



Chief Counsel

38th Annual Florida Bar/FICPA International Tax Conference

January 17, 2020, Miami, FL

Compliance Options in a Post-OVDP World

Daniel Price, Attorney
Office of Chief Counsel of the IRS
Austin, Texas
512-499-5281
daniel.n.price@irsounsel.treas.gov



Disclaimer

- These slides are designed as shorthand aids to an oral or panel presentation and are not to be used or cited as precedent



Objectives

- Offshore issues remain a priority for the IRS
- Trending compliance issues
- Delinquent withholding tax returns
- Relief Procedures for Certain Former Citizens
- Offshore compliance options available to U.S. taxpayers including voluntary disclosure practice



Offshore Issues Remain an IRS Priority

- IRS is committed to offshore enforcement
 - John Doe Summonses
 - Swiss Bank Program
 - Internal data mining
 - Whistleblowers
 - FATCA and other inter-governmental cooperation
 - LB&I Campaigns – partial list on next slide



LB&I Campaigns – Snapshot

- [F3520/3520-A Non-Compliance and Campus Assessed Penalties](#)
- [FATCA Filing Accuracy](#)
- [Foreign Earned Income Exclusion Campaign](#)
- [Forms 1042/1042-S Compliance](#)
- [Loose Filed Forms 5471](#)
- [Offshore Private Banking Campaign](#)
- [Offshore Service Providers](#)
- [OVDP Declines-Withdrawals Campaign](#)
- [Swiss Bank Program Campaign](#)
- [Verification of Form 1042-S Credit Claimed on Form 1040NR](#)
- [Virtual Currency](#)

Complete list <https://www.irs.gov/businesses/full-list-of-lb-large-business-and-international-campaigns>



Recurring Enforcement Issues

- Recurring international compliance issues
 - Form 5471- foreign corporations
 - Forms 3520 and 3520-A - reporting relating to foreign trusts
 - Form 3520 - reporting of foreign gifts/inheritances
 - Form 8854 - expatriation
 - Form 8938 - foreign financial assets
 - Other required information returns



Procedures for Accepting Delinquent Withholding Tax Returns in Connection with Withholding Agent Disclosure

- February 27, 2019 memo outlines procedures, now incorporated into I.R.M. 4.10.21.8.1
- Procedures are not for making relatively minor corrections
- Procedures are not for anyone seeking to avoid prosecution for conduct that may rise to the level of tax or tax-related crimes



Relief Procedures for Certain Former Citizens

The relief procedures are posted on IRS.gov at <https://www.irs.gov/individuals/international-taxpayers/relief-procedures-for-certain-former-citizens>

Relief Procedures for Certain Former Citizens

English

Individuals

International Taxpayers

Individuals - International

Businesses - International

Businesses and Self-Employed

Government Entities

On this page...

- [Introduction](#)
- [Background](#)
- [Relief Procedures](#)
- [Relief Procedures FAQs](#)
- [References/Related Topics](#)

Introduction

The IRS announced procedures for certain persons who have relinquished, or intend to relinquish, their United States (U.S.) citizenship and who wish to come into compliance with their U.S. income tax and reporting obligations and avoid being taxed as a “covered expatriate” under section 877A of the U.S. Internal Revenue Code (IRC). Please read all information for these procedures including the Frequently Asked Questions and Answers (FAQs) to determine eligibility. Relinquishing U.S. citizenship and the tax impacts of relinquishing U.S. citizenship are serious matters that involve irrevocable decisions. Consider consulting legal counsel before making any decisions about relinquishing U.S. citizenship.

The Department of the Treasury, the Department of State, the Internal Revenue Service, and the Social Security Administration have prepared a brief [“frequently asked questions” document](#) on obtaining social security numbers, expatriation, and tax implications of expatriation.



