



New Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer U.S. Taxpayers

On June 26, 2012, the IRS announced new streamlined filing compliance procedures for non-resident U.S. taxpayers to go into effect on Sept. 1, 2012. These procedures are being implemented in recognition that some U.S. taxpayers living abroad have failed to timely file U.S. federal income tax returns or Reports of Foreign Bank and Financial Accounts (FBARs), Form TD F 90-22.1, but have recently become aware of their filing obligations and now seek to come into compliance with the law. The streamlined filing procedures that were first offered on September 1, 2012 have been expanded and modified to accommodate a broader group of U.S. taxpayers.

Major changes to the streamlined procedures include: (1) extension of eligibility to U.S. taxpayers residing in the United States, (2) elimination of the \$1,500 tax threshold, and (3) elimination of the risk assessment process associated with the streamlined filing compliance procedure announced in 2012.

Description of the New Streamlined Procedure

Taxpayers utilizing this procedure will be required to file delinquent tax returns, with appropriate related information returns (e.g. Form 3520 or 5471), for the past three years and to file delinquent FBARs (Form Fin Cen 114) for the past six years. Payment for the tax and interest, if applicable, must be remitted along with delinquent tax returns.

In addition, retroactive relief for failure to timely elect income deferral on certain retirement and savings plans where deferral is permitted by relevant treaty is available through this process. The proper deferral elections with respect to such arrangements must be made with the submission.

Eligibility

The modified streamlined filing compliance procedures are designed for only individual taxpayers, including estates of individual taxpayers. The streamlined procedures are available to both U.S. individual taxpayers residing outside the United States and U.S. individual taxpayers residing in the United States.

Descriptions of the specific eligibility requirements for the streamlined procedures for both non-U.S. residents **SFOP** (the "Streamlined Foreign Offshore Procedures") and U.S. residents **SDOP** (the "Streamlined Domestic Offshore Procedures") are set forth below.

Taxpayers using either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will be required to certify, in accordance with the specific instructions set forth below, that the failure to report all income, pay all tax, and submit all required information returns, including FBARs (FinCEN Form 114, previously Form TD F 90-22.1), was due to non-willful conduct.

If the IRS has initiated a civil examination of a taxpayer's returns for any taxable year, regardless of whether the examination relates to undisclosed foreign financial assets, the taxpayer will not be eligible to use the streamlined procedures. Taxpayers under examination may consult with their agent. Similarly, a taxpayer under criminal investigation by IRS Criminal Investigation is also ineligible to use the streamlined procedures.

Taxpayers eligible to use the streamlined procedures who have previously filed delinquent or amended returns in an attempt to address U.S. tax and information reporting obligations with respect to foreign financial assets (so-called “quiet disclosures” made outside of the OVDP or its predecessor programs) may still use the streamlined procedures by following the instructions set forth below. However, any penalty assessments previously made with respect to those filings will not be abated.

All tax returns submitted under the streamlined procedures must have a valid Taxpayer Identification Number (TIN). For U.S. citizens, resident aliens, and certain other individuals, the proper TIN is a valid Social Security Number (SSN). For individuals who are not eligible for an SSN, an Individual Taxpayer Identification Number (ITIN) is a valid TIN. Tax returns submitted without a valid SSN or ITIN will not be processed under the streamlined procedures. However, for taxpayers who are ineligible for an SSN but do not have an ITIN, a submission may be made under the streamlined procedures if accompanied by a complete ITIN application

General treatment under the streamlined procedures

Tax returns submitted under either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will be processed like any other return submitted to the IRS. Consequently, receipt of the returns will not be acknowledged by the IRS and the streamlined filing process will not culminate in the signing of a closing agreement with the IRS.

Returns submitted under either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will not be subject to IRS audit automatically, but they may be selected for audit under the existing audit selection processes applicable to any U.S. tax return and may also be subject to verification procedures in that the accuracy and completeness of submissions may be checked against information received from banks, financial advisors, and other sources. Thus, returns submitted under the streamlined procedures may be subject to IRS examination, additional civil penalties, and even criminal liability, if appropriate. Taxpayers who are concerned that their failure to report income, pay tax, and submit required information returns was due to willful conduct and who therefore seek assurances that they will not be subject to criminal liability and/or substantial monetary penalties should consider participating in the Offshore Voluntary Disclosure Program (OVDP) and should consult with their professional tax or legal advisers.

