

Offshore US Tax Problems? IRS Announces Upcoming End to Offshore Voluntary Disclosure Program

The US Internal Revenue Service (IRS) has announced that it will close its current Offshore Voluntary Disclosure Program (OVDP) on September 28, 2018. The IRS advised that this date is intended to provide US taxpayers who have undisclosed foreign financial assets and income time to enter the OVDP before the program closes.

In order to take advantage of the OVDP, an interested taxpayer needs to act promptly because the complete OVDP submission is due by September 28, 2018. Completing an OVDP submission can require significant time prior to that deadline to prepare and complete, so there is no time to wait. At a minimum, the IRS generally requires at least 30 days to review, process and approve a pre-clearance filing and an additional 45 days to process the taxpayer's subsequent Offshore Voluntary Disclosure Letter. Only after the IRS has accepted the taxpayer into the OVDP can the taxpayer then complete the taxpayer's full OVDP submission.

The IRS also announced that it will continue to offer the following programs to address offshore compliance problems relating to foreign income, foreign financial assets, and certain property received from non-US persons or entities:

- Streamlined Filing Compliance Procedures (both for non-US residents and for US residents)
- Delinquent Foreign Bank Account Report (FBAR) submission procedures
- Delinquent international information return submission procedures

However, the Streamlined Filing Compliance Procedures are only available if the taxpayer can certify (under penalty of perjury) that the noncompliance was not "willful." For streamlined compliance purposes, the IRS defines "non-willful" conduct to mean "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 IRS defines "willful" conduct to mean conduct that is "knowing or reckless." The two "Delinquent" filing alternatives require the taxpayer to establish "reasonable cause" for the taxpayer's failure to file the required FBARs or international information returns. The disadvantage of these alternative programs is that the taxpayer does not obtain certainty as to the ultimate outcome and the taxpayer could still be subject to a subsequent IRS examination.

The IRS confirmed that its Criminal Investigation Division will continue its historic Criminal Investigation Voluntary Disclosure Program, which relates to mitigating risks of criminal prosecution for offshore tax problems.

The big advantage of the OVDP (which is the program that will end in September 2018) is that even US taxpayers who cannot satisfy the test for "non-willful" noncompliance, or who did not have "reasonable cause" for noncompliance, nevertheless can resolve all past noncompliance – and avoid potentially applicable civil and criminal penalties – by doing all of the following:

- Filing complete and accurate US income tax returns that include all non-US income for the eight most recent years for which the due date has passed.
- Filing complete and accurate FBARs and international information returns for those eight years.
- Paying all additional US income taxes owed based on these US income tax returns, with interest and with an accuracy related penalty equal to 20% of the underpaid income taxes.
- If applicable, paying all penalties for failure to file these US income tax returns, or for failure to pay the income taxes reported on these US income tax returns, with interest.
- Paying a penalty equal to 27.5% of the highest total value of the taxpayer's total financial accounts and assets affected by the noncompliance for any one of the years during this eight-year period. (This penalty percentage is increased to 50% of this highest total value if the taxpayer had any financial account with a foreign financial institution that the IRS has publicly identified for this purpose as under IRS investigation, or if the IRS has publicly identified as under IRS investigation any facilitator who assisted with establishing or maintaining an offshore arrangement for the taxpayer).
- Agreeing to cooperate and provide information to IRS personnel investigating offshore noncompliance (whether by the taxpayer or by financial institutions or facilitators who helped the taxpayer establish or maintain an offshore arrangement).

In the absence of the protection provided by successful completion of this OVDP process, taxpayers will remain potentially subject to IRS civil penalties and criminal prosecution for all past compliance failures. So, now is the time for US taxpayers who have not already addressed their past and current offshore compliance failures, promptly to do so. Please contact us if you would like to discuss doing so.

Contacts

Jeffrey S. Levin

Partner, New York
T +1 212 872 9840
E jeffrey.levin@squirepb.com

Lee A. Wendel

Partner, Columbus
T +1 614 365 2748
E lee.wendel@squirepb.com

James S. Tsang

Partner, Hong Kong
T +852 2103 0306
E james.tsang@squirepb.com

Patricia Woo

National Partner, Hong Kong
T +852 2103 0322
E patricia.woo@squirepb.com

Jeremy Cape

Partner, London
T +44 207 655 1575
E jeremy.cape@squirepb.com

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