

**SBSE**  
**Offshore Voluntary**  
**Disclosure Initiative**  
**(OVDI) 2011**

CENTRA Course #45921

Welcome, you are attending Offshore Voluntary Disclosure Initiative 2011 CENTRA training designed for examiners who have previously worked offshore voluntary disclosure cases.

## Yes/No Buttons



**The Yes/No buttons allow you to answer a question with a Yes or No (or a True/False) response.**

- If you change your mind, click on the opposite button.
- If you wish to erase your answer, click on the same button again.

Yes/No buttons allow you to answer a question with a Yes or No (or a True/False) response.

If you change your mind, click on the opposite button

If you wish to erase your answer, click on the same button again

## Participant Audio Test



If you can hear me, click on the green check button on the upper left side of the screen. We will continue when everyone has checked the green check button.

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If you can hear me please click the green check button on the upper left side of the screen.

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## Centra Tools and Etiquette

### Interactive Tools – Hand raising

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There are two Centra tools you can use to ask questions:

First you can click the hand button to raise your hand and we will call on you as time permits.

## **Centra Tools and Etiquette -**

### **Interactive Tools**



#### **Microphone**

- When you see a microphone appear next to your name in the participants listing,
  - Make sure the microphone button on your headset cord is in the ON position.
  - Hold down the Ctrl key on the keyboard,
  - Speak clearly into the microphone,
  - Wait 2 seconds and release the Ctrl key

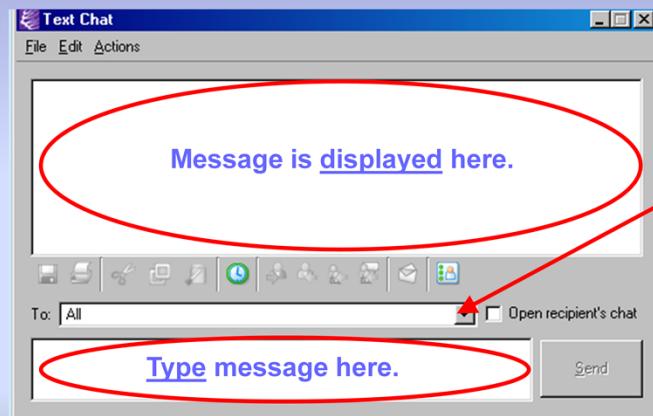
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When you raise your hand we will give you the microphone

- Make sure the microphone button on your headset cord is in the ON position
- Hold down the Ctrl key on the keyboard
- Speak clearly into the microphone
- Wait 2 seconds after you've stopped talking and release the Ctrl key

## Centra Tools and Etiquette - Interactive Tools - Text Chat



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## Technical Problems

If you are having technical difficulties  
with CENTRA, please send a text chat  
to: ***All presenters***

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## **Disclosure Awareness**



**Do not disclose taxpayer  
information during this CENTRA  
session.**

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As with any training, please be  
mindful not to disclose any  
taxpayer information during this  
session – also note ...

## **Recorded Session**

- This CENTRA session is being recorded. Participant and instructor interaction and screen action will be recorded.
- Please select the green check mark ✓ to confirm your understanding of this recorded event.

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This Centra training will be recorded; this means that participant, instructor and screen actions will be recorded for viewing at a later time.

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## **SBSE OVDI 2011- training material**

**If you have not already downloaded the course materials, you may do so now by clicking on the link below:**

**<http://wsep.ds.irsnet.gov/sites/co/dcse/sbse/srm/hr/hrd/learning/coursedev/35888/default.aspx>**

If you have not already downloaded the materials, you may do so now by accessing the link below.

## **SBSE OVDI 2011 - CENTRA – Today's Session**

- This Centra training will consist of 3 segments, each followed by a Q&A period:**
  1. 2011 Penalty Structure Memo dated 3/1/2011
  2. Submission requirements
  3. Significant FAQs
- The session will last between 2 and 3 hours**
- This session is not pre-approved for CPA CPE credit, you can check with your state board to determine if this session meets their CPE requirements**

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There are 3 topics the instructors will be discussing today: and they will be followed by an opportunity to answer questions.....

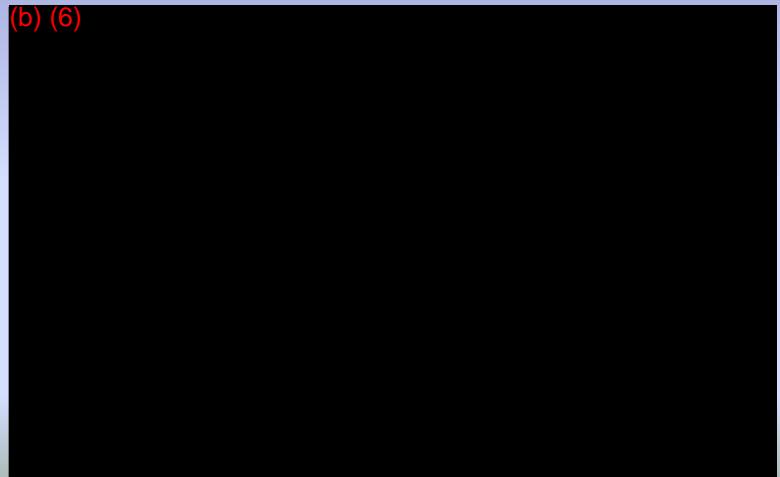
This training is expected to run approximately 2 -3 hours

And it is not pre-approved for CPA CPE but you should check with your state association to determine if this session meets their CPE requirements

## **SBSE OVDI 2011 - Centra Training presenters**

- **David Breen, Counsel**

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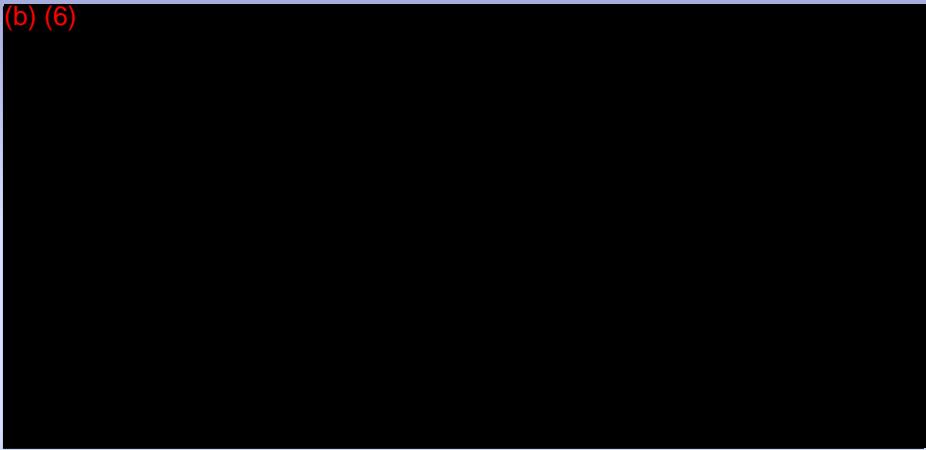
All of the presenters involved with this training are from the SBSE division and each of them has extensive experience and proven performance with offshore voluntary disclosures. They represent Counsel, Exam HQ and several Examination Areas.

## ***Handout: SBSE OVDI 2011 - Contacts***

David A. Breen, Senior Counsel, Philadelphia, PA

(215) 861-0707

(b) (6)



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Contact information for these folks is one of the handouts found on the L&E's SharePoint site

# **DAVID BREEN,**

## *Senior Counsel*

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## **Participation IRM 9.5.11.9**

- **A voluntary disclosure occurs when the communication is truthful, timely, complete, and when the taxpayer:**
  - Shows a willingness to cooperate (and does in fact cooperate) with the IRS in determining correct tax liability and
  - Makes good faith arrangements with the IRS to pay in full, the tax, interest, and penalties

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This section provides a short overview of Criminal Investigations Voluntary Disclosure Practice. This option has been available since the 1920s to taxpayers who wanted to come into compliance, but were hesitant because of the possible criminal sanctions they would face. CI's VDP enables taxpayers to become compliant and not be prosecuted if they fulfill certain requirements. If taxpayers make a complete disclosure of their wrongdoings, file amended or delinquent returns, cooperate fully with the IRS and pay (or make arrangements to pay) what they owe, they will not be prosecuted.

Next we will cover the specifics of the 2011 OVDI and how it fits into CI's VDP.

## Requirements for CI's VDP

- **Timely**
- **Legally sourced-income**
- **Complete**
- **Accurate**
- **Pays tax, interest, penalties IRS determines are due**

Here are the requirements. “Timely” refers to the fact that a taxpayer has to come in to CI before IRS contacts the taxpayer or before IRS receives information about the noncompliance. Obviously, it is not a “voluntary” disclosure if it made after a taxpayer receives an appointment letter or after a whistleblower provides the IRS with the taxpayer’s identity.

## Requirements of a Voluntary Disclosure

- **Timely**
- **Legally sourced-income**
- **Complete**
- **Accurate**
- **Pays tax, interest, penalties IRS determines are due**

CI's Role

Your Role

All voluntary disclosures come into CI. CI checks the submission for timeliness and confirms that the unreported income is from a legal source. Once CI confirms those requirements, the case is sent to the civil side of compliance. It will be your job to insure that the submission/disclosure (i.e. amended or delinquent returns) is complete and accurate. You will also determine the amount of tax, interest, and penalties owed, secure the necessary closing documents, and process the case.

