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Offshore Voluntary Disclosure Program Round Four: IRS Announces Further Changes to Encourage Broader Compliance

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On June 18, 2014, the Internal Revenue Service (IRS) announced extensive changes to the Offshore Voluntary Disclosure Program (OVDP) last revised in 2012.[1] Coinciding with changes to the OVDP are changes and expansion of the Streamlined Filing Compliance Procedure (SFCP) previously only available to U.S. citizens and lawful permanent residents residing outside of the United States. In general, the changes to both regimes reflect a concession by the IRS that a ''one size fits all'' program may not be the best approach to encourage compliance.

[1] *See* Robert E. Ward, *2012 Offshore Voluntary Disclosure Program: Issues and Opportunities*, 41 Tax Mgmt. Int'l J. 548 (Oct. 12, 2012).

A BRIEF HISTORY OF OFFSHORE VOLUNTARY DISCLOSURE INITIATIVES

''Our goal is to build on the success the IRS has already had in reducing offshore tax evasion through the OVDP, which allows individuals to avoid criminal prosecution if they disclose their foreign accounts and pay a substantial penalty.'' IRS Commissioner John Koskinen

Although the IRS has had measures in place to encourage disclosure of foreign accounts for over a decade, the genesis of the current OVDP goes back to May 2009 when the IRS announced an ''amnesty'' for individuals with foreign accounts who failed to file FinCEN Form 114 Foreign and Financial Bank Account Reports (formerly Form TD F 90-22.1) (''FBARs'') and other required information returns regarding foreign accounts and assets or report and pay tax on the income of those accounts and assets (''2009 OVDP''). The 2009 OVDP closed on September 23, 2009. It was followed approximately a year and one-half later by the offshore voluntary disclosure initiative announced on February 8, 2011 (''2011 OVDI''). The 2011 OVDI also closed within months of its announcement on September 9, 2011. In contrast to the limited duration of the initiatives in 2009 and 2011, the OVDP in place since June 26, 2012 (''2012 OVDP'') was an open-ended program without a specific sunset date, with the qualification it could be closed or changed at any time.

In each of the three prior incarnations, the amnesty from criminal prosecution was not free. Previously unreported income from foreign accounts and assets often created additional tax subject to statutory interest and a 20% understatement penalty. Taxpayers

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were also subject to significant penalties for the failure to file FBARs and other information returns (''Offshore Penalty''). The Offshore Penalty increased from 20% under the 2009 OVDP, to 25% under the 2011 OVDI, to 27.5% under the 2012 OVDP. In addition, participation in each of the previous compliance initiatives required disclosure of the banking institutions at which the offshore accounts were held and the personnel at those institutions who assisted the taxpayer in opening and maintaining the foreign accounts. In response, the IRS received more than 45,000 disclosures and collected approximately $6.5 billion in taxes, interest, and penalties.[2]

Starting September 1, 2012, the IRS offered nonfiling taxpayers residing outside the United States since at least January 1, 2009, an alternative to the OVDP.[3] The SFCP allowed nonresident U.S. persons (that is, U.S. citizens and lawful permanent residents residing outside the United States) to come into compliance by filing significantly fewer years' back returns (three years instead of eight). Those taxpayers who represented a low compliance risk could avoid all penalties for past noncompliance.[4] ''Low risk will be predicted on simple returns with little or no U.S. tax due.''[5] However, for those taxpayers representing a high compliance risk the enticement of fewer years' returns with no penalties could prove to be a trap. Unlike the OVDP which capped penalties and generally assured no criminal prosecution, a taxpayer representing a high compliance risk could be subject to the same examination and penalties as taxpayers who opted out of the OVDP.[6] Compliance risk was determined on the basis of nine factors including the presence of material economic activity in the United States, complete reporting of income in the taxpayer's country of residence, previous assertions of FBAR penalties, financial interest in or authority over accounts or entities outside the country of residence, and indications of ''sophisticated tax planning or avoidance.''[7] Most importantly, eligibility for the SFCP was considerably more narrow than the OVDP. The SFCP was only available to taxpayers residing outside the United States since January 1, 2009, who had failed to file U.S. income tax returns for those years.

THE 2014 OVDP

''We are providing additional flexibility in key parts of our compliance effort while maintaining central components of the offshore program.'' IRS Commissioner John Koskinen

The June 2014 announcements continue the 2012 OVDP with significant changes (''2014 OVDP'') and expand the SFCP to domestic taxpayers. This might be characterized as a ''two size fits all'' approach. Despite significant changes, the 2014 OVDP shares much in common with its predecessors. Participation in the 2014 OVDP, as well as eligibility for the 2014 SFCP, remain limited to taxpayers who are not currently under civil examination or criminal investigation.[8] The objective remains the same: ''to bring taxpayers that have used undisclosed foreign accounts and assets, including those held through undisclosed foreign entities, to avoid or evade tax into compliance with United States tax and related laws.''[9] Similarly, the basic approach of the 2014 OVDP remains consistent with its predecessors: it remains a uniform approach to efficiently process taxpayers seeking to resolve past noncompliance. ''The preceding incarnations of the OVDP demonstrated the value of uniform penalty structures for taxpayers who come forward voluntarily and report their previously undisclosed foreign accounts and assets. These initiatives have enabled the IRS to centralize the civil processing of offshore voluntary disclosures and to resolve a very large number of cases without examination.''[10]

''[W]e want to send a message to anyone who continues to willfully and aggressively evade our tax laws by hiding money overseas that they will pay a higher price for that noncompliance.'' IRS Commissioner John Koskinen

Most importantly, the tone of the 2014 OVDP remains unchanged from that of its predecessors. Taxpayers are warned regarding the risk created by past noncompliance and the aggressive focus of the IRS to identify those persons. ''The IRS remains actively engaged in identifying those with undisclosed foreign financial accounts and assets. Moreover, increasingly this information is available to the IRS under tax treaties, through submissions by whistleblowers, and from other sources and will become more available

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[2] Statement of IRS Commissioner John Koskinen, posted to IRS.GOV June 18, 2014.

[3] *See generally* Information Release 2012-65 (June 26, 2012), Instructions for New Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer U.S. Taxpayers.

[4] *Id.* ''For those taxpayers presenting low compliance risks, the review will be expedited and the IRS will not assert penalties or pursue follow up actions.''

[5] *Id.* In the author's experience with nonresident taxpayers who opted out of the OVDP, the complexity of the return or the amount of tax due was often not a bar to successful use of the SFCP.

[6] *Id.*

[7] *Id.* Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers Effective for OVDP Submissions Made On or After July 1, 2014, posted to IRS.GOV June 18, 2014 (''2014 FAQs'').

[8] 2014 FAQs at FAQ 14; Streamlined Filing Compliance Procedures, posted to IRS.GOV June 18, 2014.

