

# NEW FILING COMPLIANCE PROCEDURE FOR NONRESIDENT U.S. TAXPAYERS

*Federal/International Tax Alert*  
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On Friday, August 31, 2012, the Internal Revenue Service (IRS) released detailed guidance on the new streamlined filing compliance procedure it announced on June 26, 2012, for individuals who are U.S. citizens but nonresidents of the United States. The new procedure, which went into effect on September 1, 2012, is designed to provide a new option to help some U.S. citizens residing abroad who have not been filing U.S. income tax returns and Reports of Foreign Bank and Financial Accounts (FBARs) by giving them an opportunity to catch up with their U.S. tax filing obligations without incurring penalties if they owe little (less than \$1,500 USD per year) or no back taxes and are otherwise a low compliance risk.

The new procedure is available for nonresident U.S. individuals who have resided outside of the United States since January 1, 2009, and who have not filed a U.S. tax return during the same period. Such individuals must present a low level of compliance risk, as described below, for the IRS to expedite its review of the individual's submission and not assert penalties or pursue follow-up actions. An eligible individual must submit to the IRS, at a specially designated mailing address: 1) complete and accurate delinquent U.S. income tax returns, labeled "Streamlined," with any appropriate related information returns (e.g., Forms 5471 and 3520), for the last three years for which a U.S. tax return is due; 2) payment of all tax due and owing as reflected on the returns and statutory interest due and owing; 3) complete and accurate delinquent FBARs for the last six years for which an FBAR is due; and 4) a complete, accurate, and signed questionnaire that the IRS designed for purposes of this procedure (available on the IRS's website).

Any individual seeking relief for failure to timely elect deferral of tax on income from certain non-U.S. retirement or savings plans, where deferral is permitted by a relevant treaty (e.g., Canadian Registered Retirement Savings Plans and Registered Retirement Income Funds) will be required to submit: 1) a statement requesting an extension of time to make an election to defer income tax and identifying the pertinent treaty provision; 2) 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; and 3) a dated statement signed by the individual 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 the individual relied on a professional advisor, the nature of the advisor's engagement and responsibilities.

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If an individual does not have a U.S. social security number, he/she must obtain one before making a submission under this new procedure; otherwise, the IRS will not accept the submission.

The IRS will determine the level of compliance risk presented by the submission based on information provided on the returns filed and based on additional information provided in response to the required questionnaire. Low risk will be predicated on simple returns with little or no U.S. tax due. Absent any other high-risk factors, if the submitted returns and application show less than \$1,500 in tax due each year (not in the aggregate), they will be treated as low risk and processed in the streamlined manner described above. The risk level may rise if:

- Any of the returns submitted through this program claim a refund;
- There is material economic activity in the United States;
- The individual has not declared all of his/her income in his/her country of residence;
- The individual is under audit or investigation by the IRS;
- FBAR penalties have been previously assessed against the individual or the individual has previously received an FBAR warning letter;
- The individual has a financial interest or authority over a financial account(s) located outside his/her country of residence;
- The individual has a financial interest in an entity or entities located outside his/her country of residence;
- There is any U.S. source income; or
- There are indications of sophisticated tax planning or avoidance.

Amended returns submitted through this procedure will be treated as high-risk returns and subject to examination, except for those filed for the sole purpose of submitting late-filed Forms 8891 to seek relief for failure to timely elect deferral of tax on income from certain non-U.S. retirement or savings plans where deferral is permitted by a relevant treaty. Thus, an individual who has already filed a U.S. income tax return and needs to file an amended return to correct previously reported or unreported income, deductions, credits, tax, etc., should carefully consider whether he/she should use this streamlined procedure. Depending on such an individual's circumstances, he/she may want to come forward under the IRS's 2012 Offshore Voluntary Disclosure Program (OVDP), which the IRS announced on January 9, 2012. It appears that the December 2011 IRS fact sheet remains viable guidance for assessing what factors the IRS might consider in reviewing a request for waiver of penalties based on reasonable cause. However, it appears that the new procedure described in this alert supersedes the fact sheet filing approach, but the IRS did not explicitly address this point.

Also, an individual who is 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 individual's particular circumstances warrant such prosecution. It should also be noted that once an individual makes a submission under the new procedure described in this alert, the OVDP is no longer available. Furthermore, an individual who is ineligible to use the OVDP (e.g., an individual whom the IRS has already contacted) is also ineligible to participate in the new procedure.