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National Taxpayer Advocate Slams IRS Offshore Programs & FBAR Penalties, Demands Change

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The National Taxpayer Advocate Nina Olson is a strong and vocal advocate for taxpayer rights. Her annual report to Congress castigates the IRS for its unfair application of offshore account penalties, and its disparate treatment of innocent Americans caught in reporting snafus. Some of the report asks the IRS to change, to stop viewing *anything* offshore as illegal.

The report acknowledges that not only does the IRS need to change, but Congress also needs to act. The Taxpayer Advocate wants legislation to cut back on possible penalties. The FBAR penalties in particular are entirely out of proportion. The Taxpayer Advocate says the IRS main offshore program isn't fair. This so-called 'amnesty' sometimes sticks innocent taxpayers with a penalty equal to over *eight* times the unreported tax, and over *ten* times the 75% penalty for civil tax fraud.

That makes no sense, she says. What's worse says the report, those who were not represented generally paid even more. And if you came in on one of the prior IRS programs—showing that you were doing what the IRS asked—it's now too late to get the better Streamlined deal. That penalizes taxpayers who did *precisely* what the IRS asked and is simply not fair, claims the Taxpayer Advocate. But there's more.

The IRS's one-sided interpretations of its FAQ—which were not explained, appealable, or published—erodes confidence that the IRS would be reasonable in a post-opt-out examination. The IRS now allows benign actors to pay a smaller penalty under the 2014 Streamlined program. However, the IRS *will not* allow those with signed closing agreements to benefit from the most recent changes.

The IRS in its vaunted Taxpayer Bill of Rights says you have the right to pay no more than the correct amount of tax, to challenge the IRS's position and be heard, to appeal an IRS decision in an independent forum, to be informed, and to a fair and just tax system. Are those true, real rights? Where are they? The IRS should allow taxpayers to discuss IRS interpretations and to appeal the interpretations; and allow taxpayers to amend closing agreements to benefit from recent program changes.

The Taxpayer Advocate wants legislation to cut back on civil FBAR penalties, too. They should be capped and much lower. There should also be no penalty at all if the taxpayer resides where the account is located. After all, that wouldn't really be a 'foreign account.'

Even where an FBAR penalty is appropriate, the IRS should waive it if there is no evidence the account was used in connection with a crime. In cases of alleged willful violations, the IRS should have to prove willfulness, not the reverse. The Taxpayer Advocate even wants the \$10,000 FBAR filing threshold—which has existed since 1970—changed to \$50,000. That would correspond with the \$50,000 thresholds for Form 8938. Speaking of the FBAR and 8938 duplication, these should be combined so there's only one form.

For more information, in the Tax Management Portfolios, see Blum, Canale, Hester, and O'Connor, 947 T.M., Reporting Requirements Under the Code for International Transactions, and in Tax Practice Series, see ¶7170, U.S. International Withholding and Reporting Requirements and FATCA.

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