## **Certification of Offshore Voluntary Disclosure Cases**

- **Voluntary Disclosure Revenue Agents**
- **Primary Issues:**
  - Income
  - Civil penalties
- **Closing agreements for all cases**
  - **Form 906 (MFT 30 Case)**
  - **Form 8278 (separate case file) for  
Offshore Penalty (MFT 55 Case)**

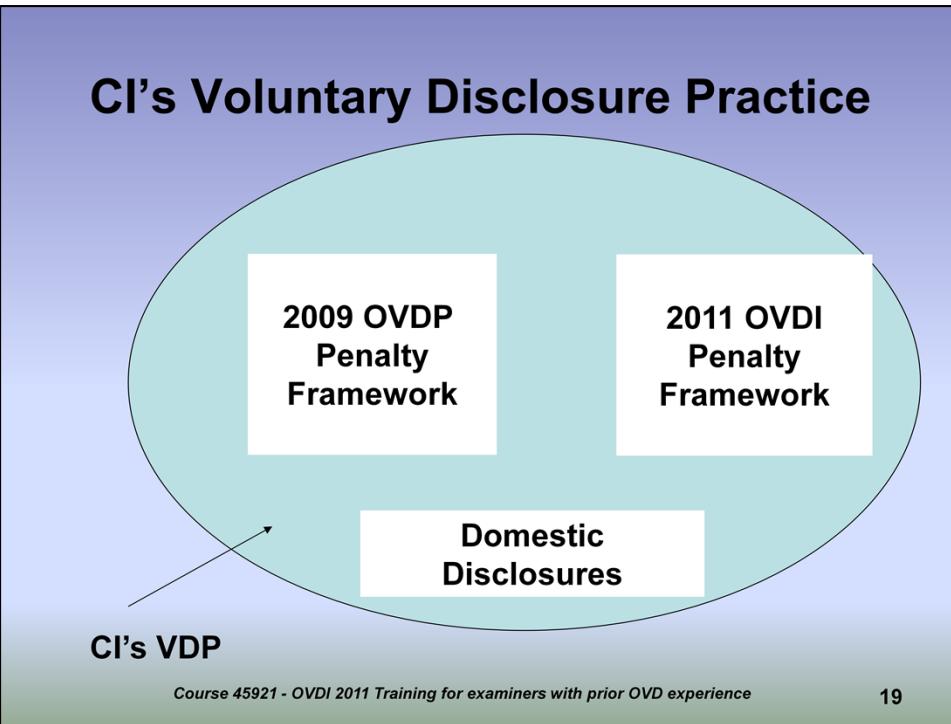
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Your role will focus on several limited areas:

- (1) Has the taxpayer reported all unreported income?
- (2) What civil penalties, including the offshore penalty apply; and
- (3) What closing documents do you need to make sure the case can be closed and the amounts assessed?

The specifics of each area will be covered later in this presentation.



This is a simplistic representation of how the 2009 OVDP and 2011 OVDI relate to CI's VDP. As the diagram suggests, cases come into the large oval of CI's Voluntary Disclosure Practice from many sources. Once in the circle the taxpayer receives a preliminary acceptance letter and the assurance of a non-prosecution recommendation. The cases you will be working initially are those in CI's VDP that came in through the 2011 initiative. Your task is to "certify" the submission. And that brings us to an important point. These are not "examinations." They are certifications. Because taxpayers came into this program on their own, they do not have any appeal rights. If you determine that they owe more than their corrected returns reflect and the taxpayer disagrees, his only option is to opt-out of the 2011 OVDI and undergo a full examination with full appeal rights. Of course once the case becomes a regular examination, all requirements such as confirming income and picking up related returns for examination apply. Keep this diagram in mind when we discuss "opt-outs." Note that when a taxpayer "opts-out" of the 2011 OVDI, he is still in CI's VDP. He still will not be prosecuted, but he also still must cooperate fully – even though he is under a regular examination.

## **Participants will be subject to:**

- A 20% accuracy-related penalty**
- A miscellaneous “offshore” penalty of 5%, 12.5% or 25% of the highest aggregate balance in their offshore accounts or assets**
- That is in addition to the income tax they owe**

These are the penalty terms. Every taxpayer in the 2011 OVDI must pay the income tax he owes. He also must pay a 20% accuracy-related penalty on those underpayments. Finally, in lieu of any other penalties the IRS could assert such as the civil fraud penalty, FBAR penalties, and penalties for failing to file offshore information returns, the taxpayer will pay a special “offshore” penalty based on the unreported offshore assets he controlled. Under the 2011 OVDI certifying the submissions should not be as daunting as it may sound, because taxpayers are required to cooperate and are required to submit with their applications much of the information you will need. What they must submit up-front depends on the amount of unreported offshore holdings they are disclosing.

## Terms

- **Taxpayer - files ALL amended or delinquent returns for 8 years (2003 – 2010), including all information returns and FBARs**
- **IRS - will assess:**
  - all tax and interest on underpayment
  - IRC § 6662 or IRC § 6651(a) and
  - Miscellaneous “offshore penalty”

What are the respective parties agreeing to? Taxpayers agree to file or correct previously filed returns for 2003 through 2010, including FBARs. In return, the IRS agrees to limit its inquiry to those tax years, not prosecute the taxpayer, and not raise civil fraud or other penalties – just the special offshore penalty and accuracy-related penalty.

## **What Returns Must be Provided?**

- **1040s and 1040-Xs already filed (copies)**
- **1040-Xs or delinquent 1040s reflecting previously unreported offshore income**
- **Offshore-related information returns (see FAQ 29 for certain dissolved entities)**
- **TD F 90-22.1 Report of Foreign Bank and Financial Accounts (FBAR)**

These are the returns taxpayers must submit. They must be complete, accurate, and signed by the taxpayer. When we discuss the FAQs later in this presentation, you will see that under certain limited circumstances, taxpayers may not be required to file the offshore information returns. In all cases, however, they must file income tax returns and FBARs.

## **What Else Must Taxpayer Do?**

- **Cooperate**
- **Provide requested offshore information**
- **Execute 872s**
- **Execute extensions for FBAR penalty**
- **Execute an IRS prepared Form 906**

This time around, the IRS is requiring taxpayers to do more upfront when they apply to the OVDI. They must execute Form 872 to extend the SOL on the covered years. They also must execute an FBAR SOL extension. These pro forma agreements are located on [www.irs.gov](http://www.irs.gov). In many cases, taxpayers must also submit their offshore records.

## **What Must A Taxpayer Pay?**

- **Pay tax due on 1040s or 1040-Xs**
- **Pay IRC § 6662(a) on the full amount of underpayments**
- **Pay IRC § 6651(a)(1), if applicable;**
- **Pay IRC § 6651(a)(2), if applicable;**
- **Pay interest (IRC § 6404(g) inapplicable)**
- **Pay miscellaneous offshore penalty**

## **Examination Approach Income Tax Component**

- **Certification of Amended Returns**
  - Unreported Income
  - Penalty assessment
- **Amended returns vs. Delinquent returns**
- **Tax & Miscellaneous Offshore Penalty paid in advance**
- **Opt Out Procedures**

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Again, what is your job? You will focus on the unreported income the taxpayer is now reporting and whether the tax is correctly determined. In this step, you may have foreign tax credit, PFIC, or other issues you may need to calculate. There are technical advisors in these specialty areas to assist you with these tasks. You should also check to make sure ALL foreign accounts are now disclosed. There have been isolated cases where a taxpayer made a voluntary disclosure only for the offshore accounts he believes the IRS *knows* about. He may have other offshore accounts he is still keeping hidden. One way to determine this is to follow the money. If the taxpayer closed out the offshore account he is now disclosing, find out where the money went. Maybe he moved it into another offshore account.

Your other task is to compute (or in some cases check the taxpayer's computation of) the offshore penalty. This may well require you to evaluate any mitigating arguments taxpayers make for departing from the 25% penalty.

The final 3 bullet points will be covered later, because they deal with procedures.

# **Which Penalty Rate Applies?**

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## **Everyone starts with the 25% Rate**

- 25% of the amount in foreign bank accounts or entities in the year with the highest aggregate account/asset value**
- The taxpayer must establish why mitigation applies**

The 2011 OVDI penalty starts with a penalty equal to 25% of the highest aggregate account balance which includes the fair market value of assets in undisclosed offshore entities and the fair market value of any foreign assets that were either acquired with improperly untaxed funds or produced improperly untaxed income. The taxpayer has the burden of proving any mitigating factors.

## **First Exception to 25%**

- 12.5% if the highest aggregate account/asset value account balance or asset value is less than \$75,000**

This is the only de minimus rule. The penalty is cut in half if the amount subject to the penalty is less than \$75,000. This is NOT a sliding scale. If the balance is \$80,000 the entire \$80,000 is subject to 25%. In other words, this penalty structure isn't like our graduated tax rates. A taxpayer doesn't pay 12.5% on the first \$75,000 and 25% on anything over \$75,000. It's 25% on everything if the total is \$75,000 or more.

## **Second Exception to 25%**

**5% Penalty if 4 factors are proven:**

- 1. taxpayer did not open or cause any accounts to be opened**
- 2. Exercised minimal, infrequent contact with account**
- 3. Not withdraw > \$1,000 in any one year and**
- 4. Can establish that all applicable taxes have been paid on funds deposited into the account**

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The penalty can be reduced to 5% if all of the factors are met. This exception was put in to cover taxpayers who may have inherited funds or received them as a gift, but they took little or no action on them. They knew the funds were offshore, but they never really exercised control over them.

## **Penalty reduced to 5%**

- (a) did not open or cause the account to be opened (unless the bank required that a new account be opened, rather than allowing a change in ownership of an existing account, upon the death of the owner of the account);**

Did not open or cause the account to be opened (unless the bank required that a new account be opened, rather than allowing a change in ownership of an existing account, upon the death of the owner of the account) – Taxpayers did cause the accounts to be opened or did they put any funds into it.

## **Penalty reduced to 5%**

- (b) have exercised minimal, infrequent contact with the account, for example, to request the account balance, or update accountholder information such as a change in address, contact person, or email address;**

The requirement that the taxpayer has exercised minimal, infrequent contact with the account, for example, to request the account balance, or update accountholder information such as a change in address, contact person, or email address is intended to show that even after the taxpayer learned of the account, he did the minimum he was required by the bank to do.

## **Penalty reduced to 5%**

- (c) have, except for a withdrawal closing the account and transferring the funds to an account in the United States, not withdrawn more than \$1,000 from the account in any year for which the taxpayer was non-compliant; and**

have, except for a withdrawal closing the account and transferring the funds to an account in the United States, not withdrawn more than \$1,000 from the account in any year for which the taxpayer was non-compliant.

This requirement was inserted to allow taxpayers to have some minimal benefit. Under the old program, a withdrawal of one dollar disqualified a taxpayer from penalty mitigation. This allows some flexibility.

## **Penalty reduced to 5%**

**(d) can establish that all applicable U.S. taxes have been paid on funds deposited to the account (only account earnings have escaped U.S. taxation)**

- For funds deposited before January 1, 1991, if no information is available to establish whether such funds were appropriately taxed, it will be presumed that they were.**

The IRS requires this proof, because it doesn't want to offer any penalty relief on funds that have avoided being taxed. Therefore, the requirement that the taxpayer can establish that all applicable U.S. taxes have been paid on funds deposited to the account (only account earnings have escaped U.S. taxation) assures this. The pre-January 1, 1991 exception recognizes the difficulty in securing any offshore records that are more than 20 years old.