After a taxpayer has completed the streamlined filing compliance procedures, he or she will be expected to comply with U.S. law for all future years and file returns according to regular filing procedures.

Coordination with treatment under OVDP

Once a taxpayer makes a submission under either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures, the taxpayer may not participate in OVDP. Similarly, a taxpayer who submits an OVDP voluntary disclosure letter pursuant to OVDP FAQ 24 on or after July 1, 2014, is not eligible to participate in the streamlined procedures.

A taxpayer eligible for treatment under the streamlined procedures who submits, or has submitted, a voluntary disclosure letter under the OVDP (or any predecessor offshore voluntary disclosure program) prior to July 1, 2014, but who does not yet have a fully executed OVDP closing agreement, may request treatment under the applicable penalty terms available under the streamlined procedures. A taxpayer seeking such treatment does not need to opt

out of OVDP, but will be required to certify, in accordance with the instructions set forth below, that the failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct. As part of the OVDP process, the IRS will consider this request in light of all the facts and circumstances of the taxpayer's case and will determine whether or not to incorporate the streamlined penalty terms in the OVDP closing agreement

Eligibility for the Streamlined Foreign Offshore Procedures (SFOP)

In addition to having to meet the general eligibility criteria described above, individual U.S. taxpayers, or estates of individual U.S. taxpayers, seeking to use the Streamlined Foreign Offshore Procedures described in this section must:

(1) meet the applicable non-residency requirement described below (for joint return filers, both spouses must meet the applicable non-residency requirement (described below) and

(2) have failed to report the income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) with respect to a foreign financial account, and such failures resulted from non-willful conduct.

Non-willful conduct is 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.

Specific Instructions for the Streamlined Foreign Offshore Procedures (SFOP)

Failure to follow these instructions or to submit the items described below will result in returns being processed in the normal course without the benefit of the favorable terms of these procedures.

1. For each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed:
 - if a U.S. tax return has not been filed previously, submit a complete and accurate delinquent tax return using Form 1040, U.S. Individual Income Tax Return, together with the required information returns (e.g., Forms 3520, 5471, and 8938) even if these information returns would normally be filed separately from the Form 1040 had the taxpayer filed on time, or
 - if a U.S. tax return has been filed previously, submit a complete and accurate amended tax return using Form 1040X, Amended U.S. Individual Income Tax Return, together with the required information returns (e.g., Forms 3520, 5471, and 8938) even if these information returns would normally be filed separately from the Form 1040 had the taxpayer filed a complete and accurate original return.
2. Include at the top of the first page of each delinquent or amended tax return and at the top of each information return "Streamlined Foreign Offshore" written in red to indicate that the returns are being submitted under these procedures. **This is critical to ensure that your returns are processed through these special procedures.**
3. Complete and sign a statement on the [Certification by U.S. Person Residing Outside of the U.S.](#) (see below) certifying (1) that you are eligible for the Streamlined Foreign Offshore Procedures; (2) that all required FBARs

have now been filed (see instruction 8 below); and (3) that the failure to file tax returns, report all income, pay all tax, and submit all required information returns, including FBARs, resulted from non-willful conduct. You must submit the original signed statement and you must attach copies of the statement to each tax return and information return being submitted through these procedures. You should not attach copies of the statement to FBARs. Failure to submit this statement, or submission of an incomplete or otherwise deficient statement, will result in returns being processed in the normal course without the benefit of the favorable terms of these procedures.

4. Submit payment of all tax due as reflected on the tax returns and all applicable statutory interest with respect to each of the late payment amounts. Your taxpayer identification number must be included on your check. [Click here to get help with the interest calculation.](#)
5. If you are not eligible to have a Social Security Number and do not already have an ITIN, submit an application for an ITIN along with the required tax returns, information returns, and other documents filed under these streamlined procedures.
6. If you seek relief for failure to timely elect deferral of income from certain retirement or savings plans where deferral is permitted by an applicable treaty, submit:
 - a statement requesting an extension of time to make an election to defer income tax and identifying the applicable treaty provision;
 - a dated statement signed by you under penalties of perjury describing:
 - the events that led to the failure to make the election,
 - the events that led to the discovery of the failure, and
 - if you relied on a professional advisor, the nature of the advisor's engagement and responsibilities; and
 - for relevant Canadian plans, a Form 8891 for each tax year and each plan and a description of the type of plan covered by the submission.
7. The documents listed above, together with the payments described above, must be sent in paper form (electronic submissions will not be accepted) to:

Internal Revenue Service
3651 South I-H 35
Stop 6063 AUSC
Attn: Streamlined Foreign Offshore
Austin, TX 78741

This address may only be used for returns filed under these procedures. For all future filings, you must

file according to regular filing procedures.

