Practice

By Charles P. Rettig

GAO to IRS: "Pursue Quiet Disclosures and First Time FBAR Filers"

The IRS has operated four offshore voluntary disclosure programs (OVDP) since 2003, offering various incentives for taxpayers to disclose their offshore financial accounts and pay delinquent taxes, interest and penalties. As of December 2012, the combined OVDPs resulted in more than 39,000 disclosures by taxpayers and over $5.5 billion in revenues received.[1] Beyond revenue generation, the offshore programs have provided the IRS with a wealth of information on various banks and advisors assisting people with offshore tax evasion, which the IRS is using to continue its international enforcement efforts.

Factors believed to have influenced participation in an offshore program include the following:

- 2003 Offshore Voluntary Compliance Initiative—Promoters identified and John Doe summons for information on taxpayers who used bank cards to access hidden offshore income[2]
- 2009 Offshore Voluntary Disclosure Program—John Doe summons for UBS accounts in Switzerland[3]
- 2011 Offshore Voluntary Disclosure Initiative—IRS actions against many foreign banks, including HSBC, which provided IRS information on accounts in India[4]
- 2012 Offshore Voluntary Disclosure Program—FATCA and increased actions against a number of foreign financial institutions[5]

The IRS has reported disclosures and collections from each offshore program as:

- 2003 Offshore Voluntary Compliance Initiative: 1,321 disclosures resulting in the collection of $200 million in unpaid taxes, penalties and/or fees;
- 2009 Offshore Voluntary Disclosure Program: 15,000 disclosures resulting in the collection of $4.1 billion (as of December 31, 2012) in unpaid taxes, penalties and/or fees;

Charles P. Rettig is a Principal with Hochman, Salkin, Rettig, Toscher & Perez, P.C. in Beverly Hills, California. Mr. Rettig is Past-Chair of the IRS Advisory Council, a member of the Advisory Board for the California Franchise Tax Board and for the California State Board of Equalization and a Regent and Elected Fellow of the American College of Tax Counsel.

- 2011 Offshore Voluntary Disclosure Initiative: 18,000 disclosures resulting in the collection of $1.4 billion (as of December 31, 2012) in unpaid taxes, penalties and/or fees; and
- 2012 Offshore Voluntary Disclosure Program: 5,000 disclosures (as of December 31, 2012) and an undetermined amount collected.[6]

Recently, the Government Accountability Office (GAO) issued a report based on a review of the 2009 OVDP.[7] The GAO Report (1) described the nature of the noncompliance of 2009 OVDP participants, (2) determined the extent the IRS used the 2009 OVDP to prevent noncompliance, and (3) assessed the efforts of the IRS to detect taxpayers trying to circumvent taxes, interests, and penalties that might otherwise be due. GAO determined that almost all of the 2009 OVDP participants received the maximum offshore penalty, almost half had accounts in Switzerland and about half of the revenue collected came from a small percentage of high penalty cases.[8]

Despite significant risks of not coming into compliance through the OVDP, some taxpayers remain noncompliant. Others attempt to disclose their offshore accounts outside the OVDP. In a "quiet disclosure," taxpayers file amended income tax returns for all or some of the tax years otherwise covered by an offshore program, and report previously unreported income—whether such income is associated with the previously unreported accounts or otherwise. At the same time, taxpayers attempting a quiet disclosure typically file late Forms 90-22.1, *Report of Foreign Bank and Financial Accounts (FBARs),* if they had not previously filed FBARs, or amended FBARs, if they had, to disclose the previously unreported offshore accounts.