## Offshore Penalty Example

- Taxpayer A held an interest in four accounts in tax years 2003- 2007
- The numbers reflected in the chart represent the highest amount in the account for each taxable year

## Offshore Penalty Example

|             | <u>Highest Balance in Account During the Year</u>    |             |             |                |                |
|-------------|--|-------------|-------------|----------------|----------------|
| <u>Acct</u> | <u>2003</u>  | <u>2004</u> | <u>2005</u> | <u>2006</u>    | <u>2007</u>    |
| 1           | 1,000,000  | 1,200,000   | 1,200,000   | 1,100,000      | 1,150,000      |
| 2           | 60,00,000  | 6,400,000   | 6,700,000   | 6,500,000      | 8,000,000      |
| 3           | Penalty is 25%<br>of \$21,147,000<br>25% = 5,286,750 |             | 0,000       | 47,000         | 55,000         |
| 4           | 9,000,000  | 11,000,000  | 13,200,000  | 11,400,000     | 11,600,000     |
| Tot.        | 16,050,00<br>0                                       | 18,630,000  | 21,147,000  | 19,055,00<br>0 | 20,815,00<br>0 |

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## **Additional 5% Taxpayers**

- **Foreign residents:**
  - who are “Accidental Citizens” or
  - meet a 3 prong test

Now we will review some additional exceptions to the 25% penalty. This applies to “Accidental Citizens.”

## **Foreign Residents “Accidental Citizens”**

- Taxpayers who are foreign residents and who were unaware they were U.S. citizens.
- Example: The taxpayer has \$60,000 in a foreign account and was:
  - born in the U.S. to parents of foreign citizenship
  - grew up in a foreign jurisdiction,
  - unaware that she had been born in the U.S
  - has never filed U.S. returns or FBARs.

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In the 2009 OVDP a number of taxpayers living abroad applied because up to a certain point in time, they didn't even know they were U.S. citizens and should have been paying U.S. taxes all these years. This may seem incredible, but it does happen.

(b) (6) [REDACTED], who lives in Minnesota, told us about Canadians who cross over into North Dakota to have their children, because the Canadian hospitals are too crowded. These children are U.S. citizens, but their parents are not. The baby is delivered and the parents take her back to Canada and never bother to tell her. This is an “Accidental Citizen.”

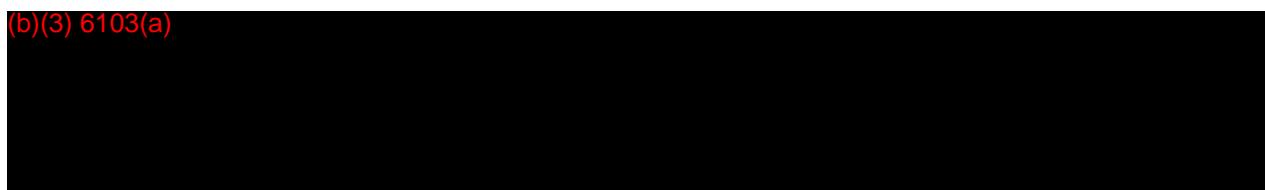
Why? Well, think how you would feel if you got a letter from the German government tomorrow telling you that your parents failed to tell you that you were born in Hamburg while your parents were on vacation. That makes you a German citizen and by the way also a German tax-evader. But don't worry, we (the Germans) will only take 25% of everything you own and call it even!

## **Foreign Residents “Accidental Citizens”**

### **Example:**

**Taxpayer became aware she was a U.S. citizen when she had to get a birth certificate in order to obtain a passport from the foreign jurisdiction where she resides**

(b)(3) 6103(a)



## **Foreign Residents “Accidental Citizens”**

Taxpayer gets the 5% penalty provided that subsequent to learning of her U.S. citizenship, taxpayer took no action with respect to her foreign accounts that would disqualify a U.S. taxpayer from the 5 percent penalty under the 4 prong test already described

But as this slide shows, it is not a completely free ride. Once she became aware of being an “Accidental Citizen” she falls under the initial 4-prong test for five per centers. If she fails that test, no 5% penalty for her!

## **Foreign Resident 3 Prong Test**

**5% also available to taxpayers who are foreign residents who:**

- 1) reside in a foreign country;**
- 2) have made a good faith showing that they have timely complied with all tax reporting and payment requirements in the country of residency; and**
- 3) have \$10,000 or less of U.S. source income each year**

5% also available to taxpayers who are foreign residents who (1) reside in a foreign country; (2) have made a good faith showing that they have timely complied with all tax reporting and payment requirements in the country of residency; and (3) have \$10,000 or less of U.S. source income each year.

Why? Because some U.S. citizens are under the mistaken belief that they only owe taxes where they reside. If the facts support that this person was a fine, upstanding, tax-compliant individual, but happened to be paying the wrong country, they also can have the 5% penalty.

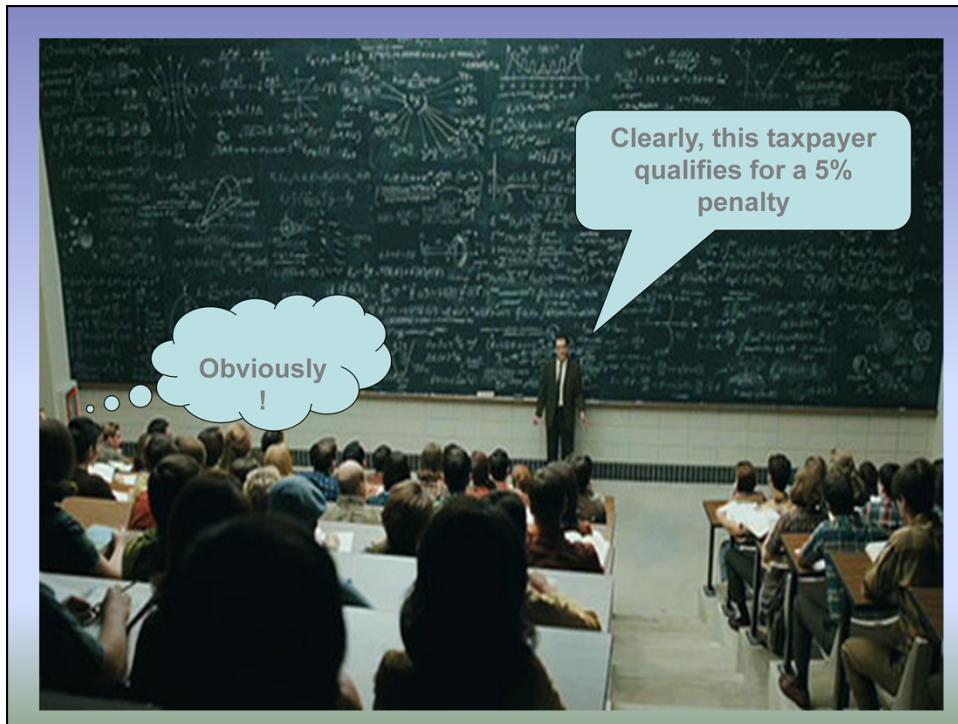
## **Additional Break for Foreign Resident 3 Prong Taxpayers only**

- The offshore penalty will not apply to non-financial assets, such as real property, business interests, or artworks, purchased with funds for which the taxpayer can establish that all applicable taxes have been paid, either in the U.S. or in the country of residence
- This exception only applies if the income tax returns filed with the foreign tax authority included the offshore-related taxable income that was not reported on the U.S. tax return

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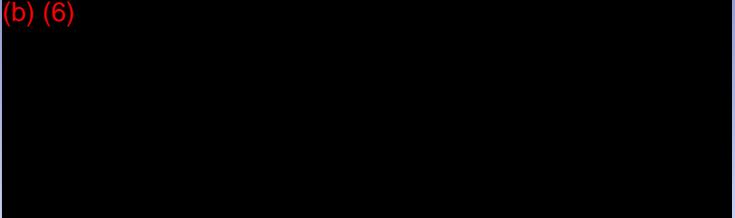
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And this is a final break they get. The offshore penalty will not apply to non-financial assets, such as real property, business interests, or artworks, purchased with funds for which the taxpayer can establish that all applicable taxes have been paid, either in the U.S. or in the country of residence.



It's easy! Now I will send it back to (b) (6)

(b) (6)



## *South Atlantic Area*

## OVDI 2011 Submission Requirements

Here's a direct link to the OVDI Submission Requirements:

<http://www.irs.gov/newsroom/article/0,,id=235584,00.html>

or refer to

**2011 OVDI Frequently Asked Question - #25**

Hello ... my name is (b) (6) for the 2011 OVDI program. I primarily service th Today I am going to cover the submission requirements for the 2011 OVDI program.

To get started ... You should have received access to a folder that contains handouts that correlate to this presentation. You will find a list of the submission requirements and significant forms. I encourage you to reference these forms throughout the lesson.

As you already know, we just completed the 2009 OVDI program and it's obvious that we learned a lot from that program. One of the biggest challenges we faced last time was getting the taxpayers to send in all of their records. We learned from that, and now for the 2011 program we asked for all of the necessary records upfront. That's right ... in order for a taxpayer to participate in the 2011 OVDI program they MUST submit certain records. In this part of our lesson we will go over each item in more detail.

But ... first things first ...

The taxpayers were first made aware of these submission requirements in one of two ways ....

One way was through the FAQs that were released when the OVDI program was announced in Feb 2011. FAQ #25 covers the submission documents.

The second place most taxpayers went to learn about the submission requirements was through irs.gov. See the direct link above.

So without any further ado let's get started ...

## Original Federal Income Tax Returns

- **Taxpayers must submit copies of previously filed original (and if applicable, previously filed amended) tax returns for years covered by the voluntary disclosure.**

## Original Federal Income Tax Returns

Nothing new here ... we need the original filed tax returns in order for us to get RGS setup with all the correct starting information. We need the taxpayer's original tax returns and any previously filed non-OVDI amended returns. As you know having these returns will greatly simplify your life when you start to prepare the 4549-A.

