

Guidance for US citizens resident outside the US



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The IRS has recently released a fact sheet ([FS-2011-13, December 2011](#)) to address a number of issues of concern to US citizens or dual citizens who reside outside of the US. The fact sheet is not specific to Canadian residents who are US citizens, but appears to encourage those who were not aware of their obligation to file US tax returns and other reporting to do so. The issues revolve around the failure to make certain required filings—specifically, federal income tax returns and Reports of Foreign Bank and Financial Accounts (FBARs). The fact sheet also addresses the potential penalties for “failure to file” and “failure to pay” and provides a number of illustrative examples.

US income tax return filing requirement

US citizens are required to file a federal income tax return for any tax year in which their gross income is equal to or greater than the applicable exemption amount and standard deduction. US citizens are required to report their worldwide income, regardless of where the income is sourced. The Internal Revenue Service (IRS)’s informal policy is that most persons need to file six years of past returns.

Where there is a tax liability on a late-filed federal income tax return, a person will be subject to a failure to file and failure to pay penalty unless it can be shown that the failure was due to reasonable cause and not due to wilful neglect.¹ Whether a failure to file or failure to pay is due to reasonable cause is based on a consideration of all of the facts and circumstances. For example, reasonable cause may be established if it can be shown that the person was not aware of his or her specific obligations to file returns or pay taxes. The fact sheet notes a number of factors that will be considered by the IRS in determining whether reasonable cause can be established. No single factor is determinative.

¹ The failure to file penalty is reduced by the failure to pay penalty for any month during which both apply.

FBAR filing requirement

US citizens are also required to report their interest in certain foreign financial accounts on Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR) if they have an interest in non-US financial accounts exceeding US\$10,000 at any time in the calendar year. Taxpayers who have not filed this report for earlier years, but who now want to comply with the law, should file the delinquent FBARs and attach a statement explaining why they were filed late. Similar to income tax returns, a person does not need to file FBAR forms that were due more than six years ago.

Penalties

As noted above, penalties can be assessed for failure to file and failure to pay. Possible additional penalties may apply in particular cases.² However, penalties will not be imposed in all cases. Taxpayers who owe no US tax (e.g., due to the application of the foreign earned income exclusion or foreign tax credits) will not be subject to a failure to file or failure to pay penalty.

Taxpayers who have failed to file the FBAR as required could be subject to either a wilful or a non-wilful civil penalty. The penalty for wilful failure to file can be up to the greater of \$100,000 or 50% of the total balance of the foreign account at the time of the violation. Non-wilful violations are subject to a penalty of up to \$10,000 per violation. As a relieving measure, no penalties will be assessed where the taxpayer can successfully demonstrate that the failure to file the FBAR was due to reasonable cause.

Where penalties are assessed, current IRS procedures also provide that an examiner may determine that the facts and circumstances of a particular case warrant a lesser (or greater) penalty or that a warning letter may be warranted in lieu of a penalty.

New reporting requirement for foreign financial assets

A new law requires US taxpayers who have an interest in certain specified foreign financial assets with an aggregate value exceeding \$50,000 to report those assets to the IRS. This reporting will be required beginning in 2012.

Conclusion

The ability to show reasonable cause for the failure to file certain US tax and reporting forms can eliminate the imposition of possible significant penalties. If you are a US citizen or dual citizen residing outside of the U.S. and you have not been filing your US federal income tax return and/or FBAR as required, you should obtain tax and possibly legal advice from qualified US tax professionals.

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² Such as the accuracy-related penalty, fraud penalty, and certain information reporting penalties.