

OFFSHORE VOLUNTARY DISCLOSURE:

A BRIEF GUIDE TO THE VARIOUS IRS PROGRAMS AND OTHER WAYS OF BECOMING (AND REMAINING) TAX COMPLIANT

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2014 OVDP PROCEDURE: THE “THREE DOORS”

DOOR #1: PRE-CLEARANCE

REQUEST FOR PRE-CLEARANCE

IS THE TAXPAYER “CLEAR” TO DISCLOSE?

I.E., DOES THE IRS ALREADY HAVE TAXPAYER’S NAME?

- FROM THE BANK?
- FROM A TREATY REQUEST?
- FROM A JOHN DOE SUMMONS?
- FROM AN AUDIT OR INVESTIGATION?
- FROM A WHISTLEBLOWER?
- FROM SOMEONE ELSE’S VOLUNTARY DISCLOSURE?

FAX TO IRS CRIMINAL INVESTIGATIONS (CI): (267) 941-1115

NEW TO 2014 OVDP: PRE-CLEARANCE FAX TO IRS DISCLOSES INCRIMINATING INFORMATION, E.G., NAME OF BANK.

APPROX. 30-60 DAYS FOR PRE-CLEARANCE RESPONSE FROM IRS

2014 OVDP PROCEDURE: THE “THREE DOORS”

DOOR #2: CRIMINAL INVESTIGATIONS (CI)

VOLUNTARY DISCLOSURE LETTER AND ATTACHMENT(S)

- NEW FORMS: IRS FORM 14457, *OFFSHORE VOLUNTARY DISCLOSURE LETTER*, AND IRS FORM 14454, *ATTACHMENT TO OFFSHORE VOLUNTARY DISCLOSURE LETTER*.
- TO CRIMINAL INVESTIGATIONS (CI)
- SIGNED BY THE TAXPAYER UNDER PENALTY OF PERJURY
 - IN-DEPTH QUESTIONNAIRE: SOURCE OF FUNDS, INTERACTION WITH ACCOUNT, WHO ASSISTED (FACILITATORS), TRANSFERS, ESTIMATE OF ACCOUNT VALUES, TAXABLE INCOME
 - EACH ACCOUNT → SEPARATE ATTACHMENT
 - DUE 45 DAYS AFTER PRE-CLEARANCE
 - 2-3 MONTH RESPONSE TIME FROM CI
 - “PRELIMINARY ACCEPTANCE”

2014 OVDP PROCEDURE: THE “THREE DOORS”

DOOR #3: THE CIVIL PROCESS

- OVDP PACKAGE:
 - ORIGINAL FILED TAX RETURNS (LAST EIGHT YEARS)
 - AMENDED RETURNS NOW REPORTING PREVIOUSLY UNREPORTED FOREIGN INCOME
 - INTEREST
 - DIVIDENDS
 - CAPITAL GAINS
 - RENT
 - ROYALTIES
 - ETC.
 - PAYMENT
 - TAX
 - INTEREST
 - 20% “ACCURACY” PENALTY
 - FAILURE TO PAY (FTP), FAILURE TO FILE (FTF), IF APPLICABLE.
 - OVDP PENALTY
 - 27.5% (OR 50% FOR ACCOUNTS AT CERTAIN BANKS)

2014 OVDP PROCEDURE: THE “THREE DOORS”

DOOR #3: THE CIVIL PROCESS (CONTINUED)

- OVDP PACKAGE (CONTINUED):
 - FBARS (LAST SIX YEARS)
 - ACCOUNT QUESTIONNAIRES/STATUTE OF LIMITATIONS WAIVERS (FBARS AND FORM 872)
 - PENALTY CALCULATION WORKSHEET
 - STATEMENT RE: ENTITIES (CORPORATIONS, TRUSTS, FOUNDATIONS, ETC., SEE FAQ 25(2)(i))
 - STATEMENT RE: PFICS

2014 OVDP PROCEDURE: THE “THREE DOORS”

DOOR #3: THE CIVIL PROCESS (CONTINUED)

- IRS WILL CASH CHECKS IMMEDIATELY
- THE SOONER YOU PAY TAX, INTEREST STOPS RUNNING
- 6-12 MONTHS TO ASSIGN TO IRS REVENUE AGENT
- AGENT MAY ISSUE IDR [INFORMATION DOCUMENT REQUEST(S)]
- UPON COMPLETION, TAXPAYER AND IRS SIGN FORM 906 (CLOSING AGREEMENT)
- 3 LEVELS OF REVIEW BEFORE IRS SIGNS 906
- TOTAL TIME FOR OVDP COULD BE TWO YEARS

2014 OVDP DOCUMENTARY SUBMISSION

- > PENALTY CHECK (27.5% OR 50%)
- > SEPARATE CHECKS FOR EACH YEAR: TAX, INTEREST, 20% “ACCURACY” PENALTY (+ FTF, FTP, IF APPLICABLE)
- > AMENDED TAX RETURNS (1040X) SHOWING FOREIGN INCOME
- > COPIES OF ORIGINALLY FILED TAX RETURNS
- > COPY OF VOLUNTARY DISCLOSURE LETTER AND ATTACHMENTS TO CRIMINAL INVESTIGATIONS (CI)
- > FOREIGN ACCOUNT OR ASSET STATEMENT FOR EACH ACCOUNT/ASSET (FORM 14452)
- > FOREIGN BANK STATEMENTS, DOCUMENTS RE: OTHER FOREIGN ASSETS
- > FBARS (FINCEN FORM 114)
- > WAIVERS OF STATUTE OF LIMITATIONS, FOR FBARS AND IRS FORM 872
- > STATEMENT RE: FOREIGN ENTITIES (CORPORATIONS, TRUSTS, ETC.)
- > IF DISCLOSING FOREIGN ENTITIES, THE APPLICABLE IRS FORMS (E.G. IRS FORM 3520/A FOR TRUSTS, 5471 FOR CORPORATIONS, ETC.)
- > PFICS?
- > RRSPTS? [FAQ 54]
- > DOCUMENTS MAY BE SUBMITTED ON CD/USB [FAQ 25.2]
 - Documentary submissions are in 2014 OVDP FAQ 25

2014 OVDP: WHAT'S DIFFERENT?

1. TAXPAYER TO DISCLOSE NAME AND CONTACT INFO OF BANK WHERE ACCOUNT IS/WAS HELD, IN THE REQUEST FOR PRE-CLEARANCE.
 - YOU PROVIDE SELF-INCRIMINATING INFORMATION INITIALLY, EVEN BEFORE PRE-CLEARANCE.