## Amended Federal Income Tax Returns

- Taxpayers must submit complete and accurate amended Federal Income Tax returns for all tax years covered by the voluntary disclosure.
- These amended returns must contain applicable schedules detailing the amount and type of previously unreported income from the foreign account or entity.
  - Sch B for interest & dividends
  - Sch D for Capital gains & losses
  - Sch E for Income from partnerships, S corps, estates or trusts
  - Foreign Information Returns ... 5471, 5472, 926, 8865, etc ...

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### Amended Federal Income Tax Returns

Next, we need the taxpayer to provide Amended Tax Returns that reflect all of the properly reportable foreign income. It is not sufficient to give us the first two pages of the 1040X ... they must provide all the pertinent schedules that detail the previously unreported foreign income. The taxpayer is required to Amend every year where they previously failed to include the foreign income.

One more bit of information ... If the taxpayer meets the requirements to file an Information Return (which we will cover a little bit later) such as a 5471, 5472, 926 or an 8865 you will likely find it attached to the income tax return. So be sure to look for it. Normally filing requirements direct taxpayers to send Forms 3520 and 3520-A to Ogden ... they aren't generally attached to the tax returns ... but in OVDI ... we know that the taxpayer may either enclose them loose in their package or they may attach them to the returns ... you never know ... so keep an eye out for them as well.

## OVDI Letter

- Criminal Investigation (CI) are the gate keepers to the OVDI program.
  - All taxpayers wishing to make a voluntary disclosure must be reviewed and approved before they are allowed entrance into the OVDI program.
- Taxpayers are required to complete and submit a 3-page letter that they download from irs.gov.
- This letter identifies the taxpayer, the undisclosed foreign accounts or assets, the value of the accounts, the unreported income and information concerning the history of the foreign accounts/assets.
- The taxpayer must sign the letter under penalties of perjury.

Next up is the OVDI Letter ...

You already know that the OVDI Letter is a crucial piece of information for the certification process. This is where you learn about the history of the foreign accounts or assets. Everyone who makes a Voluntary Disclosure must submit the OVDI Letter to CI in order to gain access into the program. This 3-page letter was created with specific questions that the taxpayer must address so CI can evaluate a taxpayer's violation and either allow them into OVDI or deny entrance into the program. The taxpayer may submit their own version of the letter but they must address all of the questions that are found in the pro-forma OVDI letter that is available at irs.gov.

The 3-pager (as it's generally referred to) identifies the taxpayer who is making the voluntary disclosure as well as provides valuable details concerning the foreign accounts and assets. The information covers the source of the foreign assets, the value, the level of unreported income, the purpose of establishing the foreign accounts, contacts with the foreign banks, and more ...

**It's important to note that the taxpayer must sign the letter under penalties of perjury ... basically .... We're looking for the truth ... the whole truth. The 3-pager is a good place to start.**

## CI – 3 page OVDI Letter

- Please check the box to estimate the annual range of the highest aggregate *value* of your offshore accounts/assets.

| Highest Aggregate Account/Asset Value | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|---------------------------------------|------|------|------|------|------|------|------|------|
| \$0 to \$100,000                      |      |      |      |      |      |      |      |      |
| \$100,000 to \$1,000,000              |      |      |      |      |      |      |      |      |
| \$1,000,000 to \$2,500,000            |      |      |      |      |      |      |      |      |
| \$2,500,000 to \$10,000,000           |      |      |      |      |      |      |      |      |
| \$10,000,000 to \$100,000,000         |      |      |      |      |      |      |      |      |
| Greater than \$100,000,000            |      |      |      |      |      |      |      |      |

- Please check the box to estimate the potential total unreported *income* from the offshore account(s) during each disclosure period. If known, please enter exact amounts/assets.

| Estimated Total Unreported Income | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 |
|-----------------------------------|------|------|------|------|------|------|------|------|
| \$0 to \$100,000                  |      |      |      |      |      |      |      |      |
| \$100,000 to \$1,000,000          |      |      |      |      |      |      |      |      |
| \$1,000,000 to \$2,500,000        |      |      |      |      |      |      |      |      |
| \$2,500,000 to \$10,000,000       |      |      |      |      |      |      |      |      |
| Greater than \$10,000,000         |      |      |      |      |      |      |      |      |

As you can see the 3-pager hasn't changed ... The taxpayer is still required to provide an estimate of the annual range of highest aggregate **VALUE** of their offshore accounts/assets. They are also asked to estimate their total unreported **INCOME** from the offshore accounts/assets. We all know that this information may be very helpful during the certification process.

## **Send a Check to the U.S. Treasury**

- Taxpayers must remit payment.
- The check must include the amount of tax, interest and accuracy-related penalty under IRC § 6662(a) and if applicable, the failure to file and failure to pay penalties under IRC § 6651(a).
- If you can not pay the total amount as described above taxpayers must submit Form 433-A or Form 433-B as appropriate.

**Please send a payment! That's right ... the taxpayer's were expected to remit payment for all tax, interest, accuracy and applicable delinquency penalties. You'll notice that the Miscellaneous Offshore Penalty (or MOP as we call it ) was not required to be remitted upfront, although we do know that some taxpayers prepaid this as well.**

**If a taxpayer is unable to remit payment they may still participate in the OVDI program however they must submit the proper Form 433-A or Form 433-B with their submission package.**

## Foreign Account or Asset Statement

- Completed foreign account or asset statement.
- Separate statements for each foreign account or asset included in the voluntary disclosure.
  - Financial account information
  - PFIC
  - Asset information

### Foreign Account or Asset Statement

This is a new form created for the 2011 OVDI program. Every taxpayer will need to submit one form per foreign account or asset that is included in their voluntary disclosure. So it's fair to say that every taxpayer will have at least one form or why would they be in the program.

This form will be of particular interest to you during the certification process as it will provide you specific details concerning each foreign account/asset. The form even requires the taxpayer to identify if a PFIC is present in their foreign accounts. This form will be your first hint that you may encounter PFICs during the certification process.

| Foreign Account or Asset Statement  |     |    |       |
|---|-----|----|-------|
| Statement ____ of ____  |     |    |       |
| Name:   |     |    |       |
| Social Security Number:   |     |    |       |
| Submit a separate Statement for each foreign account or asset included in your voluntary disclosure. At least one Statement must be submitted. Respond to each applicable question in the space provided -attachments are appropriate should additional space be necessary. |     |    |       |
| 1 Name of Foreign Financial Institution   |     |    |       |
| 2 Country where Institution is Located  |     |    |       |
| 3 Contact Person at this Institution  | YES | NO |       |
| 4 Is the offshore account a bank account holding cash, money market, or CD?   |     |    |       |
| 5 Is the offshore account a custodial account holding securities?   |     |    |       |
| 6 Is the offshore account another type of account or asset?   |     |    |       |
| 7 If so, what type of account or asset?   |     |    |       |
| Bank or Financial Accounts  |     |    |       |
| 8 Source of funds within account  |     |    |       |
| 9 Name under which the account was held   |     |    |       |
| 10 If held by an entity, type of entity   |     |    |       |
| 11 Date account was opened  |     |    |       |
| 12 Date account was closed  |     |    |       |
| 13 Does the account include Passive Foreign Investment Company (PFIC) or mutual funds?  | YES | NO | OTHER |
| Other Assets (real estate, artwork, bullion, etc.)  |     |    |       |
| 14 Description and Location of the Asset  |     |    |       |
| 15 Purchase price and date acquired   |     |    |       |
| 16 Sales price and date of disposition (if sold)  |     |    |       |
| 17 FMV at 12/31/10 if asset is still owned  |     |    |       |
| The highest value of this account and/or fair market value of asset over the period of the voluntary disclosure should be included on the Penalty Computation Worksheet.  |     |    |       |

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**Here's a quick look at the form. Question 13 addresses the PFIC.**

## Penalty Computation Worksheet

- The worksheet will show the taxpayer's determination of the highest aggregate balance (HAB) of his undisclosed offshore accounts, FMV of foreign assets and penalty computation.
  - Notice the penalty rate that the taxpayer is using  
✓ 5%, 12.5% or 25%
- The worksheet is to be signed by the taxpayer and the taxpayer's representative.

## Penalty Computation Worksheet

You've seen this one before too ... except there have been a few modifications to it ... The taxpayer must provide a penalty computation worksheet showing their highest aggregate balance (or HAB) for their foreign accounts as well as the FMV of any unreported foreign assets.

Even though this penalty computation workpaper was made available on irs.gov with a MOP penalty rate of 25% some taxpayers have modified their computation to reflect a different penalty amount. Just be aware of this during your review of the worksheet.

Also, this penalty computation is required to be signed by the taxpayer and if represented ... by the representative too.

| PENALTY COMPUTATION WORKSHEET  |      |      |      |               |      |      |      |      |
|--|------|------|------|---------------|------|------|------|------|
|  | 2003 | 2004 | 2005 | 2006          | 2007 | 2008 | 2009 | 2010 |
| Acct #1 *  |      |      |      |               |      |      |      |      |
| Acct #2 *  |      |      |      |               |      |      |      |      |
| Acct #3 *  |      |      |      |               |      |      |      |      |
| Acct #4 *  |      |      |      |               |      |      |      |      |
| (add additional accounts as needed)  |      |      |      |               |      |      |      |      |
| Highest Aggregate Balance  | \$0  | \$0  | \$0  | \$0           | \$0  | \$0  | \$0  | \$0  |
| <b>25% Offshore Penalty</b>  |      |      |      |               |      |      |      |      |
| Highest Aggregate Balance is in year:  |      |      |      |               |      |      |      |      |
| Highest Aggregate Balance in USD is:   |      |      |      |               |      |      |      |      |
| Multiply the highest aggregate balance by 25%  |      |      |      |               |      |      |      |      |
| Calculated Offshore Penalty:   |      |      |      |               |      |      |      |      |
| • For each year of your voluntary disclosure, provide the highest balance in the account (or fair market value of the asset)   |      |      |      |               |      |      |      |      |
| <br>   |      |      |      |               |      |      |      |      |
| Under the penalties of perjury, I declare that I examined the facts stated in this Penalty Computation Worksheet, including any accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete. |      |      |      |               |      |      |      |      |
| _____<br>Taxpayer's Signature(s)   |      |      |      | _____<br>Date |      |      |      |      |
| I am submitting this Penalty Computation Worksheet and any accompanying documents. Upon information and belief, the statements herein are true and correct.  |      |      |      |               |      |      |      |      |
| _____<br>Representative's Signature  |      |      |      | _____<br>Date |      |      |      |      |

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**Here it is if you haven't seen the new penalty computation worksheet yet. Notice the 8 years across the top ... the 25% MOP rate and the signature lines at the bottom.**

**And remember ... the computation should be reflected in US Dollars.**

## Statute of Limitations - Consents

- Completed and signed agreement to extend the period of time to assess tax (including tax penalties).
- Form 872
- Completed and signed agreement to extend the period of time to assess FBAR penalties.

