

International Information Return Penalties – Current Developments and Effective Strategies

Southern Federal Tax Institute

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Disclaimer

These slides are shorthand aids to an oral presentation. Neither these slides nor the oral presentation constitute legal or tax advice.

Agenda

- U.S. Reporting Overview of International Information Returns (IIRs)
- IRS Enforcement and IIR Penalties
- Common Compliance Mistakes
- Options and Strategies Once Mistakes are Identified

Form	Code Section	Potential penalties*
Form 926 (Return by a U.S. Transferor of Property to a Foreign Corporation)	6038B(c)	10% of the FMV of property transferred to foreign corporation (max. \$100,000)
Form 3520-A (Annual Information Return of Foreign Trust with a U.S. owner)	6677(b)	The greater of \$10,000 or 5% of the gross value of U.S. person's portion of foreign trust assets (measured as of the close of the U.S. person's tax year)
Form 3520 (Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts)	6677 6039F	Up to four penalties may apply. <ul style="list-style-type: none"> • For trust contributions, ownership, or distributions, a separate penalty applies for failure to timely report each transaction. Each penalty is equal to the greater of \$10,000 or (1) 35% of the trust contribution, (2) 5% of the gross value of U.S. person's portion trust assets (at close of U.S. person's tax year), or (3) 35% of the trust distribution • For failure to timely report a foreign gift/bequest, a maximum penalty equal to 25% of the FMV of the foreign gift/bequest may apply
Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations)	6038	\$10,000 per form
Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in U.S. Trade or Business)	6038A	\$25,000 per form
Form 5713 (International Boycott Report)	999	\$25,000, maximum 1 year imprisonment, or both for willful failure to report
Form 8621 (Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund)	6501(c)(8)	Statute of limitations for tax year remains open until 3 years after form is filed

* Additional/increased penalties may apply for intentional disregard of reporting requirements and/or continued noncompliance. The statute of limitations may also remain open indefinitely for failure to file the appropriate form (see Section 6501(c)(8))

Form	Code Section	Potential penalties*
Form 8854 (Initial Expatriation Statement)	877A, 6039G	\$10,000 per failure and potential treatment as “covered expatriate” subject to U.S. exit tax
Form 8858 (Information Return of U.S. Persons with respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs))	6038(b)	Form 5471, Category 4/5 filers Form 8865, Category 1/2 filers
Form 8865 (Return of U.S. Persons with Respect to Certain Foreign Partnerships)	6038(b), 6038B(c), 6046A/6679	Multiple penalties may apply: <ul style="list-style-type: none"> • \$10,000 per failure Category 1, 2, and 4 • 10% of FMV of property transferred (capped at \$100,000) per Category 3 failure
Form 8938 (Statement of Specified Foreign Financial Assets)	6038D(d)	\$10,000 per form
Form 8992 (U.S. Shareholder Calculation of Global Intangible Low-Taxed Income)	6038(b); Treas. Reg. 1.6038-5	\$10,000 per form
FBAR	31 USC 5321	<ul style="list-style-type: none"> • Up to \$14,489 (after 1/24/2022) for “non-willful” violations • Up to the greater of \$144,886 (after 1/24/2022) or 50% of account balances, plus potential criminal penalties, for “willful” violations
Section 6662(j): Penalty of 40% of underpayment attributable to transaction involving undisclosed asset under Section 6038, 6038B, 6038D, 6046A, or 6048		

* Additional/increased penalties may apply for intentional disregard of reporting requirements and/or continued noncompliance. The statute of limitations may also remain open indefinitely for failure to file the appropriate form (see Section 6501(c)(8))

Statute of Limitation Concerns – Unlimited SoL Until IIR Filed

(8) Failure to notify Secretary of certain foreign transfers

(A) In general

In the case of any information which is required to be reported to the Secretary pursuant to an election under § 1295(b) or under § 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any tax return, event, or period to which such information relates **shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.**

I.R.C. § 6501(c)(8)

Statute of Limitation Concerns (cont'd)

Reasonable cause defense limits income to the foreign financial asset.

I.R.C. § 6501(c)(8)(B) Application to failures due to reasonable cause. If the failure to furnish the information referred to in subparagraph (A) is due to reasonable cause and not willful neglect, subparagraph (A) shall apply only to the item or items related to such failure.