 2. TAXPAYER TO DISCLOSE IDENTIFYING INFORMATION FOR ALL DOMESTIC AND FOREIGN ENTITIES (CORPORATIONS, PARTNERSHIPS, TRUSTS, FOUNDATIONS) THROUGH WHICH UNDISCLOSED FOREIGN ASSETS ARE HELD.
 - YOU PROVIDE SELF-INCRIMINATING INFORMATION INITIALLY, EVEN BEFORE PRE-CLEARANCE.
- > CAN/WILL BE USED BY IRS/DOJ IF PRE-CLEARANCE DENIED?

2014 OVDP: WHAT'S DIFFERENT?

3. INCREASED PENALTIES: 50% (NOT 27.5%) IF ACCOUNT IS AT A FOREIGN FINANCIAL INSTITUTION (FFI) WHERE AN EVENT OCCURS WHICH IS A “PUBLIC DISCLOSURE” (FAQ 7.2). AS OF DECEMBER, 2014 (LAST UPDATE):
 1. UBS AG
 2. CREDIT SUISSE AG, CREDIT SUISSE FIDES, AND CLARIDEN LEU LTD.
 3. WEGELIN & CO.
 4. LIECHTENSTEINISCHE LANDESBANK AG
 5. ZURCHER KANTONALBANK
 6. SWISSPARTNERS INVESTMENT NETWORK AG, SWISSPARTNERS WEALTH MANAGEMENT AG, SWISSPARTNERS INSURANCE COMPANY SPC LTD., AND SWISSPARTNERS VERSICHERUNG AG
 7. CIBC FIRST CARIBBEAN INTERNATIONAL BANK LIMITED, ITS PREDECESSORS, SUBSIDIARIES, AND AFFILIATES
 8. STANFORD INTERNATIONAL BANK, LTD., STANFORD GROUP COMPANY, AND STANFORD TRUST COMPANY, LTD.
 9. THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED IN INDIA (HSBC INDIA)
 10. THE BANK OF N.T. BUTTERFIELD & SON LIMITED (ALSO KNOWN AS BUTTERFIELD BANK AND BANK OF BUTTERFIELD), ITS PREDECESSORS, SUBSIDIARIES, AND AFFILIATES
 11. SOVEREIGN MANAGEMENT & LEGAL, LTD., ITS PREDECESSORS, SUBSIDIARIES, AND AFFILIATES
 12. BANK LEUMI LE-ISRAEL B.M., THE BANK LEUMI LE-ISRAEL TRUST COMPANY LTD, BANK LEUMI (LUXEMBOURG) S.A., LEUMI PRIVATE BANK S.A., AND BANK LEUMI USA

2014 OVDP: WHAT'S DIFFERENT?

- > WHAT CONSTITUTES “PUBLIC DISCLOSURE”?
 - ANNOUNCEMENT BY BANK?
 - ARTICLE IN PUBLIC MEDIA (NEWSPAPER, RADIO, ETC.)?
 - BLOG?

- > PENALTY (50%) APPLIES TO ALL FOREIGN ASSETS DISCLOSED, NOT ONLY TO ACCOUNTS SUBJECT TO FAQ 7.2.

- > IF ONE ACCOUNT IS AT A 50% BANK LISTED ABOVE, AND SECOND ACCOUNT IS AT A BANK NOT ON THE LIST, BOTH ACCOUNTS SUBJECT TO 50% PENALTY.

2014 OVDP: WHAT'S DIFFERENT?

4. 12.5% AND 5% PENALTIES ARE ELIMINATED
 - BUT NOTE STREAMLINED 5%
5. OFFSHORE PENALTY CHECK (27.5% OR 50%) IS NOW DUE WITH THE OVDP SUBMISSION. (IN PREVIOUS OVDP, IT WAS DUE UPON SIGNING THE FORM 906, CLOSING AGREEMENT)
6. NEW VOLUNTARY DISCLOSURE LETTER AND ATTACHMENTS
 - VOLUNTARY DISCLOSURE LETTER, FORM 14457
 - VOLUNTARY DISCLOSURE ATTACHMENT, FORM 14454
7. NEW PENALTY CALCULATION WORKSHEET
 - NEW FORM 14453
8. NEW FORM 14452- FOREIGN ACCOUNT AND ASSET STATEMENT

ALTERNATIVES TO A VOLUNTARY DISCLOSURE

1. DO NOTHING

A. SWISS-U.S. SETTLEMENT AGREEMENT (DOJ PROGRAM FOR NON-PROSECUTION AGREEMENTS OR NON-TARGET LETTERS FOR SWISS BANKS) (AUGUST 29, 2013)

- BANKS FREEZING ACCOUNTS.
- BANKS PLACING LIENS = PENALTIES ON ACCOUNTS.

B. FATCA

- BANKS DEMANDING W-9s, FBARS, PROOF OF COMPLIANCE.

