

Scott Michel Talks to Tax Notes About FBAR Compliance

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Tax Notes

Scott D. Michel spoke with *Tax Notes* concerning the IRS' approach to FBAR compliance and why the Service may be sending the wrong message regarding unreported offshore accounts. To read the full article, please visit *Tax Notes'* website (subscription required).

Excerpt taken from the article "Do FBAR Fines Violate the Eighth Amendment?" by Marie Sapirie for Tax Notes.

Disclosure Practice Before 2009

There was a time not so long ago when quiet disclosures were the norm. Before the offshore voluntary disclosure initiative (OVDI), nearly all compliance issues were handled by submitting amended tax returns and reporting forms, not by dealing with the IRS Criminal Investigation division, said Scott Michel of Caplin & Drysdale. "There clearly was this sense before 2009 that you could solve this problem by filing amended returns and paying tax and interest," he said. Those disclosures typically involved little follow-up by the IRS, but if there was follow-up, taxpayers would cooperate.

When the UBS prosecution and the opening of the 2009 OVDI raised public awareness of the FBAR, disclosures began to stream into the IRS in greater numbers. "I think it would be a serious mistake for the Service to send the message that if you have an unreported offshore account, the only way to solve your problem is to go through CI pre-clearance, submit intake letters and eight years of filings, and then consider opting out of the offshore penalty," said Michel. He predicted that if that becomes the message taxpayers receive, the IRS is likely to drive away huge numbers of still noncompliant taxpayers whose cases don't raise traditional criminal tax issues. "There has to be more than one lane into compliance," he said, adding that the new "streamlined" program isn't broad enough to provide an attractive alternative.

Michel pointed out that the long-standing IRM provision on voluntary disclosure allows taxpayers to make a disclosure by submitting amended or delinquent returns under a cover letter. Assuming that other elements of the disclosure policy are met, the IRM says that can be valid, Michel said. "There is something not quite right about starting to throw the book at people who choose to follow the manual in making their disclosure," he said.

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