- The IRS considers reasonable cause, discussed later, to be a very high standard

Statute of Limitation Concerns – Six Year SoL

- Six year SoL under I.R.C. § 6501(e)(1)(A)(ii) when a taxpayer has \$5,000 unreported income from foreign financial asset

IRS Enforcement and Penalty Administration

International Penalties Remain an IRS Priority

- IRS is committed to international information return enforcement and views penalties as revenue
- IRS is using data analytics to identify variances in reporting among information returns to open examinations
- Examiners actively identify international penalty issues

International Penalties Remain an IRS Priority (cont'd)

- Treasury Inspector General For Tax Administration, Rep. No. 2023-30-019, The IRS Large Business and International Division Should Consider Shifting Individual Examination Resources to More Productive Examinations (May 25, 2023)
- LB&I WEIIC focuses on individual examinations involving international issues.
- Ninety percent of WEIIC individual examination closures reported less than \$200,000 total positive income (TPI) for Fiscal Years 2017 through 2021. pg. 7.
- “[T]he majority (73 percent) of WEIIC examinations conducted by its GS-13 revenue agents were of taxpayer returns reporting TPI less than \$200,000” for 2016 through 2020. pg. 11.
- “The IRS stated that the Dollars per Hour metric does not include the assessment of penalties, and that **penalties are a significant focus of [LB&I] WEIIC’s compliance effort.**” pg. 6.
- Takeaway point: LB&I WEIIC has spent the vast majority of its examination resources pursuing middle class taxpayers focusing on penalties.

International Penalties Remain an IRS Priority (cont'd)

- Specific leads may spark examinations focusing on international penalty issues
 - Whistleblowers
 - [Foreign Account Tax Compliance Act](#) (a.k.a. FATCA)
 - Inter-governmental cooperation
 - Legacy use of [Swiss Bank Program](#) data and leads resulting from new non-prosecution agreements with DOJ Tax Division
 - [LB&I Campaigns](#)
 - John Doe Summonses

Common Compliance Mistakes

Common Mistakes

- Failing to identify an information return is due
- Form 5471 – Overlooking constructive ownership/attribution rules; mistaking foreign entity classification default rules; § 965 Transition Tax; not identifying all applicable filer categories; adjusting financials for GAAP
- Form 3520 – Failing to timely report large foreign gifts and inheritances; not disclosing U.S. owner of foreign trust; failure to disclose distributions from foreign trusts (e.g., uncompensated use of trust property, loans that are not qualified obligations); failing to timely file by 10/15 for taxpayers residing abroad with 12/15 filing deadlines.

Common Mistakes (cont'd)

- Form 3520-A
 - Failing to timely file because the deadline is not the same as the deadline for Form 1040 unless it is filed as a substitute Form 3520-A
 - Not filing Form 7004 to request an extension of time to file for Form 3520-A
 - Failing to indicate at the top of Form 3520-A that it is a fiscal year filing
 - Failing to use most recently assigned EIN if IRS assigned an EIN

Common Mistakes (cont'd)

- Misclassifying foreign pensions and other plans as exempt from Form 3520 and Form 3520-A reporting under Rev. Proc. 2020-17
 - See Rev. Proc. 2020-17 § 5.03 (tax-favored retirement trusts) and § 5.04 (tax-favored foreign non-retirement savings trust)
 - Critical requirements under Rev. Proc. 2020-17:
 - “Only contributions with respect to income earned from the performance of personal services are permitted”
 - Specific annual / lifetime contribution limits
 - Note the proposed foreign trust regulations released in 2024 provide additional reporting exceptions broader than Rev. Proc. 2020-17 (may rely on the proposed regs for tax year 2024 and later)
 - Some practitioners are ignoring/stretching the requirements for relief

Common Mistakes (cont'd)

- Form 8621 – Failing to identify an investment as foreign mutual fund subject to PFIC reporting
- Form 8938 – Failing to report less common foreign financial assets such as stock in foreign corporations, foreign pensions, promissory notes issued by foreign persons, interests in foreign estates
- Form 8854 – Long term permanent residents surrender green card triggering mark-to-market exit tax
- FBAR – Overlooking certain familial arrangements for foreign bank accounts where taxpayer either has authority over the account or is named as beneficial owner of the account
- Form 5472 – Failing to file pro-forma Form 1120 and Form 5472 for foreign owned domestic disregarded entity

Common Mistakes (cont'd)

FBAR

- Overlooking familial arrangements
 - Signature authority
 - Named as joint owner for convenience
 - Informal authority (online access to family member's account)
- Misinterpreting FBAR filing thresholds (focusing on individual accounts v. aggregate values)
- Failing to properly compute max. value

Less Common Types of FBAR Reportable Accounts

- “Transit” accounts – Wise, Firepay, etc.
 - Example: John uses a Wise Belgium account as an intermediary when moving funds from his Italian bank account to his U.S. bank account to avoid international wire fees. Funds rarely stay in the Wise account for more than 48 hours. The Wise account is reportable on FBAR.
- Other stored value accounts
 - IRS has taken position that funds available for use in offshore casino account are reportable on FBAR – *U.S. v. Hom*
 - As FinTech expands, expect IRS to assert any type of arrangement involving a foreign counterparty and moving money is a reportable account
- Foreign law firm trust accounts
 - U.S. person is client of foreign law firm and pays a retainer for future services. The client trust account is reportable on FBAR.