C. JOHN DOE SUMMONS

D. TREATY REQUEST

E. PENALTIES OUTSIDE PROGRAM > PENALTIES INSIDE OVDP

- U.S.A. v. ZWERNER (2014)

2. FILE FBARS

A. FORMER FAQ 17, STILL VIABLE IF NO UNREPORTED FOREIGN INCOME (SEE 2014 FAQ 1.1 AND “DELINQUENT FBAR SUBMISSION PROCEDURES”)

ALTERNATIVES TO A VOLUNTARY DISCLOSURE

3. QUIET DISCLOSURE
 - FBARS + AMENDED RETURNS = HUGE RISK
4. STREAMLINED DOMESTIC/OFFSHORE
 - LACK OF CLARITY/GUIDANCE RE: “WILLFULNESS”
 - POSSIBLE TRAP
 - SWORN STATEMENT/PERJURY
5. OVDP, THEN OPT-OUT: NEED TO EXAMINE (A) FACTS AND (B) MATH: COMPARE 27.5% PENALTY TO PENALTY ON OPT-OUT
6. WHAT IF I CLOSE THE ACCOUNT? MOVE THE MONEY TO A NEW BANK? BUY GOLD? BUY REAL ESTATE?
 - PAPER TRAIL
 - SOURCE OF FUNDS/ “KNOW YOUR CLIENT”
 - FATCA

2014 OVDP COMMON QUESTIONS

> HOW LONG WILL THE PROCESS TAKE?

- PRE-CLEARANCE
 - 30-60 DAYS FOR IRS RESPONSE
- VOLUNTARY DISCLOSURE LETTER AND ATTACHMENTS
 - DUE 45 DAYS FROM PRE-CLEARANCE
 - 2-3 MONTHS FOR IRS RESPONSE (PRELIMINARY ACCEPTANCE)
- CIVIL PROCESS
 - OVDP PACKAGE DUE WITHIN 90 DAYS OF PRELIMINARY ACCEPTANCE
 - 6-12 MONTHS TO ASSIGN TO IRS REVENUE AGENT
- TOTAL: 1-2 YEARS

> WHAT WILL IT COST?

- TAX
- INTEREST
- 20% "ACCURACY" PENALTY
- OVDP "MISCELLANEOUS" PENALTY (27.5%/ 50%)
- FAILURE TO FILE (FTF) AND FAILURE TO PAY (FTP) PENALTIES, IF APPLICABLE
- + LEGAL FEES
- + CPA FEES
- TRANSLATIONS?
- BANK PHOTOCOPY / ARCHIVE FEES?

2014 OVDP COMMON QUESTIONS

- > CAN PENALTIES OR TAXES BE NEGOTIATED?
- > WHEN WILL I HAVE TO PAY?
- > WHAT IF I CAN'T PAY IT ALL AT ONCE?
- > SHOULD I HIRE A LAWYER?
- > WILL THE OVDP LEAD TO AN AUDIT?
- > WILL MY EMPLOYER FIND OUT?
- > CAN I LEAVE THE COUNTRY? MUST I SURRENDER MY PASSPORT?
- > WHAT IF THE FOREIGN FUNDS WERE ILLEGALLY OBTAINED?
- > CAN I DISCLOSE ONE ACCOUNT, BUT NOT DISCLOSE A DIFFERENT ACCOUNT OR ASSET?
- > WHAT IF FAMILY MEMBERS WERE ON AN ACCOUNT? WILL THEY GET INTO TROUBLE?
- > WHEN WILL THE OVDP END? WHEN SHOULD I DO THIS?
- > WHAT IF I JUST CLOSE THE ACCOUNT?
- > WHEN CAN I BRING THE MONEY BACK?

ASHER RUBINSTEIN BIOGRAPHY

Asher Rubinstein, Esq. concentrates his law practice on asset protection, wealth preservation, tax planning, tax compliance and tax controversy.

Asher has advised hundreds of clients around the world on IRS compliance issues, including international banking and cross-border taxation. He has represented clients before the IRS including in connection with offshore voluntary disclosures.

Asher is a frequent commentator on tax, banking and offshore issues in major media, including the New York Times, Bloomberg, CNBC, Forbes, NPR, Tax Notes International, CNNMoney.com and Reuters, as well as media in Switzerland, Austria, the United Kingdom and India.

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- Since 2009, Ms. Jacobs has devoted a significant portion of her practice to international tax compliance matters--primarily in the areas of Offshore Voluntary Disclosure, Dual Citizenships, FBAR Compliance, and FATCA Compliance. She has had frequent speaking engagements on the Offshore Voluntary Disclosure Programs, most recently speaking at an American Bar Association Tax Section Meeting and as a panelist for a Strafford Webinar. She also has been quoted in *Tax Notes Today* and Politico's *Morning Tax* on related issues.
- In addition, Ms. Jacobs has more than 25 years of experience in all aspects of international tax practice, including issues related to Subpart F, PFIC, repatriation, foreign tax credit, and tax treaty planning. Her cross-border transactional experience includes mergers and acquisitions, post-merger/acquisition integrations, cross-border financings, private equity transactions, and structured finance.
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STREAMLINED FILING COMPLIANCE PROCEDURES

- On June 18, 2014, the IRS announced changes to the existing Streamlined Filing Compliance Procedure, which had been in effect since September 1, 2012 (the “Former 2012 Streamlined Program”).
- The Former 2012 Streamlined Program was difficult to qualify for because it applied only to non-resident, non-filing U.S. taxpayers (including dual residents) with a low compliance risk and less than \$1500 of tax due.
- U.S. resident taxpayers and U.S. non-resident taxpayers who filed U.S. tax returns, but who (1) failed to include offshore income on their U.S. tax returns, and/or (2) failed to properly file FBARs, were not allowed to participate in the Former 2012 Streamlined Procedure.

WHAT IS THE PURPOSE OF THE NEW STREAMLINED FILING COMPLIANCE PROCEDURES?

- The new Streamlined Filing Compliance Procedures are designed to provide new options to help both U.S. taxpayers residing overseas, **AND** in the U.S., comply with their U.S. tax obligations.
- **Effective July 1, 2014, there are 2 NEW Streamlined Filing Compliance Procedures:**
 - (1) the Streamlined Domestic Offshore Procedures (SDOP) and**
 - (2) the Streamlined Foreign Offshore Procedures (SFOP)**
- Compared to the Former 2012 Streamlined Program, the SDOP and the SFOP include a broader section of non-compliant, but non-willful, U.S. taxpayers.
- For the first time, U.S. resident taxpayers who are out of compliance with reporting their foreign source income or, who have failed to file international information returns such as the FBAR, can now participate.