Some taxpayers attempt to report their interests in offshore accounts and any income from the accounts prospectively on their current year's tax return, without amending prior years' returns, and by filing FBARs for the current and subsequent tax years. This filing would be similar to a situation where someone opened a new offshore account in the current year. Taxpayers pursuing a quiet disclosure or a prospective filing are aware of the OVDP but believe they would be unduly punished by the "one size fits all" approach under the OVDP. Although possibly economically oppressive for some, the OVDP avoids exposure to numerous additional penalties associated with the income tax returns and various required foreign information reports, a detailed examination, and limits the number of tax years at issue while also providing certainty with respect to the avoidance of a referral for criminal tax prosecution. Those who are discovered disclosing offshore accounts outside of the OVDP risk more significant penalties and the possibility of criminal prosecution, depending on the facts and circumstances of their cases.

The GAO Report recommended and the IRS agreed that going forward it should (1) use offshore data to identify and educate taxpayers who might not be aware of their reporting requirements; (2) explore options for employing a methodology to more effectively detect and pursue quiet disclosures and implement the best option; and (3) analyze first-time offshore account reporting trends to identify possible attempts to circumvent tax, interest and possibly penalties that might be due and take action to help ensure compliance. The IRS agreed with the foregoing GAO recommendations.

BSA Filing Requirements

Under the Bank Secrecy Act, U.S. residents or persons in and doing business in the United States must file a report with the government if they have a financial account in a foreign country with a value exceeding $10,000 at any time during the calendar year. Taxpayers comply with this law by noting the account on their income tax return and by filing the FBAR. Willfully failing to file an FBAR can be subject to both criminal sanctions (*i.e.,* imprisonment) and civil penalties equivalent to the greater of $100,000 or 50 percent of the balance in an unreported foreign account, per year, for up to six tax years.

FATCA

Unlike the reporting requirements for U.S. financial institutions, there has been no reporting regime for foreign financial institutions, and this lack of information has limited the IRS's ability to ensure taxpayers were reporting offshore income accurately. The IRS has begun implementing provisions of the Foreign Account Tax Compliance Act (FATCA), which requires, beginning in 2015, U.S. financial institutions to withhold a portion of certain payments made to foreign financial institutions that have not entered into a specific agreement with the IRS to report information on their U.S. clients. FATCA should enhance the ability of the IRS to identify noncompliant taxpayers. Although FATCA will not replace the OVDP, future offshore programs will likely be more focused on

identifying promoters of offshore tax schemes that are not associated with the financial institutions otherwise subject to the FATCA reporting requirements.

The OVDP

For years, the IRS has been pursuing—with undetermined success—the disclosure of information regarding undeclared interests of U.S. taxpayers (or those who ought to be U.S. taxpayers) in foreign financial accounts. An OVDP attracts taxpayers by offering a reduced risk of criminal prosecution and potentially lower penalties than if the unreported income and foreign financial account was discovered by one of the IRS's other enforcement programs. In order to encourage participation in the OVDP, the IRS publicizes the fact that it knows, or soon will know, the names of some offshore account holders. Since 2009, the IRS and the Tax Division of the Department of Justice (DOJ) have publicized more than 40 prosecutions of taxpayers and foreign advisors and bankers. The IRS also publicizes the terms of its offshore programs, which offer incentives to taxpayers who voluntarily disclose their accounts before the IRS learns about them.

Numerous taxpayers with previously undisclosed interests in foreign financial accounts and assets continue to seek participation in the current IRS offshore voluntary disclosure program (the OVDP which began in 2012), modeled after similar programs in 2009 and 2011. Taxpayers participating in the ongoing 2012 OVDP generally agree to file amended returns and file FBARs for eight tax years, pay the appropriate taxes and interest together with an accuracy-related penalty equivalent to 20 percent of any income tax deficiency and an "FBAR-related" penalty (in lieu of all other potentially applicable penalties associated with a foreign financial account or entity) of 27.5 percent of the highest account value that existed at any time during the prior eight tax years. Under the 2009 OVDP, the FBAR-related penalty was 20 percent,[9] and under the 2011 OVDP, the FBAR-related penalty was 25 percent of the highest account value during the prior six tax years. The 2012 OVDP is ongoing and does not have a stated expiration date, but it can be terminated by the IRS at any time either entirely or as to specific classes of taxpayers.[10]

GAO Analysis of the 2009 OVDP

The GAO analyzed tax return data for all 2009 OVDP participants and exam files for a random sample of cases with penalties over $1 million; interviewed IRS Offshore officials; and developed and implemented a methodology to detect taxpayers circumventing monies owed. To determine the extent to which the IRS used data from the 2009 OVDP to better prevent and detect future noncompliance, the GAO reviewed changes the IRS made to subsequent offshore programs and interviewed IRS officials from the Offshore Compliance Initiative office about actions taken to identify and target additional offshore noncompliance.

