

# **U.S. Crackdown on International Tax Non-Compliance Continues: New Developments and Options**

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# Goals of Presentation

- Significant changes to the OVDP
- New Streamlined Filing Compliance Procedures
- Delinquent Submission Procedures
- Other Developments in IRS Offshore Compliance

# Offshore Voluntary Disclosure Revisions

## – Major Revisions

- Potentially significant changes from 2012 OVDP depending on client's situation
  - Additional information required at time of preclearance
  - New 50% penalty under certain circumstances
  - Accelerated payment of the offshore penalty
  - Lower penalty scenarios (5% and 12.5%) have been removed and replaced by the Streamlined Filing Compliance Procedures
  - The old FAQ 17 & 18 have been removed and replaced by Delinquent Submission Procedures

# Offshore Voluntary Disclosure Revisions

## – Additional Information at Time of Preclearance

- Taxpayers must show their cards earlier
- In addition to the identifying information, taxpayers must identify:
  - Financial institutions involved
  - Entities involved with the undisclosed assets/income
- This appears to signify that the IRS has amassed great deal of data regarding U.S. taxpayers noncompliance against which they are checking names

# Offshore Voluntary Disclosure Revisions

## New 50% Penalty

- Applies to taxpayer who entered OVDP after August 4, 2014
- Applies when taxpayer has or had an account with a financial institution or dealt with a facilitator have been identified as being under investigation or as cooperating with the government.
- Once triggered by one account, the 50% penalty applies to **all** noncompliant assets

# Offshore Voluntary Disclosure Revisions

## – New 50% Penalty Continued

- IRS maintains a non-exclusive list of financial institutions and facilitators the dealings with which would trigger the penalty
- At the time of first publication in mid-2014, the list included 10 names
- Three additional names added since then
- Unclear at this point how the cooperation of Swiss banks will affect this list
- The list may not necessarily include all financial institutions and facilitators.

# Offshore Voluntary Disclosure Revisions

## – New 50% Penalty Continued

- Current List

- UBS AG
- Credit Suisse AG, Credit Suisse Fides, and Clariden Leu Ltd.
- Wegelin & Co.
- Liechtensteinische Landesbank AG
- Zurcher Kantonalbank
- swisspartners Investment Network AG, swisspartners Wealth Management AG, swisspartners Insurance Company SPC Ltd., and swisspartners Versicherung AG
- CIBC FirstCaribbean International Bank Limited, its predecessors, subsidiaries, and affiliates
- Stanford International Bank, Ltd., Stanford Group Company, and Stanford Trust Company, Ltd.
- The Hong Kong and Shanghai Banking Corporation Limited in India (HSBC India)
- The Bank of N.T. Butterfield & Son Limited (also known as Butterfield Bank and Bank of Butterfield), its predecessors, subsidiaries, and affiliates
- Sovereign Management & Legal, Ltd., its predecessors, subsidiaries, and affiliates (effective 12/19/14)
- Bank Leumi le-Israel B.M., The Bank Leumi le-Israel Trust Company Ltd, Bank Leumi (Luxembourg) S.A., Leumi Private Bank S.A., and Bank Leumi USA (effective 12/22/14)
- BSI SA (effective 3/30/15)

# Offshore Voluntary Disclosure Revisions

## – New 50% Penalty Continued

- In order to avoid the 50% penalty, the preclearance must be submitted prior to:

“an event has already occurred that constitutes a public disclosure that either (a) the foreign financial institution where the account is held, or another facilitator who assisted in establishing or maintaining the taxpayer’s offshore arrangement, **is or has been under investigation by the IRS or the Department of Justice in connection with accounts that are beneficially owned by a U.S. person;** (b) the foreign financial institution or other facilitator **is cooperating with the IRS or the Department of Justice in connection with accounts that are beneficially owned by a U.S. person** or (c) the foreign financial institution or other facilitator **has been identified in a court- approved issuance of a summons seeking information about U.S. taxpayers who may hold financial accounts (a “John Doe summons”) at the foreign financial institution or have accounts established or maintained by the facilitator.** Examples of a public disclosure include, without limitation: a public filing in a judicial proceeding by any party or judicial officer; or public disclosure by the Department of Justice regarding a Deferred Prosecution Agreement or Non-Prosecution Agreement with a financial institution or other facilitator. “



# Offshore Voluntary Disclosure Revisions

## – Accelerated Payment of the Offshore Penalty

- Prior to July 2014, the payment of the offshore penalty would take place at the closing of the case
- Currently, the payment of the 27.5%/50% penalty is required at the time of submission of the OVDP package (amended returns, FBARs, etc.)
- According to the IRS, the payment of the offshore penalty is required even if taxpayer intends to opt out.
- The unintended consequence of this new rule is that it potentially prevents certain taxpayers from entering OVDP.