PURPOSE OF THE NEW STREAMLINED FILING COMPLIANCE PROCEDURES, CONT.

- The new Streamlined Filing Compliance Procedures are designed to provide U.S. taxpayers with a streamlined procedure for:
 - (1) filing amended or delinquent tax and international information returns; and
 - (2) for resolving their tax and penalty obligations.
- These two new procedures will be available for an indefinite period of time—until otherwise announced.

GENERAL ELIGIBILITY FOR THE NEW STREAMLINED FILING COMPLIANCE PROCEDURES

- The new Streamlined Filing Compliance Procedures are designed only for individual taxpayers, including estates of individual taxpayers.
- **To be eligible for the SFOP:** the taxpayer must meet the definition of a “non-resident taxpayer.”
- **To be eligible for the SDOP:** the taxpayer must fail to satisfy the “non-residency” criteria.
- **Taxpayers must certify under penalties of perjury:** that their conduct for the failure to report all income, pay all tax and file all information returns, including FBARs, **was due to non-willful conduct.**
- Taxpayers are not eligible if the IRS has initiated a civil examination of a taxpayer’s return for any taxable year, regardless of whether the examination relates to undisclosed offshore assets.

GENERAL ELIGIBILITY FOR THE NEW STREAMLINED FILING COMPLIANCE PROCEDURES, CON'T.

- All tax returns submitted under the new Streamlined Filing Compliance Procedures must have a valid TIN (taxpayer identification number), which is either a valid SSN or a valid ITIN.
- Tax returns submitted without a valid SSN or a valid ITIN will not be processed under these procedures.
- However, taxpayers who are ineligible for an SSN and do not have a valid ITIN, may submit tax returns under these procedures if accompanied by a complete ITIN application.
- Taxpayers who are otherwise eligible to use the new Streamlined Filing Compliance Procedures, but who have previously made “quiet disclosures” outside any of the prior OVDPs, may still use the new procedures. (The prior quiet disclosures will not bar their participation).
- However, any penalty assessments previously made with respect to those filings--such as the 20% accuracy related penalty--will not be abated.

GENERAL TREATMENT UNDER THE NEW STREAMLINED FILING COMPLIANCE PROCEDURES

- Tax returns submitted under these new procedures will be processed like any other returns submitted to the IRS.
- Thus, the receipt of returns will not be acknowledged by the IRS and these procedures will not result in the signing of a Closing Agreement.
- Tax returns submitted under these new procedures will not be subject to IRS audit automatically, but they may be selected for audit and subject to verification procedures.

INHERENT RISKS IN THE NEW STREAMLINED FILING COMPLIANCE PROCEDURES

- Once a taxpayer makes a submission under either of the new Streamlined Procedures (*i.e.*, the SFOP or the SDOP), she/he may *not* participate in the 2014 Offshore Voluntary Disclosure Program (OVDP).
- Moreover, if the IRS receives or discovers evidence of willfulness, fraud, or criminal conduct on the part of the taxpayer, the IRS could open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even a referral to Criminal Investigation.
- In addition, the IRS has said that there will be no pre-clearance protection under the new Streamlined Procedures.
- Accordingly, taxpayers who are concerned that their failure to report income, pay tax, and/or to file required information returns was due to willful conduct should seriously consider participating in the OVDP.

WHAT IS NON-WILLFUL CONDUCT?

- In order to participate in the SFOP or the SDOP, a Taxpayer must certify under penalty of perjury that his/her conduct was non-willful.
- The IRS has said that “non-willful conduct” for the new Streamlined Programs 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.”***
- The IRS also has said that it will give no further definition of non-willful conduct **for** purposes of the SFOP or the SDOP (other than that stated above). It has said that the concept of willfulness is well documented in case law and expects practitioners to apply those definitions, as well as relevant portions of the IRS Manual in advising clients on whether their conduct fits within the definition of non-willfulness.

WHAT IS NON-WILLFUL CONDUCT?

- What kind of evidence is relevant to demonstrate “non-willfulness” for purposes of the SDOP and the SFOP when the definition of non-willful conduct ranges from negligent conduct to conduct resulting from a good faith misunderstanding of the law?
- How does a taxpayer actually prove that he/she did not know about including offshore income on his/her U.S. tax return or that he/she never knew about the FBAR filing requirement? What kind of supporting evidence does the taxpayer need to show?
- In determining whether the taxpayer can legitimately certify that he or she is non-willful, **ALL** relevant facts and circumstances should be analyzed.

WHAT IS NON-WILLFUL CONDUCT? CON'T.

- The IRS requires that every U.S. taxpayer applying for one of the new Streamlined Procedures write a personal statement on the Certification Form setting forth the specific reasons for his or her failure to report all income, pay all tax, and submit all required information returns, including FBARs.
- If the taxpayer relied on a professional advisor, the IRS wants the taxpayer to provide the name, address, and telephone number of the advisor, and a summary of the advice relied upon.
- Moreover, if married taxpayers submitting a joint certification have different reasons for non-compliance, then the IRS requires that each taxpayer provide his or her own personal statement on the Certification Form.

WHAT IS NON-WILLFUL CONDUCT? USE OF AN ACCOUNTANT/TAX PREPARER

Questions relevant to a finding of non-willfulness:

- Did the taxpayer use an accountant or paid return preparer to prepare the tax returns?
- If so, was the taxpayer given a tax organizer? If yes, did the taxpayer fill it out truthfully? Does the taxpayer have a copy of the organizer?
- If the taxpayer did not receive an organizer from the tax advisor, was he/she asked about the existence of any offshore accounts or assets, or about any foreign source income?
- If the advisor did not ask the taxpayer the above questions, did the taxpayer affirmatively tell the accountant or tax return preparer about the existence of any offshore accounts, offshore assets, or foreign source income?

