very narrow exception, adding, "It's probably most useful for those people like Canadians who had deferred compensation arrangements for which they didn't make elections timely."

### Not Built for Europe

Kaplan said two criteria in particular that raise a taxpayer's risk level could prove troublesome for potential applicants to the program. A taxpayer's risk will increase if the taxpayer has a financial interest in or authority over a financial account located outside its country of residence, or if it holds a financial interest in an entity or entities located outside its country of residence.

Kaplan said it's not uncommon for U.S. taxpayers, especially those living in Europe, to have accounts in a different country. "We've certainly seen a lot of nonresidents where that's the case," she said.

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Niles A. Elber of Caplin & Drysdale agreed, equating Europeans holding foreign accounts to U.S. residents keeping bank accounts in different states. "Say for instance you live in Europe — it's like living in D.C. and having an account in Maryland," he said. "We're talking about a very small geographic distance, and all of a sudden that's a factor that increases risk?"

Elber said the IRS is too concerned with "people who are trying to game this" and has made compliance too onerous for people who want to participate. Regarding the risk factor of a taxpayer having an interest in an entity outside his country of residence, Elber was equally critical. "It's a geographic thing to me, that countries in other regions of the world are more closely located to one another," he said. "I don't see why it would be terribly unreasonable for an Italian to have a business interest in Greece, for example."

### Risks for Taxpayers, Too

While taxpayers classified by the IRS as low risk will not face penalties under the procedures, high-risk taxpayers may face penalties for failure to file and failure to pay taxes owed, as well as FBAR penalties, the IRS said. Notably, the new procedures do not provide protection from criminal prosecution, and "once a taxpayer makes a submission under the new procedure . . . OVDP is no longer available," the IRS said.

Those are considerations that practitioners should take into account, said Ken Jones of Sutherland Asbill & Brennan LLP. "If I was the slightest bit unsure, why would I do this?" he asked.

Kaplan said the possibility of large penalties and prosecution will create more complexity for advisers who have to evaluate their clients' circumstances. Those taxpayers who need the OVDP to avoid prosecution will have no incentive to participate in the new procedures, she said. But for those whose issues fall on the border between the simplified procedures and a higher level of risk for an examination, it will be a judgment call, she said.

Elber, too, said he sees too much risk in the procedures for many taxpayers. "You're applying to the program basically naked," he said. "How many people are going to pop their heads out?"

"If the IRS is trying to bring more people into the system, to get these nonresidents to come into full compliance, I still think you have to make it simpler, and I think you have to make it less costly," Elber said. ■