Options and Strategies for International Information Return Issues

Recent Examinations

- LB&I WEIIC aggressively interprets exceptions to assessment statute of limitation under § 6501(c)(8) and aggressively pursues maximum penalties
 - Recent example in Malta pension case that originated from a U.K. workplace pension rolled over in a QROPS transaction to a Malta pension
 - Maximum § 6677 penalties for all years although reasonable cause was apparent
 - Punitive domestic adjustments proposed even when reasonable cause should have prevented domestic adjustments
 - If the case is part of an LB&I campaign, expect aggressive penalty positions

Recent Examinations (cont'd)

- SB/SE BSA news – IRS began conducting stand alone FBAR examinations
- SB/SE often aggressively pursues maximum penalties without regard for reasonable cause
 - If case is assigned to an SB/SE SEP group, anticipate aggressive penalty positions
- LB&I corporate examination reasonably approached late filings of Forms 5471 and implicitly accepted reasonable cause without formally examining issue

Recent Examinations (cont'd)

- If a significant penalty issue comes to an impasse during an exam, consider requesting Fast Track Mediation
 - If IRS examination manager refuses to discuss Fast Track Mediation, elevate the issue.
 - IRS executives have agreed to pursue ADR, but that agreement has not necessarily reached the front lines.
- If the IRS agrees to mediation and the issue is material, consider retaining a non-IRS independent co-mediator

Systemic Assessments of Penalties

- Former IRS Commissioner Werfel announced in October 2024 that IRS would stop systemic assessment of Form 3520 and Form 3520-A penalties. Andrew Velarde and Benjamin Valdez, *IRS Signals Major Internal Changes for Foreign Gift Penalties*, TAX NOTES (Oct. 25, 2024)
- IRS will consider reasonable cause prior before making a decision to assess penalties

Systemic Assessments of Penalties (cont'd)

- It has been reported that the IRS has stopped all non-examination assessments of Form 3520, Part IV penalties under § 6039F
 - Submit reasonable cause with late filed Forms 3520 reporting foreign gifts and inheritances because IRS has indicated it may review submissions for examinations
- IRS continues to systemically assess penalties relating to other IIRs including businesses filing Forms 5471 and 5472

Independent Office of Appeals

- Recent improvement to Appeals process: Appeals International will make SMEs available for settlement discussions if an issue is subject to review and concurrence. Andrew Velarde, *After Shift, IRS Appeals Expects Few Foreign Gift Penalty Cases* (Jan. 16, 2025) (quoting Director of Appeals International)
- For campus assessed IIR penalties the process to get to Appeals faces an internal IRS hurdle- the campus penalty coordinator
 - Consider filing a Form 911 focusing on the unjust delay of penalty cases caused by campus penalty coordinators

Independent Office of Appeals (cont'd)

- Consideration of international penalty issues by Appeals has been a mixed bag.
 - Some recent full concessions of Form 3520-A foreign trust penalties, Form 3520 foreign gift/inheritance penalties, etc.
 - Sometimes issue is raised to Appeals through Collection Due Process rights
 - Some informal reports indicate that AOs are liberally construing Form 3520 relief provided by Rev. Proc. 2020-17
- Settlements dependent on biases of individual appeals officers

Independent Office of Appeals (cont'd)

- Appeals may ignore or give little weight to “creative lawyer” arguments
 - *Farhy*-type arguments concerning IRS’ lack of assessment authority
 - 5th Amendment Due Process
 - 7th Amendment right to jury trial
 - 8th Amended excessive fines clause
 - Administrative Procedure Act

Independent Office of Appeals (cont'd)

- Best arguments to advance include
 - IRS administrative penalty relief for specific penalty or circumstances
 - Reasonable cause- reliance on a tax professional
 - Reliance on IRS guidance as reasonable cause (instructions, IRS.gov, FAQs, other guidance that was not clear)
 - Lack of written supervisory approval of penalties
- Appeals can be tough on reasonable cause for IIRs, sometimes relying on secret Chief Counsel advice memos to Appeals that paint with a broad brush
 - Chief Counsel has marked certain blank advice memos on reasonable cause relating to IIRs as “law enforcement privilege” to avoid releasing them under the FOIA