WHAT IS NON-WILLFUL CONDUCT? TAXPAYER'S KNOWLEDGE AND LEVEL OF SOPHISTICATION

- Did the taxpayer have any knowledge of the foreign source income, foreign accounts or foreign assets? Why was there income?
- What is taxpayer's level and type of education?
- Does the taxpayer have any specialized knowledge of tax rules or finance or the fact that the U.S. requires U.S. persons to report income on a worldwide basis on their tax returns?
- Does the taxpayer know anything about an FBAR or international information returns, such as a Form 5471?

WHAT IS NON-WILLFUL CONDUCT? TAXPAYER'S CONNECTION TO THE COUNTRY, ETC.

- Was the taxpayer a citizen or resident of the country where the accounts/assets were/are located? If not, why were the accounts opened in that country?
- If the taxpayer opened the account, did he/she do so with a U.S. passport, if applicable? Was the account opened in a jurisdiction with no bank secrecy laws?
- What were/are the sources of the funds in the accounts?
- Is the source of funds traceable to previously taxed income? Were the funds an inheritance? Were the funds from taxpayer's work in the country where the accounts are located?

WHAT IS NON-WILLFUL CONDUCT? ACTIVITIES IN THE OFFSHORE ACCOUNT

- What type of activities took place with respect to the accounts? Deposits, withdrawals, wire transfers? If so, how frequent were these activities?
- Were there any trades in the accounts? If so, who managed the accounts?
- Was there a credit card associated with the account? If so, did the taxpayer ever use it? If so, how frequently?
- Did the taxpayer receive regular statements from the bank? If not, did a relative or friend receive statements or did the bank have instructions not to send any statements to the taxpayer?

WHAT IS NON-WILLFUL CONDUCT? ACTIVITIES IN THE OFFSHORE ACCOUNT, CON'T.

- Has the account ever been moved? If so, why? Was it moved to a tax transparent country or to a jurisdiction with a tradition of bank secrecy?
- Was an entity used when the account was opened? If so, did the bank require the use of an entity? Was it used to disguise the true identity of the account owner?

THE CONCEPT OF WILLFUL BLINDNESS

- The IRM defines willfulness in the FBAR context as “a voluntary, intentional violation of a known legal duty.” (IRM 4.26.16.4.5.3).
- Under the concept of “willful blindness,” willfulness may be attributed to a person who has made a conscious effort to avoid learning about the FBAR reporting requirements.
- **Key Question:** Under all the facts and circumstances, should the taxpayer have inquired about the reporting of a foreign financial account and/or its income? Or should the accountant or tax preparer have made an effort to explain what kinds of foreign accounts and assets are reportable?
- What if the wrong box is checked on Schedule B? Implications? The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that an FBAR violation was due to willful blindness.

DIFFERENCES BETWEEN THE SDOP AND THE SFOP

The primary differences between the SFOP and the SDOP are:

1. **Residency vs. non-residency:** in the SFOP, the taxpayer qualifies as a non-resident U.S. taxpayer, whereas in the SDOP, the taxpayer qualifies as a resident U.S. taxpayer;
2. **Penalties:** in the SFOP, all penalties are waived--the taxpayer only needs to pay taxes and interest due over a three-year period. In the SDOP, the taxpayer must pay taxes and interest due over a three-year period AND a 5% miscellaneous penalty on the highest account balances of the taxpayer's offshore assets (using a six-year look back period and the year-end balances); and

DIFFERENCES BETWEEN THE SDOP AND THE SFOP, CON'T.

- 3. Information returns:** Paragraph 21.8.1.27.2.1 (9)(6) of the Internal Revenue Manual instructs account managers to refer any SDOP case with five or more foreign information returns (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, or 8621) to LB&I OVDP Compliance. The five information return threshold is a combination of all years filed. (This referral threshold does not apply to the SFOP).

Example: Taxpayer's submission contains three Forms 5471 for 2011 and three Forms 5471 for 2012. This submission would be referred to LB&I since the total number of information returns submitted is six.

ELIGIBILITY REQUIREMENTS FOR THE SFOP

In addition to the general eligibility requirements discussed before, the Taxpayer must:

1. Meet the applicable non-residency requirement (for joint filers, both spouses must meet the applicable non-residency requirement);
2. Have failed to report the income from a foreign financial asset and failed to pay tax on it;
3. May have failed to file an Information Return, such as an FBAR; and
4. Such failures resulted from non-willful conduct.

NON-RESIDENCY REQUIREMENT OF THE SFOP

Individual U.S. citizens or lawful permanent residents (e.g., Green Card Holders) or their estates meet the applicable non-residency requirement if:

1. In any one or more of the most recent three years for which the U.S. tax return due date (or properly extended due date) has passed, the taxpayer did not have a U.S. “abode” and the taxpayer was physically outside the U.S. for at least 330 days.
2. Neither temporary presence of the taxpayer in the U.S. nor maintenance of a dwelling in the U.S. by an individual necessarily means that the taxpayer’s “abode” is in the U.S.

WHAT IS A U.S. ABODE?

- The SFOP looks to the definition of Abode in IRC Section 911(d)(3) and Treas. Reg. § 1.911-2(b).
- Abode has been defined as one's home, habitation, residence, domicile, or place of dwelling.
- It does not mean your principal place of business.
- Abode has a domestic rather than a vocational meaning and does not mean the same thing as "tax home."
- The location of your abode often will depend on where you maintain your economic, family, and personal ties.
- You are not considered to have a tax home in a foreign country for any period in which your abode is in the U.S.

WHAT IS A NON-RESIDENT FOR PURPOSES OF THE SFOP?

- **Example One**: Taxpayer was born in the U.S. but moved to France with his parents when he was six years old, has lived in France ever since, and does not have a U.S. abode. Taxpayer meets the non-residency requirement applicable to individuals who are U.S. citizens or green card holders.
- **Example Two**: Assume the same facts except that Taxpayer moved to the U.S. and acquired a U.S. abode in 2012. The most recent 3 years for which the Taxpayer's U.S. tax return due date (or properly extended due date) has passed are 2013, 2012 and 2011. Taxpayer meets the non-residency requirement applicable to individuals who are U.S. citizens or green card holders because in one or more of the most recent three years for which the U.S. tax return due date has passed, the taxpayer did *not* have a U.S. abode.

