

IRS Programs for Taxpayers Who Haven't Kept Up with Their Foreign Reporting Obligations

Taxpayers who find themselves in the situation of not having satisfied their U.S. tax compliance obligations may feel as if fixing the situation is daunting. However, the IRS does offer a variety of programs that taxpayers can use in order to come into compliance. Here is a brief summary of the available compliance programs for taxpayers with undisclosed foreign financial assets.

Streamlined Filing Compliance Procedures.

The Streamlined Filing Compliance Procedures is a program for taxpayers whose failure to comply is not willful. It consists of two separate tracks: (1) the Streamlined Foreign Offshore Procedures (SFOP) for U.S. taxpayers residing outside the U.S., and (2) the Streamlined Domestic Offshore Procedures (SDOP) for U.S. taxpayers residing in the U.S.

For All Streamlined Cases (Both SFOP and SDOP), the Taxpayer Must Meet the Following Conditions:

- Has failed to report the income from a foreign financial asset and pay the required tax (if any), and may have failed to file a Report of Foreign Bank and Financial Accounts (FBAR) and/or one or more international information returns.
- Certifies under penalty of perjury that these failures resulted from non-willful conduct.
- Is not under a civil examination or a criminal investigation by the IRS.
- Files three years of tax returns or amended returns with all required information returns, pays tax and interest, and files six years of FBARs.



Differences Between the Streamlined Foreign Offshore Procedures and the Streamlined Domestic Offshore Procedures

- SDOP requires the taxpayer to pay certain penalties in order to participate in the program, while SFOP does not.
- SFOP is available to taxpayers who meet the applicable non-residency requirements, while SDOP is available to taxpayers who do not meet those requirements. The non-residency requirements to be able to participate in the SFOP are as follows:
 - For individuals who are U.S. citizens or lawful permanent residents (or estates of deceased taxpayers who met these requirements prior to death), the individual must not have had a U.S. "home" (referred to as an "abode" in U.S. tax parlance), and must have been physically outside the U.S. for at least 330 full days. Both of these requirements must be satisfied in at least one of the most recent three years for which the U.S. tax return due date (or properly applied-for extended due date) has passed.

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- For individuals who are neither U.S. citizens nor lawful permanent residents (or estates of deceased taxpayers who met these requirements prior to death), the individual must not have met the substantial presence test (colloquially referred to as the day-count test) for U.S. federal income tax residency purposes in at least one of the most recent three years for which the U.S. tax return due date (or properly applied-for extended due date) has passed.
- In order to qualify for SDOP, the taxpayer must have previously filed a U.S. tax return for each of the most recent three years for which the U.S. tax return due date (or properly applied-for extended due date) has passed. In contrast, taxpayers qualifying for SFOP are not required to have made any previous U.S. tax filings.

Delinquent FBAR Submission Procedures.

Taxpayers who have not filed a required FBAR may consider the Delinquent FBAR Submission Procedures. In order to use these procedures, the taxpayer needs to meet certain requirements, including:

- Does not need to use either the IRS Criminal Investigation Voluntary Disclosure Practice or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax.
- Is not under a civil examination or a criminal investigation by the IRS.
- Has not already been contacted by the IRS about the delinquent FBARs.
- Files all delinquent FBARs electronically with the Financial Crimes Enforcement Network (FinCEN).
- Provides the required statement of reasonable cause.

Delinquent International Information Return Submission Procedures.

Taxpayers who have not filed one or more required international information returns (e.g., Form 3520, Form 3520-A, Form 5471, Form 8938) may consider the Delinquent International Information Return Submission Procedures. For this program, the taxpayer may submit a reasonable cause statement with the initial filing or in response to an initial penalty notice if one is later received. It is important to note that penalty relief is not automatic. In order to use these procedures, the taxpayer needs to meet certain requirements, including:

- Is not under a civil examination or a criminal investigation by the IRS.
- Has not already been contacted by the IRS about the delinquent information returns.

IRS Criminal Investigation Voluntary Disclosure Practice.

Taxpayers who have willfully failed to comply with tax or tax-related obligations may consider the IRS Criminal Investigation Voluntary Disclosure Practice, which may limit exposure to criminal prosecution. In order to use this program, the taxpayer must meet certain requirements, including:

- Is not under a civil examination or criminal investigation.
- No information alerting the noncompliance has been provided to the IRS by a third party or acquired directly by the IRS.
- The source income is not illegal.
- Submits a preclearance request to the IRS Criminal Investigation Division.
- Provides additional facts and circumstances to the IRS, including unreported accounts and income and a noncompliance narrative.
- Cooperates and makes good faith arrangements with the IRS to pay the full tax, interest and any penalties.

These four programs offer varying forms and degrees of relief. For example, a taxpayer who is eligible to use the SFOP and who complies with all the program requirements will not be subject to penalties. The SFOP does not offer any protection from criminal liability, but if a taxpayer's compliance failures have not been willful, this is typically not a significant concern. In exchange for protection from criminal prosecution, taxpayers using the Voluntary Disclosure Practice may not be afforded any substantive procedural rights or civil penalty relief.

A taxpayer's ability to use any of the above programs will depend on the particular facts surrounding the individual's noncompliance. Taxpayers should expect to be fully forthcoming by making a full disclosure of all unreported income, gains and noncompliant assets under any one of the compliance programs. Loeb & Loeb's International Trust and Estate Planning practice has assisted many clients in using these programs. For more information, please contact any of the attorneys below connection with.

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