[9] 2014 FAQs at FAQ 2.

[10] 2014 FAQs at FAQ 1.

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under FATCA and Foreign Financial Asset Reporting.''[11] The animosity expressed by the FAQs of prior programs toward quiet disclosures continues in the 2014 OVDP. However, perhaps in response to the March 2013 GAO report, which criticized the IRS for failing to aggressively pursue taxpayers making quiet disclosures,[12] statements made in the 2012 FAQs regarding procedures to review amended returns were deleted from the 2014 FAQs.[13]

The 2014 FAQs make it clear that taxpayers who have made quiet disclosures by filing amended returns and paying the additional tax and resulting interest remain eligible to take advantage of the 2014 OVDP. These taxpayers are encouraged to participate in the OVDP in order ''to avail themselves of the protection from criminal prosecution and the favorable penalty structure offered under the OVDP.''[14] Taxpayers who fail to do so are warned that ''quiet disclosures provide no protection from criminal prosecution and may lead to civil examination and the imposition of all applicable penalties.''[15]

THE 2014 OVDP PROCESS

''From now on, people who want to participate in this program will have to provide more information than in the past, submit all account statements at the time they apply for the program, and in some cases pay more in penalties than they would have done had they entered this program earlier.'' IRS Commissioner John Koskinen

The process for making a voluntary disclosure under the 2014 OVDP is similar to that involved in making a voluntary disclosure under the 2012 OVDP. The process is explained in detail in the 2014 OVDP FAQs. Taxpayers and their advisors who have questions about the 2014 OVDP continue to be encouraged to contact the IRS OVDP Hotline at (267) 941-0020 and are directed to additional information available on the 2012 Offshore Voluntary Disclosure Program page.[16] The opportunity for preclearance remains available under the 2014 OVDP but additional information is required.[17] To request preclearance, taxpayers or their advisors are directed to send the following information to the IRS Criminal Investigation Lead Development Center:

(1) the name, date of birth, tax identification number, addresses, and telephone numbers for the taxpayer;

(2) identifying information for all financial institutions at which assets subject to the OVDP were held, including complete names, DBAs, and pseudonyms for the financial institutions at which assets were held, along with addresses and telephone numbers;

(3) identifying information for all foreign and domestic entities through which OVDP assets were held by the taxpayer, including names, DBAs, and pseudonyms for those entities, employer identification numbers (where applicable), addresses, and the jurisdictions in which the entities were organized; and

(4) an executed Form 2848 if the taxpayer is represented by counsel.

The preceding information is submitted by or on behalf of the taxpayer by facsimile to (267) 941-1115. If a joint return was filed for any of the years within the eight-year OVDP period, a separate preclearance submission should be made for each spouse if both of them intend to request preclearance. In response to the preclearance request, the IRS Criminal Investigation Lead Development Center will respond via fax whether the taxpayer is eligible to make a voluntary disclosure. The FAQs indicate that it may take up to 30 days for Criminal Investigation to respond to the preclearance request.[18] If taxpayers or their representatives do not receive a response within this period, the preclearance request should be resubmitted. Questions regarding preclearance are directed to a different phone number than the one referenced above: the IRS-CI OVDP hotline at (267) 941-1607.

OVDP Letter

The voluntary disclosure process may begin without requesting preclearance. If preclearance is re-

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[11] 2014 FAQs at FAQ 4.

[12] *See* GAO Report, Offshore Tax Evasion, IRS Has Collected Billions of Dollars, but May Be Missing Continued Evasion, March 27, 2013.

[13] *Compare* Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012 FAQs (''2012 FAQs'') at FAQ 16 *with* 2014 FAQs at FAQ 16 (described as ''consolidated into FAQ 15''; however, the entire text was deleted). ''The IRS is reviewing amended returns and could select any amended return for examination. The IRS has identified, and will continue to identify, amended tax returns reporting increases in income. The IRS will closely review these returns in order to determine whether enforcement action is appropriate. If a return is selected for examination the 27.5 percent offshore penalty would not be available. When criminal behavior is evident and the disclosure does not meet the requirements of a voluntary disclosure under IRM 9.5.11.9, the IRS may recommend criminal prosecution to the Department of Justice.'' 2012 FAQs at FAQ 16.

[14] 2014 FAQs at FAQ 15.

[15] *Id.*

[16] *See* 2014 FAQs at FAQ 22.

[17] *Compare* 2012 FAQs at FAQ 23 *with* 2014 FAQs at FAQ 23.

[18] *See* 2014 FAQs at FAQ 23.

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quested, the Offshore Voluntary Disclosure Letter (''OVDP Letter'') and attachments must be sent within 45 days of notification that the taxpayer is eligible to make a voluntary disclosure.[19] The OVDP Letter is available at www.irs.gov/pub/irs-utl/OVDIntakeLtr.pdf and is submitted to the IRS Voluntary Disclosure Coordinator at:

1-D04-100297 Market Street
Philadelphia, Pennsylvania 19104.

The OVDP letter solicits:

(1) complete identifying information for the taxpayer, including passports and occupation;

(2) how the taxpayer learned about the OVDP;

(3) information regarding the source of foreign assets;

(4) whether any of the accounts disclosed have been identified by the IRS as ineligible for the OVDP;

(5) whether the taxpayer has been advised by either a foreign government or a foreign financial institution that the offshore account records ''were susceptible'' to being turned over to the U.S. government and whether such a request was opposed by or on behalf of the taxpayer;

(6) whether the taxpayer or any related entities are under audit or criminal investigation;

(7) estimates of account balances and unreported income; and

(8) estimates of the highest aggregated value of the taxpayer's offshore accounts and total unreported income from those accounts during the eight-year disclosure period.

Collection of the information necessary to submit a complete OVDP letter within 45 days of notice of the taxpayer's eligibility to make a voluntary disclosure may prove challenging.

A taxpayer's voluntary disclosure must regard foreign accounts and assets. A domestic voluntary disclosure is permitted to be made in connection with an offshore voluntary disclosure.[20] However, domestic noncompliance will not receive the relief extended by the 2014 OVDP to foreign issues.[21] Spouses wishing to make a voluntary disclosure may do so jointly or separately. The information required of each spouse is the same.[22]

IRS Criminal Investigation will review the taxpayer's OVDP Letter and respond as to whether the taxpayer is ''preliminarily'' accepted into the OVDP or declined.[23] The FAQs indicate that it is intended that this determination be made within 45 days of receipt of the taxpayer's OVDP Letter.[24] On receipt of preliminary acceptance into the OVDP, the taxpayer has 90 days in which to assemble the returns and account statements required in order to make a complete submission. Full payment of tax, interest, and related penalties is also required at the same time. In addition, a separate check must be submitted for the Offshore Penalty. ''These payments are advance payments; consequently, any credit or refund of the payments is subject to the limitations of IRC Section 6511.''[25]

Section 6511 of the Internal Revenue Code of 1986, as amended (''Code'') requires claims for refund to be submitted within the later of: (1) three years from filing the return; or (2) two years from payment of the tax.[26] Practitioners approaching these deadlines should consider filing protective claims for refund. Taxpayers participating in the 2011 OVDI experienced considerable delays in the processing of their submissions such that more than two years expired between payment of taxes, interest, and penalties (including the Offshore Penalty) and contact from the IRS that the taxpayer's submission had been assigned to a revenue agent. Thus a taxpayer participating in the 2011 OVDI who has not yet entered into a Closing Agreement (Form 906) is eligible for transitional treatment but not necessarily a refund of penalties paid.[27]

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[19] *Id.*

[20] *Id.*

[21] *Id.* at FAQ 7.1.