NON-RESIDENCY REQUIREMENT FOR TAXPAYERS WHO ARE NOT U.S. CITIZENS OR GREEN CARDHOLDERS

- The SFOP provides a different non-residency requirement for taxpayers who are not U.S. citizens or green card holders.
- Taxpayers in this category will meet the non-residency requirement if, in any one or more of the last three years for which the U.S. tax return due date (or properly extended due date) has passed, the taxpayer did not meet the “substantial presence” test.

NON-RESIDENCY REQUIREMENT FOR TAXPAYERS WHO ARE NOT U.S. CITIZENS OR GREEN CARD HOLDERS, CON'T.

- **Example:** Taxpayer is not a U.S. citizen or a green card holder. Taxpayer was born in Italy and resided in Italy until May 1, 2012, when her employer transferred her to the U.S. Taxpayer was physically present in the U.S. for more than 183 days in both 2012 and 2013. The most recent 3 years for which the taxpayer's U.S. tax return due date (or properly extended due date) has passed are 2013, 2012 and 2011. While Taxpayer did meet the substantial presence test for 2012 and 2013, she did not meet it for 2011.

Result: Taxpayer meets the non-residency requirement for purposes of the SFOP.

THE SFOP PROCEDURE

Once it is determined that a Taxpayer is eligible to participate in the SFOP, the Taxpayer must:

- File delinquent or amended tax returns, together with all required information returns for each of the most recent three years and pay any tax and interest due;
- File delinquent or amended FBARs for each of the most recent six years; *and*
- File a Certification in which the Taxpayer certifies under penalty of perjury that the failure to file tax returns, report all income, pay all tax, and submit all information returns, including FBARs was due to non-willful conduct.

There are special rules if the Taxpayer is seeking relief for failure to elect deferral of income from retirement plans.

ELIGIBILITY REQUIREMENTS FOR THE SDOP

In addition to the general eligibility requirements discussed before, the Taxpayer must:

1. **FAIL** to meet the applicable non-residency requirement (for joint filers one or both spouses must **FAIL** to meet the applicable non-residency requirement);
2. Have previously filed a U.S. tax return for each of the most recent 3 years for which the U.S. tax return due date (or properly extended due date) has passed;
3. Have failed to report gross income for a foreign financial asset and pay tax on it and may have failed to an information return, such as an FBAR, with respect to such asset; ***and***
4. Certify that such failures resulted from non-willful conduct.

THE SDOP PROCEDURE

Once it is determined that a Taxpayer is eligible to participate in the SDOP, the Taxpayer must:

- File amended tax returns, together with all required information returns for each of the most recent three years and pay any tax and interest due;
- File delinquent FBARs for each of the most recent six years; ***and***
- File a Certification in which the Taxpayer certifies under penalty of perjury that the failure to file tax returns, report all income, pay all tax, and submit all information returns, including FBARs, was due to non-willful conduct.

There are special rules if the Taxpayer is seeking relief for failure to elect deferral of income from retirement plans.

THE SDOP MISCELLANEOUS PENALTY

- In addition to paying any tax and interest due, a taxpayer participating in the SDOP must pay a 5% miscellaneous penalty on the highest aggregate balance/value of the Taxpayer's foreign financial assets that are subject to the miscellaneous offshore penalty during the years in the covered FBAR period.
- In this case, year-end account balances and year-end asset values are used in lieu of the highest balances over the course of the year—and the 5% penalty is assessed on the highest year.

ASSETS INCLUDED IN THE MISCELLANEOUS PENALTY

- For the six years covered in the FBAR period, all foreign financial accounts (as defined in the instructions for FINCEN Form 114) in which the taxpayer has a personal financial interest that should have been, but were not reported on an FBAR.
- For the three years covered in the tax return period, all foreign financial assets (as defined in the instructions for Form 8938) in which the taxpayer has a personal financial interest that should have been, but were not reported on Form 8938,
- For the three years covered in the tax return period, all foreign financial accounts/assets (as defined in the Instructions for FINCEN Form 114 or IRS Form 8938) for which gross income was not reported for that year.



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FAQ 17 SUPERSEDED

- OLD FAQ 17. If all taxable income was reported then the taxpayer could file the delinquent FBAR with an explanation, and no penalty would be imposed.
- New Delinquent FBAR Submission Procedures: Very similar.

OLD FAQ 18 ELIMINATED. BAD NEWS!

- Old FAQ 18. A taxpayer who has failed to file tax information returns, such as Form 5471 for controlled foreign corporations (CFCs) or Form 3520 for foreign trusts but who has reported, and paid tax on, all their taxable income with respect to all transactions related to the CFCs or foreign trusts, could file delinquent information returns. No penalty.
- New Delinquent International Information Return Submission Procedures. A statement of reasonable cause with a statement of all facts establishing reasonable cause for the failure to file must be submitted.
- The statement should be signed by the taxpayer under penalties of perjury
- Must include a certification that the entity for which the return is being submitted did not engage in tax evasion.
- FAQ No. 1 Delinquent International Information Return Submission Procedures reiterates that “Unlike the procedures described in OVDP FAQ 18, penalties may be imposed under the Delinquent International Information Return Submission Procedures if the Service does not accept the explanation of reasonable cause.”
- But Cf. OVDP FAQ 32 and 35 excepting from penalties accounts and assets which generated no gross income.
- Also Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing in the United States FAQ No. 1 which provides that the Service will apply the principles announced in OVDP FAQs 31 through 33, 35.1, and 38 through 41.

ALTERNATIVES TO ENTERING OVDP: JUST SAY NO?

