Evaluation of an IRS Undisclosed Offshore Account IDR

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Undisclosed foreign financial accounts represent a target-rich environment for the government. Awaiting receipt of an IRS examination IDR is not a viable option for any U.S. person.

Everything seems okay . . . until it isn't! IRS Commissioner Douglas Shulman recently said, "If you are a U.S. individual holding overseas assets, you must report and pay your taxes or we will be increasingly focused on finding you."[1] The government's war on undisclosed interests in foreign financial accounts includes:

- the worldwide deployment of civil and criminal tax enforcement resources;
- the development of relationships with corresponding taxing agencies in other countries;
- treaty-based information exchanges;
- the use of the civil summons process to seek the identification of account holders in foreign institutions operating within the jurisdiction of the United States;
- indictments of foreign institutions and their bankers operating within the jurisdiction of the United States;
- the receipt of information from whistleblowers and informants;
- cooperation from taxpayers, advisers, foreign banks, and bankers who have been criminally prosecuted;
- the threat of future disclosures under the Foreign Account Tax Compliance Act;[2] and
- data-mining submissions received from participants in initiatives designed to encourage voluntary compliance.

Government tax initiatives offer reduced penalties to taxpayers who voluntarily come into compliance before the IRS is aware of their tax transgressions. The 2009 IRS offshore voluntary disclosure program (OVDP) and the 2011 IRS offshore voluntary disclosure initiative (OVDI) targeted U.S. taxpayers with previously undisclosed interests in foreign financial accounts and assets.[3] For eligible taxpayers, the OVDP and the OVDI provided the certainty of civil penalty relief and no criminal prosecution. Heightened tax enforcement efforts and increased penalties for noncompliance must be coupled with efforts to continually encourage taxpayers to voluntarily come into compliance before the government is aware of their prior tax and reporting indiscretions. Further, the public must perceive that heightened future civil and criminal tax enforcement efforts will effectively ferret out a significant proportion of the remaining noncompliant taxpayer community. The future is uncertain at best for U.S. persons who failed to participate in the OVDP or the OVDI and have any remaining undisclosed interests in foreign financial accounts.

U.S. citizens and residents are taxed on their worldwide income, subject to some very specific

[1]Prepared statement by Shulman at the American Institute of Certified Public Accountants National Conference, Oct. 26, 2009, *Doc 2009-23542, 2009 TNT 205-22*.

[2]FATCA, which was enacted as part of the Hiring Incentives to Restore Employment Act of 2010, added sections 1471 through 1474 to target noncompliance by U.S. taxpayers having undisclosed interests in foreign accounts. Beginning in 2014, FATCA will require foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. To avoid being withheld upon under FATCA, a participating FFI must enter into an agreement with the IRS to identify U.S. accounts, report specified information to the IRS regarding U.S. accounts, and withhold a 30 percent tax on some payments to nonparticipating FFIs and account holders who are unwilling to provide the required information. FFIs that do not enter into an agreement with the IRS will be subject to withholding on specified types of payments, including U.S.-source interest and dividends, gross proceeds from the disposition of U.S. securities, and passthrough payments.

[3]The OVDP expired on October 15, 2009, and the OVDI expired on September 9, 2011.

exemptions, whether they live inside or outside the United States. Foreign income must be reported on a U.S. tax return whether or not the person receives a Form W-2, a Form 1099, or the foreign equivalent of those forms. Foreign-source income includes but is not limited to earned and unearned income such as wages and tips, interest, dividends, capital gains, pensions, rents, and royalties. Some U.S. persons are required to file Form TD F 90-22.1, ''Report of Foreign Bank and Financial Accounts (foreign bank account report, or FBAR),'' with the government if they have a reportable interest in one or more financial accounts in a foreign country that have an aggregate value exceeding $10,000 at any time during the calendar year.

The IRS has been aggressively attempting to uncover tax avoidance schemes involving the use of domestic or offshore financial accounts and arrangements. The government has long suspected that some individuals might be using credit or debit cards linked to foreign financial accounts or foreign nominee entities to conceal earnings and evade payment of U.S. taxes. Indeed, some schemes use credit and debit cards to provide relatively easy — many believe untraceable — access to their foreign accounts maintained in various tax havens and other countries. Sometimes funds are diverted overseas through the claiming of false deductions for payments to foreign entities, the diversion of payments from legitimate foreign business transactions, or other methods. And sometimes funds are repatriated as disguised gifts or loans from foreign relatives or nominee entities.

Most individuals wrongly believe that prior tax indiscretions can somehow be routinely resolved in a purely civil manner, without a criminal investigation or prosecution. However, within the past few years at least 40 U.S. taxpayers and another 20 advisers (bankers, lawyers, consultants, and so on) have been criminally indicted for activities associated with U.S. persons holding undeclared interests in foreign financial accounts. Untold others are targets or subjects of ongoing federal criminal investigations.[4] In July 2010 various individuals around the country received a letter from the Justice Department's Tax Division, stating:

> Re Investigation of Undeclared Foreign Financial Accounts
>
> The Department of Justice is conducting an investigation of U.S. taxpayers who may have violated federal criminal laws by failing to report they had a financial interest in, or signature authority over, a financial account located in a foreign country. We have reason to believe that you had an interest in a financial account in India that was not reported to the IRS on either a tax return or FBAR, Department of Treasury Form TD F 90-22.1, report of Foreign Bank and Financial Account. You are advised that the destruction or alteration of any document that may relate to this investigation constitutes a serious violation of federal law, including but not limited to obstruction of justice. . . . You are further advised that you are a subject of a criminal investigation being conducted by the Tax Division.

Few individuals can emotionally survive the receipt, at home, of the foregoing type of letter advising them that they are the subject of a criminal investigation being conducted by the Tax Division of the DOJ. If the initial taxpayer contact regarding an undisclosed potential interest in a foreign financial account is from the IRS, a purely civil tax resolution is no longer certain, and the likelihood of substantial civil penalties is significant. If the initial contact is from the DOJ, a purely civil tax resolution is doubtful and perhaps unlikely.

Waiting is not a viable option for taxpayers who have an undisclosed interest in a foreign financial account. They should immediately pursue a course of compliance designed to avoid criminal prosecution and substantial civil penalties. Actions designed to avoid detection by the government will surely increase the potential for criminal prosecution. Taunting a tiger having 11 active aircraft carriers and SEAL Team Six simply doesn't make any sense.

Overview of FBAR Requirements

Under the Bank Secrecy Act,[5] a resident or citizen of the United States and a person in and doing business in the United States must file an FBAR if (1) the person has a financial interest in, signature authority, or other authority over one or more accounts in a foreign country, and (2) the aggregate value of all foreign financial accounts exceeds $10,000 at any time during the calendar year.[6] The FBAR must be filed by June 30 of each year for the prior calendar year. Extensions to file federal income tax returns do not extend the time for filing

[4]A ''target'' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. A ''subject'' of an investigation is a person whose conduct is within the scope of the grand jury's investigation. *See* U.S. Attorneys Manual 9-11.151.

[5]*See* 31 U.S.C. sections 5311-5330 and 31 C.F.R. Ch. X (effective March 1, 2011) (formerly 31 C.F.R. Pt. 103, effective through February 28, 2011).

[6]31 U.S.C. section 5314; 31 C.F.R. sections 103.24 and 103.32.

FBARs — there is currently no statutory or regulatory provision granting an extension beyond June 30.

Taxpayers are required to acknowledge their interest in the foreign financial account and identify the foreign country where the account is maintained on Schedule B, line 7, of their income tax return. Line 7a of Schedule B of Form 1040 generally asks the taxpayer for a somewhat unsophisticated yes-or-no answer to the question: ''At any time during [tax year], did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See instructions on back for exceptions and filing requirements for Form TD F 90-22.1.'' The instructions to Schedule B provide a general description of the FBAR and how to obtain a copy of it.[7]

A financial account includes bank accounts such as savings, checking, and time deposit accounts; securities accounts; mutual funds; brokerage and securities derivatives accounts; accounts in which the assets are held in a commingled fund and the owner holds an equity interest in the fund; any other account maintained in a foreign financial institution (FFI) or with a person doing business as a financial institution; and a foreign insurance policy having a cash surrender value.[8] The term ''financial account'' does not include individual bonds, notes, or stock certifications in the physical possession of the U.S. person. The FBAR is not required for an account maintained with a branch, agency, or other office located in the United States, even though the financial institution itself may be foreign.

