

**IV. The “Delinquent International Information Return Submission Procedures.”** The new procedures for filing delinquent international returns where there is no unpaid tax are no longer a part of OVDP FAQ 18, as set forth above. Instead, the New International Information Return Submission Procedures are set out as a separate submission procedure.

A. The Delinquent International Information Return Submission Procedures. The Delinquent International Information Return Submission Procedures are described as follows (<http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures>):

**“Delinquent International Information Return Submission Procedures”**

Taxpayers who do not need to use the OVDP (described in section 1 above) or the Streamlined Filing Compliance Procedures (set forth in section 2 above) to file delinquent or amended tax returns to report and pay additional tax, but who:

- (1) have not filed one or more required international information returns,
- (2) have reasonable cause for not timely filing the information returns,
- (3) are not under a civil examination or a criminal investigation by the IRS, and
- (4) have not already been contacted by the IRS about the delinquent information returns should file the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file. As part of the reasonable cause statement, taxpayers must also certify that any entity for which the information returns are being filed was not engaged in tax evasion. If a reasonable cause statement is not attached to each delinquent information return filed, penalties may be assessed in accordance with existing procedures.

All delinquent international information returns other than Forms 3520 and 3520-A should be attached to an amended return and filed according to the applicable instructions for the amended return. All delinquent Forms 3520 and 3520-A should be filed according to the applicable instructions for those forms. A reasonable cause statement must be attached to each delinquent information return filed for which reasonable cause is being requested.

Information returns filed with amended returns will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.”

B. Delinquent Informational Return Procedures Compared to 2012 Submissions Under FAQ 18.

1. Similarities. Similar to the comments regarding the late FBAR submissions compared to 2012 FAQ 17 procedures, the New Procedures expressly state that information return submitted thereunder “may be selected for audit” whereas under 2012 FAQ 18, they apparently were

not-at least the FAQ didn't mention the possibility whereas possibility of examination is now highlighted.

2. Different From 2012 FAQ 18 No Assurance of No Penalties and Evasion Certification Required.

A. No assurance of no late filing penalty. The New Procedures do make no representations that the IRS will not impose a late filing penalty under these procedures. This is unlike the 2012 procedures under 2012 FAQ 18 which expressly provided that the IRS would not impose a late filing penalty if no tax liabilities were under-reported. Therefore, if the filing is examined the IRS could impose a late filing penalty or other penalties. These procedures are wholly without assurances to taxpayers submitting under them. Consider the following from 2012 FAX 18, which is not anywhere in the New Procedures:

2012 FAQ 18: (reads in part as follows):

“The IRS will not impose a penalty for the failure to file the delinquent Forms 5471 and 3520 if there are no under-reported tax liabilities and you have not previously been contacted regarding an income tax examination or a request for delinquent returns.”

**The above assurances are not contained under the New Procedures for Delinquent Offshore International Returns!**

B. Statements of Reasonable Cause and No Evasion. The new procedures require:

1. Reasonable cause statement as follows: “..a statement of all facts establishing reasonable cause for the failure to file.

2. Statement of “no evasion” as follows: As part of the reasonable cause statement, taxpayers must also certify that “any entity for which the information returns are being filed was not engaged in tax evasion.” Although not in the New Procedures, but apparently explaining this “no evasion” requirement, is the following example from “Tax Havens: International Tax Avoidance and Evasion,” Jane G. Gravelle, Senior Specialist in Economic Policy, Jan. 23, 2013:

“A typical way that U.S. individuals can easily evade tax on domestic income through a Cayman Islands operation with little expense using current technology. The individual, using the Internet, can open a bank account in the name of a Cayman corporation that can be set up for a minimal fee. Money can be electronically transferred without any reporting to tax authorities, and investments can be made in the United States or abroad. Investments by non-residents in interest bearing assets and most capital gains are not subject to a withholding tax in the United States.”

In the foregoing example, arguably, any omitted income would be omitted U.S. income of the individual such that filing arguably qualified for former FAQ 18. Alternatively, in the absence of a “no evasion” certification, the filing seemingly qualified for the prior OVDP’s no-penalty delinquent information return procedures, since the entity created would not have had offshore income omitted. In any event, the intent of the IRS is clear: offshore entities are suspect and the IRS wants full disclosure so that evaders of income come into compliance under the OVDP and not through the other voluntary disclosure procedures.

C. Conclusion As to Delinquent International Information Return Submission Procedures. Unlike the 2012 OVDP FAQ 18, under the New Delinquent International Information Return Procedures, there are no assurances that the failure to file delinquent international returns will be permitted without imposition of penalties if the IRS examines the submission, even where all tax liabilities have been reported. Further, submissions won’t qualify under the New Procedures, if the taxpayer is under an IRS examination, civil or criminal, or if the IRS finds that the entities were used for tax evasion.

Although the New Delinquent International Information Return Procedures provide no assurances that penalties won’t be imposed if the submissions are examined by the IRS, hopefully filings under the procedures won’t result in penalties being automatically imposed as long as the “reasonable cause” statement is enclosed, the filing is timely, there is no tax evasion, and the submission otherwise qualifies under the procedures.

Submissions do not qualify for the New Delinquent Information Return Procedures: (1) if there are unreported tax liabilities related to the offshore entity, (2) if there is an ongoing IRS exam concerning the taxpayer or the offshore entity, or (3) if the entity was used for “tax evasion.”

As under the Streamlined and Delinquent FBAR New Procedures, non-qualifying submissions under the Delinquent Information Return Procedures are subject to civil and criminal penalties. Therefore, taxpayers should not file under the Delinquent Information Return Procedures without first assuring they qualify. They should carefully consider their “reasonable cause” statements, make sure that “evasion” or some kind of scheme or trickery is explained or non-existent, and should be certain that there are no unpaid tax liabilities related to the offshore entity.

Taxpayers who are not certain whether they will qualify under the New International Offshore Information Return Procedures, should consider filing pursuant to the Streamlined Procedures, the OVDP, or under the voluntary disclosure procedures in IRM 9.5.11., as discussed in Part V herein.