- Filing a quiet disclosure
- Prospective Compliance. Filing accurate 2014 tax returns, and/or FBARs, but not self correcting prior years
- Enter OVDP followed by Opt-out
- Stick head in sand, and do nothing (Not Recommended!)
- Potential Risks
 - FULL BLOWN AUDIT
 - POTENTIAL PENALTIES EXCEEDING THE VALUE OF OFFSHORE ASSETS
 - PAY SPECIAL ATTENTION TO FAILURE TO FILE “INFORMATION RETURNS” E.G. 5471, 3520 ETC.
 - POSSIBLE CRIMINAL EXPOSURE INCLUDING JAIL TIME
 - DEPORTATION OF NON-CITIZENS
- Potential Rewards
 - NO TAXES
 - NO PENALTIES
 - NO AUDIT

QUIET DISCLOSURES. IRM 9.5.11.9.

- It is currently the practice of the IRS that a voluntary disclosure will be considered along with all other factors in the investigation in determining whether criminal prosecution will be recommended.
- This voluntary disclosure practice creates no substantive or procedural rights for taxpayers, but rather is a matter of internal IRS practice, provided solely for guidance to IRS personnel.
- Taxpayers cannot rely on the fact that other similarly situated taxpayers may not have been recommended for criminal prosecution.
- A voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended. This practice does not apply to taxpayers with illegal source income.

QUIET DISCLOSURE. WHAT IS IT?

A communication from the Taxpayer which is timely, truthful, and Complete

- The Taxpayer shows a willingness to cooperate (and does in fact cooperate) with the IRS in determining his or her correct tax liability; and
- the taxpayer makes good faith arrangements with the IRS to pay in full, the tax, interest, and any penalties determined by the IRS to be applicable

WHAT DOES A QUIET DISCLOSURE LOOK LIKE?

Examples of voluntary disclosures include:

- a letter from an attorney which encloses amended returns from a client which are complete and accurate (reporting legal source income omitted from the original returns), which offers to pay the tax, interest, and any penalties determined by the IRS to be applicable in full and which meets the timeliness.
- The letter offering to pay is an essential part of a quiet Voluntary Disclosure.

ARE QUIET DISCLOSURES STILL VIABLE? SEE OVDP FAQ 15

- The IRS is aware that some taxpayers have made “quiet disclosures” by filing amended returns, by filing delinquent FBARs, and paying any related tax and interest for previously unreported income from OVDP assets (see FAQ 35) without otherwise notifying the IRS.
- Taxpayers who have already made “quiet disclosures” are encouraged to participate in the OVDP by submitting an application, along with copies of their previously filed returns (original and amended), and all other required documents and information (see FAQ 25) to the IRS’s Voluntary Disclosure Coordinator (see FAQ 24).
- Taxpayers are encouraged to avail themselves of the protection from criminal prosecution and the favorable penalty structure offered under the OVDP.
- Unlike a voluntary disclosure through the OVDP, quiet disclosures provide no protection from criminal prosecution and may lead to civil examination and the imposition of all applicable penalties.

ARE QUIET DISCLOSURES STILL VIABLE? (CONT.)

- In 2014 the GAO released a report critical of the IRS for failing to follow-up and audit taxpayers who had filed quiet disclosures.
- The IRS has sent notifications to some taxpayers who attempted to file quiet Disclosures an “offer” for them to enter OVDP

PROSPECTIVE DISCLOSURES

➤ Advantages Over Quiet Disclosure

- Less Chance of scrutiny
- Lower transactional costs

➤ Advantages over Streamlined

- No 5% Streamlined penalty for those with reasonable cause

➤ Disadvantages

- More chance of criminal exposure if picked up on Audit
- Accuracy Penalty may be imposed if there is no Reasonable cause
- Statute of limitations on assessment remains open based failure to file Form 8938 until 3 years after the form is filed. IRC Section 6501(c)(8)

OPTING OUT OF OVDP. DOES IT MAKE SENSE?

- Generally Not a Prospective Strategy
- Possible escape valve if there was an error in deciding to enter OVDP, or new facts have come to light after entering ovdv which make the original decision onerous.
- The one advantage might be to obtain semi-binding promise of non-criminal prosecution, but still allow for arguing non-willfulness.
 - IMAGINE A CLIENT WHO HAS SIGNIFICANT UNREPORTED INCOME FROM REAL ESTATE HOLDINGS WHICH ARE SUBJECT TO THE “IN LIEU” PENALTY, BUT WHO LEGITIMATELY WAS UNAWARE OF THE FBAR REQUIREMENT FOR RELATIVELY SMALL OFFSHORE ACCOUNT.

EXPATRIATION. HIDE THE MONEY OVERSEAS. IS IT A STRATEGY?

- Expatriation does not Relieve a U.s. Person of her obligation to file Past Due FBARs.
- Expatriation does not Relieve a U.s. Person of her obligation to file and pay taxes while a U.s. person
- At least Five Countries have treaties with the United States which provide for significant mutual assistance in the collection of tax obligations
 - CANADA
 - DENMARK
 - FRANCE
 - NETHERLANDS
 - SWEDEN
- It is likely that in this age of Globalization more will follow.

WRIT NE EXEAT REPUBLICA. IRC § 7402(A)

- The DOJ can obtain a Court order prohibiting an individual with a tax liability from leaving the Country if The Taxpayer is:
 - ABOUT TO LEAVE THE U.S.
 - IS UNLIKELY TO RETURN TO THE U.S.
 - HAS CONVEYED OR CONCEALED PROPERTY SO THAT THE PROPERTY MAY BE TAKEN OUT OF THE U.S.

CUSTOMS ORDER OR PREVENT DEPARTURE ORDER. SEE IRM 5.21.3.4 (12-04-2013)

- A Customs Order or Prevent Departure Order is an administrative action similar to the Writ Ne Exeat Republica.
- A Customs Order can prevent a non-U.S. Citizen from exiting the United States, pending the resolution of a collection matter.
- The authority for a Customs Order is found in 22 C.F.R. § 46.2(a) which states in part "...No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interest of the United States under the provisions of 46.3."
- In addition, C.F.R § 46.3(h) applies to a collection investigation where it states, in part, "Any alien who is needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local."

