

US tax update: US passport revocation program casting a wide net

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We have previously published [blogs](#) discussing the new passport certification provisions and, given the relatively low threshold of tax debt required for certification, we emphasized the need for US citizens to correctly and annually file US tax returns no matter where they live in the world. This blog provides an update on implementation of the law and points out that, especially because of current IRS enforcement campaigns for international information returns with hefty monetary penalties, it is increasingly easy even for non-compliant US residents of high tax countries (who often do not owe US tax after they claim foreign tax credits on US tax returns) to be at risk of losing their US passports.

In late 2015, Congress added Section 7345 to the Internal Revenue Code, giving the IRS a new tool to pursue US citizens who have “*seriously delinquent tax debts*.” Concerned about the amount of unpaid tax debt and challenges that the IRS faces in collecting that debt, under the *Fixing America’s Surface Transportation (FAST) Act* Congress gave the IRS a big stick to enforce tax compliance by linking passport issuance with paying a tax debt, and mandated that the IRS and the Department of State use this new enforcement mechanism.^[1] Under the FAST Act, seriously delinquent tax debt is an “*unpaid, legally enforceable federal tax liability of an individual*” which:

1. Has been assessed;
2. Is greater than \$50,000 USD (adjusted for inflation)^[2] and,
3. Meets either of the following criteria: (1) a notice of lien has been filed under Code § 6323, and the Collection Due Process (CDP) hearing rights under Code § 6320 have been exhausted or lapsed; or (2) a levy has been made under Code 6331.^[3]

Given the fact that the certification can only be made on assessed liabilities, generally, passport revocation will not apply to a taxpayer who has not yet filed. However, the IRS is empowered to file substitute returns for taxpayers,^[4] so a taxpayer may be assessed without filing. This could be complicated if the IRS does not have the taxpayer’s new non-US address on record.

In early 2018, the IRS started enforcing § 7345 and, according to the Taxpayer Advocate Service, the IRS has sent almost 389,000 certification notices to taxpayers as of the middle of this year.^[5] Not all certifications resulted in the revocation of passports: as of mid-May 2019, the IRS had decertified about 100,000 taxpayers for a variety of reasons, the top three being taxpayers located in a disaster zone, taxpayers having a pending instalment agreement request, and certifications issued on taxpayers for whom the statutory period of limitations on collections had expired.^[6] Nonetheless, the net number of individuals certified for denial of new passports or revocation of existing ones is significant, and the number continues to grow.

While a seriously delinquent tax debt does not include all debts collected by the IRS—assessments for failing to file FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR) ^[7] or unpaid child support obligations are excluded—for US citizens living abroad there are numerous informational reporting requirements that carry significant penalties which can very quickly total over \$52,000 (the

2019 inflation-adjusted threshold for a “seriously delinquent tax debt”).

For example, the penalties for failure to timely file Forms 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, and 3520-A, *Annual Information Return of Foreign Trust With a US Owner* are the greater of \$10,000 or 5% to 35% of the gross reportable account.^[8] The IRS currently has in place an enforcement campaign targeting 3520 and 3520-A compliance.^[9] In our experience, this campaign has resulted in an automatic assessment of penalties for late-filed forms even when the taxpayer has made a voluntary disclosure with a reasonable cause argument under the IRS Delinquent International Information Return Submission Procedures (DIIRSP). The DIIRSP is often the only option for taxpayers who may not fit the criteria for the Streamlined Filing Compliance Procedures, which have US day count limits and require a minimum of three years of late-filed tax returns.^[10] It is important to note that getting 3520 and 3520-A penalties abated likely requires a trip to the IRS Independent Office of Appeals and perhaps to court. Practically speaking, the costs of these penalties may prove less than the time and fees required for an administrative appeal or litigation.

Unfortunately, many US citizens living abroad who may not owe any US tax may still unwittingly get caught by the passport certification program because of these penalties. Exacerbating the problem is the fact that the law only requires two forms of notice to affected taxpayers: a contemporaneous notice issued to the taxpayer at the time of the certification, or reversal and language included in the taxpayer’s collection notice.^[11] Generally, the contemporaneous notice is issued within days of the certification and does not provide US taxpayers living abroad with sufficient time to come into compliance before the IRS makes the certification and advises the taxpayer that the certification has already occurred.

For US citizens living abroad, information return penalties that may also lead to loss of a passport are two strong reasons to come into compliance as soon as possible.

^[1] Section 32101, H.R. Res. 22, 114th Cong. (2015).

^[2] The \$50,000 threshold is indexed for inflation. For 2019 a seriously delinquent tax debt includes liabilities of \$52,000 and above. Rev. Proc. 2018-57.59.

^[3] FAST Act § 32101(a) (codified as Code § 7345(b), 32101(f)).

^[4] Code § 6020.

^[5] Taxpayer Advocate Service — *Fiscal Year 2020 Objectives Report to Congress* — Volume One.

^[6] *Id.*

^[7] FBAR penalties are asserted under Title 31 as a non-tax debt.

^[8] Code § 6677(a), (c)(1).

^[9] <https://www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-six-large-business-and-international-compliance-campaigns>.

^[10] Evidently, the Relief Procedures for Certain Former Citizens would also not apply to individuals with US passports as these procedures are available only to individuals who have renounced US citizenship within the past decade and owe less than a total of \$25,000 in US federal income taxes for the six tax years ending in the year of renunciation.

^[11] Code §§ 6320(a)(3)(E), 6331(d)(4)(E), and 7435(d). Note that the IRS does not currently send a copy of the notice to any taxpayer representative on file so, if the taxpayer’s address in the IRS system is not up to date, the notice may never be delivered.