Compliance Options

1. Voluntary Disclosure Practice
2. Filing Amended/Delinquent Returns
3. Streamlined Filing Compliance Procedures
 - Streamlined Foreign Offshore
 - Streamlined Domestic Offshore
4. Delinquent FBAR Submission Procedures
5. Delinquent International Information Return Submission Procedures



OVDP Closed

- OVDP closed on September 28, 2018
- The closing of the OVDP ends the unique civil settlement structure of OVDP and terminates all special provisions of OVDP (including but not limited to the alternative PFIC computation and the “miscellaneous offshore penalty”)
- “Since the announcement, the IRS has not received any public comments addressing a continued need for the OVDP.”
IR-2018-176, Sept. 4, 2018



Changes to the Voluntary Disclosure Practice

Interim Guidance dated November 20, 2018 announced updates to the voluntary disclosure practice

Key Points:

- The voluntary disclosure practice will remain centralized with Criminal Investigation in Philadelphia
- Criminal Investigation now requires preclearance for all voluntary disclosures
- The IRS revised Form 14457 to be used for two steps in the voluntary disclosure process



New Voluntary Disclosure Practice Website

New landing page: <http://www.irs.gov/vdp>

[Home](#) > [Our Agency](#) > [Criminal Investigation](#) > [IRS Criminal Investigation Voluntary Disclosure Practice](#)

IRS Criminal Investigation Voluntary Disclosure Practice

English

[Volunteer](#)

[Tax Statistics](#)

[Procurement](#)

[Privacy Policy](#)

[Freedom of Information Act](#)

[Civil Rights](#)

[Criminal Investigation](#)

[Nonfiler Enforcement](#)

[Abusive Tax Schemes](#)

[Abusive Return Preparer](#)

You have a legal duty to fully comply with U.S. tax laws. "Voluntary compliance" is the cornerstone of our tax system. While most taxpayers voluntarily comply with their obligations, some fail to do so. We have a wide variety of civil and criminal sanctions that we may impose on non-compliant taxpayers. Failure to voluntarily comply may result in imprisonment, fines, and penalties.

If you have willfully failed to comply with tax or tax-related obligations, submitting a voluntary disclosure may be a means to resolve your non-compliance and limit exposure to criminal prosecution.

> [What is the Voluntary Disclosure Practice?](#)

> [Who may disclose](#)

> [How to disclose](#)

> [Contact and feedback](#)

> [Historical information](#)

Voluntary Disclosure not for you?

- [Amended Return Procedures](#)
- [Delinquent Return Procedures](#)
- [Other Options Available For U.S. Taxpayers with Undisclosed Foreign Financial Assets](#)

Helpful Information

- [Form 14457, Voluntary Disclosure Practice Preclearance and Application \(PDF\)](#)
- [Interim Guidance Memo LB&I- 09-1118-014, Updated Voluntary Disclosure Practice \(PDF\)](#)



Form 14457 – Facts in Narrative Section

1. Noncompliance
2. Taxpayer background
 - A. Personal background
 - B. Professional background
3. Professional advisors



Key Points from 11/20/2018 Interim Guidance

- Once Criminal Investigation preliminarily accepts submissions, it will forward cases to a civil compliance unit in Austin for distribution to the appropriate civil examination unit
- All voluntary disclosures will be assigned for examination and follow standard examination procedures
- The IRS expects the majority of cases to be resolved by agreement



Key Points from 11/20/2018 Interim Guidance (cont'd)

Highlights of the civil resolution framework

- Voluntary disclosures will generally include a 6 year disclosure period
- Taxpayers must submit all required returns and reports for the disclosure period
- Taxpayer cooperation is required
- Examiners will use the interim guidance in considering penalties



Voluntary Disclosure Practice Hypothetical 1

Taxpayer 1 is a US citizen who lives in California, but he was born in Italy and lived in Italy for parts of his adult life. Taxpayer 1 has several bank accounts in Italy and a Swiss bank account established by his grandfather's estate for Taxpayer 1's inheritance. Taxpayer 1 accessed the Swiss account and never informed the Swiss bankers of his US citizenship. Taxpayer 1 had no interests in or control over any foreign entities. He intentionally did not tell his return preparer about his foreign bank accounts and checked "no" to the question about having foreign bank accounts on Schedules B filed with his tax returns. Taxpayer 1 fully cooperates with the civil examination. The examiner asserts the civil fraud penalty for one year and a willful FBAR penalty totaling 50% of the highest aggregate balance in all foreign bank accounts.