The term ''financial interest'' includes accounts for which the U.S. person is the owner of record or has legal title, whether the account is maintained for the person's own benefit or for the benefit of others, which might include non-U.S. persons. It also includes accounts for which the owner of record or holder of legal title is (1) a person acting as an agent, nominee, or in some other capacity on behalf of a U.S. person; (2) a corporation in which a U.S. person directly or indirectly owns more than half of the total value of the shares of stock; or (3) a partnership in which the U.S. person owns interest in more than half of the profits; and (4) a trust in which the U.S. person either has a present beneficial interest in more than half of the assets or from which that person receives more than half of the current income.[9]

A U.S. person has account signature authority if he can control the disposition of money or other property in the account by delivering a document containing his signature to the bank or other person with whom the account is maintained.[10] A person with ''other authority'' over an account is one who can exercise power that is comparable to signature authority over an account by direct communication, either orally or by some other means, to the bank or other person with whom the account is maintained.

It is not a violation of U.S. law to have a legal or beneficial interest in a foreign financial account. However, failure to properly report the foreign account on Schedule B and to file an FBAR may warrant civil and criminal sanctions. The two primary civil FBAR penalties are referred to as ''non-willful'' and ''willful.''[11] The non-willful penalty is up to $10,000 for each negligent violation of the FBAR filing or record-keeping requirements, and it may be waived if the violation was ''due to reasonable cause'' and the amount of the transaction or the balance in the account at the time of the transaction was properly reported.[12] Willfully failing to file an FBAR can warrant both criminal sanctions (imprisonment) and civil penalties equivalent to the greater of $100,000 or 50 percent of the high balance in an unreported foreign account per year — for each year since October 22, 2004, for which an FBAR wasn't filed.[13] If asserted for one or more years, the penalty is not limited to the amount of funds in the account. Schedule B and the instructions provide the government with what may be an important ''willfulness'' link between an income tax return and the FBAR filing requirements.

Willfulness

Willfulness is generally determined by ''a voluntary, intentional violation of a known legal duty.''[14] The Internal Revenue Manual provides that willfulness is demonstrated by the person's knowledge of the FBAR requirements coupled with his conscious choice not to comply with them.[15]

Under the concept of willful blindness, willfulness may be attributed to a person who has made a conscious effort to avoid learning about the FBAR and record-keeping requirements.[16] The IRM provides an example involving willful blindness in which a person admits knowledge of but fails to

[7] *See* http://www.irs.gov/pub/irs-pdf/f90221.pdf.
[8] IRM 4.26.16.3.2.
[9] Internal Revenue Manual 4.26.16.3.4.
[10] IRM 4.26.16.3.5.
[11] 31 U.S.C. section 5321(a)(5).
[12] 31 U.S.C. section 5321(a)(5)(B).
[13] 31 U.S.C. section 5321(a)(5)(C).
[14] IRM 4.26.16.5.3.
[15] *Id.*
[16] *Id.*

answer the question concerning signature authority at foreign banks on Schedule B of his income tax return.[17]

To impose a willful FBAR penalty, the government has the burden of proving that the taxpayer was willful in that he somehow made a voluntary, intentional violation of a known legal duty.[18]

In *United States v. Williams*,[19] even though Mr. Williams acknowledged using a foreign financial account for the purpose of evading taxes in a conspiracy to defraud the government and checked ''No'' for Question 7a on Schedule B of his Form 1040, the district court held that his failure to file an FBAR was non-willful because the government did not meet its burden of proving that he knew about the FBAR requirements and nonetheless affirmatively chose to not comply. The court explained that the government did not adequately ''account for the difference between failing and *willfully* failing to disclose an interest in a foreign bank account.''[20]

The government has acknowledged the ''inherent difficulty of proving, or disproving, a state of mind (willfulness) at the time of a violation.''[21] A determination that there was a willful violation must generally be supported by substantial circumstantial evidence, which will depend on the facts and circumstances of each case. Examples include a combination of efforts to conceal the source and existence of the accounts through nominee foreign corporations or foundations having no true business or estate planning purposes,[22] a lack of disclosures to the taxpayer's advisers and possibly others, ''hold mail'' instructions to the institution, and information and notes in the FFI's internal records.[23] The government might assert that the Schedule B reference to the FBAR instructions somehow supports a conclusion that the person could have learned of the FBAR filing and record-keeping requirements. However, the IRM clearly states that the mere fact that a person checked the wrong box or no box on a Schedule B is insufficient by itself to establish a willful FBAR violation.[24]

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[17]*Id.*

[18]*See* ILM 200603026, *Doc 2006-1196*, *2006 TNT 14-14*; IRM 4.26.16.4.5.3; *see also United States v. Williams*, 106 AFTR2d 2010-6150 (E.D. Va., Sept. 1, 2010), *Doc 2010-19385*, *2010 TNT 171-8*.

[19]106 AFTR2d 2010-6150.

[20]*Id.* at *7 (emphasis in original). *See also Ratzlaf v. United States*, 510 U.S. 135 (1994), in which the Supreme Court addressed the standard for willfulness in the context of a criminal violation of a structuring provision of the Bank Secrecy Act. The standard applied in *Ratzlaf* was ''a voluntary intentional violation of a known legal duty.'' *Id.* at 141. The government had to prove that the defendant had acted with knowledge that his conduct was unlawful in order to establish he had willfully violated the anti-structuring law. It was not enough that he knew the bank had a duty to report the transactions. In ILM 200603026, the IRS concluded that ''in order for there to be a voluntary intentional violation of a known legal duty, the account holder would just have to have knowledge that he had a duty to file an FBAR, since knowledge of the duty to file an FBAR would entail knowledge that it is illegal not to file the FBAR. A corollary of this principle is that there is no willfulness if the account holder has no knowledge of the duty to file the FBAR.''

[21]*See* ILM 200603026:

> The burden of proof for criminal cases for establishing willfulness is to provide proof ''beyond a reasonable doubt.'' Although the same definition for willfulness applies (''a voluntary intentional violation of a known legal duty''), the Service would have a lesser burden of proof to meet with respect to the civil FBAR penalty than the criminal penalty. We expect that a court will find the burden in civil FBAR cases to be that of providing ''clear and convincing evidence,'' rather than merely a ''preponderance of the evidence.'' The clear and convincing evidence standard is the same burden the Service must meet with respect to civil tax fraud cases where the Service also has to show the intent of the taxpayer at the time of the violation. Courts have traditionally applied the clear and convincing standard with respect to fraud cases in general, not just to tax fraud cases, because, just as it is difficult to show intent, it is also difficult to show a lack of intent. The higher standard of clear and convincing evidence offers some protection for an individual who may be wrongly accused of fraud.
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> The burden of proof the Service has with respect to civil tax fraud penalties represents an exception to the general presumption of correctness that the courts have afforded to tax assessments (where the taxpayer, who is in the best position to provide supporting documentation, would ordinarily have the burden to show that taxes and tax penalties assessed are incorrect). There is a presumption of correctness in tax cases because the courts recognize the importance of the government's ability to efficiently collect taxes, which are ''the life-blood of government.'' Because the FBAR penalty is not a tax or a tax penalty, the presumption of correctness with respect to tax assessments would not apply to an FBAR penalty assessment for a willful violation. [Footnotes omitted]

(Footnote continued in next column.)