To assess the IRS's efforts to detect quiet disclosures, the GAO used IRS tax return data from the tax years covered by the 2009 OVDP, tax year 2003 through tax year 2008, and compared their results with those from the IRS. GAO also used general tax return data from tax years 2003 through 2010 from the IRS and FBAR data from the Financial Crimes Enforcement Network (FinCEN) to assess other possible methods by which taxpayers may be circumventing potential liabilities for taxes, interest and penalties associated with a failure to report an interest in an offshore account.

The GAO Report determined that of 10,439 closed 2009 OVDP cases reviewed, 96 percent agreed to the standard offshore penalty—20 percent of the highest aggregate value of the accounts—meaning the account value was greater than $75,000 and taxpayers used the accounts (*e.g.*, made deposits or withdrawals) during the period subject to the OVDP.[11] The overall median account balance from the 2009 OVDP was $570,000. Participant cases with offshore penalties greater than $1 million represented about six percent of all 2009 OVDP cases, but accounted for almost half of all offshore penalties collected.

Taxpayers from these cases disclosed a variety of reasons for maintaining accounts offshore, with many having accounts at UBS in Switzerland. GAO compared the locations of offshore accounts on 2008 FBARs filed by 2009 OVDP Participants with all 2008 individual FBAR filers and determined that Swiss accounts represented 42.11 percent of all 2009 OVDP individual participants as compared to 7.44 percent of all individual taxpayers filing 2008 FBARs; Canadian accounts represented 4.31 percent of all 2009 OVDP individual participants as compared to 17.08 percent of all individual taxpayers filing 2008 FBARs; Chinese accounts represented 3.06 percent of all 2009 OVDP individual participants as compared to 2.81 percent of all individual taxpayers filing 2008 FBARs; French accounts represented 4.1 percent of all 2009 OVDP individual participants as compared to 4.4 percent of all individual taxpayers filing 2008 FBARs; German

accounts represented 3.76 percent of all 2009 OVDP individual participants as compared to 5.82 percent of all individual taxpayers filing 2008 FBARs; Hong Kong accounts represented 2.81 percent of all 2009 OVDP individual participants as compared to 2.78 percent of all individual taxpayers filing 2008 FBARs; Indian accounts represented 2.37 percent of all 2009 OVDP individual participants as compared to 3.0 percent of all individual taxpayers filing 2008 FBARs; Israeli accounts represented 3.96 percent of all 2009 OVDP individual participants as compared to 1.76 percent of all individual taxpayers filing 2008 FBARs; Taiwanese accounts represented 2.38 percent of all 2009 OVDP individual participants as compared to 0.94 percent of all individual taxpayers filing 2008 FBARs; and accounts in the United Kingdom represented 8.21 percent of all 2009 OVDP individual participants as compared to 14.4 percent of all individual taxpayers filing 2008 FBARs.[12]

The GAO review of the 2009 OVDP closed cases for individual taxpayers[13] revealed that taxpayers agreeing to the 20-percent penalty represented 96 percent of closed cases with penalties remitting $2.786 billion in penalty dollars having a median penalty amount of $116,393; taxpayers agreeing to the 12.5-percent penalty represented less than one percent of closed cases with penalties remitting $0.002 billion in penalty dollars having a median penalty amount of $5,831; taxpayers agreeing to the five-percent penalty represented four percent of closed cases with penalties remitting $0.021 billion in penalty dollars having a median penalty amount of $18,478; and all penalty rates remitting an aggregate of $2.810 billion in total penalty dollars and a median penalty amount of $107,949.[14]

