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IRS Changes Offshore Voluntary Disclosure Program and Streamlined Filing Compliance Procedures for Undisclosed Foreign Accounts

This alert concerns taxpayers with undisclosed foreign financial accounts and undisclosed foreign assets, as well as taxpayers participating in the Internal Revenue Service's Offshore Voluntary Disclosure Program (OVDP) or Streamlined Filing Compliance Procedures (Streamlined).

On June 18, the IRS introduced significant changes to both OVDP and Streamlined. These changes again increase the volume and breadth of information requested by the IRS within OVDP and increase the penalties payable under OVDP in certain cases. The changes also, however, broaden the availability of Streamlined, especially for U.S.-resident taxpayers, and permit those already in OVDP who qualify for Streamlined to apply the Streamlined penalty to their OVDP matters instead of incurring the OVDP penalty in certain cases.

Changes to the Programs

Many taxpayers and practitioners believed that the OVDP 27.5 percent penalty on the total value of undisclosed foreign assets was too expensive for U.S.-resident taxpayers whose failures to disclose offshore accounts or assets were not due to willful tax avoidance. To address this and other issues, the IRS has expanded the availability of the Streamlined program, including for the first time making it available to U.S.-resident taxpayers, albeit with a small penalty.

Streamlined Changes

- The Streamlined questionnaire – which requested information on various factors that the IRS believed might be indicative of willful tax evasion – has been eliminated.
- The fact that a taxpayer had a U.S. income tax liability of \$1,500 or more in any of the three years covered by Streamlined is no longer a substantial factor the IRS will consider in determining whether the taxpayer had willfully evaded taxes.
- The taxpayer must now execute a "certification" stating that his or her failure to file U.S. tax returns, pay U.S. tax, or report reportable assets was non-willful. Non-willfulness is 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."



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- The IRS has made Streamlined available to U.S.-resident taxpayers; however, U.S.-resident taxpayers will have to pay a miscellaneous penalty equaling 5 percent of the highest aggregate value of all previously undisclosed foreign accounts and assets in any given year of the prior three years. There continues to be no penalty for non-U.S.-resident taxpayers.

OVDP Changes

- A pre-clearance request must now include, in addition to the taxpayer's identifying information, the identities of all foreign financial institutions or entities at or through which undisclosed assets were held. In addition, the Offshore Voluntary Disclosure Letter and Attachment now request more detailed information.
- The 27.5 percent OVDP penalty must now be paid with filing of the amended returns and payment of tax, penalties, and interest instead of when the IRS closes the case.
- The 27.5 percent OVDP penalty is increased to 50 percent if a taxpayer has not submitted an Offshore Voluntary Disclosure Letter by July 1, and if there has been a public announcement that any of the financial institutions where the taxpayer had a foreign account is under investigation by or is cooperating with the IRS.
- Reduced penalties for certain cases are no longer available; however, taxpayers may avail themselves of the Streamlined penalty instead of the OVDP penalty in certain cases as described below.

Applying the Streamlined Penalty Instead of the OVDP Penalty in Certain OVDP Cases

Since the changes to Streamlined have opened that program to U.S.-resident taxpayers, the IRS has made it possible for taxpayers already in OVDP to pay the Streamlined penalty instead of the OVDP penalty if their conduct was non-willful. To take advantage of this penalty reduction, the taxpayer must have submitted the Offshore Voluntary Disclosure Letter by July 1. (A taxpayer who has not done so may still opt out of OVDP and simply apply for Streamlined.)

The taxpayer must still complete and file all documents required by OVDP and pay all tax, penalties, and interest required by OVDP, except for the 27.5 percent OVDP penalty, by the applicable OVDP deadline. The taxpayer must also sign a more detailed version of the Streamlined non-willfulness certification under penalty of perjury. If the certification is accepted, the taxpayer will have to pay the 5 percent Streamlined penalty in lieu of the 27.5 percent OVDP penalty.

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