[22]*See* AM 2009-012 ''Entity Classification of Liechtenstein Anstalts and Stiftungs,'' *Doc 2009-22825*, *2009 TNT 199-22*, differentiating the U.S. tax treatment between Lichtenstein *anstalts* (which are typically classified as business entities under reg. section 301.7701-2(a) and not as trusts under reg. section 301.7701-4(a), because in most situations their primary purpose is to actively carry on business activities) *and stiftungs* (which are generally treated as trusts under reg. section 301.7701-4(a), have the primary purpose of protecting or conserving the property transferred to *the stiftung* for *the stiftung's* beneficiaries, and are usually not established primarily for actively carrying on business activities).

[23]*See In re Grand Jury Investigation M.H.*, 108 AFTR2d 5880 (9th Cir. Aug. 19, 2011), *Doc 2011-17903*, *2011 TNT 162-22*, for a discussion regarding whether foreign account information required to be maintained under 31 U.S.C. section 5311 and the regulations thereunder is protected by the Fifth Amendment privilege or must be disclosed under the required records doctrine espoused in *United States v Doe*, 465 U.S. 605, 611-612 (1984), and *Fisher v United States*, 425 U.S. 391, 409-410 (1967).

[24]IRM 4.26.16.5.3.

How much more is required will surely be the subject of future litigation.

Other Potentially Applicable Civil Penalties

In addition to the FBAR related penalties, there are numerous other potentially applicable penalties that might be associated with interests in foreign financial accounts and structures designed to hold title to those accounts. They include the following:

- Penalties for failure to report foreign trust information — sections 6048 and 6039F. Taxpayers must report on Form 3520, ''Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts,'' various transactions involving foreign trusts. They include the creation of a foreign trust by a U.S. person, a U.S. person's transfer of property to a foreign trust, and a U.S. person's receipt of distributions from foreign trusts under section 6048. Form 3520 is also used to report the receipt of gifts from foreign entities under section 6039F. The penalty for failing to file Form 3520 or for filing an incomplete return is 35 percent of the gross reportable amount. For returns reporting gifts, however, the penalty is 5 percent of the gift per month, up to a maximum penalty of 25 percent of the gift.
- There is also a penalty for failure to file Form 3520-A, ''Information Return of Foreign Trust With a U.S. Owner.'' Taxpayers must report ownership interests in foreign trusts by U.S. persons with various interests in and powers over those trusts under section 6048(b).The penalty for failing to file Form 3520-A or for filing an incomplete return is 5 percent of the gross value of trust assets determined to be owned by the U.S. person.
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- Penalty for failure to report ownership interest in a foreign corporation. Some U.S. persons who are officers, directors, or shareholders in specified foreign corporations (including international business corporations) are required to report information under sections 6035, 6038, and 6046 on Form 5471, ''Information Return of U.S. Persons with Respect to Certain Foreign Corporations.'' The penalty for failing to file Form 5471 is $10,000, with $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return.
- Penalty for failure to file the information return of a foreign-owned corporation — sections 6038A and 6038C. Taxpayers may be required to file Form 5472, ''Information Return of a 25 Percent Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business,'' to report transactions between a 25 percent foreign-owned domestic corporation or a foreign corporation engaged in a trade or business in the United States and a related party as required by sections 6038A and 6038C. The penalty for failing to file Form 5472 or failing to keep specified records regarding reportable transactions is $10,000, with $10,000 added for each month the failure continues, beginning 90 days after the taxpayer is notified of the delinquency.
- Penalty for failure to report the transfer of property to a foreign corporation — section 6038B. Taxpayers are required to file Form 926, ''Return by a U.S. Transferor of Property to a Foreign Corporation,'' to report transfers of property to foreign corporations and other information under section 6038B. The penalty for failing to file Form 926 is 10 percent of the value of the property transferred, up to a maximum of $100,000 per return, with no limit if the failure to report the transfer was intentional.
- Penalty for failure to report an ownership interest in a foreign partnership — sections 6038, 6038B, and 6046A. U.S. persons with specified interests in foreign partnerships use Form 8865, ''Return of U.S. Persons With Respect to Certain Foreign Partnerships,'' to report interests in and transactions of foreign partnerships, transfers of property to foreign partnerships, and acquisitions, dispositions, and changes in foreign partnership interests under sections 6038, 6038B, and 6046A. Penalties include $10,000 for failure to file Form 8865, with $10,000 added for each month the failure continues, beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return; and 10 percent of the value of any transferred property that is not reported, subject to a $100,000 limit.
- Fraud penalties — section 6651(f) or 6663. When an underpayment of tax or a failure to file a tax return is attributable to fraud, the taxpayer is liable for penalties that, although calculated differently, essentially amount to 75 percent of the unpaid tax.
- Penalty for failure to file a tax return — section 6651(a)(1). If a taxpayer is required to file an income tax return and fails to do so, the IRS may impose a penalty of 5 percent of the balance due, plus an additional 5 percent for each month or fraction thereof during which the failure continues (up to 25 percent).
- Penalty for failure to pay the tax shown on the return — section 6651(a)(2). If a taxpayer fails

to pay the amount of tax shown on the return, he may be liable for a penalty of 0.5 percent of the amount of tax shown on the return, plus an extra 0.5 percent for each additional month or fraction thereof that the amount remains unpaid (up to 25 percent).

- Accuracy-related penalty on underpayments of tax — section 6662. Depending on which component of the accuracy-related penalty is applicable, a taxpayer may be liable for a 20 percent or 40 percent penalty.

Recent Offshore Voluntary Disclosure Programs

As centuries-old Swiss bank secrecy was beginning to crack at the hands of the DOJ and the IRS, Shulman announced the commencement of the 2009 OVDP:

> My goal has always been clear — to get those taxpayers hiding assets offshore back into the system. . . . We draw a clear line between those individual taxpayers with offshore accounts who voluntarily come forward to get right with the government and those who continue to fail to meet their tax obligations. People who come in voluntarily will get a fair settlement. . . . For taxpayers who continue to hide their head in the sand, the situation will only become more dire. They should come forward now under our voluntary disclosure practice and get right with the government.[25]

Financial transactions occurring before 2003 were mostly irrelevant for those participating in the OVDP or the OVDI. Approximately 14,700 U.S. taxpayers (disclosing accounts in more than 60 countries and paying at least $2.2 billion in tax, penalties, and interest) participated in the 2009 OVDP by knocking on the front door of the IRS Criminal Investigation division while surely thousands of others came into compliance by quietly filing amended or delinquent income tax returns and FBARs, some as far back as 2003. Eligible taxpayers who ventured through the front door were provided the certainty of avoiding criminal prosecution and receiving civil penalty relief. They were required to pay back taxes from 2003 to 2008, interest, and a 20 percent accuracy-related penalty or a 25 percent delinquency penalty on the delinquent taxes. Participants were also required to pay a single FBAR-related ''offshore penalty'' (a single penalty in lieu of all other potentially applicable penalties) equivalent to 20 percent of the highest aggregate value of each undisclosed financial account at any time during the 2003-2008 period. In limited situations, the offshore penalty could be reduced to 5 percent of the account value, or $10,000 per tax year.

Many U.S. taxpayers and their advisers have long been unaware of or have simply ignored the FBAR information reporting requirements. Under the 2011 OVDI, eligible taxpayers were required to file all original and amended tax returns and include payment for (or make good-faith arrangements to pay) taxes, interest, and accuracy-related penalties. The OVDI required an offshore penalty equivalent to 25 percent of the highest value of each foreign financial account and some foreign assets at any time between 2003 and 2010. In limited situations, the offshore penalty could be reduced to 12.5 percent or 5 percent of the account value, or $10,000 per tax year. Approximately 3,000 taxpayers contacted CI following the conclusion of the OVDP and were allowed to participate in the OVDI together with an additional 12,000 who contacted CI during the OVDI (and made initial payments of tax and interest exceeding $500 million).[26] Many others likely accepted the uncertainty of pursuing compliance through the process of quietly filing amended or delinquent income tax returns and FBARs. Some filed as far back as 2003 while others pursued a path of prospective compliance by filing accurate returns and FBARs beginning with tax year 2009 or 2010. Countless others likely did nothing.