For large penalty cases, almost 50 percent of taxpayers had one or more bank accounts with UBS in Switzerland.[15] Many taxpayers in the 30 large penalty cases reviewed by GAO had resided outside the United States for extended periods of time—either as U.S. citizens or prior to obtaining U.S. citizenship. Many taxpayers who disclosed extended periods of non-U.S. residency reported that they had opened their offshore accounts with income earned outside of the United States. Some had been living and working overseas as U.S. citizens for many years. Others opened accounts before immigrating to the United States. Although some taxpayers became U.S. residents decades ago, they maintained their offshore accounts and did not disclose them on tax returns or FBARs. Some taxpayers reported opening bank accounts in Switzerland as a means of protecting family assets during periods of war or instability in their native country; some cited family histories or personal fears about the safety of U.S. banks as their reasons for moving savings offshore; some cited the need to protect or shelter assets from possible U.S. lawsuits; some who immigrated to the United States reported that they had been unaware of their FBAR reporting requirements, that they had to state that they had foreign accounts on the Form 1040, Schedule B, or that the United States taxes the worldwide income of its residents, including overseas investment income.[16]

GAO estimated that that 47 percent of taxpayers receiving large penalties inherited offshore accounts from a parent, spouse or other relative—some of whom were not U.S. citizens or residents.[17] GAO further estimated that that 40 percent of 2009 OVDP participants receiving large penalties used complex arrangements to indirectly own or manage their offshore accounts.[18] These arrangements involved the use of foreign corporations, foundations, trusts and other entities in jurisdictions that have been designated as offshore tax havens and financial privacy jurisdictions, some of which were recommended by foreign financial advisors. In some cases, the entities were "sham" entities—*i.e.,* entities created to conceal ownership from U.S. tax authorities or disguise the repatriation of offshore funds back to the United States.

Detecting Quiet Disclosures

The IRS Offshore Compliance Initiative office tested several different methodologies to identify "quiet disclosures," including (1) looking at amended returns during tax year 2003 to tax year 2008, the period covered by the 2009 OVDP, and removing any non-offshore related adjustments, such as filings status changes and additional exemptions; (2) looking at amended returns with increased tax assessments over an established threshold during tax year 2003 to tax year 2010; (3) comparing taxpayers with a history of filing FBARs in nonsecrecy jurisdictions between tax year 2003 and tax year 2008 with those who filed delinquent FBARs processed in 2009 involving a secrecy jurisdiction along with an amended return; and (4) in 2012, an effort that was not designed to detect quiet disclosures, but to reroute misaddressed amended returns sent in by participants in the 2011 offshore program, was the most successful effort to find them. Collectively, the IRS detected several hundred returns that were

identified as quiet disclosures involving previously unreported interests in offshore accounts.[19]

GAO identified 10,595 potential "quiet disclosures" that occurred during the pendency of the 2009 OVPD.[20] Unlike the IRS, GAO looked at all taxpayers who, for the tax years covered by the 2009 OVDP, filed amended or late returns and filed amended or late FBARs. They then excluded 2009 OVDP participants from this population. While only an IRS examination can determine whether a potential quiet disclosure is an actual quiet disclosure, the 10,595 taxpayers that GAO identified have an unlikely combination of characteristics that could indicate that taxpayers are quietly disclosing. GAO identified 3,386 taxpayers that filed amended or late returns, and filed amended or late FBARs for multiple years. From that group, GAO identified 94 taxpayers that met the same criteria for all six tax years covered by the 2009 OVDP. The IRS agreed with the GAO methodology as reasonable and appropriate.[21] GAO further recommended that the IRS explore different methodologies that include a systematic evaluation of amended returns or late filed returns, along with amended or late filed FBARs, without too narrowly restricting either the amended return or the FBAR populations.[22]

> Beyond revenue generation, the offshore programs have provided the IRS with a wealth of information on various banks and advisors assisting people with offshore tax evasion, which the IRS is using to continue its international enforcement efforts.