[22] *Id.* at FAQ 24.1.

[23] *Id.* at FAQ 24.

[24] *See id.*

[25] *Id.* at FAQ 25.

[26] *See* §6511(a). The interplay between §6511(a) and §6511(b) will result in the refund period being limited to two years for most years within the OVDP period. Results may differ from Circuit to Circuit. *See generally Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000); *Miller v. United States*, 38 F.3d 473 (9th Cir. 1994); *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994); *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993); Saltzman, *IRS Practice and Procedure*, ¶11.05 [3] (Rev. 2d ed. 2002); IRM 25.6.1.10.2.7.2.2 (Oct. 15, 2009).

[27] *See generally* Transition Rules: Frequently Asked Questions (FAQs), posted to IRS.GOV on June 18, 2014 (''Transition FAQs'') at FAQ 9. Although payment of accuracy related, failure to file, and failure to pay penalties (if applicable) is required in order to receive transition treatment, the author's experience is that these penalties are sometimes adjusted in the process of review of the taxpayer's returns. Further, refund of the Offshore Penalty would be subject to limitations of §6511.

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Documentation

The documentation requirements for the 2014 OVDP have increased from prior programs. In addition to submitting:

(1) full payment for tax, interest, and accuracy related, failure to file, and failure to pay penalties (if applicable);

(2) copies of previously filed original federal income tax returns for the taxable years included in the voluntary disclosure period;

(3) amended federal income tax returns reporting previously unreported income;

(4) a foreign account or asset statement; and

(5) a taxpayer account summary with penalty calculation;

taxpayers participating in the 2014 OVDP are also required to submit:

(1) payment in full of the Offshore Penalty by separate check;

(2) copies of filed FBARs;

(3) copies of statements for all foreign financial accounts (without regard to balances);

(4) a statement identifying all foreign entities held during the disclosure period (whether held directly or indirectly);

(5) complete and accurate information returns for any foreign entities holding OVDP assets;

(6) estate and gift tax returns for estates of deceased taxpayers participating in the OVDP;

(7) a statement addressing PFIC issues; and

(8) if applicable, the documentation required under the FAQs for Canadian Registered Retirement Savings Plans and Registered Retirement Income Funds for those taxpayers wishing to make late elections to defer U.S. income tax on earnings by filing Form 8891.[28]

As in the 2012 OVDP, taxpayers may request that the Service waive reporting requirements for foreign entities through which OVDP assets were held by submitting a ''Statement on Abandoned Entities'' form.[29]

If the taxpayer is unable to pay the full amount of tax, interest, and penalties, a completed Collection Information Statement (Form 433-A or 433-B, as appropriate) should be submitted at the same time as the other documents. Recognizing the volume of documentation involved, the IRS allows submissions to be made using compact disc or flash drives for documents not requiring signature by the taxpayer.[30] Taxpayers experiencing difficulty obtaining financial account information are directed to document their attempts.[31] As with prior programs, taxpayers experiencing difficulty submitting the documentation required within the 90-day period may request extensions of time to file by including a statement describing the items missing, the reasons for omission of those items, and the steps taken to secure them.[32] Regardless of what other documents are omitted, the taxpayer must, at a minimum, submit Form 872 Consent to Extend the Time to Assess Tax and a Consent to Extend the Time to Assess Civil Penalties Provided by 31 U.S.C. §5321 for FBAR Violations within the 90-day period. Based on the author's experience representing taxpayers in the 2011 OVDI, taxpayers should be prepared to sign additional extensions of the statute of limitations throughout the OVDP process.

At least on the basis of the 2014 FAQs, the level of review to which the taxpayer's documentation will be subjected appears to be unchanged from the 2012 OVDP. An ''examiner'' will be assigned to review the taxpayer's documentation but ''no examination will be conducted. . ., although the Service reserves the right to conduct an examination.''[33] ''[T]he examiner has the right to ask any relevant questions, request any relevant documents, and even make third party contacts, if necessary, to certify the accuracy of the amended returns, without converting the certification to an examination.''[34] Taxpayers will not have the notice and appeal rights typical of examinations.

Although focusing on foreign financial accounts, the 2014 OVDP is consistent with the scope of prior programs and extends to any foreign assets arising from tax noncompliance. ''Tax noncompliance includes failure to report gross income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset.''[35] Thus, the Offshore Penalty is computed on the value of all assets in addition to foreign financial accounts (such as bank, brokerage, or cash value life insurance) whether tangible (such as real estate or art) or intangible (such as intellectual property or equity interests

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[28] *Id.* at FAQ 25.

[29] *Id.* at FAQ 25(2.J), FAQ 29 (if the taxpayer is willing to certify ''under penalty of perjury that the entity had no purpose other than to conceal the taxpayer's ownership of assets and liquidates and abandons the entity'').

[30] *Id.* at FAQ 25, 25.2. Special procedures are available for professional firms with established record retention policies.

[31] *See id.* at FAQ 30.

[32] *Id.* at FAQ 25.1.

[33] *Id.* at FAQ 27.

[34] *Id.*

[35] *Id.* at FAQ 35.

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in U.S. or foreign businesses).[36] Unlike prior FAQs, the 2014 OVDP FAQs make it clear that equity interests in entities are valued without regard to valuation discounts.[37] In order for the taxpayer's tangible personal property to be excluded from the base on which the Offshore Penalty is assessed, the asset must satisfy two conditions:

(1) it must have been acquired with funds which were either not subject to U.S. taxation or with funds on which taxes were paid; and

(2) it either must be non-income producing or, if income producing, U.S. tax must have been paid on that income.[38]

The 2014 OVDP carries forward past practice regarding excluding accounts from the Offshore Penalty base over which the taxpayer had mere signature authority but no financial interest[39] and allowing taxpayers flexibility to allocate beneficial ownership of the foreign account or asset in some cases.[40] Although the Offshore Penalty is assessed on all OVDP assets, funds transferred among unreported financial accounts are not counted twice. Thus, tracing account transfers continues to be desirable in order to reduce the Offshore Penalty exposure.