Data-Mining Voluntary Disclosure Submissions

In announcing the October 15, 2009, conclusion of the 2009 OVDP, Shulman said: ''A key aspect of our future international offshore work will be mining the voluntary disclosure information from people who have come forward. We will be scouring this information to identify financial institutions, advisors, and others who promoted or otherwise helped U.S. taxpayers hide assets and income offshore and skirt their tax responsibilities at home.''[27]

Participants in the OVDP and the OVDI were required to provide relevant information related to the creation and maintenance of their foreign financial accounts. They were required to:

- provide information identifying all FFIs where they maintained accounts;
- list the dates the accounts were opened or closed, together with their point of contact at each financial institution;

[25]Statement by Shulman on Offshore Income, Mar. 26, 2009, *Doc 2009-6833*, *2009 TNT 57-11*.

[26]IR-2011-94, *Doc 2011-19648*, *2011 TNT 180-14*.

[27]Statement by Shulman, IR-2011-14, *Doc 2011-2718*, *2011 TNT 27-10*.

- explain all face-to-face meetings and any other communications they had regarding the accounts or assets with the financial institution(s);
- explain all face-to-face meetings or other communications regarding the accounts or assets with independent advisers or investment managers not from the financial institution(s) where the funds were held, including the persons' names and the locations and dates of the meetings or other communications.

The foregoing information significantly enhanced the already resource-intensive civil and criminal enforcement efforts of the IRS and the DOJ in targeting FFIs and advisers throughout the world. Many participants in the OVDP have been subjected to interviews by IRS and DOJ representatives inquiring about the knowledge and possible assistance of others in creating the foreign financial account. IRS interviews typically include the following questions and requests:

1. Did your preparer ask you if you had any foreign accounts or entities? What was your response?

2. Identify all accounts, foreign and domestic, in which you had beneficial ownership, or over which you had signature authority or other authority.

3. Explain the purpose of having those accounts as opposed to using domestic banks. Also explain the source (origin) of the funds deposited into those accounts and who (names and addresses) advised you to place funds in the accounts.

4. What was the source (origin) of the funds used to make this investment, and when was the investment made? Provide details, including dates and amounts. Did you report those amounts in income before depositing them offshore? If yes, for what tax years and in what amounts?

5. Do you have any dealings with a private bank or private banking department of a U.S. or foreign bank? If so, provide details, including the bank's name and address, the private banker's (relationship manager's) name, the type of services it provides, entities it may have formed for your use, etc.

6. Who else did you discuss opening the offshore account with? Who advised you in moving funds offshore? Did you receive written guidance?

7. Do you hold an ownership interest (directly or indirectly) in any foreign or domestic partnerships, joint ventures, corporations, limited liability companies, trusts, etc.? If so, give details as to the type of entity, the trade or business name of the entity, the country of incorporation or formation, the kind of business activity, any office or title held by you in that entity, and indicate whether the entity files U.S. income tax returns.

8. What are the names and addresses of any accountants, attorneys, or advisers who performed any services for you and any of these foreign accounts and entities during the years of your voluntary disclosure?

9. Provide the name(s) and addresses of any persons who introduced you to or advised you regarding your investments.

10. Are you aware of your responsibility to report signature authority over foreign accounts to the IRS ($10,000 — Schedule B)? Have you ever filed an FBAR for any foreign accounts?

11. During the years of your voluntary disclosure, have you paid management fees, consulting fees, research and development fees, insurance premiums, legal fees, royalties, lease or rental fees, loan fees, interest, salaries or wages, or any other item to any foreign entity or individual? If so, explain why you decided to obtain those services or property from a foreign person or entity as opposed to a domestic person or entity. Are there others, foreign or domestic, that you approached to provide the same or similar services before deciding to contract with the foreign person or entity? Who advised you that the foreign person or entity could provide those services or property? With whom did you negotiate the fees? (Provide the names and addresses, and dates and locations of the negotiations.)

12. Did anyone else, whether a nominee or as a favor to you or in any other way, ever keep or hold for you cash, currency, or any money or property belonging to you? Did you ever as a nominee or as a favor in any other way ever keep or hold anyone else's cash, currency, or any money or property belonging to them? If so, please explain.

13. Do you know of any unreported income, deductions, or credits that should have been included in your voluntary disclosure submissions?

DOJ representatives recently coordinated interviews of OVDP participants that focused on specific FFIs located in Europe (beyond Switzerland), Asia (China, India, and Singapore), and the Middle East (Egypt, Iran, Israel, and elsewhere). There have long

been rumors of a consortium of Swiss financial institutions attempting to coordinate some form of global resolution with the United States that would include the delivery of information regarding U.S. account holders and the payment of fines believed to exceed $1 billion in exchange for not receiving individualized ''UBS treatment.''[28]

There are also rumors about ongoing John Doe summons activity and possible indictments of FFIs to force the institutions to deliver account holder information to the U.S. government. Recently, several foreign institutions advised their account holders to consult their U.S. tax advisers regarding the IRS voluntary disclosure program and their U.S. tax reporting obligations for foreign financial accounts. It is reasonable to assume that those institutions will take whatever action is necessary to avoid being indicted, beginning with the delivery of account holder information to the U.S. government. It is also reasonable to assume that the government will continually increase the pressure on FFIs as well as on U.S. account holders and their advisers.

UBS Disclosure Criteria

It is uncertain whether any agreement between the United States and other foreign institutions will resemble the agreement previously reached with UBS. On November 17, 2009, the DOJ and the IRS revealed the disclosure criteria set forth in the attachment to the UBS settlement of August 9, 2009, which governed the selection of approximately 4,450 U.S. account holders to be identified. The criteria included the disclosure of accounts at UBS between 2001 and 2008 with a balance of more than 1 million Swiss francs, together with various types of custody accounts (including bank-only accounts) in which securities or other investment assets were held, and offshore company nominee accounts through which individuals indirectly held beneficial ownership.[29]

The disclosure criteria also included (i) 250 accounts in which there is evidence of ''fraudulent conduct,'' such as false documents or the use of calling cards to disguise the source of trading (the threshold for disclosure is 250,000 francs), and (ii) 4,200 accounts that generated revenues of an average of more than 100,000 francs a year for at least three years, including any year between 2001-2008. For purposes of the foregoing, revenues were defined to include gross income (interest and dividends) and capital gains (which are calculated as 50 percent of the gross sales proceeds generated by the accounts during the relevant period).

Under the disclosure criteria, fraudulent conduct was deemed to exist for offshore company accounts when the UBS records reflected that beneficial owners continued to direct and control, in full or in part, the management and disposition of the assets held in the offshore company account or otherwise disregarded the formalities or substance of the purported corporate ownership (that is, the offshore corporation functioned as a nominee, sham entity, or alter ego of the U.S. beneficial owner) by:

- making investment decisions contrary to the representations made in the account documentation or regarding the tax forms submitted to the IRS and UBS;
- using calling cards or special mobile phones to disguise the source of trading;
- using debit or credit cards to enable the beneficial owners to deceptively repatriate or otherwise transfer funds to pay personal expenses or to make routine payments of credit card invoices for personal expenses using assets in the offshore company account;
- conducting wire transfer activity or other payments from the offshore company's account to accounts in the United States or elsewhere that were held or controlled by the U.S. beneficial owner or a related party with a view to disguising the true source of the person originating those wire transfer payments;
- using related entities or persons as conduits or nominees to repatriate or otherwise transfer funds in the offshore company's account; or
- obtaining ''loans'' to the U.S. beneficial owner or a related party directly from, secured by, or paid by assets in the offshore company's account.

It is likely that the United States will require other financial institutions to disclose account holders having smaller accounts and less earnings than those at UBS. There have been rumors of discussions regarding the required disclosure of accounts having a high balance of the equivalent of $50,000 at any time between 2002 and 2010. U.S. persons having interests in foreign financial accounts should not find comfort in a belief that other institutions will somehow refrain from disclosing relatively small accounts in the current enforcement environment. Those who think too long may be sorely surprised at the high level of ultimate cooperation between their institution and the U.S. government.

