



Resolving U.S. Tax Non-Compliance

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- More than 20 years helping multinational businesses and families with U.S. connections
- Worked for a U.S. Tax Court Judge and with Ernst & Young
- Fully bilingual and bicultural Spanish speaker with experience representing clients in Latin America and Spain
- Tax professor and author, regularly lecturing at international seminars for attorneys, CPAs, bankers and business people, both in English and Spanish
- More than 1500 endorsements on [LinkedIn](#)

Agenda

- Basic U.S. Tax and Reporting Obligations
- Common Non-Compliance Scenarios
- Non-Compliance Resolution Methodology
- Concepts of Reasonable Cause and Willfulness
- Review of IRS Compliance Programs
- Maintaining Confidentiality

Foreigners Who Are Not Tax Residents

- Only taxed on “U.S. Source” income
- Some U.S. Source income is exempt (e.g. capital gains on the sale of U.S. stock, interest on certain loans to U.S. person)
- Usually taxed at a flat 30% rate without taking any deductions, unless reduced by a treaty or relates to certain business activities
- The person paying the foreigner is normally required to withhold the tax

Income Taxation of Tax Residents

- Taxed on worldwide income, both U.S. Source and Foreign Source
- A Tax Resident's taxable Foreign Source income can include, for example:
 - dividends and interest generated by non-U.S. investments
 - gains from the sale of foreign real estate or businesses
 - commissions or fees earned for the performance of personal services outside the U.S.
 - gains from the exchange of foreign currency, etc.
- A "Foreign Tax Credit" can usually be taken for the amount of income tax on the same income that was actually paid to another country

Information Reporting for Tax Residents

- Foreign bank and financial accounts in which they have a direct or indirect financial interest or signature authority;
- Direct and indirect ownership in and economic activity of, certain foreign companies and partnerships;
- Transfers to and from certain foreign trusts;
- Receipt of gifts and inheritances from foreigners; and
- Virtually anything else that a U.S. citizen must report.

Some Common Fact Patterns

- Greencard holder returns to home country and stops reporting in US
- Accidental Gringo just realized they are a US taxpayer
- Immigrant realizes too late the extent of their US tax filing obligations
- US person discovers the extent of their connections to foreign family assets that were at some point “put in their name”
- US person learns they had to report their receipt of a gift or inheritance from a foreigner
- Unexpected community property attribution
- Executor learns that decedent had unreported items
- Unawareness of Foreign-Owned Single Member LLC and Grantor Trust filing requirements

Examples of Potential Exposure

- Penalties of up to 75% of the unpaid taxes.
- Information reporting and record maintenance penalties relating to foreign assets, companies and trusts, starting at \$10,000 per form and per year.
- Unreported bank account penalties up to the lesser of \$100,000 or half the maximum account balance, per account and per year.
- Up to 5 years in prison.
- Deportation.

Methodology

- Establish attorney-client privilege.
- Evaluate what were the U.S. tax and information reporting obligations during the relevant period.
- Assess the civil and criminal exposure...
- Consider available compliance mechanisms.
- Prepare, file and pay as required.
- Sleep like a baby.

Now what? What are my options?

- **Do nothing, just expatriate or only start filing correctly next year:**
 - Never recommended
 - Could lead to increased exposure

- **Pay taxes, interest, and possibly penalties via:**
 - Delinquent Submission Procedures
 - Streamlined Compliance Procedures
 - Voluntary Disclosure Practice

- **Qualitative and Quantitative Evaluation of Eligibility and Penalty Outcomes**



Concepts of “Reasonable Cause” and “Willfulness”

- **Reasonable Cause:** Behave in a responsible manner to determine your tax obligations, but failing to meet those obligations due to factors beyond taxpayer control.
- **Non-Willfulness:** Due to negligence or mistake, or a good faith misunderstanding of the law.
- **Willfulness:** Voluntary, intentional violation of a known legal duty, including “willfull blindness”.