# Offshore Voluntary Disclosure Revisions

## – Miscellaneous

- Lower penalty scenarios (5% and 12.5%) have been removed and replaced by the Streamlined Filing Compliance Procedures (discussed next)
- The old FAQ 17 & 18 have been removed and replaced by Delinquent Submission Procedures

# Streamlined Filing Compliance Procedures

## – General

- New and potentially very favorable way to resolve past noncompliance associated with foreign income and assets
- Taxpayer must be “non-willful” in order to take advantage of these procedures
- Taxpayer must submit a certification form which includes an explanation of reasons for noncompliance and sign the same under penalty of perjury
- Unlike OVDP, no closure - IRS reserves the right to audit and assess higher penalties

# Streamlined Filing Compliance Procedures

## – General

- Streamlined procedures and OVDP are now mutually exclusive
  - Once the streamlined submission is made, the taxpayer can no longer change his/her mind and enter OVDP
  - Once the OVDL is submitted, the taxpayer cannot switch to Streamlined procedures
  - Taxpayers who submitted the OVDP prior to July 1, 2014 and whose case has not yet been resolved may seek “transitional treatment”
    - » Transitional treatment is a hybrid between OVDP and the Streamlined procedures

# Streamlined Filing Compliance Procedures

## – General

- Different eligibility criteria and results for taxpayers residing in and outside of the U.S.
- Designed for individuals (and estates)
- Taxpayer must not be under audit or investigation
- Taxpayer who has previously made a quiet disclosure can still participate
- Do *not* try to sneak in if you have willful or criminal exposure. The Streamlined program will *not* protect the taxpayer from willful penalties or criminal prosecution.

# Streamlined Filing Compliance Procedures

- **Streamlined Domestic Offshore Procedures**
  - Intended for taxpayers who reside in the U.S.
  - Requires amendment of three years of income tax returns
    - » This filing must include all international information returns which apply
    - » Not available to non-filers (by design)
  - Requires filing of six years of FBARs
  - Requires payment of tax and interest with respect to the amendments
    - » Note that taxpayers who have previously made a quiet disclosure and have been assessed a penalty will not have the penalty abated
  - Requires payment of 5% penalty (discussed next)

# Streamlined Filing Compliance Procedures

## – Streamlined **Domestic** Offshore Procedures

- **5% penalty**

- Applies to foreign financial assets

- » This potentially leads to a *narrower* penalty base than in OVDP

- Applies when there is *either* income tax noncompliance *or* information return noncompliance

- » This potentially leads to a *broader* penalty base than in OVDP

# Streamlined Filing Compliance Procedures

- Streamlined **Domestic** Offshore Procedures
  - 5% penalty
    - Applies to the aggregate value of assets as of 12/31 of each applicable year
      - » Unlike the maximum value rule in OVDP, this rule prevents duplicative application of penalty without the need to trace transfers.
    - The steps in calculation of the penalty must be closely followed to ensure proper calculation of the penalty (different time periods between FBAR and income tax)



# Streamlined Filing Compliance Procedures

## – Streamlined **Foreign** Offshore Procedures

– Applies to taxpayers “not residing the U.S.”

» U.S. citizens or lawful permanent residents

- In *one* or more of the last three years for which (extended) due date has not passed:

- Must not have U.S. abode; and
- Must not have been present in the U.S. for at least 330 full days

» Non-U.S. citizens or lawful permanent residents

- Must not meet the substantial presence test under 7701(b)(3) in *one* or more of the last three years for which (extended) due date has not passed.

# Streamlined Filing Compliance Procedures

## – Streamlined **Foreign** Offshore Procedures

- Requires filing or amendment of three years of income tax returns
  - » This filing must include all international information returns which apply
  - » Is available to non-filers
- Requires filing of six years of FBARs
- Requires payment of tax and interest with respect to the amendments
  - » Note that taxpayers who have previously made a quiet disclosure and have been assessed a penalty will not have the penalty abated
- **NO INFORMATION RETURN PENALTIES**
- **NO DELINQUENCY PENALTIES WITH RESPECT TO UNFILED RETURNS**

# Delinquent Submission Procedures

## – General

- “FAQ 17 & 18” have been removed and replaced by
  - Delinquent *FBAR* Submission Procedures; and
  - Delinquent *International Information Return (IIR)* Submission Procedures
- Taxpayer cannot be under audit or investigation
- IRS must not have contacted the taxpayer about unfiled FBAR or international information return(s)
- There must be no unreported income or tax
  - Note slight difference in language (probably unintentional?)

# Delinquent Submission Procedures

## – Delinquent **FBAR** Submission Procedures

- File delinquent FBARs
  - Note that guidance does not state how many years to file
  - Is six years enough? 6-Year Civil SOL
- Provide an explanation why filing late
- IRS will not impose penalty if all income had been reported (and other criteria of delinquent filing procedures are met)
- This procedure is very similar to FAQ 17

# Delinquent Submission Procedures

## – Delinquent **IIR** Submission Procedures

- File delinquent IIRs
  - Except for Forms 3520 and 3520-A, IIRs must be part of amended returns
  - Note that guidance does not state how many years to file
  - Is six or eight years enough? ... NO SOL
- Provide *reasonable cause statement*
  - Penalty relief is no longer automatic
- IRS will not impose penalty if all income had been reported *and if reasonable cause exists* (and other criteria of delinquent filing procedures are met)
- This procedure is different from FAQ 18

# The Crackdown Continues...

## Other Developments

- Swiss bank program
- Data leaks leading to audits/investigations
- Foreign financial institutions' compliance with FATCA leading those previously unaware of U.S. obligations to clean things up
- IRS looking at expats