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[28]UBS was the subject of a deferred prosecution agreement. It paid fines and penalties totaling almost $780 million, and after the Swiss parliament changed its law, UBS delivered information to the U.S. government regarding approximately 4,450 U.S. account holders.

[29]''Criteria for Granting Assistance Pursuant to the Treaty Request'' (Aug. 9, 2009), *Doc 2009-25241, 2009 TNT 220-14.*

Historic Voluntary Disclosure Practice

Absent an active voluntary disclosure initiative, there is some uncertainty regarding the appropriate process for coming into compliance. Practitioners are unaware of any situation since 1952 in which the IRS has referred a timely, truthful, and complete voluntary disclosure to the DOJ for criminal prosecution. Such a disclosure is a factor considered by the IRS in its decision regarding a possible criminal prosecution referral to the DOJ.[30] The taxpayer must fully cooperate with the government; make good-faith arrangements to pay any tax, interest, and penalties determined to be applicable; and must disclose every aspect of noncompliance.[31]

The voluntary disclosure practices of the IRS and the DOJ are designed to encourage noncompliant taxpayers to come into compliance. Our system of tax administration requires a perception of fairness and respect for those who make a voluntary, conscious decision to come forward before being contacted about their previous tax indiscretions. The OVDP and the OVDI represented a formalization of the historic voluntary disclosure practice in effect for limited taxpayers and for a limited time. Those initiatives provided an important opportunity for the government to publicly demonstrate the benefits of taxpayers voluntarily coming into compliance. Now that the OVDP and the OVDI have expired, relevance of the traditional voluntary disclosures process must be considered.

A disclosure is timely if it is received before:

- the IRS has initiated a civil examination or criminal investigation of the taxpayer or has notified the taxpayer that it intends to commence such an examination or investigation;
- the IRS has received information from a third party (for example, an informant, other governmental agency, or the media) alerting it to the specific taxpayer's noncompliance;
- the IRS has initiated a civil examination or criminal investigation that is directly related to the specific liability of the taxpayer; or
- the IRS has acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (for example, a search warrant or grand jury subpoena).[32]

Importantly, the IRS voluntary disclosure practice describes a voluntary disclosure to include:

> a letter from an attorney which encloses amended returns from a client which are complete and accurate (reporting legal source income omitted from the original returns), which offers to pay the tax, interest, and any penalties determined by the IRS to be applicable in full and which meets the timeliness standard set forth above. This is a voluntary disclosure because all elements . . . above are met.[33]

The DOJ maintains a voluntary disclosure policy that provides:

> Whenever a person voluntarily discloses that he or she committed a crime before any investigation of the person's conduct begins, that factor is considered by the Tax Division along with all other factors in the case in determining whether to pursue criminal prosecution. If a putative criminal defendant has complied in all respects with all of the requirements of the Internal Revenue Service's voluntary disclosure practice, the Tax Division may consider

[30]IRM 9.5.11.9.
[31]*Id.*
[32]*Id.*

[33]*Id. See also* the criminal information in *United States v. Schiavo*, No. 1:11-cr-10192-RGS-1 (D. Mass. filed May 19, 2011), *Doc 2011-10984*, *2011 TNT 99-21*, regarding the prosecution of a taxpayer for quietly filing a false amended return disclosing earnings on a foreign account but failing to disclose the underlying income deposited into the foreign account:

> 11. A "silent disclosure" occurs when a U.S. taxpayer with an undeclared account files FBARs and amended returns and pays any related tax and interest for previously unreported offshore income without notifying the IRS of the undeclared account through the Voluntary Disclosure Program. A silent disclosure does not constitute a voluntary disclosure. On its website, the IRS strongly encourages taxpayers to come forward under the Voluntary Disclosure Program and warns them that taxpayers who instead make silent disclosures risk being criminally prosecuted for all applicable years.
> * * *
> 18. On or about October 6, 2009, following widespread media coverage of UBS's disclosure to the IRS of account records for undeclared accounts held by U.S. taxpayers and the IRS's Voluntary Disclosure Program, Schiavo made a "silent disclosure" by preparing and filing FBARs and amended Forms 1040 for tax years 2003 to 2008, in which he reported the existence of his previously undeclared account at HSBC Bank Bermuda. He made those filings despite the availability of the Voluntary Disclosure Program. Schaivo reported on the amended individual income tax returns the interest income that he earned from the previously undeclared account he held at HSBC Bank Bermuda but did not report on the 2006 return the income that he earned from Headway Partners.
> 19. On or about October 27, 2009, a special agent from the IRS attempted to interview Schiavo at his home.
> 20. On or about October 29, 2009, Schiavo prepared and executed a second amended individual income tax return for tax year 2006 on which he reported the income that he earned from Headway Partners and that had been deposited into his previously undeclared account at HSBC Bank Bermuda).

> that factor in its exercise of prosecutorial discretion. It will consider, inter alia, the timeliness of the voluntary disclosure, what prompted the person to make the disclosure, and whether the person fully and truthfully cooperated with the government by paying past tax liabilities, complying with subsequent tax obligations, and assisting in the prosecution of other persons involved in the crime.[34]

Further, the DOJ's ''Policy Directives and Memoranda'' provides:

> the Service's voluntary disclosure policy remains, as it has since 1952, an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers. If the Service has referred a case to the Division, it is reasonable and appropriate to assume that the Service has considered any voluntary disclosure claims made by the taxpayer and has referred the case to the Division in a manner consistent with its public statements and internal policies. As a result, our review is normally confined to the merits of the case and the application of the Department's voluntary disclosure policy set forth in Section 4.01 of the Criminal Tax Manual.[35]

Taxpayers submitting a voluntary disclosure as well as those who opt out of the OVDP or the OVDI remain within CI's voluntary disclosure practice. Therefore, they are still required to cooperate fully with any subsequent examination by providing all requested information and records, and they must pay or make arrangements to pay the tax, interest, and penalties that are ultimately determined to be due. If a taxpayer does not cooperate or make payment arrangements, his matter may be referred back to CI.

Voluntary Disclosure Considerations

Practitioners are currently unable to provide any degree of certainty to their clients who have yet to step forward. The government will not be able to criminally prosecute thousands of individuals with previously undisclosed foreign financial accounts. The highest value in any criminal prosecution is deterrence of other similarly situated taxpayers. The threat of potential prosecutions for those who are technically deficient and somewhat confused but who seek to somehow voluntarily come into compliance has a significant negative effect on the future of our voluntary compliance system.

There are many considerations before a taxpayer determines whether to pursue a voluntary disclosure of prior tax indiscretions. When reviewing the OVDP and the OVDI, many taxpayers made decisions based on whether they could be considered realistic candidates for a criminal prosecution referral by the IRS or a prosecution by the DOJ. (If so, the decision to participate was relatively quick and easy.) Was there a possibility of reducing that prospect by filing amended or delinquent returns and FBARs in lieu of direct participation in the OVDP or OVDI? What would be the potential penalties on an examination of those returns and FBARs? Could the government actually carry its burden of demonstrating that the taxpayer willfully violated the FBAR filing requirements?

Since the OVDI asserted an offshore penalty based on foreign financial accounts *and* asset valuations, for many with smaller financial account values the aggregate offshore penalty determination, even for multiple years, was actually less outside the OVDI. Will the government pursue noncompliant taxpayers through the required judicial process following the assessment of an FBAR penalty?[36] Might the FBAR-related mitigation guidelines set forth in the IRM somehow benefit the taxpayer outside the framework of the OVDP or OVDI?[37] Do those mitigation guidelines have any continued vitality?

Examining the Offshore Account IDR

Questions regarding the depth of an offshore account examination for those who, for whatever reason, did not participate in the OVDP or the OVDI are now beginning to be answered in various IRS examinations around the country. A voluntary disclosure would likely not be considered timely following receipt of a notice of an IRS examination. Those examinations are highly focused on the source of funds deposited into the foreign financial account, earnings on the account, and the reasoning behind the taxpayer not previously pursuing a voluntary disclosure. A nontaxable nature of the funds deposited (such as an inheritance or deposits before the taxpayer became a U.S. citizen) does not seem to slow the momentum of those examinations.