Voluntary Disclosure Practice Hypothetical 2

Taxpayer 2 owns a restaurant in Dallas as a sole proprietorship. Taxpayer 2 reports all credit card receipts but only 20% of cash receipts. Taxpayer 2 kept a second set of books tracking his actual income. Taxpayer 2 had no other tax or information reporting noncompliance. Taxpayer 2 used the unreported cash to pay various personal expenditures and to buy gold bullion. Taxpayer 2 accumulated \$2 million in gold bullion in his personal safety deposit box over the last 10 years with his cash skimming scheme. In Taxpayer 2's voluntary disclosure letter to CI, he expresses willingness to sell his bullion to pay all outstanding tax liabilities if he doesn't have sufficient liquid assets to pay his taxes. Taxpayer 2 fully cooperates including providing his second set of books tracking his actual income to the examiner. The examiner asserts the civil fraud penalty for one tax year.



Voluntary Disclosure Practice Penalty Application

- Assuming all terms of the voluntary disclosure practice are complied with (including but not limited to fully cooperating), then the one-year civil fraud penalty is in lieu of accuracy-related penalties and delinquency penalties
 - Not in lieu of penalty for failure to make estimated tax payments under I.R.C. § 6654
- Examples on next slide



Voluntary Disclosure Practice Penalty Application (cont'd)

Examples of penalty application

1. Taxpayer submits six years of amended returns: one fraud penalty on the year with the highest tax liability and no accuracy-related penalties for the other five years
2. Taxpayer submits six years of delinquent returns: one fraudulent failure to file penalty on the year with the highest tax liability with no delinquency penalties on the other five years
3. Taxpayer submits three years of delinquent returns and three years of amended returns: a single penalty for either fraud or fraudulent failure to file on the year with the highest tax liability with no accuracy-related or delinquency penalties on the other five years



Voluntary Disclosure Practice Penalty Application (cont'd)

Information Return Penalties

- Penalties for the failure to file information returns will not be automatically imposed

Other Title 26 Penalties

- Penalties relating to excise taxes, estate and gift tax, etc. will not be automatically imposed

FBAR

- Willful FBAR penalties will apply to all cases involving FBAR noncompliance and will be computed in accordance with existing IRS penalty guidelines under I.R.M. 4.26.16 and 4.26.17



Voluntary Disclosure Practice Collection

- General expectation - full payment
- A taxpayer who is unable to make full payment may request that the IRS consider other payment arrangements
- The burden is on the taxpayer to establish inability to pay, to the satisfaction of the IRS, based on full disclosure of all assets and income sources, domestic and foreign, under the taxpayer's control



Voluntary Disclosure Practice Cooperation

Cooperation includes but is not limited to:

- promptly and fully responding to all information document requests
- submitting to interviews and providing access to related party witnesses
- providing statute extensions or waivers as necessary for tax and tax related issues
- providing delinquent or amended returns, information returns, supporting documents, workpapers, etc.
- providing bank secrecy waivers (for offshore cases)



Voluntary Disclosure Practice – Information Returns

Taxpayers must submit all required returns, reports, and schedules for the disclosure period to the assigned examiner once the civil examination commences.

For offshore cases, taxpayers must also provide copies of electronically filed FBARs to the examiner.



Recurring Practitioner Questions about Campaigns

Question: What is the OVDP Declines/Withdrawals Campaign?

Definitions:

“Decline” refers to CI denying a taxpayer request to participate in an OVDP.

“Withdraw” refers to a taxpayer beginning the OVDP process and then withdrawing from OVDP before CI allows entry.