### Consents

The taxpayers were required to sign statute extensions. One for income tax and penalties and one for FBAR penalties. Both of the forms were made available on irs.gov and already had certain fields pre-filled.

Form 872 for the income taxes covers the periods ending 2003 through 2008. You will have the opportunity to learn more about this OVDI 872 and how to determine what years are valid to be extended. For now ... Just be aware that all years may not be extended by this 872 even though they are listed. The basic concept here is ... a consent can not extend an already expired statute. So, even though the 2003 year may be listed on the 872 ... if the statute was already expired when the taxpayer signed it ... then that year is GONE! The nuances of consents is beyond the scope of this lesson but if you have additional questions I recommend that you take the OVDI Centra course that covers OVDI statutes.

The FBAR consent covers the 2004 & 2005 years. The next slide displays this unique form.

**CONSENT TO EXTEND THE TIME TO  
ASSESS CIVIL PENALTIES PROVIDED BY  
31 U.S.C. § 5321 FOR FBAR VIOLATIONS**

**WHEREAS**, the parties to this agreement desire to extend the time during which the penalties provided by 31 U.S.C. 5321 may be assessed and collected;

**WHEREAS**, the parties to this agreement are aware that they have the right to refuse to sign this consent;

\_\_\_\_\_  
(name and taxpayer identification number)

United States person, of \_\_\_\_\_  
(address)

and the Commissioner of the Internal Revenue Service, hereby agree and consent to the following:

(1) For violations with respect to the requirement, established under 31 U.S.C. 5314, for a United States person to report having a financial interest in or signature authority, or other authority, over a financial account during the calendar years 2004 and 2005 that was maintained with a foreign financial institution, a civil penalty provided by 31 U.S.C. 5321 may be assessed at any time on or before December 31, 2012.

(2) This consent does not reduce, waive, or extend any period of limitation under 26 U.S.C. 6501 for assessing or collecting tax. This consent also does not supersede or amend any other agreement between the United States person and the Internal Revenue Service.

|             |  |
|-------------|--|
| Date        | Signature of the United States Person    |
| _____       | _____                                    |
| Date        | Signature of Authorized Representative   |
| _____       | _____                                    |
| Date        | Signature of the Commissioner's Delegate |
| _____       | _____                                    |
| Title _____ |  |

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**Here is the consent that is used for FBARs. Separate FBAR consent forms must be signed by each person, even if the accounts are jointly owned.**

**When you receive your cases you must thoroughly review all of the consents to determine if they are valid, have they been executed, and have proper updates been made to AIMS to reflect any date changes.**

**As you know, In OVDI ... if all goes well you will not need to rely on these consents ... however ... if the taxpayer elects to opt-out or is removed from the program these consents will be of vital importance.**

## **Foreign Financial Institution Statement**

- **Taxpayers who are disclosing offshore financial accounts with a HAB in any year of \$1 million or more, must submit a separate statement for each foreign financial institution.**
- **These statements will be used to identify promoters and banks.**

### **Foreign Financial Institution Statement**

Another new OVDI form. This time we are looking for information on any foreign accounts with an HAB of over \$1 million. We state right on the form that the IRS will use this information to identify promoters and banks who may have been involved in offshore activities.

| Foreign Financial Institution Statement<br>Statement ____ of ____  |  |          |           |
|--|--|----------|-----------|
| Name: _____<br>Social Security Number: _____   |  |          |           |
| For those applicants disclosing offshore financial accounts with an aggregate highest account balance in any year of \$1 million or more, submit a <u>separate</u> Statement for each foreign financial institution where you held the funds you are now disclosing. At least one Statement must be submitted. These Statements will be used by us to identify promoters and banks. We may request additional information from you about promoters or banks. |  |          |           |
| Name of Foreign Financial Institution<br>Country where it is located   |  | Question | YES    NO |
| 1  | Did a representative of the foreign financial institution visit you in the United States regarding the offshore account or asset?  |          |           |
| 2  | Did a representative of the foreign financial institution suggest to you the use of offshore accounts, offshore institutions, offshore entities or partners in foreign countries as a way of avoiding taxes or avoiding the disclosure of your ownership of the account or asset?                                    |          |           |
| 3  | Did a representative of the foreign financial institution suggest to you the use of practices such as holding mail at the institution, using of prepaid plastic cards, bank storage of account documentation, or conducting face to face meetings to avoid the disclosure of your ownership of the account or asset? |          |           |
| 4  | Did a representative of the foreign financial institution or one of its U.S. subsidiaries provide services in the U.S. related to offshore accounts or assets (such as facilitating opening accounts, reviewing account activity, forwarding account statements, providing investment and/or tax advice, etc.)?      |          |           |
| 5  | Were you able to make deposits to or withdrawals from your offshore account through the use of a U.S. domestic branch office of the foreign financial institution?   |          |           |
| 6  | Were you able to access funds in your offshore account by the use of wire transfers made into the U.S.?  |          |           |
| 7  | Was a U.S. attorney, return preparer or other business person in the U.S. involved in setting up the offshore account, investment or entity or in advising their use?  |          |           |
| 8  | Was a U.S. bank, brokerage firm, or other financial services company involved in setting up the offshore account, investment or entity or in advising their use?   |          |           |
| 9  | Did a representative of the foreign financial institution attempt to discourage or prevent you from filing a voluntary disclosure with the IRS or remitting the foreign funds into the U.S.?   |          |           |
| 10   | Did an advisor or foreign entity encourage you to move funds from one foreign financial institution to another or from one foreign country to another to avoid disclosure of the account or asset?   |          |           |

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**Here is a look at the Foreign Financial Institution Statement. I anticipate that this form will greatly assist you during your completion of the e-Trak database.**

## FBARs

- The taxpayer must submit complete and accurate form TD F 90.22-1 for foreign accounts maintained during calendar years covered by the voluntary disclosure.
- If applicable, taxpayer must submit copies of previously filed FBARs.

### FBAR - Report of Foreign Bank and Financial Accounts

As you know, taxpayers who have foreign bank accounts are required to file an FBAR every year when the aggregate balance of ALL of their foreign accounts exceeds \$10,000. There can be substantial penalties imposed for failure to do this.

As part of the OVDI submission requirements, taxpayers must submit complete and accurate FBARs for all years covered by the voluntary disclosure.

If the taxpayer previously filed FBARs they must send in copies.

Just as a reminder ..... You should check that you still have access to CBRS so you can check your taxpayer's FBAR filing history.

## Offshore Financial Account Statements

- Taxpayers who are disclosing offshore financial accounts with an HAB in any year of \$500,000 or more must submit financial account statements reflecting all account activity for each of the tax years covered by their voluntary disclosure.
- Taxpayers must explain any differences between the amounts reported in the account statements and the tax returns.
- Taxpayers with accounts with an HAB less than \$500,000 are required to provide statements upon request.

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### Offshore Financial Account Statements

This requirement has a little twist to it ... if you have OVER \$500,00 in a foreign account you must submit your bank statements so we can verify your foreign income and confirm your HAB.

The taxpayer must explain any differences between the amounts indicated in the bank statements and their tax returns.

Taxpayers with accounts with less than \$500,000 must be prepared to provide bank records upon request. So basically, if you determine that you need the bank records to verify any part of the certification you should not hesitate to request them.

In the next lesson you'll hear more about completing the certification without complete bank records .... We can do it ... just document your file properly.

## Offshore Entities

- **Taxpayers must submit a statement identifying all offshore entities for the tax years covered by the voluntary disclosure whether held directly or indirectly.**
- **The statement must indicate their ownership or control share of such entities.**

### Offshore Entities

... foreign partnerships, foreign corporations, trusts, foundations, etc ... As part of making a complete and accurate disclosure the taxpayer must notify us of any offshore entities that they were involved in during the years covered by the voluntary disclosure.

There is no pro-forma format for this statement. The taxpayer may use any format that conveys the required information ... particularly their ownership or control share of each entity.

## Information Returns Required to be Filed

- When accounts or assets were held in the name of a foreign entity, taxpayers must submit complete and accurate amended (or original, if delinquent) information returns required to be filed.
- Forms, including but not limited to, the 3520, 3520-A, 5471, 5472, 926 and 8865 for all tax years covered by the voluntary disclosure.
- If the taxpayer is requesting that the IRS waive the information report requirement, they should submit a complete and signed Statement on Dissolved Entities. (See FAQ 29)

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### Information Returns

As you know, when accounts and/or assets are held in foreign entities or certain gifts and inheritances are received, taxpayers are required to inform the government through filing certain information returns. The more common information forms are the 3520, 3520-A, the 5471 and the 5472. At this point you are likely all to familiar with many of these forms.

So let's take a step back and review the unique decision that Taxpayers must make in OVDI ...

They may provide us with complete and accurate amended or original information forms and continue the involvement with the foreign entity. Of course, going forward they would report all of their income and file the required information returns.

OR ... if they choose ...

A taxpayer may admit that the entity was a mere nominee or alter ego that had no business purpose other than to hold the foreign financial accounts. In doing so we ask that the taxpayer dissolve or terminate the entity and sign a separate STATEMENT ON DISSOLVED ENTITIES. The relief to the taxpayer is that they would NOT have to file the various information returns as normally required. In some cases this could represent a substantial savings to the taxpayer.