SUIT TO REPATRIATE PROPERTY - REPATRIATION ORDERS. SEE IRM 5.21.3.6 (12-04-2013)

- A Repatriation Order is an order issued by a federal judge, after a hearing, requiring a taxpayer who has transferred assets to a foreign country to transfer them back into the United States. If the taxpayer refuses or neglects to return the assets, the taxpayer is subject to contempt proceedings.

- A Repatriation Order must show:
 - AN OUTSTANDING TAX LIABILITY
 - A REASONABLE BASIS THAT THE TAXPAYER HAS ASSETS OUTSIDE THE U.S.
 - LEVY ON DOMESTIC ASSETS IS NOT SUFFICIENT TO SATISFY THE TAX LIABILITY
 - U.S. IS ABLE TO GET PERSONAL JURISDICTION OVER THE TAXPAYER.
 - THE REVENUE OFFICER MUST SHOW THAT THE TAXPAYER IS EITHER IN THE U.S. OR A U.S. TERRITORY OR THE LIKELIHOOD THAT THE TAXPAYER WILL BE RETURNING TO, OR PASSING THROUGH, THE UNITED STATES.

MISCELLANEOUS

- funds held offshore can be reached by a levy if the bank has a branch in the U.S. See Treasury Regulations Section 301.6332–1(a)(2).
- Appointment of a Receiver. See IRM 5.21.3.5 (12-04-2013).
 - THE APPOINTMENT OF A RECEIVER IS A CIVIL ACTION BROUGHT IN THE U.S. DISTRICT COURT UNDER THE AUTHORITY OF IRC §7402(A).

EXPATRIATION A VERY, VERY, VERY BRIEF OVERVIEW

- EXIT TAX. A U.S. CITIZEN OR LONG-TERM U.S. RESIDENT WHO EXPATRIATES AFTER JUNE 16, 2008, IS DEEMED FOR ALL FEDERAL INCOME TAX PURPOSES TO HAVE SOLD AT FAIR MARKET VALUE ALL OF HIS OR HER WORLDWIDE ASSETS IN A TAXABLE TRANSACTION ON THE DAY BEFORE THE EXPATRIATION DATE IF SUCH PERSON IS A “COVERED EXPATRIATE.”
- THE INCOME FROM THE DEEMED SALE, REDUCED (BUT NOT BELOW ZERO) BY AN INFLATION-ADJUSTED AMOUNT \$690,000 FOR TAXABLE YEARS BEGINNING IN 2015), IS INCLUDIBLE IN THE TAXPAYER'S GROSS INCOME FOR THE TAXABLE YEAR OF THE DEEMED SALE. SEE REV. PROC. 2014-61, 2014-47 I.R.B. 860, §3.31.
- GIFTS OR INHERITANCES FROM A COVERED EXPATRIATE TO A U.S. PERSON.
 - IF A U.S. CITIZEN OR RESIDENT RECEIVES PROPERTY DIRECTLY OR INDIRECTLY EITHER BY GIFT FROM, OR BY REASON OF THE DEATH OF, A PERSON WHO AT THE TIME OF THE ACQUISITION OR DEATH WAS A COVERED EXPATRIATE, THEN THE TRANSFER IS SUBJECT TO A TAX EQUAL TO THE VALUE OF THE PROPERTY MULTIPLIED BY THE HIGHEST RATE OF TAX FOR FEDERAL ESTATE TAX OR FEDERAL GIFT TAX PURPOSES. IRC §2801(A), (E)(1). NOTICE 2009-85, THIS TAX IS PAYABLE BY THE RECIPIENT. IRC SECTION 2801(B).

EXPATRIATION. A DEFINITION.

- An individual can cease to be a citizen under the pertinent provisions of the Immigration and Nationality Act (the "INA"), and yet continue to be a Citizen for tax purposes subject to all of the requirements of the Internal Revenue Code.
- an individual is considered to have relinquished citizenship for federal tax purposes on the earliest date that one of four specified "notice events" occurs. IRC Section 877A(g)(4).
- section 7701(a)(50) generally provides that an individual shall not cease to be treated as a U.S. citizen before the date on which the individual's citizenship is treated as relinquished under section 877A(g)(4).

EXPATRIATION. THE NOTICE EVENTS

An individual is considered to have relinquished citizenship on the earliest of:

- the date the individual renounces his U.S. nationality before a diplomatic or consular officer of the United States
- the date the individual furnishes to the U.S. Department of State a signed statement of voluntary relinquishment of United States nationality confirming the performance of a specified act of expatriation
- the date the U.S. Department of State issues to the individual a certificate of loss of nationality, or
- the date a U.S. court cancels a naturalized citizen's certificate of naturalization.

COVERED EXPATRIATE

- U.S. Citizens and certain Long-Term residents who meet the Notice Requirement of IRC Section 877a(g)(4)
- have average annual net income tax for the 5 years ending before the date of expatriation or termination of residency is more than a specified amount that is adjusted for inflation (\$147,000 for 2011, \$151,000 for 2012, \$155,000 for 2013 and \$157,000 for 2014)
- Have a net worth or \$2 million or more on the date of your or termination of residency
- Has failed to certify on Form 8854 that she has complied with all U.S. federal tax obligations for the 5 years preceding the date of expatriation or termination of residency.

TRAP FOR THE UNWARY. PITY THE POOR CPA.

- The Failure to File Form 8854 Makes a Taxpayer who has a net Worth of Less Than \$2 million subject to the exit tax in the Year of Expatriation
- Form 8854 requires a certification that the Taxpayer has Complied with all Federal Tax obligations for 5 years preceding the Date of expatriation
 - INABILITY TO CERTIFY WILL ALSO RESULT IN IMPOSITION OF THE EXIT TAX. SEE INSTRUCTIONS TO PART IV, LINE 6 FORM 8854

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