Recurring Practitioner Questions about Campaigns (cont'd)

- The OVDP Declines/Withdrawals Campaign is focusing on a population of approximately 6,000 taxpayers
- Treatment streams include
 - Examination
 - Soft letter outlining compliance options (Letter 5935) and monitoring post-letter with possibility of examination
 - Review and no contact



Streamlined Procedures Eligibility

- U.S. individuals and estates only
- Failed to report foreign financial assets or pay all tax due in respect of those assets
- Able to certify failures are related to non-willful conduct
- Not currently under IRS examination or criminal investigation
- Have a valid Taxpayer Identification Number



SSN/TIN Required for Submissions

If a taxpayer is not eligible for a Social Security Number (SSN) and does not already have an ITIN:

- Submit an application for an ITIN along with the required tax returns, information returns, and other documents filed under these Streamlined Procedures
- Search “ITIN” on www.irs.gov for more information

If a taxpayer is eligible for an SSN and does not have one, first obtain an SSN before making a submission under the Streamlined Procedures. If a taxpayer who is eligible for an SSN makes a Streamlined Procedures submission without an SSN, the return will be processed subject to penalties applicable outside of the Streamlined Procedures



Certifications for 2014 Streamlined Procedures

- Form 14654 – SDO (Streamlined Domestic Offshore)
 - Requires foreign financial asset information for 6 year period
 - Includes computation of MOP (miscellaneous offshore penalty)
- Form 14653 – SFO (Streamlined Foreign Offshore)
- Forms have been revised several times
 - Feb. 2016: revision emphasized that taxpayers MUST include narrative statement of facts and provided guidance on providing a complete narrative
 - Revisions in 2017 (Form 14654 9-2017 and Form 14653 10-2017)



Certifications Required on Forms 14653 and 14654

Both forms require taxpayers to agree to terms and represent certain facts:

- Retaining records for 6 years and providing records upon request
- Representing that failures were due to non-willful conduct
- Acknowledging possibility of examination



Definition of “Non-Willful” for Streamlined Procedures

“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.”

- Based on facts and circumstances of each case
- No one fact controls analysis

Press coverage includes 2014 TNT 212-7, document 2014-26106 (11/3/2014)



Statement of Facts for Non-Willful Certifications

- Written statement signed under penalties of perjury
- Certifying non-willful conduct with respect to all foreign activities and assets
- Provide reasons for the income and information reporting failures
- Specifically identify professional advisor and advice relied upon



Explaining Non-Willful Conduct

SFO FAQ #6 and SDO FAQ #13 provide guidance

- Provide specific reasons and background
- Include the whole story including favorable and unfavorable facts
- Explain the source of funds in all foreign financial accounts/assets
- Explain contacts with the account/asset including withdrawals, deposits, and investment/management decisions



Explaining Non-Willful Conduct (cont'd)

- What if I checked no on Schedule B?
- What if I owned or controlled a foreign entity?

You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.		Yes	No
Part III Foreign Accounts and Trusts <small>(See instructions on back.)</small>	7a At any time during 2015, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions	<input type="checkbox"/>	<input type="checkbox"/>
	If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements	<input type="checkbox"/>	<input type="checkbox"/>
	b If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located ► <input type="text"/>	<input type="checkbox"/>	<input type="checkbox"/>
	8 During 2015, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions on back	<input type="checkbox"/>	<input type="checkbox"/>
For Paperwork Reduction Act Notice, see your tax return instructions.		Cat. No. 17146N Schedule B (Form 1040A or 1040) 2015	



SFO vs. SDO

SFO – Streamlined Foreign Offshore

- Meet non-residency requirement
- Provide delinquent or amended income tax returns (Form 1040/1041)
- Forms 1040NR are not accepted
- No penalties

SDO – Streamlined Domestic Offshore

- Do not meet SFO residency requirements
- Must have filed income tax returns before submitting amended returns through procedures
- 5% penalty on assets reportable on FBAR/Form 8938
(explained infra)



SFO Non-Residency Requirements

Individuals who are U.S. citizens or lawful permanent residents

- In any one or more of the most recent three years
 - Not have a U.S. abode and
 - Physically outside the United States for at least 330 full days
- Both taxpayers on joint return must meet residency requirements
- Snowbird Issue— some taxpayers fail SFO if present in US more than 35 days/year but cannot use SDO because they did not file income tax returns