Reminder ... not only is a STATEMENT ON DISSOLVED ENTITIES required but a 906

**that address dissolved entities would also be prepared. You can find the 2011 Dissolved Entity 906 on the national SharePoint site.**

| STATEMENT ON DISSOLVED ENTITIES   |                |          |          |                |  |  |             |  |  |                           |  |  |   |   |
|---|----------------|----------|----------|----------------|--|--|-------------|--|--|---------------------------|--|--|---|---|
| <p>In re: [Name and TIN of Taxpayer]</p> <p>I controlled and/or was beneficial owner of the following foreign entities (the "Offshore Entities") during the periods indicated:</p>  |                |          |          |                |  |  |             |  |  |                           |  |  |   |   |
| <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; padding: 2px;">Name of Entity</th> <th style="text-align: left; padding: 2px;">Entity 1</th> <th style="text-align: left; padding: 2px;">Entity 2</th> </tr> </thead> <tbody> <tr> <td style="padding: 2px;">Type of Entity</td> <td style="padding: 2px;"></td> <td style="padding: 2px;"></td> </tr> <tr> <td style="padding: 2px;">Date Formed</td> <td style="padding: 2px;"></td> <td style="padding: 2px;"></td> </tr> <tr> <td style="padding: 2px;">Date Dissolved/Terminated</td> <td style="padding: 2px;"></td> <td style="padding: 2px;"></td> </tr> </tbody> </table> | Name of Entity | Entity 1 | Entity 2 | Type of Entity |  |  | Date Formed |  |  | Date Dissolved/Terminated |  |  | <p>During the periods indicated above (dates formed through dates dissolved/terminated), I used the above entities for the purpose of holding foreign accounts and/or assets without disclosing my beneficial ownership. The Offshore Entities purported to be separate and apart from me but, in actuality, acted as my nominee or alter ego in holding the financial accounts and/or assets. I treated the financial accounts and/or assets of the Offshore Entities as my personal assets and accounts at all times after the formation of the Offshore Entities. The financial accounts and/or assets held in the names of the entities were my assets.</p> <p>I further acknowledge that during the period(s) stated above, I was responsible for filing voluntary returns under Form 8777 for corporations and Form 3500 and Form 3520-A for trusts and similar entities. Because these entities had no business purpose other than to act as my nominees, I request that the I.R.S. waive the requirement that I file such delinquent information returns as a condition of resolving my voluntary disclosure. In view of filing these returns, I will discontinue maintaining these entities prior to entering into a written closing agreement resolving my voluntary disclosure and provide information about their dissolution or termination upon request. I agree that if the I.R.S. waives this filing requirement, the waiver will have no effect on the applicability of I.R.C. § 6501(c)(8).</p> <p>Under the penalties of perjury, I declare that I examined the above statements, and, to the best of my knowledge and belief, they are true, correct, and complete.</p> | <p>[Signature of Taxpayer] _____ [Date] _____</p> <p>[Print Name] _____</p> <p>[Signature of Taxpayer] _____ [Date] _____</p> <p>[Print Name] _____</p> |
| Name of Entity  | Entity 1       | Entity 2 |          |                |  |  |             |  |  |                           |  |  |   |   |
| Type of Entity  |                |          |          |                |  |  |             |  |  |                           |  |  |   |   |
| Date Formed   |                |          |          |                |  |  |             |  |  |                           |  |  |   |   |
| Date Dissolved/Terminated   |                |          |          |                |  |  |             |  |  |                           |  |  |   |   |

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## Here's the Statement on Dissolved Entities.

**If you see this in the case file you know that you're going to need the Dissolved Entity 906 form to complete the certification.**

## Estates, Executors and Advisors

- If the taxpayer is a decedent's estate, and the foreign account, asset or entity was not adequately disclosed on a required estate tax return, Form 706, the responsible party must submit a complete and accurate estate tax return (an original if none has been filed, a supplemental if merely adding assets).
- Technical Analyst (b) (6) is our OVDI Estate and Gift Tax specialist.

### Estates, Executors and Advisors

This one sounds worse than it really is ... not all of our taxpayers are still alive ... especially in OVDI. Since our 2011 OVDI scope could potentially span eight years it is possible that your taxpayer may have died sometime during that period. It's up to the executor or advisor of the estate to make sure that all income tax returns are properly filed. But you already know that part ... here's where OVDI kicks in ...

Generally, when dealing with a decedent's estate we find that the foreign accounts or assets were not originally reported for estate tax purposes (on the Form 706) AND any income earned on these foreign assets was not reported for income tax purposes (either on the decedent's Form 1040 or on the estate's income tax return, the Form 1041).

As part of the OVDI submission requirements the Estate must file all required tax returns. These must be complete and accurate returns. If you secure the original returns, you should make a copy for your casefile and submit the originals for processing. Contact (b) (6) if you have any questions at all concerning estate tax questions.

This submission requirement also applies to any situation where a gift tax return would have been required.

In a nutshell .. In order to participate in OVDI ... a taxpayer must file all required tax returns ... the returns must be complete and accurate ... meaning that the foreign income is reported accurately!

## **What to do with decedent issues?**

**Whether you are working a case  
where your taxpayer is  
deceased prior to your  
involvement, or after your  
involvement, there are ways to  
deal with it....**

Some of the OVDI 11 disclosures are made on behalf of decedents, either by executors, personal representatives, or family members. Sometimes, your taxpayer may die during the course of the OVDI certification. Either way, you should always remember to contact the E & G liaison, (b) (6)

(b) (6)

Discuss the facts of the case, including the dollars involved, with the Liaison to determine if a referral to E & G may be warranted.

**Typically, the issues that could arise during the certification include, but are not limited to, the following:**

- The foreign bank account or other asset is the result of a gift or an inheritance
- The disclosing taxpayer is a donor (person who made the gift) or an estate
- The disclosing taxpayer is a decedent's estate reporting only income tax non-compliance

## Estate Tax Filing Requirements

| Tax / Calendar Year | Minimum Gross Estate |
|---------------------|----------------------|
| 2003                | \$1,000,000.         |
| 2004                | \$1,500,000.         |
| 2005                | \$1,500,000.         |
| 2006                | \$2,000,000.         |
| 2007                | \$2,000,000.         |
| 2008                | \$2,000,000.         |
| 2009                | \$3,500,000.         |

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If the decedent had a gross estate (the Fair Market Value of all assets owned by the decedent, including the offshore asset(s) on the date of his/her death) equal to or in excess of the filing requirement, then an Estate Tax Return, Form 706, should be filed.

You can research whether a Form 706 was filed on behalf of the decedent by checking IDRS. Using Command Code BMFOL, you would check: BMFOLI123-45-6789V (the decedent's SSN followed by the letter V). The only thing that will show on IDRS with that format is the 706, if filed.

For all intents and purposes, there was no estate tax in calendar year 2010. There are extenuating circumstances depending up on the size of the estate, so contact the E & G liaison with any questions regarding decedent's estates from 2010.

## **Gift Tax Filing Requirements**

| Tax / Calendar Year | Minimum Gross Estate |
|---------------------|----------------------|
| 2003                | \$11,000.            |
| 2004                | \$11,000.            |
| 2005                | \$11,000.            |
| 2006                | \$12,000.            |
| 2007                | \$12,000.            |
| 2008                | \$12,000.            |
| 2009                | \$13,000.            |
| 2010                | \$13,000.            |

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There may be times when you are told the taxpayer received the funds as gifts. If the donor was subject to US income tax, there should be a gift tax return, Form 709, filed by the donor reporting the gifts.

If there was no Form 709 filed by the donor (not the recipient), then you should again contact the E & G liaison to discuss a possible referral to E & G.

## PFIC

- The taxpayer must provide a statement whether the amended returns involve PFIC issues.
- The taxpayer must indicate if they choose to elect the alternative MTM PFIC method allowed in OVDI.

### PFIC – Passive Foreign Investment Company

... face it, you are an OVDI veteran ... PFIC doesn't scare you anymore! What did we learn in the 2009 program ... that a PFIC is really nothing more than a foreign mutual fund. I already told you that the taxpayer is required to indicate on the Foreign Account or Asset Statement if their investments include PFICs. This particular requirement now delves further into the PFIC issue and requires that the taxpayer make an election ... they can stay with the statutory 1291 PFIC computation or elect to utilize the alternative OVDI mark-to-market method.

I will add, that we expect any taxpayer who has PFIC issues to have properly accounted for this in their amended tax returns. PFICs are not new to most of the Representatives out there with OVDI clients. As a matter of fact ... PFICs were actually written into the 2011 OVDI FAQs this time ( see FAQ #10 ).

## Power of Attorney

- Taxpayers wishing to be represented must submit a Form 2848 with the unique OVDI language requirements.
- The OVDI Form 2848 is available on [irs.gov](http://irs.gov).
  - Sec. 3 – Matters must include:
    - » Income, civil penalties & FBARs
  - Sec. 5 – Acts authorized must include:
    - » The appropriate reference to FBAR related matters

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The Power of Attorney form is not really a submission requirement as not every taxpayer chooses to be represented but it seems to fit in here so let's cover it.

Not much is new here ...

Taxpayers could go onto [irs.gov](http://irs.gov) and download a F2848 with all the OVDI language requirements. Even though a newer version of the F2848 is now available we are NOT required to solicit the newer version. As long as the form you are dealing with has income, civil penalties and FBARs listed under section 3 and section 5 has the appropriate FBAR related matters reference you are good to go.

If for some reason you do not have a valid POA and need to seek a new one, you should use the current version of form 2848 ( revised 2/2012). The new form has been updated by Counsel to reflect the proper OVDI requirements. You'll find this newly updated OVDI f2848 in the handouts for this lesson.

Well ... there you have it ... the 2011 OVDI Submission Requirements

(b) (6)



## *Western Exam Area*

## Our Guiding Light



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I'm (b) (6) [REDACTED] Western Area...

We will now be discussing the FAQs for the 2011 OVDI program. Hopefully you have read over these FAQs and have a basic understanding of what they contain. Some of these FAQs were the same ones that we used in the 2009 program so they should not be new to you, however, there are also some FAQs that are new to the 2011 program and we will spend the next little while going over the new FAQs.

## **FAQs Our Guiding Light**

- **Convey major procedures and terms of the 2011 OVDI**
- **Have become the “Code” for OVDI**
- **Issued February 8, 2011**
- **Numerous updates thru August, 2011**

Similar to the 2009 program, the FAQs for the 2011 OVDI are in place to help convey the major procedures and terms of the program. You and the representatives will be citing these FAQs and referring to them as the “Code.” This is not new to the 2011 program and I am sure you were all very familiar with the 2009 FAQs and quoted them the same way.