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[34]DOJ, Criminal Tax Manual section 4.01.

[35]DOJ Tax Division, ''Policy Directives and Memoranda,'' section 3 (Feb. 17, 1993).

[36]The period of limitations on collection of FBAR penalties is found in 31 U.S.C. section 5321(b)(2). The government may commence a civil action to recover a civil penalty assessed under subsection (a) at any time before the end of the two-year period beginning on the later of the date the penalty was assessed or the date any judgment becomes final in any criminal action under 31 U.S.C. section 5322 in connection with the same transaction for which the penalty is assessed. The date the FBAR penalty is assessed is the date that the IRS designated official stamps IRS Form 13448. *See* IRM 4.26.17.5.5.2.

[37]IRM 4.26.16.4.5.6 and 4.26.16.4.6.

The initial information document request (IDR) issued in connection with the commencement of an examination involving previously undisclosed offshore financial accounts will seem overwhelming to even the most seasoned tax practitioners. Predictably, the IRS appears to have somewhat standardized its IDR in these matters by requesting everything imaginable regarding the taxpayer and all related entities. (See the Appendix for a typical IDR.)

Detailed responses to detailed requests for information often generate additional detailed requests for information. As such, offshore account IDRs typically conclude with the admonition that additional years and items can be added as audit issues and that additional records or documents may be requested as the examination progresses. Further, taxpayers are cautioned to retain all potentially relevant and previously requested records or documents until the examination is concluded.

Taxpayers having previously undisclosed interests in foreign financial accounts should immediately consider ways to become compliant. There is no better time to prepare for a later examination than when the documents are being drafted and executed. Files for relevant documents and schedules should be coordinated with a view toward accelerating any later examination. If there are any unusual concerns, those issues should be well documented. It is sometimes difficult to later recall why documents were drafted in a particular manner or with unique provisions.

During the examination, the IRS may require responses within a relatively short time frame (often less than 30 days, since most of these examinations are part of a larger examination project focused on FFIs and their account holders). If documents are not readily available, make that fact known in advance.

The standardized offshore account IDR may cause the practitioner to wonder about his or her ability to effectively respond — as well as their ethical responsibilities. On request by the IRS, practitioners must promptly submit non-privileged records and information to the IRS, notify the IRS of the location of requested records and information in the possession of others, and make reasonable inquiries of the taxpayer regarding the location of requested records and information in possession of others.[38] Further, a practitioner may not unreasonably delay the prompt disposition of any matter before the IRS.[39]

Competent counsel must be consulted before the examination begins, since sensitive tax issues permeate an examination of any taxpayer having previously undisclosed interests in a foreign financial account or foreign assets. How can any practitioner promptly and effectively respond to an offshore account IDR that requests everything imaginable regarding the domestic and foreign activities of what are likely high-wealth taxpayers having numerous domestic and foreign related entities? Neither the taxpayer nor the IRS has any desire to unnecessarily prolong the examination process. Initially, the practitioner should coordinate a meeting with the examiner to determine whether it might be possible to streamline the examination process, being careful about obvious sensitive issues. Is it possible to determine whether the examination will be resolved in a purely civil manner without a referral for criminal investigation? What is the purpose of the examination?

The practitioner's duty of representation to the client must be balanced with the effort to reasonably cooperate with the examination process. The practitioner should attempt to reasonably limit the scope of the inquiry and limit the information provided so as to avoid the waiver of any potential privileges. If matters are privileged, the correspondence and relevant files should be appropriately labeled. Be aware of any potential privileges that may apply, and make sure not to inadvertently waive any privilege. Separate files should be maintained for relevant documents that might be requested by the IRS as well as for documents that contain potentially confidential, privileged information. It is important to know exactly which documents are deemed important to the IRS. Copies of documents provided during the course of the examination should be made in duplicate — one copy for the IRS and an extra copy to be maintained in a separate audit file specifically identifying documents provided during the course of the examination.

It is generally advisable to attempt to resolve any examination at the earliest opportunity. However, the design of foreign account examinations mostly precludes any ability for a prompt resolution. Practitioners must respect the nature of those examinations and exercise discretion and their best judgment in responding (or not) to each request for information. The IRS has expended considerable resources rooting out noncompliant taxpayers having previously undisclosed interests in foreign financial accounts. It has determined that those taxpayers represent a compliance challenge worthy of such substantial enforcement resources. Taxpayers and their representatives must be prepared to respond in kind.

[38]Circular 230, section 10.20.
[39]Circular 230, section 10.23.

Compliance, Compliance, Compliance

Those with undisclosed interests in foreign accounts should immediately consult with competent tax counsel about coming into compliance. The ability of a U.S. taxpayer to maintain a ''secret'' foreign financial account is fast becoming nonexistent. Foreign account information is flowing into the IRS under tax treaties, through whistleblower submissions, and from OVDP and OVDI participants who identified their banks, bankers, advisers, and others. Additional information will become available as FATCA and foreign financial asset reporting (new section 6038D) become effective in the next few years.[40]

The criminal pre-clearance OVDP/OVDI voluntary disclosure process of submitting the taxpayer's name, address, date of birth, and taxpayer identification number to CI is expected to remain available indefinitely. Representatives of numerous taxpayers having undisclosed interests in foreign financial accounts will continue to contact CI, although there is no certainty in any potential civil resolution of the issues involved. However, it's likely that far more taxpayers may not come forward out of concern that the IRS might assert FBAR (and other offshore-related) penalties of up to 50 percent of the high account balance, per year. Some will undoubtedly decide to risk detection by the IRS and the imposition of substantial penalties — including the civil fraud penalty and several foreign information return penalties — and potential criminal prosecution.

Many taxpayers will decide to submit a voluntary disclosure based on a personal desire to come into compliance now that they are aware of the FBAR and other foreign account reporting requirements. Others will recognize an opportunity to repatriate stagnant foreign funds into a domestic recessionary economy or may simply want to move on with their lives. Government and private practitioners should continue to respect the value of the IRS and DOJ voluntary disclosure practice and policies to our system of tax administration — as well as the value of ongoing international tax enforcement efforts within a shrinking global community.

This is a target-rich environment for the government. The IRS is committed to enforcement concerning offshore accounts, and it can be expected to continually enhance those efforts. The changing environment concerning bank secrecy will continue to uncover overly optimistic U.S. persons. However, the IRS will simply be unable to locate most foreign account holders through enforcement efforts alone. The IRS and DOJ voluntary disclosure practices are designed to encourage noncompliant taxpayers to come forward.

Our system of tax administration requires a perception of fairness and respect for those who make a voluntary, conscious decision to come into compliance before being contacted about their previous tax indiscretions. Accordingly, it can be anticipated that the IRS will continue to ''draw a clear line between those individual taxpayers with offshore accounts who voluntarily come forward to get right with the government and those who continue to fail to meet their tax obligations.''[41] Coming into past compliance through a voluntary disclosure, or at least prospective compliance, is the right thing to do. Waiting is simply not a viable option.

Appendix — Offshore Account IDR

For the year under examination, a typical offshore account IDR will request that the taxpayer provide:

A. TAX RETURNS

1. Provide copies of all tax returns and information return forms filed:

a. Form-l040, ''U.S. Income Tax Return for Individuals,'' including all schedules and attached informational returns for the year;

b. Forms 1099 received by the taxpayer for the year.

c. Forms 1099 issued by the taxpayer for the year.

d. Forms 1065, ''U.S. Partnership Return of Income,'' including all schedules and attached informational returns for the year.

e. Forms 1120 and 1120S, U.S. corporate income tax returns, including all schedules and attached informational returns for the year for each corporation of which taxpayer owned or exercised control over more than 50 percent of the total combined voting power of all classes of stock or more than 50 percent of the total value of the stock of the corporation.

f. Form 1120F, ''U.S. Income Tax Return of a Foreign Corporation,'' including

[40]*See* Scott D. Michel and H. David Rosenbloom, ''FATCA and Foreign Bank Accounts: Has the U.S. Overreached?'' *Tax Analysis 2011*, May 30, 2011.