SDO Miscellaneous Offshore Penalty

5% Title 26 miscellaneous offshore penalty applied to assets:

- in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year
- in the covered tax return period if the asset should have been, but was not, reported on a Form 8938 for that year
- in the covered tax return period if the asset was properly reported for that year, but gross income in respect of the asset was not reported in that year

See SDO FAQ #6

Year end account/asset values are used to aggregate assets

Exceptions for assets:

- Accounts with no financial interest are excluded (e.g. mere signature authority)- see SDO FAQ #1
- Canadian RRSP/RRIF accounts – see SDO FAQ #8



Streamlined Procedures Refinements

- **FAQs**
 - Refined, modified, new FAQs added based on feedback from stakeholders
 - Service welcomes practitioner feedback
- **Form revisions and new forms (e.g., Form 14708 relating to Canadian retirement plans)**



FAQs for Streamlined Procedures and Delinquent Return Procedures

- Initial Streamlined Procedures FAQs released on 10/8/14, additional FAQs released 7/16/15 and 1/7/16
- Key FAQs for SDO
 - FAQ #1: Assets included in penalty base
 - Assets in which taxpayer had no financial interest are not included in penalty base
 - FAQ #4: Valuing entities
 - Disregarded entities- look through to the underlying financial accounts
 - Corporations- use stock value (no discounts per FAQ #5)
 - FAQ #7: Allows recently compliant taxpayers (2013, 2012, 2011) to enter Streamlined and pay 5% for earlier years
 - Recurring pattern for certain Swiss account holders



Streamlined Procedures FAQs (cont'd)

- SFO FAQ #7 and SDO FAQ #14 provide a procedure for a joint filer to make an individual Streamlined Procedure submission
 - Joint amended income tax returns with only one signature
 - Amended income tax returns must reflect increase in tax
 - Explain circumstances
 - Write “SFO FAQ #7” or “SDO FAQ #14” in red ink on amended returns and certification form



Streamlined Procedures FAQs (cont'd)

- SFO FAQ #9 and SDO FAQ #16 provide a procedure for correcting mistakes in earlier Streamlined Procedures submissions
 - Explain all facts and circumstances concerning the error in the original Streamlined Procedures submission
 - Opportunity to self-correct before IRS identifies issue and initiates examination
 - On certification form write “amended” in red ink
 - On tax returns write “Amended Streamlined Domestic Offshore” or “Amended Streamlined Foreign Offshore”



Streamlined Procedures - Post Submission

- Unlike OVDP, Streamlined Procedures cases do not involve Service personnel certifying submissions and do not culminate in a closing agreement
- Streamlined Procedures attempt to normalize return processing
 - Returns are processed by Submission Processing
 - Returns may be selected for examination



Trending Problems Observed with Streamlined Procedures Submissions

- Filing delinquent Forms 3520 with Ogden and requesting that they relate back to an earlier Streamlined Procedures submission
- Attempting to use the Streamlined Procedures to try to correct purely domestic issues
- Submissions for entities (e.g., corporations)
- Submissions of Forms 1040NR
- Insufficient narrative statement of fact
 - Provide a complete story
 - See SFO FAQ #6 and SDO FAQ #13 for guidance



Trending Problems (cont'd)

- Mistakes with SDO penalty base

“A foreign financial asset is subject to the 5-percent miscellaneous offshore penalty in a given year in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year. A foreign financial asset is subject to the 5-percent miscellaneous offshore penalty in a given year in the covered tax return period if the asset should have been, but was not, reported on a Form 8938 for that year. A foreign financial asset is also subject to the 5-percent miscellaneous offshore penalty in a given year in the covered tax return period if the asset was properly reported for that year, but gross income in respect of the asset was not reported in that year.”
quote from <https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-in-the-united-states>



Trending Problems - Mistakes with SDO Penalty Base (cont'd)

- Submissions that fail to include in the SDO penalty base foreign financial assets that were not reported on FBARs but were tax compliant
 - Some representatives are pointing out their creativity with footnotes
 - Other representatives do not make their creativity clear and later argue including tax compliant accounts in SDO penalty base is “unfair”