The 2011 program was announced on February 8, 2011. Simultaneously, the FAQs were released to help everyone understand the terms of the new program. If you look at the first page of the FAQs, you will see a list of updates that have been made to the FAQs since they were released. You will be able to see that there were numerous updates with the most recent updates being listed first.

## Sections of FAQs

- **Overview** (1-6)
- **Key Features of Initiative** (7-11)
- **Eligibility for this Initiative** (12-21)
- **2011 OVDI Process** (22-30)

In the 2009 program the FAQs were written as needed and the FAQs were not listed in a topical sequence, but rather were listed as the questions were answered. The FAQs for the 2011 program have been organized into sections. This should make it easier to locate a specific FAQ. The first section is the

**Overview** - These questions related to:

- Why was the initiative announced
- What are the objectives of the initiative,
- How does this differ from the 2009 OVDP
- What are some of the civil and criminal penalties that may apply if the taxpayer does not come into the program

**Key features of Initiative**- This section covers:

- What are the terms (what must the taxpayer do) of the 2011 program.
- Penalty framework
- Years covered
- PFIC and Alt PFIC options

**Eligibility for this Initiative**

- As the heading states this section covers Who is eligible and ineligible to file
- Who should file a Voluntary Disclosure; and
- Who should not file a voluntary disclosure but just file the information returns

**2011 OVDI Process**

- How to make a voluntary disclosure
- What documents are to be provided
- How to request an extension
- How will it be processed and how long will it take
- What to do if records are hard to acquire.

## Sections of FAQs

- **Calculating the Offshore Penalty (31-41)**
- **Statute of Limitations (42-43)**
- **FBAR Questions (44-46)**
- **Taxpayer Representatives (47-48)**
- **Case Resolution (49-53)**

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### **Calculating the Offshore Penalty –**

- Conversion rate for foreign currency
- Is there an amount of de minimis unreported income?
- What is the lookback period for computing the penalty
- What kind of assets are included in the penalty base
- Transfers and how they effect the HAB
- Jointly held accounts – who is liable for the penalty

### **Statute of Limitations**

- How can IRS make adjustments after 3 year statute has expired
- Do I need to extend the statute

### **FBAR Questions**

- How to file an FBAR
- Where to get answers to FBAR questions

### **Taxpayer Representatives**

- Responsibilities of the Representatives
- How to complete a 2848 – what items are needed

### **Case Resolution** –These FAQs deal with the exception to the standard 25% offshore penalty.

- Can the agents settle the cases for a lower penalty
- What if the taxpayer disagrees - Is appeals an option?
- When is it a good idea for the taxpayer to Opt Out of the program. With examples
- What happens when a taxpayer opts out.
- Criteria for 5% penalty
- Criteria for 12.5% penalty

Now that we have discussed the basic outline of the FAQs and how they are organized, let's look at the main FAQs that are new to the 2011 program. I don't think we need to look at all of the FAQs because there are some that are similar or exactly the same as the 2009 program.

## FAQs of Interest

- **FAQ 7**

- **What are the terms of the 2011 Offshore Voluntary Disclosure Initiative?**

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### FAQ 7

*<Read the question>*

The content of this FAQ has already been covered by (b) (6) earlier in the presentation, however, I mention it only to bring your attention to the content of FAQ 7 and not to cover the material again. FAQ 7 explains...

## FAQs of Interest

- **FAQ 7**
  - Provide previously filed 1040/1040X
  - Complete and accurate 1040X
  - Provide complete and accurate Information Returns
  - Cooperate in the OVDI process
  - Pay applicable penalties accuracy/delinquency and Offshore penalty.
  - Execute closing agreement

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that the taxpayer must:

*<read bullet points of slide>*

## FAQs of Interest

- **FAQ 25**

- After I am notified by CI that my disclosure is timely, what other information will I have to provide?

FAQ 7 provided the terms of the program and FAQ 25 states the information the taxpayer needs to provide in order to make a disclosure.

<read FAQ>

These are the documents that (b) just covered, but they are also listed in FAQ 25 .

## FAQs of Interest

- **FAQ 25**

- You can request additional documents in order to certify that the voluntary disclosure is correct, accurate, and complete.

In the answer to FAQ 25 it also states that the examiner may request specific additional information in order to process your request. Simply because the document was not specifically requested in FAQ 25, it does not mean that you cannot request it later. An example would be the banks statements for accounts with an highest aggregated balance of less than \$500,000. You can request any document necessary in order to determine that the disclosure is correct, accurate, and complete. Obviously not all of these disclosures are the same and you will need to request documents specific to each taxpayer

You are not limited to the documents that were required to be submitted in order to be accepted into the program.

*(Depending on how much detail [b] went into this on his presentation earlier I might expand more on this topic or not address this at all if [b] already covers this.)*

## **FAQs of Interest**

- **FAQ 28**
  - **How long should the process take before it is completed?**

*<read FAQ>*

## FAQs of Interest

- **FAQ 28**
  - The 2011 OVDI will operate on a first-come, first-serve basis.

The cases will be assigned to the field in the same order that they were received into the disclosure program.

## FAQs of Interest

- **FAQ 35**
  - **What kind of assets does the 25 percent offshore penalty apply to?**

I am sure that some of you had experience in the 2009 program with taxpayer or representatives have questions or concerns about what assets were included in the offshore penalty base. In the 2009 program we had the FAQ 20 and 37 which some people felt were not detailed enough and left it a little ambiguous. We took the stance that all assets with tax non-compliance, regardless of form, were included in the penalty base. In the 2011 program FAQ 35 addresses this question:

<read FAQ>

## FAQs of Interest

- **FAQ 35**

- **The offshore penalty is intended to apply to all of the taxpayer's offshore holdings that are related in any way to tax non-compliance, regardless of the form of the taxpayer's ownership or the character of the asset.**

The answer to FAQ 35 states:

*<read slide>*

I know a number of representatives had a hard time agreeing to the fact that we were adding Non-financial foreign assets such as real property, business interest, or art work to the penalty. Actually a couple of weeks ago a representative said, "I know we need to include the rental property in the highest aggregate balance in the 2011 program, but where is your authority to include this in the 2009 program." I think that FAQ 35 is a much better description of the type of assets subject to the 25% offshore penalty.

Nothing has changed in the process of calculating the highest aggregate balance, it is just explained in a more direct and concise manner.

## FAQs of Interest

- **FAQ 36**

– A taxpayer owns valuable land and artwork located in a foreign jurisdiction. This property produces no income and there were no reporting requirements regarding this property. Must the taxpayer report the land and artwork and pay a 25% penalty? What if the property produced income that the taxpayer did not report?

<read FAQ>

FAQ 35 was an improvement from the 2009 program and the answer to FAQ 36 is also an improvement as it gives a good definition of tax non-compliance. There are two types of tax non-compliance and this FAQ explains both.

## FAQs of Interest

- **FAQ 36 – (tax non-compliance)**
  - ...The offshore penalty is intended to apply to offshore assets that are related to tax non-compliance. Thus, if offshore assets were acquired with funds that were subject to U.S. tax but on which no such tax was paid, the offshore penalty would apply...

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*<read slide>*

The first part of tax non-compliance is: “if the offshore assets were acquired with funds that were subject to U.S. tax but on which no such tax was paid.”

We first look to the source of the funds to determine tax non-compliance.

## FAQs of Interest

- **FAQ 36 – (tax non-compliance)**
  - ...if the assets produced income subject to U.S. tax during 2003-2010 which was not reported, the assets will be included in the penalty computation regardless of the source of the funds used to acquire the assets.

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The second situation that could cause tax non-compliance is “if the asset produced income subject to U.S. tax during 2003-2010 which was not reported.” This will be considered tax non-compliance regardless if the source of the funds had been previously taxed.

This isn’t new as we defined tax non-compliance the same way in the 2009 program, however, in the 2011 program, the complete definition of tax non-compliance is included in the FAQs.

## **FAQs of Interest**

- **FAQs 50, 51, 52, and 53**
  - **New FAQs for 2011 initiative, however...**

Technically FAQs 50, 51, 52, and 53 are new for the 2011 program. However, when the 2011 FAQs were announced in February 2011, we immediately applied these FAQs to the 2009 program.

I am sure that you know, or at least “knew,” these FAQs at one point in time. Since they are very important to this program, we will review these FAQs.

## **FAQs of Interest**

- **FAQ 50**
  - **Will examiners have any discretion to settle cases?**

*<read FAQ>*

## FAQs of Interest

- **FAQ 50**

- **Examiner will compare the amount due under this offshore initiative to the tax, interest, and applicable penalties (at their maximum levels and without regard to issues relating to reasonable cause, willfulness, mitigating factors, or other circumstances that may reduce liability)...**

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Obviously, the important change from the FAQ 35 in the 2009 program to the FAQ 50 in the 2011 program is the fact that the offshore penalty will be compared to “all other penalties that would otherwise apply” at their “maximum levels and without regard to issues relating to reasonable cause, willfulness, mitigating factors, or other circumstances that may reduce liability.”

This was a big change for the 2009 program as we were previously following the former FAQ 35 until it was replaced with FAQ 50 from the 2011 program. If all of the information return penalties such as FBAR, 5471s, 3520s, etc were computed at their maximum levels, without regard to reasonable cause, willfulness, etc. and they were less than the 25% offshore penalty, then the taxpayer would only be liable pay the lesser penalty under FAQ 50. This penalty, of course, would have to be approved by a Technical Advisor.

If the taxpayer believes that they have reasonable cause and the penalties that otherwise would apply would be lower than the offshore penalty, then the taxpayer can look to FAQ 51 for guidance.

## FAQs of Interest

- **FAQ 51**

- **If, after making a voluntary disclosure, a taxpayer disagrees with the application of the offshore penalty, what can the taxpayer do?**

<read FAQ>

As with the 2009 program, the taxpayers are able to opt out of the 2011 OVDI penalty structure. The “opt out and removal guide for the 2009 OVDP and the 2011 OVDI” will continue to be used for opt out procedures.

## FAQs of Interest

- **FAQ 51**

- ...Taxpayers are reminded, that even after opting out of the Service's civil settlement structure, they remain within Criminal Investigation's Voluntary Disclosure Practice. Therefore, the taxpayers are still required to cooperate fully with the examiner by providing all requested information and records and must still pay or make arrangements to pay the tax, interest and penalties they are ultimately determined to owe...