[41]Shulman statement, *supra* note 25.

all schedules and attached informational returns for the year for each corporation of which the taxpayer owned or exercised control over more than 50 percent of the total combined voting power of all classes of stock or more than 50 percent of the total value of the stock of the corporation.

g. Form 1041, ''U.S. Income Tax Return for Estates and Trusts,'' including all schedules and attached information returns for which the taxpayer was the administrator, executor, fiduciary, trustee, grantor, or a beneficiary for the year.

h. Form l040NR, ''U.S, Nonresident Alien Income Tax Return,'' (used for foreign trusts), including all schedules and attached information returns for which the taxpayer was the administrator, executor, or beneficiary for the year.

i. Form 3520A, ''Annual Information Return of Foreign Trust With a U.S. Owner,'' for the year for which the taxpayer is treated as an owner.

j. Form 3520, ''Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts,'' for the year for which the taxpayer is or is treated as an owner.

k. Form 1042, ''Annual Withholding Tax Return for U.S. Sourced Income of Foreign Persons,'' for the year.

l. Form 1042-S, ''Foreign Person's U.S. Source Income Subject to Withholding,'' for the year.

m. Form 5471, ''Information Return of a Person With Respect to Certain Foreign Corporations,'' for the year.

n. Form 5472, ''Information Return of a. 25 Percent Foreign-Owned Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business,'' for the year.

o. All amended tax returns and informational returns.

B. BANK RECORDS

1. For each bank account, in any name, whether foreign or domestic, over which the taxpayer had signature or other authority and/or over which the taxpayer exercised control during the year, produce all documents in the taxpayer's possession, custody, or control including, but not limited to:

a. account applications (regardless of date; in English)

b. monthly or periodic statements (in English)

c. wire transfer authorizations and confirmations

d. deposit slips and deposited items

e. credit and debit memos and advices

f. cancelled checks

g. check registers

h. passbooks

i. loan applications (regardless of date)

j. promissory notes

k. certificates of deposit

l. letters of credit

m. cashiers checks

n. money orders

o. safe deposit box rental agreements (regardless of date)

p. safe deposit box visitation ledgers

q. all correspondence/e-mails (in English) from the inception of the account through today

r. memorandum files maintained by the bank or other financial institution or any of their officers or employees, reflecting communications between the bank and the taxpayer or others acting on the taxpayer's behalf and documenting actions taken pursuant to directions received from the taxpayer or on the taxpayer's behalf, reflecting any thoughts or decisions of the bank or its employees or officers regarding the account.

s. documents verifying the origin of all funds used to open the accounts or deposited to these accounts (regardless of date).

2. For the year, provide all period statements for each bank account, whether foreign or domestic, under any name, over which the taxpayer had signature or other authority or over which the taxpayer exercised control.

3. For each bank account, whether foreign or domestic, under any name, over which the taxpayer had signature or other authority and/or over which the

taxpayer exercised control during the year produce the Know Your Customer Account information given to the bank and/or financial institution by the taxpayer and/or on the taxpayer's behalf including, but not limited to, all account set-up documents (regardless of the year), such as signature cards, opening deposit slips, passport copies, certificates of beneficial ownership, letters of reference, certificates of clean funds, and/or other source of funds documentation.

4. For each certificate of deposit, time deposit, or equivalent account at a bank or financial institution, whether foreign or domestic, over which the taxpayer had signature authority or other authority or over which the taxpayer exercised control at any time during the year produce statements of certificate of deposit, records reflecting purchase of the certificate, earnings, records reflecting redemption, or other disposition of the certificate. In addition, provide documents verifying the origin of all funds used to open these accounts or deposited to these accounts at any time.

5. For all transfers of funds during the year between all bank accounts, financial accounts, and other accounts over which the taxpayer had signature or other authority, or over which the taxpayer exercised control during the year, provide the following:

a. list of transfers

b. documents showing the source of the funds transferred (e.g., copy of check — back and front, wire transfer authorizations, bank statement, source of cash deposit)

c. documents showing the deposit of the funds transferred (e.g., bank statement)

d. advice memos, correspondence, or other direction the taxpayer sent or received regarding the transfers, withdrawals, and deposits

6. All documents relating to foreign and domestic credit, debit, ATM, or charge accounts over which the taxpayer had signature or other authority or over which the taxpayer exercised control for the year, including, but not limited to:

a. original cards (the IRS will make a copy of each card and return it to the taxpayer)

b. card applications (regardless of date)

c. agreements (regardless of date)

d. customer relationship records or other similar record identifying persons with signatory authority or other authority over the account (regardless of date)

e. monthly or periodic charge statements

f. charge receipts

g. cash advance confirmations

h. payments or funds transferred for balances due

i. electronic payment and/or transfer records

7. For each foreign bank account, in any name, over which the taxpayer had signature or other authority and/or over which the taxpayer exercised control during the year, produce all documents from such bank informing you that your account information was subject to an exchange of information request with the United States government. If you received such a notice, state whether you signed a waiver or consent permitting disclosure of your account information to the IRS.

C. BROKERAGE OR SECURITIES ACCOUNTS

1. For each brokerage or securities account, in any name, whether foreign or domestic, over which the taxpayer had signature, dealer, or other authority or which the taxpayer controlled, either directly or through nominees, agents, powers of attorney, letters of direction, or any device whatsoever, during the year produce all documents in the taxpayer's possession, custody, or control or to which the taxpayer had right of access for the period January 1 through December 31 of the year, including but not limited to:

a. account application (regardless of date)

b. signature cards (regardless of date)

c. monthly or periodic account statements

d. annual account statements

e. wire transfer authorizations and confirmations

f. all correspondence, including but not limited to, letters, memoranda, telegrams, telexes, e-mail, and letters of instruction

g. memorandum files maintained by the brokerage firm or any of its officers or employees reflecting communications between the firm, its officers, or employees and the taxpayer or others acting on the taxpayer's behalf, documenting actions taken pursuant to directions received from the taxpayer or on the taxpayer's behalf, and reflecting any thoughts or decisions of any person regarding the account

h. documents verifying the origin of all funds deposited in the account

i. Know Your Customer files or other similar records maintained for anti-money laundering purposes (regardless of date), including but not limited to account set-up documents, identification documents such as passports and driver's licenses, opening deposit slips, certificates of beneficial ownership, letters of reference, certificates of clean funds, and other source of funds documentation

D. OWNERSHIP

1. For each entity or structure, foreign or domestic (including but not limited to all foundations, *stiftungs*, *anstalts*, and/or other legal entities) in which the taxpayer exercised control and/or held an ownership interest, legal interest, fiduciary interest, and/or beneficial interest at any time during the year, provide all documents relating to each entity or structure, including but not limited to:

a. organizational documents, deeds of incorporation, by-laws, and registrations (regardless of date)

b. ownership documents including those reflecting the taxpayer's percentage of legal ownership, percentage of beneficial ownership, and all changes in ownership (regardless of date)

c. operational and business documents

d. financial statements

2. For each entity or structure identified, provide all books and records for the year, including but not limited to:

a. monthly or periodic bank statements, general ledgers

b. articles of incorporation

c. memoranda of association

d. stock record book

e. minute book

f. partnership agreements

g. trust instruments and other formation documents

h. documents designating beneficiaries

i. documents designating trustees

j. documents designating protectors

k. documents designating partners

l. documents designating percentage ownership

m. contracts and agreements

n. records of brokerage or other investment accounts

o. records of assets and liabilities

p. powers of attorney, letters of wishes, letters of direction, or other similar documents granting authority to agents to act on behalf of the entity

q. correspondence files

r. documents under ''mail to be kept at the bank'' agreements

s. safe deposit boxes

t. correspondence to or from the legal entity

u. organizational charts

v. orders to change representation or for cancellation of the legal entity

w. internal notes and memoranda referencing any aspect of the legal entity, founder, and/or beneficiary(ies)

x. last will and testament and all estate planning documents, whether superseded or not, of the founder and all beneficiaries

3. For each entity or structure identified, provide all documents distributed, sent, and/or transmitted by or to any legal, fiduciary, and/or beneficial owners to and from professionals (e.g., attorneys, accountants, bankers, trust advisers, etc.) including but not limited to contracts, agreements, advisories, schedules, letters, memoranda, notes, and instructions.