Trending Problems - Mistakes with SDO Penalty Base (cont'd)

- Failure to include assets in the penalty base may result in
 - IRS reversing beneficial penalty provisions of procedures
 - Examination
- What should a representative do if an asset was omitted from the SDO penalty base?
 - Follow the procedures in SDO FAQ #14 to provide an amended certification



Delinquent FBAR Procedures

- File all FBARs electronically with FinCEN
 - <http://bsaefiling.fincen.treas.gov/main.html>
 - BSA e-filing system offers an instruction booklet that provides line by line instructions for filing FBARs
- On cover page select reason for filing late
- Include statement explaining why filing late



FBAR Developments

- Change in due date
 - The FBAR is due by April 15 of the following year beginning with 2016 FBAR (31 U.S.C. § 1010.306(c))
 - Automatic extension to October 15
- Statutory penalties adjusted for inflation
 - For FBARs due after August 1, 2016:
 - “Non-willful” penalty raised from \$10,000 to \$12,459 per account for failing to file a timely, complete, and correct FBAR
 - Minimum “willful” penalty raised from \$100,000 to \$124,588 (penalty based on the account balance unaffected)
- Interim Final Rule, 31 C.F.R. § 1010.821 (6/30/2016)



FBAR Penalty Guidance

- May 13, 2015 interim guidance provided new guidance on FBAR penalties
- Penalty guidance incorporated into I.R.M. 4.26.16 (11/6/2015)
- Penalties are based on the facts and circumstances of each case



FBAR Penalty Guidance

- Penalty for Willful FBAR Violations - Calculation – I.R.M. 4.26.16.6.5.3
 - (2) “[I]n most cases, the total penalty ... will be limited to 50 percent of the highest aggregate balance...”
 - (3) “Examiners may recommend a penalty that is higher or lower than 50 percent of the highest aggregate account balance ... In no event will the total penalty amount exceed 100 percent of the highest aggregate balance... .”
- Highest aggregate balance occurs on any day during the reporting year. The penalty may not exceed the statutory maximum which is 50% of balance on due date of FBAR
- See 2014 OVDP FAQ #50.1 for application to OVDP FAQ #50 analysis



FBAR Penalty Guidance

- Penalty for Nonwillful Violations - Calculation – I.R.M. 4.26.16.6.4.1
 - (1) “[I]n most cases, examiners will recommend one penalty per open year, regardless of the number of unreported foreign accounts. The penalty for each year is limited to \$10,000*.”
 - (4) “In no event will the total amount of the penalties for nonwillful violations exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts... .”

* Or amount indexed for inflation



Delinquent Information Return Procedures

Taxpayers who:

- have not filed required international information returns,
- have reasonable cause,
- are not under civil examination/criminal investigation, and
- have not been contacted about the delinquent information returns

May file the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file

- Normalizes handling delinquent information returns
- Penalties may be imposed if the Service does not accept the explanation of reasonable cause



Resources

- IRS.gov
 - <https://www.irs.gov/individuals/international-taxpayers/options-available-for-u-s-taxpayers-with-undisclosed-foreign-financial-assets>
- FAQs
- OVDP and Streamlined Hotline
267-466-0020 (new phone number)



FBAR Resources

- FinCEN website:
 - www.FinCEN.gov
- FinCEN Resource Center:
 - 1-800-767-2825 or (703) 905-3591
 - FRC@fincen.gov



Webinar Resources

- Webinar on filing FBARs (August 30, 2017)
 - <https://www.irsvideos.gov/ReportingOfForeignBankAndFinancialAccountsOnTheElectronicFBAR/>
- Webinar on Streamlined Filing Compliance Procedures (May 11, 2016)
 - <https://www.irsvideos.gov/Business/FilingPayingTaxes/StreamlinedFilingComplianceProceduresAComplianceOptionForSomeTaxpayers>
- Other webinars on international issues available at www.irsvideos.gov