Guidance regarding FBAR issues remains generally unchanged from the 2012 OVDP FAQs. However, the 2014 FAQs recognize that FBAR filing is now done electronically at FinCEN's website. Specific instructions to complete the FBAR are provided as well as references to sources of assistance.[41]

Guidance for taxpayer representatives continues to be unchanged from the 2012 FAQs. Practitioners are required to ''exercise due diligence in determining the correctness of any oral or written representations that the practitioner makes during the representation to the Department of the Treasury.''[42] For taxpayers electing not to make a voluntary disclosure, reference is made to Circular 230, which ''requires the practitioner to advise the client of the fact of the client's noncompliance and the consequences of the client's noncompliance.''[43] Practitioners are barred from preparing returns for taxpayers who fail to disclose all foreign financial accounts or report the income those accounts yield.

As with prior programs, taxpayers do not have appeal rights from determinations made by the IRS as part of the 2014 OVDP. The taxpayer's only options are to either acquiesce or opt out. The 2014 FAQs omit the helpful explanation and examples found in the 2012 FAQs regarding circumstances in which it would be beneficial for a taxpayer to consider opting out and circumstances in which the taxpayer might be disadvantaged by doing so.[44] (Details regarding the opt-out process are available from the Opt Out and Removal Guide.)[45] The 2014 FAQs suggest (and the Opt Out and Removal Guide confirms) that the returns of taxpayers who opt out of the OVDP will be examined ''and all applicable penalties will be imposed. . . .''[46] The taxpayer who has opted out will have the opportunity to appeal any tax and penalties proposed for assessment in the examination process. The Service's handling of the OVDP, however, may not be appealed. Although examiners have no discretion to settle OVDP cases, they are directed to consider tax, interest, and penalties applicable outside of the Program (without regard to reasonable cause or other mitigation factors) and offer the smaller of the two amounts to the taxpayer. In practice, the author's experience is that many examiners have been and continue to be forthcoming in suggesting nonresident taxpayers consider opting out to take advantage of the relief from OVDP penalties provided by the SFCP.

Regardless of whether the taxpayer remains in the OVDP or opts out, the taxpayer remains fully obligated to respond to information requests and document production initiated by the examiner. Failure to cooperate or pay taxes, interest, and penalties assessed may result in a referral to Criminal Investigation.[47]

The two most significant changes made to the 2014 OVDP are the increase in the Offshore Penalty from 27.5% to 50% for taxpayers whose banks have received direct scrutiny from the IRS or the U.S. Department of Justice,[48] the omission of reduced Offshore Penalties, and the requirement to show reasonable cause to avoid assertion of penalties for failures to file FBARs or Forms 8938 even when all of the income from foreign financial assets and accounts was reported by the taxpayer. The 2012 OVDP provided a reduced Offshore Penalty in four circumstances:

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[36] *See id.* at FAQ 35.

[37] *Id.* at FAQ 35.

[38] *Id.* at FAQ 36.

[39] *Id.* at FAQ 38.

[40] *See id.* at FAQ 39, 40, 41.

[41] *See id.* at FAQ 44.

[42] *Id.* at FAQ 47.

[43] *Id.*

[44] *See* 2012 FAQs, FAQ 51.1, 51.2.

[45] *Id.* at FAQ 51. *See* Steven T. Miller, Guidance for Opt Out and Removal of Taxpayer from the Civil Settlement Structure of the 2009 Offshore Voluntary Disclosure Program (2009 OVDP) and the 2011 Offshore Voluntary Disclosure Initiative (2011 OVDI) (Treas. Dep't Mem. June 1, 2011).

[46] *Id.* at FAQ 49.

[47] *Id.* at FAQ 51.

[48] *See id.* at FAQ 7.2.

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(1) The taxpayer did not open the foreign account and had limited contact or withdrawals from the account (5% Offshore Penalty).

(2) The nonresident taxpayer was unaware the taxpayer was a U.S. citizen (5% Offshore Penalty).

(3) The nonresident taxpayer had no more than $10,000 of U.S.-source income in any year during the OVDP period (5% Offshore Penalty).

(4) The taxpayer's aggregate foreign account balances never exceeded $75,000 during the OVDP period (12.5% Offshore Penalty).[49]

The 2014 FAQs delete FAQ 18 from the 2012 FAQs. FAQ 18, as well as corresponding FAQs from the 2009 FAQs and 2011 FAQs, provided no penalties would be asserted in the case of taxpayers who had declared and paid tax on all income from foreign accounts and assets but merely failed to file FBARs or other information returns disclosing those assets and accounts. The 2014 FAQs refer to an IRS webpage captioned ''Options Available for U.S. Taxpayers with Undisclosed Foreign Assets.'' That brief page offers taxpayers four options:

(1) the OVDP,

(2) the SFCP,

(3) ''Delinquent FBAR Submission Procedures,'' and

(4) ''Delinquent International Information Returns Submission Procedures.''[50]

Each option is a link to another IRS webpage explaining the particular procedure referenced by the option. The third and fourth options (regarding delinquent FBARs and delinquent international information returns, respectively) direct taxpayers to include with the delinquent FBAR or information return a statement explaining why the FBAR or information return is filed late. The webpage captioned ''Delinquent International Information Return Submission Procedures'' requires that ''[a]s part of the reasonable cause statement, taxpayers must also certify that any entity for which the information returns are being filed was not engaged in tax evasion. If a reasonable cause statement is not attached to each delinquent information return filed, penalties may be assessed in accordance with the existing procedures.''[51] The ''Delinquent FBAR Submission Procedures'' contains the following statement: ''The IRS will not impose a penalty for the failure to file the delinquent FBARs if you properly reported on your U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs and you have not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted.''[52] A similar statement does not appear on the webpage captioned ''Delinquent International Information Return Submission Procedures.''

Transitional Treatment

In the case of domestic taxpayers who have not yet completed a Form 906 Closing Agreement in the 2009 OVDP, 2011 OVDI, or 2012 OVDP, transitional treatment is available that will allow a taxpayer to take advantage of the expanded SFCP announced on June 18, 2014 (''2014 SFCP'') without leaving the OVDP.[53] In order to be eligible for transitional treatment, the taxpayer must have submitted an OVDP voluntary disclosure letter and attachments prior to July 1, 2014, and either:

(1) ''remained in the OVDP but not yet completed the OVDP certification process where a Form 906 Closing Agreement has been fully executed by the IRS''; or

(2) ''opted out of OVDP, but not yet received a letter initiating an examination and enclosing a Notice 609.''[54]

Submission of a preclearance letter prior to July 1, 2014, is insufficient in order to be eligible for transitional treatment.[55] To be eligible for transitional treatment, the taxpayer must submit:

(1) all documents required by the OVDP in which the taxpayer is participating;

(2) a completed Certification of non-willfulness signed under penalties of perjury; and

(3) full payment of all taxes, interest, and any accuracy-related, failure to file, and failure-to-pay penalties applicable under the OVDP.[56]

The Transition FAQs make it apparent that transitional relief is not automatic. ''Before transitional

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[49] *See* 2012 FAQs, FAQ 52, 53.

