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FATCA Fuels IRS Amnesty, But Advocate Calls It Harsh

It's no secret that the IRS has pushed hard on offshore accounts and income, raking in billions in taxes, penalties and interest. And while prosecutions have been few, their threat is enough to make most people quake. For many, the risks of quietly amending tax returns and filing FBARs is just too great.

In some ways, not much has changed since 2009. The IRS was already having big successes with its push into offshore banks. It was breaking down virtually every international barrier to information. But in other ways, 2014 dawns as radically different from the last five years.

It is now clear that FATCA is a bigger success than anyone could have imagined. The IRS is getting quicker, better and more complete information than it did in the past, and the sources are many. And FATCA will expand it like a fire hose.

The IRS has less reason to compromise these days. The IRS has said that it will pursue quiet disclosures aggressively, and although those statements are controversial, they are hard to ignore. Many taxpayers are caught between a rock and a hard place. They can't feel entirely comfortable with a quiet disclosure. They also can't just close the account and ignore the past.



IRS in midtown New York (Photo credit: Wikipedia)

And yet they squirm at the thought of entering the IRS Offshore Voluntary Disclosure Program. According to the IRS Taxpayer Advocate, the program isn't a very good deal for many. The voluntary disclosure wave started in 2009, and when that program ended, another replaced it in 2011.

When that ended, the current OVDP came into play in 2012. It is still with us, and is virtually identical to the prior iterations, only with higher penalties. The programs are good in that they offer a certain and predictable method of resolving these issues with the IRS.

But the Taxpayer Advocate isn't so sure. Her [report says](#) the program imposes excessive penalties on taxpayers whose failure to file were not willful. What is willful is a key concept in the tax law. Analyzing results from the IRS's 2009 program, the Advocate found the median offshore penalty was about 381% of the additional tax assessed for taxpayers with median-sized account balances.

What's more, the Advocate's report says the medial offshore penalty leapt to a whopping 580% of the tax assessed for taxpayers with the smallest account balances (i.e., the bottom 10 percent, with an average \$44,855 account balance). Taxpayers who "opted out" of the program and agreed to subject

themselves to audit fared better. However, they still faced penalties of nearly 70% of the tax and interest, says the report.

These numbers are drawn from the 2009 program, when the main penalty was 20% of the highest account balance. Now that number is up to 27.5%. Of course, FBAR penalties are computed as a percentage of account balances rather than tax liabilities. Nevertheless, the report uses the tax delinquency as a reference point to illustrate the report's claim that the penalties are often Draconian.

The report even says that with the size of the penalties, some taxpayers may actually be deterred from coming into compliance. Does that mean the IRS is promoting long-term noncompliance with offshore accounts? It's a stark accusation, and yet Taxpayer Advocate Nina Olson seems to suggest it in her report to Congress.

She claims that the penalties are unfair to regular taxpayers who made mistakes but were far from willful. And opting out is not good as a sole remedy to the situation present when the penalties are high. Unfortunately, though, it isn't clear that Ms. Olson's views are causing the IRS to backtrack. And the bottom line is that the program is still the best way for many taxpayers to get their situations resolved without endless worry.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.