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## Are FBAR Settlement Programs Provoking Expatriation?

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Since 2009 the IRS and some state governments have initiated settlement programs designed to encourage taxpayers with offshore financial accounts to come forward with the expectation that by doing so they will avoid criminal sanctions. The cost of coming forward varies by program, but for the IRS programs, the 2009 FBAR settlement was 20% of the highest aggregate foreign account balance during years 2003-2008. For the 2011 program the percentage changed to 25% and extended to years 2003-2010. By comparison the non-willful penalty for failing to file an FBAR timely is \$10,000 per year in the absence of "reasonable cause". The penalty for "willful" violations is the greater of 50% or \$100,000 of the aggregate account balances per year. Some taxpayers are considering the costs of settlement offers as truly excessive in light of the nature of the non-compliance and are weighing giving up their U.S. citizenship (expatriating). Who are those taxpayers and why would they seriously consider expatriation.

The profile of an expatriate driven by FBAR enforcement is someone who is a dual national ( a Green Card holder or who holds citizenship from their country of origin. They typically have family holdings in their country of origin and have unreported foreign financial accounts. Another profile is a U.S. citizen living abroad who has established roots, and perhaps gained citizenship in the new country and has unreported financial accounts. A third profile is a U.S. citizen who has FBAR and non-FBAR reasons for acquiring a second passport.

The argument that is most often put forth is that the FBAR penalty is "excessive" and that the settlement offers are punitive and are not related to the nature of the non-compliance by these taxpayers. Some of these taxpayers may be in the 2009 or 2011 IRS program and some not yet. But the sentiment is that the failure to file an FBAR, which is an information return, should not be punished in what they view as a confiscatory manner. They have expressed regret at not filing, many out of ignorance and bad advice, and have no issue with paying income tax on unreported income, and related income tax penalties. But the FBAR penalty is tipping point for many.

Expatriation is a very serious undertaking. Estimates of annual expatriates range from 1600-4500 for formal expatriations per year. The process is also complex and involves an "exit tax" for the right to surrender citizenship. The exit tax is based upon the appreciation in the taxpayer's assets and results in an income tax at capital gains rates. Expatriation is a time consuming and expensive process and the fact that taxpayer's are now opening talking about surrendering U.S. citizenship because of FBAR penalties is disturbing. As enrollment in the IRS 2011 program has expired, and thought of a more stringent program is suggested, perhaps discretion should be allowed in the next program offering. The alternative is more and more taxpayers will find expatriation a better choice.

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