Independent Office of Appeals (cont'd)

- Appeals Officers should consider hazards of litigation in considering settlements for penalty cases
- Ask the AO to explain the analysis of the hazards
- Ask the AO to provide citations to federal court cases that favor the taxpayer and favor the government
 - Some AOs display bias and only cite cases that favor the government, often with significantly distinguishable facts
- If a settlement cannot be reached, consider
 - Were there any procedural irregularities that may merit a new settlement conference with a new appeals officer?
 - Post Appeals Mediation

Compliance Options for Taxpayers with International Information Return Issues

1. Streamlined Filing Compliance Procedures
 - Streamlined Foreign Offshore
 - Streamlined Domestic Offshore
2. Filing Amended/Delinquent Returns (a.k.a. “quiet disclosure”)
3. Prospective compliance (a.k.a. “silent disclosure”)
4. Delinquent FBAR Submission Procedures- still viable if fully tax compliant
5. Voluntary Disclosure Practice

What about the DIIRSP?

- Delinquent International Information Return Submission Procedures (DIIRSP) is now a “door to nowhere”
- Essence of DIIRSP- submit delinquent IIRs following the IRM and the IRS will simply follow the IRM in handling them
- Current DIIRSP provides zero procedural benefits

Streamlined Procedures Eligibility

- U.S. individuals and estates only
- Failed to report foreign financial assets or pay all tax due in respect of those assets
- Able to certify failures are related to non-willful conduct
- Not currently under IRS examination or criminal investigation
- Have a valid Taxpayer Identification Number

SSN/TIN Required for Submissions

If a taxpayer is not eligible for a Social Security Number (SSN) and does not already have an ITIN:

- Submit an application for an ITIN along with the required tax returns, information returns, and other documents filed under these Streamlined Procedures
- Search “ITIN” on www.irs.gov for more information

If a taxpayer is eligible for an SSN and does not have one, first obtain an SSN before making a submission under the Streamlined Procedures. If a taxpayer who is eligible for an SSN makes a Streamlined Procedures submission without an SSN, the return will be processed subject to penalties applicable outside of the Streamlined Procedures

Certifications for 2014 Streamlined Procedures

- Form 14654 – SDO (Streamlined Domestic Offshore)
 - Requires foreign financial asset information for 6 year period
 - Includes computation of MOP (miscellaneous offshore penalty)
- Form 14653 – SFO (Streamlined Foreign Offshore)
- Forms have been revised several times
 - Feb. 2016: revision emphasized that taxpayers **MUST** include narrative statement of facts and provided guidance on providing a complete narrative
 - Revisions in 2017 (Form 14654 9-2017 and Form 14653 10-2017)

Certifications Required on Forms 14653 and 14654

Both forms require taxpayers to agree to terms and represent certain facts:

- Retaining records for 6 years and providing records upon request
- Representing that failures were due to non-willful conduct
- Acknowledging possibility of examination

Definition of “Non-Willful” for Streamlined Procedures

“Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.”

- Based on facts and circumstances of each case
- No one fact controls analysis

Press coverage includes 2014 TNT 212-7, document 2014-26106 (11/3/2014)

Official IRS Spokesman Comments on Intent

"For those of you who, as a short-hand, refer to the certification of non-willfulness as a reasonable cause statement, stop doing that because it is clouding your thinking," McDougal said. **Negligence or even gross negligence "will still get you in the door" for the streamlined program**, he added.

2015 TNT 92-2 “Disclosure of Facts Reduces Streamlined False Certification Risk” (May 12, 2015) (TNT Doc 2015-11363).

What Does Willful Mean?

- Willful in criminal context: intentional violation of a known legal duty.
See Cheek v. United States, 498 U.S. 192 (1991)
- Willful in civil context: knowing violations and reckless violations.
See Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007)

Gradients of Intent

- Willful
- Reckless
- Gross negligence
- Negligent
- Reporting error excused by reasonable cause

Streamlined Procedures FAQs (cont'd)

- SFO FAQ #9 and SDO FAQ #16 provide a procedure for correcting mistakes in earlier Streamlined Procedures submissions
 - Explain all facts and circumstances concerning the error in the original Streamlined Procedures submission
 - Opportunity to self-correct before IRS identifies issue and initiates examination
 - On certification form write “amended” in red ink
 - On tax returns write “Amended Streamlined Domestic Offshore” or “Amended Streamlined Foreign Offshore”

Determining Non-Willful Conduct Requires Nuanced Legal Analysis

- Interview of taxpayer
- Interview of return preparer
- Access to all records taxpayer provided to return preparer
- Access to workpapers
- Access to all emails between taxpayer and return preparer
- Application of facts to body of caselaw involving both Title 31 willful FBAR cases and Title 26 income tax cases involving fraud