[50] Options Available for U.S. Taxpayers with Undisclosed Foreign Financial Assets, posted to IRS.GOV June 18, 2014.

[51] *See* Delinquent International Information Return Submission Procedures, posted to IRS.GOV June 18, 2014.

[52] *See* Delinquent FBAR Submission Procedures, posted to IRS.GOV June 18, 2014.

[53] *See* 2014 FAQs at FAQ 1.4 and Transition FAQs at FAQ 1.

[54] Transition FAQs at FAQ 2.

[55] Transition FAQs at FAQ 3.

[56] Transition FAQs at FAQ 6.

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treatment is given, the IRS must agree that the taxpayer is eligible for transitional treatment and must agree that the available information is consistent with the taxpayer's certification of non-willful conduct.''[57] The Transition FAQs describe the review process for the non-willfulness determination as involving an initial determination by the examiner assigned to review the taxpayer's certification of non-willfulness followed by further review by the examiner's manager, who must concur with the examiner's determination. Further review may be undertaken by a ''central review committee'' whose decision will be final and unappealable.[58] If a taxpayer disagrees with the determination of the central review committee, the taxpayer's alternatives are to either pay the offshore penalty required by the Voluntary Disclosure Program in which the taxpayer is participating or opt out of the OVDP.

THE 2014 SFCP

''[W]e're expanding the streamlined procedures to cover a much broader group of U.S. taxpayers we believe are out there who have failed to disclose their foreign accounts but who aren't willfully evading their tax obligations. To encourage these taxpayers to come forward, we're expanding the eligibility criteria, eliminating the cap on the amount owed to qualify for the program, and doing away with the questionnaire that applicants were required to complete.'' IRS Commissioner John Koskinen

Qualification

The basic submission requirements for the SFCP remain unchanged as a result of the June 18, 2014 announcement:

(1) three years delinquent or amended U.S. income tax and information returns;

(2) FBARs for the six years prior to year in which the disclosure is occurring; and

(3) full payment of taxes and statutory interest for the tax shown due on the delinquent or amended U.S. income tax returns.

However, qualification for the relief provided by the SFCP has changed dramatically. The SFCP has been extended to domestic taxpayers. As a result, the 2014 SFCP is divided into two programs: the Streamlined Foreign Offshore Procedures (''SFOP'') and the Streamlined Domestic Offshore Procedures (''SDOP''). The program in which the taxpayer will be eligible to participate is determined by a nonresidency requirement. In order to qualify under the SFCP in effect prior to July 1, 2014 (''2012 SFCP''), the taxpayer must have resided outside of the United States since before January 1, 2009.[59] In contrast, taxpayers who during *any one* of the three most recent years for which a U.S. tax return due date (or extended due date) has passed did not have a ''U.S. abode'' and were physically outside the United States for at least a full 330 days are eligible for the SFOP.

Nonresident taxpayers satisfying the SFOP nonresidency requirement must submit the delinquent or amended U.S. income tax and information returns including FBARs required for SFCP submissions and pay the taxes and statutory interest arising from those returns. In addition, nonresident taxpayers must complete and sign the Certification by U.S. Person Residing Outside of the United States for Streamlined Foreign Offshore Procedures (''Non-Resident Certification'').[60]

In addition to submitting a signed original Non-Resident Certification, copies of the Non-Resident Certification must be attached to each income tax and information return submitted through the SFOP (but not to the FBARs). Each delinquent or amended income tax return and each information return should be inscribed at the top of the first page with the words ''Streamlined Foreign Offshore'' written in red.[61] In the case of a nonresident taxpayer filing FBARs, a statement should be submitted explaining the FBARs are being filed as part of the SFCP. The guidance indicates that this is done by selecting ''other'' as the reason for filing the FBAR late and inserting the words ''Streamlined Filing Compliance Procedures'' in the explanation box that will appear.[62]

Unlike the SFOP, resident taxpayers wishing to take advantage of the SDOP must have previously filed U.S. income tax returns (if those returns were required to be filed) for each of the three most recent years for which the return due date (including extension) has expired. Resident taxpayers participating in the SDOP must file amended U.S. income tax and information returns including FBARs required for SFCP submissions and pay the tax and statutory interest for the taxes shown on the amended returns. In addition, resident taxpayers must complete and sign a

[57] Transition FAQs at FAQ 7.

[58] Transition FAQs at FAQ 8.

[59] Instructions for New Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer U.S. Taxpayers; Instructions for Form 14438, Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer Taxpayers.

[60] U.S. Taxpayers Residing Outside the United States, posted to IRS.GOV July 18, 2014. Available at WWW.IRS.GOV/pub/irs-utl/CertUSResidents.pdf.

[61] *Id.*

[62] *Id.*

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Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures (''Resident Certification'') available on the internet[63] and make full payment of a 5% Offshore Penalty.[64] Filing procedures are the same as those applicable to submissions by nonresident taxpayers under the SFOP other than directing the returns to the attention of the streamlined domestic offshore personnel at the same address and office of the IRS in Austin, Texas, and inscribing the first page of each return with the legend ''Streamlined Domestic Offshore'' written in red.[65]

It is anticipated that further guidance will be forthcoming regarding computation of the 5% Offshore Penalty under the SDOP (''SDOP Penalty'').[66] It is expected that this guidance will confirm that unlike the asset base on which the 27.5% or 50% Offshore Penalty under the OVDP (the ''OVDP Penalties'') is assessed which includes ''all of the taxpayer's offshore holdings that are related in any way to tax noncompliance,''[67] the asset base on which the SDOP Penalty is assessed will be limited to assets reportable on Form 8938 or the FBAR. Thus, real property and artwork which is not owned through an entity will be excluded from foreign financial assets subject to the SDOP Penalty. In the case of entity interests, the SDOP Penalty will be assessed on the fair market value of the taxpayer's equity interest in an entity which is regarded for U.S. tax purposes. In contrast, the SDOP Penalty will be assessed on the fair market value of the assets owned by a disregarded entity. It is expected forthcoming guidance will import several concepts used to compute the OVDP Penalties to the computation of the SDOP Penalty.

- Foreign currency is to be converted to U.S. dollars using the currency exchange rate at the end of the year.

- If the taxpayer had signature authority over an account but no financial interest, the account is not included in the financial assets on which the Offshore Penalty is assessed.