8. For each of the most recent 6 years for which the FBAR due date has passed, file delinquent FBARs according to the FBAR instructions and include a statement explaining that the FBARs are being filed as part of the Streamlined Filing Compliance Procedures. You are required to file these delinquent FBARs electronically at [FinCen](#).

Instructions for Using This Procedure

Other Considerations

Taxpayers who are concerned about the risk of criminal prosecution should be advised that this new procedure does not provide protection from criminal prosecution if the IRS and Department of Justice determine that the taxpayer's particular circumstances warrant such prosecution. Taxpayers concerned about criminal prosecution because of their particular circumstances should be aware of and consult their legal advisers about the Offshore Voluntary Disclosure Program (OVDP), announced on Jan. 9, 2012, which offers another means by which taxpayers with undisclosed offshore accounts may become compliant. It should also be noted that taxpayers who are ineligible to use OVDP are also ineligible to participate in this procedure.

****Possible penalties for failure to file FBAR**

If you fail to file an FBAR, in the absence of reasonable cause, you may be subject to either a willful or non-willful civil penalty. Generally, the civil penalty for willfully failing to file an FBAR can be up to the greater of \$100,000 or 50 percent of the total balance of the foreign account at the time of the violation. See 31 U.S.C. § 5321(a)(5).

CPA Note: that this penalty is applicable only in cases in which there is willful intent to avoid filing. Non-willful violations that the IRS determines are not due to reasonable cause are subject to a penalty of up to \$10,000 per violation. There is no penalty in the case of a violation that IRS determines was due to reasonable cause.

Example 1: Taxpayer is a United States citizen who lived abroad in Country A for all of 2010, during which time Taxpayer worked as an English instructor. He maintained a checking account with a bank in Country A, and the highest balance in the account exceeded \$10,000 in 2010. Taxpayer complied with Country A's tax laws and properly reported all his income on Country A tax returns. Although Taxpayer earned income in excess of the applicable exemption amount and standard deduction, he did not timely file a federal income tax return for tax year 2010. After learning of his U.S. filing obligations, Taxpayer filed an accurate, though late, federal income tax return showing no tax liability after taking into account the section 911 foreign earned income exclusion and the foreign tax credit for taxes paid to Country A. Taxpayer is not liable for a failure to file penalty, since the amount of tax required to be shown on the federal income tax return is zero. Taxpayer is not liable for a failure to pay penalty, since the amount of tax shown on the return is zero., except that the highest balance in Taxpayer's checking account exceeded \$10,000 and, after reading recent press and thus learning of his FBAR filing obligations, Taxpayer filed an accurate, though late, FBAR. The FBAR was accompanied by a written statement explaining why Taxpayer believed the failure to file the FBAR was due to reasonable cause. The IRS will determine whether the violation was due to reasonable cause based on all the facts and circumstances. Taxpayer's explanation for why he failed to timely file an FBAR appears reasonable in view of the facts and circumstances of the case. Since the IRS determined that the FBAR violation was due to reasonable cause, no FBAR penalty will be asserted.

Factors that might weigh in favor of a determination that an FBAR violation was due to reasonable cause include reliance upon the advice of a professional tax advisor who was informed of the existence of the foreign financial account, that the unreported account was established for a legitimate purpose and there were no indications of efforts taken to intentionally conceal the reporting of income or assets, and that there was no tax deficiency (or there was a tax deficiency but the amount was de-minimis) related to the unreported foreign account. There may be factors in addition to those listed that weigh in favor of a determination that a violation was due to reasonable cause. No single factor is determinative.

Factors that might weigh against a determination that an FBAR violation was due to reasonable cause include:

- whether the taxpayer's background and education indicate that he should have known of the FBAR reporting requirements.
- whether there was a tax deficiency related to the unreported foreign account, and whether the taxpayer failed to disclose the existence of the account to the person preparing his tax return.