Statement of Facts for Non-Willful Certifications

- Written statement signed under penalties of perjury
- Certifying non-willful conduct with respect to all foreign activities and assets
- Provide reasons for the income and information reporting failures
- Specifically identify professional advisors and advice relied upon

Explaining Non-Willful Conduct

SFO FAQ #6 and SDO FAQ #13 provide guidance

- Provide background including “personal background, financial background, and anything else you believe is relevant to your failure to report all income, pay all tax, and submit all required information returns”
- Include the whole story including favorable and unfavorable facts
- Explain the source of funds in all foreign financial accounts/assets
- Explain contacts with the account/asset including withdrawals, deposits, and investment/management decisions

Explaining Non-Willful Conduct (cont'd)

- What if I checked no on Schedule B?
- What if I owned or controlled a foreign entity?

You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.		Yes	No
Part III Foreign Accounts and Trusts <small>(See instructions on back.)</small>	7a At any time during 2015, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions	<input type="checkbox"/>	<input type="checkbox"/>
	If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements	<input type="checkbox"/>	<input type="checkbox"/>
	b If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located ► <input type="text"/>	<input type="checkbox"/>	<input type="checkbox"/>
	8 During 2015, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions on back	<input type="checkbox"/>	<input type="checkbox"/>

For Paperwork Reduction Act Notice, see your tax return instructions.

Cat. No. 17146N

Schedule B (Form 1040A or 1040) 2015

SFO vs. SDO

SFO – Streamlined Foreign Offshore

- Meet non-residency requirement
- Provide delinquent or amended income tax returns (Form 1040/1041)
- Forms 1040NR are not accepted
- No penalties

SDO – Streamlined Domestic Offshore

- Do not meet SFO residency requirements
- Must have filed income tax returns before submitting amended returns through procedures
- 5% penalty on assets reportable on FBAR/Form 8938 (explained infra)

SFO Non-Residency Requirements

Individuals who are U.S. citizens or lawful permanent residents

- In any one or more of the most recent three years
 - Not have a U.S. abode and
 - Physically outside the United States for at least 330 full days
- Both taxpayers on joint return must meet residency requirements
- Snowbird Issue— some taxpayers fail SFO if present in US more than 35 days/year but cannot use SDO because they did not file income tax returns

SDO Miscellaneous Offshore Penalty

5% Title 26 miscellaneous offshore penalty applied to assets:

- in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year
- in the covered tax return period if the asset should have been, but was not, reported on a Form 8938 for that year
- in the covered tax return period if the asset was properly reported for that year, but gross income in respect of the asset was not reported in that year

•See SDO FAQ #6

Year end account/asset values are used to aggregate assets

- Exceptions for assets:
 - Accounts with no financial interest are excluded (e.g. mere signature authority)- see SDO FAQ #1
 - Canadian RRSP/RRIF accounts – see SDO FAQ #8

FAQs for Streamlined Procedures and Delinquent Return Procedures

- Initial Streamlined Procedures FAQs released on 10/8/14, additional FAQs released 7/16/15 and 1/7/16
- Key FAQs for SDO
 - FAQ #1: Assets included in penalty base
 - Assets in which taxpayer had no financial interest are not included in penalty base
 - FAQ #4: Valuing entities
 - Disregarded entities- look through to the underlying financial accounts
 - Corporations- use stock value (no discounts per FAQ #5)
 - FAQ #7: Allows recently compliant taxpayers (2013, 2012, 2011) to enter Streamlined and pay 5% for earlier years
 - Recurring pattern for certain Swiss account holders

Streamlined Procedures FAQs (cont'd)

- SFO FAQ #7 and SDO FAQ #14 provide a procedure for a joint filer to make an individual Streamlined Procedure submission
 - Joint amended income tax returns with only one signature
 - Amended income tax returns must reflect increase in tax
 - Explain circumstances
 - Write “SFO FAQ #7” or “SDO FAQ #14” in red ink on amended returns and certification form

Streamlined Procedures - Post Submission

- Streamlined Procedures cases do not involve Service personnel certifying submissions and do not culminate in a closing agreement
- Streamlined Procedures attempt to normalize return processing
 - Returns are processed by IRS Submission Processing
 - Return processing is slow, sometimes 12-18 months
 - Returns may be selected for examination

Resources

- [Official IRS webinar transcript](#) explaining the Streamlined Filing Compliance Procedures (May 11, 2016)
- [A Plain Language Handbook on the IRS Voluntary Disclosure Practice](#)