- In the case of entities, discounts for lack of control and lack of marketability do not apply.[68]

- In the case of joint accounts or jointly owned assets, only that portion of the asset which corresponds to the percentage owned by the taxpayer will be included in the base on which the 5% Offshore Penalty is assessed.

The relatively objective compliance risk assessment on which penalty abatement was based under the 2012 SFCP has been replaced by a far more subjective willfulness determination. The questionnaire filed under the 2012 SFCP (used to determine the taxpayer's level of compliance risk) has been replaced with a statement signed under penalties of perjury asserting the taxpayer's noncompliance was the result of non-willful conduct. The following statement appears in both the Resident Certification and the Non-Resident Certification: ''My failure to report all income, pay all tax, and submit the required information returns, including FBARs, was due to non-willful conduct. I understand that 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.''[69] Both the Resident and Non-Resident Certifications elicit:

(1) recognition from the taxpayer ''that if the Internal Revenue Service receives or discovers evidence of willfulness, fraud, or criminal conduct, it may open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even referral to Criminal Investigation'';

(2) the specific reasons for the taxpayer's failure to report the omitted income, taxes, or file the required information returns; and

(3) disclosure of the name, address, and telephone number of any professional advisor on which the taxpayer relied along with a summary of the advice the taxpayer received.[70]

Willfulness

The 2014 SFCP has dispensed with the factors used to distinguish between low- and high-compliance-risk taxpayers and instead requires certification that the taxpayer's noncompliance was not willful. ''Nonwillful conduct is conduct that is due to negligence, inadvertence, or mistake, or conduct that is a result of

[63] U.S. Taxpayers Residing in the United States, posted to IRS.GOV on June 18, 2014. Available at WWW.IRS.GOV/pub/irs-utl/CertUSResidents.pdf.

[64] Unlike the OVDP, which computes the Offshore Penalty on the basis of the highest balance in the taxpayer's accounts each year, the SFOP relies on year-end balances. *Id.*

[65] *Id.*

[66] Comments of John C. McDougal, Special Trial Attorney, Small Business/Self-Employed Division, Internal Revenue Service at ABA Tax Section Meeting September 20, 2014.

[67] 2014 FAQs at FAQ 35.

[68] This would seem to render the distinction between regarded and disregarded entities meaningless.

[69] Nn. 60 and 63, above.

[70] *Id.*

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a good faith misunderstanding of the requirements of the law.''[71] ''Taxpayers who are concerned that their failure to report income, pay tax, and submit required information returns was due to willful conduct and who therefore seek assurances they will not be subject to criminal liability and/or substantial monetary penalties should consult with their professional tax or legal advisors.''[72]

Willfulness has been the central issue in determining whether a taxpayer should take advantage of the OVDP in its various incarnations going back to 2009. The distinction between a willful as opposed to a merely negligent failure to file FBARs determines the penalties to which the taxpayer will be subject. The Secretary of the Treasury is authorized to impose civil monetary penalties on persons who violate the record-keeping and reporting requirements of the Bank Secrecy Act.[73] In the case of individuals, the amount of the penalty is limited to $10,000 for each violation, subject to a reasonable cause exception.[74] However, in the case of a willful violation, the maximum penalty is increased to the greater of $100,000 or 50% of the balance in the account to which the failure to report relates when the failure occurs.[75]

DECISIONS, DECISIONS, DECISIONS

It may appear that expansion of the SFCP to domestic taxpayers presents an accommodation intended to encourage compliance. While the intent is commendable, practitioners experienced with prior incarnations of the OVDP will realize that at best, as observed above, this is a two size fits all program. What has been lost are the reduced penalty options which were a feature of the 2011 OVDI and 2012 OVDP. More importantly, what has been lost for nonresident taxpayers is an SFCP based on objective indicia used to determine the level of compliance risk represented by the taxpayer.[76] The compliance risk criteria have been replaced by a far more subjective standard of willfulness.

As of July 1, 2014, taxpayers whose voluntary disclosures or opt-out procedures remain incomplete, as well as taxpayers contemplating making a voluntary disclosure of foreign accounts or assets or unreported income therefrom, have choices. Those choices differ depending upon:

(1) whether the taxpayer resides in the United States or outside the United States; and

(2) whether the taxpayer's voluntary disclosure was initiated prior to July 1, 2014, or on or after that date.

Nonresident Taxpayers Who Have Not Yet Submitted an OVDP Letter

Taxpayers with compliance issues resulting from ownership of foreign accounts and assets who satisfy the non-residency requirements of the SFOP have two avenues by which their noncompliance may be resolved:

(1) the 2014 OVDP or

(2) the 2014 SFOP.

For nonresident taxpayers who can successfully certify non-willfulness,[77] the SFOP offers a significantly diminished compliance burden (three years back returns instead of eight) and no penalty exposure in contrast with the 2014 OVDP. The dilemma for those taxpayers, however, is that once the decision to take advantage of the SFOP is made, the 2014 OVDP is no longer available if the taxpayer's Domestic Certification (of non-willfulness) is rejected by the IRS. Resident and nonresident taxpayers who avail themselves of the SFCP are ineligible to participate in OVDP.[78] Taxpayers whose non-willfulness is in doubt should clearly take advantage of the 2014 OVDP instead of the SFOP. However, taxpayers with significant passive foreign investment company (PFIC) issues may also prefer the 2014 OVDP because of the abbreviated mark-to-market method available to compute the income from PFIC investments.[79] As a further consideration, taxpayers taking advantage of the OVDP will have the benefit of a Form 906 Closing Agreement with the IRS. No such closure is provided under the SFOP.[80]

Resident Taxpayers Who Have Not Yet Submitted an OVDP Letter

Taxpayers with compliance issues resulting from the ownership of foreign accounts and assets who are

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[71] U.S. Taxpayers Residing in the United States, posted to IRS.GOV June 18, 2014.

[72] Streamlined Filing Compliance Procedures, posted to IRS.GOV June 18, 2014.

[73] *See* 31 U.S.C. §5321(a)(5)(A).

[74] *See* 31 U.S.C. §5321(a)(5)(B).

[75] 31 U.S.C. §5321(a)(5)(C), §5321(a)(5)(D).

[76] *See* text above at nn. 69–70.

[77] *See* authorities below at n. 91.

[78] Streamlined Filing Compliance Procedures, posted to IRS.GOV on June 18, 2014.

[79] 2014 FAQs at FAQ 10.

[80] Streamlined Filing Compliance Procedures, posted to IRS.GOV June 18, 2014. ''Tax returns submitted under either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will be processed like any other returns submitted to the IRS. Consequently, receipt of the returns will not be acknowledged by the IRS and the streamline filing process will not culminate in the signing of a closing agreement with the IRS.''