4. For each entity or structure identified, provide the name, address, and telephone number of the person(s) controlling the assets of the entity or structure during the year.

5. All written contracts, agreements, letters, memoranda, notes, statements, and all other documents of the year pertaining to the assignment and transfer of ownership interest in and rights to use of real, personal, or intangible property by or for the taxpayer or the taxpayer's benefit.

6. All powers of attorney giving the taxpayer authority to act on behalf of any person or entity, foreign or domestic, during the year.

7. All powers of attorney executed by the taxpayer giving another the authority to act on the taxpayer's behalf or on behalf of any person or entity, whether foreign or domestic, over which the taxpayer exercises control during the year.

8. All certificates of beneficial ownership, stock certificates, including bearer shares, or other similar evidences of ownership, owned by the taxpayer at any time during the year with respect to any foreign trust, corporation, foundation, international business company, or similar entity.

9. Provide all records, returns, information related to foreign joint venture profit participation from inception to current.

E. NONTAXABLE SOURCES OF INCOME

1. All records pertaining to any nontaxable sources of income, including but not limited to proceeds of loans, gifts, inheritances, insurance settlements, tax refunds, and tax-exempt interest the taxpayer received for year.

a. For each loan, whether commercial or private, made or obtained by the taxpayer or on the taxpayer's behalf during the year or which was in existence during the year, provide all documents evidencing the terms and performance of the transaction, including, but not limited to:

(1) loan applications (regardless of date)

(2) loan agreements and contracts (regardless of date)

(3) loan amortization schedules (regardless of date)

(4) promissory notes

(5) grant deeds, deeds of trust, mortgages, or other security

(6) documents showing disbursement of the loan proceeds (e.g., wire transfer authorization)

(7) records of receipt of principal and interest

(8) records of payment of principal and interest

F. TRAVEL

1. All of the taxpayer's original U.S. passports, both current and expired.

2. All of the taxpayer's original foreign passports, both current and expired.

3. All records of foreign travel during the year, including but not limited to commercial transportation, private leasing, and vehicles/aircraft/boats owned by the taxpayer.

G. PROFESSIONALS

1. All financial statements prepared by the taxpayer, for the taxpayer, or on the taxpayer's behalf for any purpose during and/or for the year.

2. Provide the name, address, and telephone number of each private banker, broker, trust adviser, investment or other financial adviser, adviser on privacy matters, lawyer, and accountant from whom the taxpayer received advice or services during the year.

3. All business cards for attorneys, paralegals, consultants, accountants, and/or other professionals in the taxpayer's possession and/or within the taxpayer's control during the year.

4. All records relating to any payments in the year by or for the benefit of the taxpayer or any non-publicly traded entity, foreign or domestic, in which the taxpayer held a direct or indirect ownership or beneficial interest or over which the taxpayer exercised control, either directly or through a nominee, agent, power of attorney, letter of direction, letter of wishes, or any device whatsoever, for:

a. management fees

b. consulting fees

c. research and development fees

d. legal fees

e. brokerage fees

f. other personal service fees

g. salaries or wages

h. insurance premiums

i. royalties

j. lease or rental fees

k. loan fees

l. interest

The foregoing records should include, but are not limited to:

a. contracts or agreements

b. invoices

c. cancelled checks

d. wire transfers

e. letters of credit

f. all correspondence

5. Identify all professional, social, and civic organizations the taxpayer has been a member of from January 1 of the year to present. Include in your response the following:

a. name, telephone number, and current address of the organization

b. dates of membership

c. offices held (and dates)

d. membership number or other identifying numbers (e.g., state bar numbers, CPA ID numbers)

6. If the taxpayer is a member of an organization with an oversight committee or disciplinary board, identify any complaints filed against the taxpayer, including:

a. name and address of the complainant (if anonymous, so indicate)

b. date of complaint

c. copy of the taxpayer's written response

d. disposition or result of investigation

e. date and location of any hearing, including the tribunal the taxpayer appeared before

INSTRUCTIONS FOR THIS REQUEST — READ CAREFULLY

1. The term "document(s)" is used in the broadest sense and includes all attachments. Document(s) includes any written, typed, photo static, recorded, or otherwise visually reproduced communications or presentations, whether comprised of letters, words, numbers, pictures, sounds, symbols, or any combination thereof. Document(s) refers to all written, printed, typed, graphically, visually, or aurally reproduced material of any kind, or other means of preserving thought or expression, and all tangible things from which information can be processed or transcribed. Further, "documents" include, but are not limited to:

a. items designated as internal, confidential, "not to be disclosed," or private;

b. all electronic mail (e-mail), whether on an electronic disk and/or any other system or device that saves e-mails, attachments, links; and

c. videotapes, audiotapes, CDs, cassettes, DVDs, films, flash drives (memory sticks, etc.), microfilm, computer files, computer discs, computer programs, and other electronic media.

2. If a document has been prepared in several copies, or additional copies have been made, and the copies are not identical (or, by reason of subsequent modification or notation, are no longer identical), each non-identical copy is a separate "document."

3. The taxpayer has "possession, custody, or control" if the taxpayer has actual or constructive possession of the document and/or can access the document upon inquiry and/or through a legal right to obtain the document including, but not limited to, responsive documents in the possession, custody, or control of taxpayer's lawyer(s), accountant(s), banker(s), adviser(s), and/or trust adviser(s).

4. All responsive documents in the taxpayer's possession, custody, or control should be provided, as well as all documents, in the possession, custody, or control of the taxpayer's agents, employees, and/or representatives, including but not limited to, responsive documents in the possession, custody, or control of the taxpayer's lawyer(s), accountant(s), advisers, and/or trust adviser(s).

5. If any responsive document was, but is no longer, in the taxpayer's possession, custody, or control, state what disposition

was made of it, the reason for such disposition, and who has possession or control of the document.

6. The term ''taxpayer'' means the individual under audit. The term ''taxpayer'' also means all foreign or domestic entities or structures over which the individual taxpayer exercises control including, but not limited to, corporations, partnerships, associations, limited liability companies, trusts, estates, foundations, escrows, charitable foundations, banks, and nominees.

7. A taxpayer can ''exercise control'' by acting directly or indirectly. Indirect control includes, but is not limited to, the use of nominees, agents, powers of attorney, protectors, advisers, trusts, letter of wishes, by-laws, letters of direction, or any device whatsoever.

8. The taxpayer has ''signature or other authority'' over an account if the taxpayer can control the disposition of money or other property in the account by delivery of a document containing the taxpayer's signature — either alone or with the signature of other person(s) and/or with code word(s) and/or code name(s) — to the bank or other person with whom the account is maintained, or if the taxpayer can exercise comparable authority over the account by direct or indirect communication with the bank or other person with whom the account is maintained, either orally or by some other means.

9. If the taxpayer claims a ''privilege'' for any document responsive to any request, or any part of such document, specify:

a. name and title of the author;

b. date appearing on such document or, if undated, the date or approximate dates such document was created;

c. name and title of each addressee and of each recipient of the document and/or copies thereto;

d. subject matter of the document;

e. name and address of each persons having present possession, custody, or control of such document and/or copies thereof;

f. privilege or protection claimed; and

g. number of the request(s) to which production of the document would otherwise be responsive.

10. If you do not have one or more of the requested items or do not know the answer to one or more of the questions asked but you know who does, please state the name, address, and phone number or other contact information for each such person in your response to the request or question.