As with factors that might weigh in favor of a determination that an FBAR violation was due to reasonable cause, there may be other factors that weigh against a determination that a violation was due to reasonable cause. No single factor is determinative.

Current IRS procedures state that an examiner may determine that the facts and circumstances of a particular case do not justify asserting a penalty and that instead an examiner should issue a warning letter. The IRS has established penalty mitigation guidelines, but examiners may determine that a penalty is not appropriate or that a lesser (or greater) penalty amount than the guidelines would otherwise provide is appropriate.

Example 2: Taxpayer is a United States citizen who lives and works in Country B as a computer programmer. Taxpayer has checking and savings accounts with a bank that is located in the city where he lives. The aggregate balance of the checking and savings accounts is \$50,000 during the tax year. Taxpayer complied with Country B's tax laws and properly reported all his income on Country B tax returns. Taxpayer failed to file federal income tax returns and failed to file FBARs to report his financial interest in the checking and savings accounts. After reading recent press and thus learning of his federal income tax return and FBAR reporting obligations, Taxpayer filed delinquent FBARs, reporting both foreign accounts, and attached statements to the FBARs explaining that he was previously unaware of his obligation to report the accounts on an FBAR. Taxpayer also filed federal income tax returns properly reporting all income and no tax was due. The IRS will determine whether the FBAR violation was due to reasonable cause based on all the facts and circumstances. Taxpayer had a legitimate purpose for maintaining the foreign accounts, there were no indications of efforts taken to intentionally conceal the reporting of income or assets, and no tax was due. Taxpayer's explanation for why he failed to timely file an FBAR appears reasonable in view of the facts and circumstances of the case. Since the IRS determined that the FBAR violation was due to reasonable cause, no FBAR penalty will be asserted.

Please be advised that, based on current IRS rules and standards as of July 20, 2014, the advice contained herein is not intended or written by the practitioner to be used and cannot be used by the taxpayer for the purpose of avoiding penalties. This article contains general guidance and is to be used for informational purposes only. The law is always changing. We highly recommend that you speak to a CPA regarding how the law applies to you. We can be reached at info@globaltax.solutions or (703) 717-5000.

**Certification by U.S. Person Residing Outside of the United States
for Streamlined Foreign Offshore Procedures**

Name(s) of taxpayer(s): _____

TIN(s) of taxpayer(s): _____

Certification:

I am providing delinquent or amended income tax returns, including all required information returns, for each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed. The tax and interest I owe for each year are as follows:

Year List years in order

Year	Amount of tax owed	Interest	Total
2010			
2011			
2012			
Total			

Note: Your payment should equal the total tax and interest due for all three years. You may receive a balance due notice or a refund if the tax or interest is not calculated correctly.

I failed to report income from one or more foreign financial assets during the above period.

I meet the non-residency requirements for the Streamlined Foreign Offshore procedures.

Note: Both spouses filing a joint certification must meet the non-residency requirements.

I meet all the other eligibility requirements for the Streamlined Foreign Offshore procedures. If I failed to timely file correct and complete FBARs for any of the last six years, I have now filed those FBARs.

I agree to retain all records related to my income and assets during the period covered by my delinquent or amended returns until three years from the date of this certification. If I was required to file delinquent FBARs in accordance with these procedures, I also agree to retain all records (including, but not limited to, account statements) related to my foreign financial accounts until six years from the date of this certification. Upon request, I agree to provide all such records to the Internal Revenue Service. My failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct. I understand that non-willful conduct is 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.

I recognize that if the Internal Revenue Service receives or discovers evidence of willfulness, fraud, or

criminal conduct, it may open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even referral to Criminal Investigation. *In the space below (or on an attached page), provide specific reasons for your failure to report all income, pay all tax, and submit all required information returns, including FBARs. If you relied on a professional advisor, provide the name, address, and telephone number of the advisor and a summary of the advice. If married taxpayers submitting a joint certification have different reasons, provide the individual reasons for each spouse separately in the statement of facts.*

Under penalties of perjury, I declare that I have examined this certification and all accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.

Signature of Taxpayer	Date
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Printed Name	
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Signature of Taxpayer [if joint certification]	Date
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Printed Name	
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FOR ESTATES ONLY:

Signature of Fiduciary	Date
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Title of Fiduciary (e.g., executor or administrator)	
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Printed Name	
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