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unable to satisfy the non-residency requirements of the SFOP will have a choice between:

(1) the 2014 OVDP or

(2) the 2014 SDOP.

While the compliance requirements, tax, and interest are substantially identical under the SFOP and SDOP, where the two Procedures depart is that taxpayers participating in the SDOP are subject to an Offshore Penalty of 5% based upon the highest aggregate value of the taxpayer's foreign financial assets during the three years covered by the income tax returns and six years of FBARs. Thus, the highest aggregate values may be determined over a period of as many as seven years in the case of a taxpayer who files after the due date for the prior year's income tax return but before the due date for the prior year's FBAR.[81] Consequently, the need to gather account statements and appraisals will be nearly coextensive with taxpayers electing to use the OVDP. Otherwise, the considerations in choosing between the OVDP and the SDOP appear to be identical to those described above with respect to the choice between the OVDP and the SFOP.[82]

Resident Taxpayers Participating in the Pre-July 1, 2014 OVDP Programs (2009 OVDP, 2011 OVDI, or 2012 OVDP)

U.S. resident taxpayers who have entered a pre-2014 OVDP may either:

(1) stay in the OVDP,

(2) seek transitional treatment, or

(3) opt out for examination by and negotiation with the IRS.

If not already submitted, taxpayers participating in the OVDP or seeking transitional treatment will be compelled to satisfy all of the filing requirements explained above,[83] including submitting eight years delinquent or amended U.S. income tax returns, information returns, and FBARs and paying taxes, interest, accuracy related, failure to file, and failure to pay penalties and an Offshore Penalty of between 20% and 50% depending upon the OVDP program in which the taxpayer is engaged and whether the taxpayer's financial institutions are under IRS scrutiny. Taxpayers seeking transitional treatment to take advantage of the 2014 SFCP may remain in the OVDP. Consequently, the OVDP compliance burden remains unchanged and the abbreviated mark-to-market method for PFIC investments remains available to those taxpayers.

For taxpayers contemplating opting out of the OVDP for examination by and negotiation with the IRS, the strategic moment to do so would be after submission of the OVDP letter but before filing the amended income tax returns and FBARs and the required extensions of the statute of limitations. First, the statute of limitations for FBARs (even in cases of non-filers) is limited to six years.[84] Second, traditional voluntary disclosure practice typically involves filing six years back income tax and (where applicable) information returns. Filing six instead of eight years returns may represent a modest savings in professional fees. More importantly, the opportunity exists to present reasonable cause arguments to negotiate penalties before paying. For taxpayers who have passed this point and paid taxes, interest, and penalties (particularly those who may have paid the Offshore Penalty), filing protective claims for refund to avoid the limitations of §6511 will likely be important.[85]

Nonresident Taxpayers Participating in a Pre-2014 OVDP (2009 OVDP, 2011 OVDI, or 2012 OVDP)

Nonresident taxpayers who are engaged in a pre-2014 OVDP have the most options:

(1) stay in the OVDP,

(2) seek transitional treatment,

(3) opt out for the 2012 SFCP, or

(4) opt out for examination by and negotiation with the IRS.

In addition to the choices and considerations confronting resident taxpayers participating in a pre-2014 OVDP, taxpayers who are able to satisfy the non-residency requirements of the 2012 SFCP are being given a choice of those procedures or transitional treatment as alternatives to the OVDP. Qualifying for the 2012 SFCP requires the taxpayer to have resided outside of the United States for each of the three years involved in the compliance period.[86] While this opportunity to utilize the 2012 SFCP is not expressly addressed in any of the published guidance, the author's

[81] *See* Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures.

[82] *See* above at nn. 77–80.

[83] *See* above text at n. 28.

[84] *See* 31 U.S.C. §5321(b)(1).

[85] *See* text and nn. above at 25–27.

[86] *See* above n. 59.

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experience representing clients who have not completed the OVDP process by receipt of a Form 906 Closing Agreement signed by the IRS is that the option to opt out to take advantage of the 2012 SFCP is being offered by the revenue agents assigned to those taxpayers' files. Particularly for those taxpayers whose returns during the three-year period covered by SFCP show little U.S. tax due and present a low compliance risk after application of the nine factors set forth in the instructions, opting out of the OVDP avoids exposure to all penalties (including the Offshore Penalty) without exposing the taxpayer to a willfulness inquiry and analysis by the IRS.

Nonresident taxpayers who opt out of the OVDP will be eligible to qualify for the SFCP in effect prior to July 1, 2014 (''2012 SFCP''). The author's limited but consistent experience with requests for transitional treatment since July 1, 2014, has been that taxpayers are compelled to ''prove'' non-willfulness. Taxpayers requesting transitional relief should anticipate that the IRS will inquire as to the timing and circumstances by which the taxpayer became aware of the requirement to report foreign accounts and the circumstances in which that awareness arose. Taxpayers will be required to explain why FBARs and other information returns were not filed or income from foreign accounts and assets was not reported. Faced with the uncomfortable responses such inquiries are likely to elicit, a nonresident taxpayer eligible for the 2012 SFCP will prefer that alternative if the indicia used to determine the level of the taxpayer's compliance risk indicate that compliance risk is low.[87]

For nonresident taxpayers opting out for the 2012 SFCP, the benefit of doing so after submission of the OVDP letter but before filing the delinquent or amended returns and the required extensions of the statute of limitations is even more meaningful than for similarly situated resident taxpayers. First, preparation of three instead of eight years income tax returns may represent a significant savings in professional fees. Second, taxes, interest, and penalties for the first five years of the OVDP period remain unpaid. For taxpayers who have passed this point and paid taxes, interest, and penalties (particularly those who may have paid the Offshore Penalty), filing protective claims for refund to avoid the limitations of §6511 will also be important.[88]

CONCLUSION

Extension of the SFCP to domestic taxpayers is likely to be perceived as offering additional relief in the form of a lower compliance burden and a reduced Offshore Penalty. However, that relief is conditioned upon acceptance by the IRS that the taxpayer's failure to file FBARs or report income from foreign assets and accounts was not willful. The practices adopted by most accounting firms in recent years, particularly the use of tax organizers which expressly request information regarding a client's foreign accounts, combined with the question on Schedule B to the Form 1040 regarding the existence of foreign accounts, will raise questions about willfulness in every situation in which those circumstances exist. If the aggressive analysis applied by the IRS under the Transition FAQs is applied to the Certifications required by the SFOP and SDOP, non-willfulness cannot be assumed.