Some Willfulness Factors

- Reasonable reliance on the tax preparer with full disclosure of all relevant facts
- Lack of efforts to conceal the income
- Minimum loss to the treasury
- Education level and life experience

Delinquent International Information Return and Delinquent FBAR Submission

- FinCen114, Forms 3520 and 3520-A, Informational Returns Attached to an Income Tax Return
- Must be non willful and have reasonable cause
- Not under audit or investigation
- Not contacted by IRS about returns
- No penalty
- Subject to modification or closure at any time

Overview

- Policy
- Scope of Disclosure
- Non-Residency Test
- Penalty Framework

Policy

- Establish a procedure for non-willful individuals and estates to cure their non-compliance, despite their lack of reasonable cause
- Exclude taxpayers who are already under civil audit or criminal investigation
- Provide for a reduced penalty framework, including a waiver of penalties for taxpayers with minimal US connections...
- Subject to modification or closure at any time

Scope of Disclosure

- File or amend income tax returns for the last 3 years that are past due.
- FinCen 114 for the last 6 years that are past due.
- Certification of non willfulness
- Narrative statement of specific reasons for non-compliance, including “bad facts”.

Non-Residency Test: During any one of the last 3 tax years..

- Citizens and Lawful Permanent Residents:
 1. Did Not have a U.S. Abode, and
 2. Was physically outside the US at least 330 full days
- All others: Not having met the substantial presence test

Penalty Framework

- Always full pay taxes, interest and any applicable penalty at time of filing.
- Streamlined Foreign: No penalties
- Streamlined Domestic: 5% Misc. Offshore Penalty imposed on value of:
 - Unreported FinCen114 assets
 - Unreported Form 8938 assets
 - Reported foreign financial assets for which related income was unreported.
 - Applied to year with highest aggregate balance

Overview

- OVDP closed in September 2018
- Longstanding IRS Policy
- Qualified applicants should not be referred for criminal prosecution
- Requirements...

Requirements

- No illegal source income
- Disclosure must be received before the initiation of a civil audit or criminal investigation, *and* before information is:
 - Received from a third party (e.g. informant, media, other agency), or
 - Acquired as a result of an IRS or criminal action against another taxpayer
- Cooperation with IRS
- Good faith arrangements to full pay tax, penalties and interest.



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How will they know?

Just a few examples:

- Whistleblowers providing information to the IRS (or foreign tax authorities) for revenge or money
- Information obtained during the audit or from the voluntary disclosure of another taxpayer
- Intergovernmental information exchange
- Expatriation
- Increased cooperation between IRS and Immigration agencies
- Investor visa application
- Evidence and documents submitted to probate courts
- Information leaked from banks and other offshore service providers
- Recorded phone calls, electronic mail archived online, undercover agents, clients cooperating in the investigations of promoters/facilitators in exchange for criminal relief (and vice versa)

How will they know?

Maintaining Confidentiality:

- What is attorney-client privilege?
- Who doesn't have it: accountants, financial advisors, trustees, wealth planners, realtors, etc.
- If you think there is there is even a remote possibility of non-compliance, have the client hire a lawyer FIRST to gather the relevant information under the protection of attorney client privilege.

We can help.

Our Firm:

- Multidisciplinary team of attorneys and accountants providing comprehensive legal and tax solutions for high net worth, American and Multinational families.
- Listed as a recommended firm by many financial institutions and other professionals worldwide with a particular focus on Latin America.
- Totally bilingual team and platform in both English and Spanish.
- Team-oriented firm culture with extensive experience achieving optimal results working in conjunction with financial advisors and other attorneys/accountants both within and outside the United States.

We can help.

Core Services:

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 - U.S. Descendants & Spouses,
 - U.S. Financial or Real Estate Investments
- Designing and Forming Trusts
- Structuring and Forming Corporations and LLCs
- Resolving Tax Non-Compliance
- Preparing Tax Returns
- Probate of Estates



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We look forward to an opportunity to be of assistance.

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