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Once the taxpayers opt out of the Service's civil settlement structure, they would remain in Criminal Investigation's Voluntary Disclosure Practice.

By remaining in the voluntary disclosure practice, they would be required to cooperate fully. Cooperation is considered to be: providing all the requested information and paying, or making arrangements to pay the tax, interest, and penalties.

If the taxpayers do not cooperate and provide all the information requested, then the case **may** be referred back to Criminal Investigations.

Since we are comparing the penalties that would otherwise apply at their maximum levels without regard to willfulness, reasonable cause, mitigating factors, or anything else that would reduce the liability, there are legitimate reasons for the taxpayer to want to opt out of the Service's civil settlement structure. However, there are other taxpayers who would not benefit from opting out of the civil settlement structure and therefore should not opt out.

FAQs 51.1 and 51.2 go on to provide scenarios to illustrate the effect of a

taxpayer opting out of the civil settlement structure. Let's look at a few of these scenarios now. We will first start with an example of when it would be beneficial for the taxpayer to opt out of the settlement structure.

## **FAQ 51.1 Example 2**

### **Unreported Income and Failure to File FBAR**

- U.S. citizen who lived abroad in 2007, 2008, and 2009**
- In 2007, TP opened foreign account in Country X**
- Highest account balance during 2007, 2008, and 2009 was \$200,000**
- TP filed income tax returns all years**
- TP filed FBARs for 2008 and 2009 but not 2007**

The taxpayer is a U.S. citizen, who lived abroad in 2007, 2008 and 2009. While living abroad, the taxpayer opened an account in 2007 with a bank located in Country X. Assume that the highest account balance during the three years (2007, 2008 and 2009) was \$200,000. The taxpayer filed U.S. income tax returns for all years but only filed an FBAR for 2008 and 2009, not for 2007.

## **FAQ 51.1 Example 2**

### **Unreported Income and Failure to File FBAR**

- Taxpayer was unaware of FBAR filing obligations until 2008**
- Taxpayer failed to report \$2,000 of interest income**
- Tax deficiency was \$700**
- Taxpayer does not otherwise qualify for a reduced penalty**

The taxpayer was unaware of his FBAR filing obligation until having his return professionally prepared in 2008. The taxpayer failed to report approximately \$2,000 of interest income from the account, and, is therefore, unable to simply file a delinquent FBAR for 2007 as provided in FAQ 17 (FAQ 17 is similar to FAQ 9 in the 2009 program. FAQ 17 states that if you reported and paid tax on all taxable income, but failed to file FBARs, then the tp should not use the VDP, but file your delinquent FBARs) The tax deficiency was \$700. In addition, assume the taxpayer does not otherwise qualify for a reduced penalty under FAQ 52 or 53.

|   | Civil Settlement Structure | Opt Out and 1 year nonwillful FBAR penalty | Opt out - assume the civil fraud penalty applied |
|---|----------------------------|--|--|
| Income Tax Due (not including interest) | \$700                      |  |  |
| 20% Accuracy Penalty                    | \$140                      |  |  |
| 25% Offshore Penalty                    | \$50,000                   |  |  |
| Civil Fraud Penalty                     | 0                          |  |  |
| FBAR Penalty                            | 0                          |  |  |
| Total                                   | \$50,840                   |  |  |

The Offshore Penalty under 2011 OVDI will be \$50,000 (i.e., 25% of \$200,000). The taxpayer would also be required to pay the tax deficiency for each year, interest on the deficiency, and the 20% accuracy-related penalty on the deficiency.

|   | Civil Settlement Structure | Opt Out and 1 year nonwillful FBAR penalty | Opt out - assume the civil fraud penalty applied |
|---|----------------------------|--|--|
| Income Tax Due (not including interest) | \$700                      | \$700                                      |  |
| 20% Accuracy Penalty                    | \$140                      | \$140                                      |  |
| 25% Offshore Penalty                    | \$50,000                   | 0  |  |
| Civil Fraud Penalty                     | 0                          | 0  |  |
| FBAR Penalty                            | 0                          | \$10,000                                   |  |
| Total                                   | \$50,840                   | \$10,840                                   |  |

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If the taxpayer elected to opt out, the taxpayer will be subject to tax, penalties, and interest on the unreported income and, if, upon examination, IRS determines that the failure to file the FBAR was not willful, the taxpayer will be subject to a non-willful FBAR penalty of no more than \$10,000 for failing to file an FBAR for 2007. If IRS determines that the FBAR violation was due to reasonable cause, then no FBAR penalty will be imposed.

|   | Civil Settlement Structure | Opt Out and 1 year nonwillful FBAR penalty | Opt out - assume the civil fraud penalty applied |
|---|----------------------------|--|--|
| Income Tax Due (not including interest) | \$700                      | \$700                                      | \$700  |
| 20% Accuracy Penalty                    | \$140                      | \$140                                      | 0  |
| 25% Offshore Penalty                    | \$50,000                   | 0  | 0  |
| Civil Fraud Penalty                     | 0                          | 0  | \$525  |
| FBAR Penalty                            | 0                          | \$10,000                                   | \$10,000   |
| Total                                   | \$50,840                   | \$10,840                                   | \$11,225   |

If the civil fraud penalty is determined to be owed, then total amount would increase as the 20% accuracy penalty would not be assessed but the Civil Fraud penalty of \$525 (75% of the \$700) would apply.

This taxpayer would benefit from opting out of the civil settlement penalty structure, since the 25% offshore penalty would be greater than the penalty would be if a one year nonwillful FBAR penalty and the civil fraud penalty were applied.

## **FAQ 51.2 Example 4 Large Unreported Gain**

- In 2008 taxpayer opened a checking account in Country A with previously U.S. taxed funds**
- In 2008 taxpayer failed to report the sale of Apartment building in Country A**
  - Sales Price \$10 million**
  - Unreported Gain \$6 million**
  - Related tax deficiency was \$2.1 million**
- \$10 million deposited into the foreign bank account.**

The taxpayer, a U.S. citizen, opened a checking account in Country A in 2008 with funds upon which U.S. taxes were previously paid. The taxpayer discloses that he had failed to report the sale, in 2008, of an apartment building in Country A that he owned. The apartment building was valued at \$10 million and the taxpayer's unreported gain on the sale was \$6 million. The related tax deficiency was \$2.1 million. The taxpayer deposited the entire \$10 million, from the sale, in the checking account with the foreign bank.

## **FAQ 51.2 Example 4 Large Unreported Gain**

- \$10 Million was the highest balance during the year and at June 30 of the following year**
- A foreign grantor trust was established in 2008**
- The building was transferred to the foreign trust prior to the sale in 2008**
- The Form 3520 was not filed**

\$10 million represented the highest balance in the foreign checking account during the year and was the balance in the account as of June 30 of the following year, the date that an FBAR was due. The apartment building that was sold was held in a foreign trust that was a grantor trust (with the taxpayer as the grantor). The taxpayer established the trust in 2008, just prior to the sale of the apartment building, and transferred the building to the trust. The taxpayer did not file a Form 3520 to report the creation of the trust and the transfer of property into the trust.

|   | Civil Settlement Structure | Opt Out and 1 year willful FBAR penalty | Opt out - assume the civil fraud penalty applied |
|---|----------------------------|---|--|
| Income Tax Due (not including interest) | \$2,100,000                |   |  |
| 20% Accuracy Penalty                    | \$420,000                  |   |  |
| 25% Offshore Penalty                    | \$2,500,000                |   |  |
| Civil Fraud Penalty                     | 0                          |   |  |
| § 6677 Penalty                          | 0                          |   |  |
| FBAR Penalty                            | 0                          |   |  |
| Total                                   | \$5,020,000                |   |  |

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The taxpayer would also be required to pay the \$2,100,000 tax deficiency, interest, and a 20% accuracy-related penalty. A 20% penalty on a \$2,100,000 deficiency is \$420,000. The Offshore Penalty under 2011 OVDI will be \$2,500,000 (i.e., 25% of \$10 million).

|   | Civil Settlement Structure | Opt Out and 1 year willful FBAR penalty | Opt out - assume the civil fraud penalty applied |
|---|----------------------------|---|--|
| Income Tax Due (not including interest) | \$2,100,000                | \$2,100,000                             |  |
| 20% Accuracy Penalty                    | \$420,000                  | \$420,000                               |  |
| 25% Offshore Penalty                    | \$2,500,000                |   |  |
| Civil Fraud Penalty                     | 0                          | 0                                       |  |
| § 6677 Penalty                          | 0                          | \$3,500,000                             |  |
| FBAR Penalty                            | 0                          | \$5,000,000                             |  |
| Total                                   | \$5,020,000                | \$11,020,000                            |  |

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If the taxpayer opts out of the civil settlement structure he will still owe tax, penalties, and interest with respect to the \$2,100,000 deficiency as the statute is still open on the 2008 tax year. The taxpayer would also be subject to FBAR penalties for all other open years, if the aggregate balance in the checking account exceeded \$10,000 during each year.

If the taxpayer elected to opt out, he could face an FBAR penalty with respect to the 2008 calendar year of \$5,000,000 (i.e., a 50% willful FBAR penalty on the balance in the checking account as of June 30, the date that the FBAR was due).

|   | Civil Settlement Structure | Opt Out and 1 year willful FBAR penalty | Opt out - assume the civil fraud penalty applied |
|---|----------------------------|---|--|
| Income Tax Due (not including interest) | \$2,100,000                | \$2,100,000                             | \$2,100,000                                      |
| 20% Accuracy Penalty                    | \$420,000                  | \$420,000                               | 0  |
| 25% Offshore Penalty                    | \$2,500,000                |   | 0  |
| Civil Fraud Penalty                     | 0                          | 0                                       | \$1,575,000                                      |
| § 6677 Penalty                          | 0                          | \$3,500,000                             | \$3,500,000                                      |
| FBAR Penalty                            | 0                          | \$5,000,000                             | \$5,000,000                                      |
| Total                                   | \$5,020,000                | \$11,020,000                            | \$12,175,000                                     |

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Upon examination, the revenue agent may determine that the nonreporting was due to fraud. In that case, the civil fraud penalty on the \$2.1 million tax deficiency attributable to fraud would be \$1,575,000 (i.e., 75% of \$2,100,000). The IRC § 6677 penalty for failing to file the Form 3520 information return would be an additional \$3.5 million (i.e., 35% of \$10 million).

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