The requirement that taxpayers participating in both the SFOP and SDOP certify non-willfulness not only exposes taxpayers to a subjective determination that may prove inconsistent from examiner to examiner, but also may expose the taxpayer to the higher FBAR penalties imposed on willful violations. A taxpayer whose noncompliance is determined to be willful will lose the benefit of the relief from penalties promised by the SFCP and (except in those cases of taxpayers engaged in a pre-2014 OVDP who seek transitional treatment) the protection provided by the OVDP, even if the disclosures made by taxpayer's Certification are complete and accurate. Taxpayers run the risk of being penalized by their own statements. Whatever compels the IRS to conclude the taxpayer's noncompliance was not non-willful may also support assertion of willful FBAR penalties. A taxpayer whose Certification of non-willfulness in the context of an SFOP or SDOP submission is rejected should not automatically be exposed to willful FBAR penalties. However, the terminology of the Certifications suggests this duality. Is not any taxpayer whose noncompliance is *not* non-willful, implicitly willful? Will the IRS automatically assert willful FBAR penalties against any taxpayer whose Certification of non-willfulness in the context of an SFOP or SDOP filing is rejected? True, the burden to prove willfulness rests with the government.[89] However, until experience with the actual operation of the 2014 SFCP proves otherwise, practitioners should consider the possibility that the very Certifications required by the SFOP and SDOP may entice those administering the SFCP to assert, if not willful FBAR penalties, at least nonwillful penalties of $10,000 per occurrence.

In response to these concerns the Internal Revenue Service has stressed that the 2014 SFCP is a processing procedure in which only those returns selected for

[87] For more information on the 2012 SFCP, see Ward above n. 1.

[88] *See* text above at nn. 25–27.

[89] *See* IRM 4.26.16.4.5.3.3 (July 1, 2008).

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audit will be examined.[90] This reassurance amounts to a suggestion that taxpayers play audit lottery and will provide little solace to those unfortunate enough to be selected for audit.

Whatever benefit extension of the SFCP to domestic taxpayers provides, the burden on professionals advising those taxpayers regarding choices between the OVDP and SFCP alternatives becomes demanding and problematic. The stakes are high. Professionals will be compelled to document carefully the taxpayer's experience and knowledge regarding U.S. foreign tax compliance issues and information reporting, as well as the taxpayer's responses and actions on becoming aware of those compliance obligations. Each taxpayer's unique circumstances will then have to be analyzed under the available guidance of the IRS, courts, and commentators regarding the less than bright line that separates willfulness from nonwillfulness. This will be no simple task and one that will require knowledgeable professional assistance.

There is a developing body of law and commentary regarding the willfulness standard.[91] However, the positions taken by the IRS regarding willfulness will be more important than the analysis of the courts. For example, the Internal Revenue Manual defines willfulness as ''a voluntary, intentional violation of a known legal duty.''[92] In CCM 200603026, the IRS recognized that under the standards set forth by the Supreme Court in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the government would have to prove not only that taxpayer was aware of the requirement to file an FBAR in order to demonstrate an intentional violation of a known legal duty, but also that the taxpayer was aware his failure to do so was illegal. The CCM adopts the position of the dissent in *Ratzlaf* that the requirement to prove awareness of the illegal nature of the violation is unnecessary inasmuch as the ''knowledge of the duty to file an FBAR would entail knowledge that it is illegal not to file an FBAR.''

The Internal Revenue Manual describes a state of ''willful blindness'' in which ''willfulness may be attributed to a person who has made a conscious effort to avoid learning about FBAR reporting and recordkeeping requirements. An example that might involve willful blindness would be a person who admits knowledge of and fails to answer a question concerning signature authority at foreign banks on Schedule B of his income tax return.''[93] As the Transition FAQs make clear, in order for a taxpayer to be eligible for transitional treatment the IRS ''must agree that the available information is consistent with the taxpayer's Certification of non-willful conduct.''[94] Despite well-established principles and even the admission in the Internal Revenue Manual that the IRS has the burden of proof to establish willfulness, the lack of appeal rights within the OVDP has the practical effect of shifting that burden to the taxpayer.

''It's important to keep in mind that the IRS is seeking a balanced approach with this program, particularly in light of our other work on offshore issues. Our aim is to get people to disclose their accounts, pay the taxes they owe and get right with the government.'' IRS Commissioner John Koskinen

Questions 7 and 8 of the Transition FAQs describe the review to which requests for transitional treatment will be subject. However, no similar explanation appears in the guidance for the SFCP or either the SFOP or SDOP. What remains to be seen is whether the IRS will give Certifications made in the context of SFOP and SDOP submissions the same scrutiny it appears to be giving to requests for transitional treatment. Doing so may prove impractical. Nonetheless, the risk such scrutiny invites creates a chilling effect. Consider the possible reaction of taxpayers who become aware of the SFCP but are persuaded by their professional advisors that the risk of failing to prove to the IRS that the taxpayer's noncompliance was non-willful makes that option inappropriate. Will those individuals find the OVDP (by comparison with the SFCP) too onerous? Will they continue to ''take their chances'' and do nothing? Alternatively, taxpayers who submit returns and Certifications under the SFOP and SDOP will have to live with the uncertainty created by the lack of any confirmation that those returns and accompanying Certifications of non-willfulness have been accepted as filed.

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[90] ''The difference is streamlined, it's a processing procedure.. . .The taxpayer needs to submit the non-willful certification and we're going to look at some of those, but we're not going to be doing a certification or an audit of all or every single one of those submissions.'' Comment of Jennifer L. Best, Senior Advisor, Deputy Commissioner, Large Business and International Division, Internal Revenue Service at ABA Tax Section meeting September 20, 2014. ''Other than spot checks we are not verifying the willfulness question.'' Statement of John C. McDougal, Special Trial Attorney, Small Business/Self-Employed Division, Internal Revenue Service at ABA Tax Section Meeting September 20, 2014.

[91] *See generally United States v. J. Bryan Williams*, 202 WL 2948569 (C.A. 4 Va.), 110 A.F.T.R 2d 2012-5298, 2012-2 USTC ¶50,475 (July 20, 2010); *United States v. McBride*, No. 2:09-CV-00378 (D. Utah 2012); Jeremiah Coder, *Taxpayers Face Hurdles and Risks When Opting Out of OVDP*, Tax Notes Today (Jan. 17, 2013); Caroline D. Ciraolo, *The Morning After — What You Need to Know About FBAR International Information Returns Including Defending Against and Litigating the Penalties*, CCH Journal of Tax Practice and Procedure (Oct.-Nov. 2009); Stephen Toscher and Lacey Strachen, *Proving Willfulness in FBAR Case*, CCH Journal of Tax Practice and Procedure (Apr.-May 2012).

[92] IRM 4.26.16.4.5.3.1 (July 1, 2008).

[93] IRM 4.26.16.4.5.3.6 (July 1, 2008).

[94] Transition FAQs at FAQ 7.

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"From me as a tax administrator, the bottom line on what we're announcing today is about fairness."
IRS Commissioner John Koskinen

Good luck with that.

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