The GAO Report asserts that a failure by the IRS to identify and pursue "quiet disclosures" will undermine the incentive of others to participate in the offshore programs.[23] If taxpayers are able to quietly disclose and pay less overall penalties than they would have in the OVDP, the incentive for other noncompliant taxpayers to participate in a program is significantly reduced. Further, if quiet disclosures remain undetected, the IRS might not receive leads to other noncompliant taxpayers, their advisors and other financial institutions enabling such conduct by U.S. citizens and residents.

The IRS can be expected to pursue leads from every potential source and design computer filters to match and detect those pursuing compliance outside the 2012 OVDP. To maintain the integrity of the 2012 OVDP, the IRS is likely to assert penalties exceeding those within the OVDP against those discovered to have pursued a quiet disclosure. As such, currently noncompliant taxpayers should carefully consider their unique facts and circumstances in deciding whether to avoid participating in the OVDP in favor of a quiet or prospective disclosure. When considering the OVDP, many look to whether the taxpayer might be considered a realistic candidate for a criminal prosecution referral by the IRS or prosecution by the Department of Justice? (If so, the determination to participate was relatively quick and easy.) What is the realistic possibility of reducing that prospect by filing amended or delinquent returns and FBARs in lieu of a direct participation in the OVDP? What would be the potentially applicable penalties upon an examination of such returns and FBARs? Could the government actually carry their burden of demonstrating that the taxpayer "willfully" violated the FBAR filing requirements? Since the OVDP asserts 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, is actually less outside the OVDP.

The decision to participate in the ongoing 2012 OVDP as opposed to possibly pursuing a quiet or prospective disclosure must take into account all relevant facts and circumstances as well as the possibility of expansive IRS discretion to perform examinations over a lengthy period of time. Having inherited funds in a foreign financial account, without more, might not be considered deserving by the IRS of some lesser penalty regime. Other considerations often include the source and amount of funds, how long the account has been maintained, whether there were withdrawals or deposits into the account or the account was moved to another foreign financial institution at some point, whether the taxpayer's advisors had some degree of knowledge about the account, the sophistication and education of the taxpayer, whether foreign entities were involved as accountholders, *etc.*

Finally, all noncompliant taxpayers should carefully review the recent court decisions in *Williams* and *McBride* on the issue of determining "willfulness" for

assertion of the more significant FBAR penalties (of up to 50 percent of the account balance, per year).[24] Although the underlying facts in each case were not the best, the courts might not lightly view those with considerable financial resources who fail to inquire about their potential reporting requirements associated with various interests in foreign financial accounts.

First Time FBAR Filers

The number of taxpayers reporting offshore accounts on Form 1040, Schedule B and the number of taxpayers filing FBARs has increased significantly in recent years.[25] In 2003, there were 243,296 Schedule Bs filed reporting foreign accounts and 199,738 FBARs filed.[26] In 2010, there were 515,635 Schedule Bs filed reporting foreign accounts and 594,488 FBARs filed.[27] In 2011 there were 618,134 FBARs filed.[28] The GAO Report surmised that the increased foreign account reporting could be attributable to taxpayers reporting new offshore accounts, or taxpayers who had always reported income from offshore accounts on their tax returns could now be filing FBARs and reporting the existence of the accounts on Schedule B for the first time (perhaps as a result of the IRS publicity surrounding the IRS offshore enforcement efforts).[29]

The increased reporting of foreign accounts on Schedule B and the increased FBAR filings are significantly larger than the approximately 39,000 taxpayers that came forward in one of the IRS's offshore programs. As such, GAO questioned whether these increases are most likely attributable to taxpayers attempting to circumvent the penalty regime of the OVDP. The IRS is expected to try to determine whether taxpayers who reported their offshore income properly, but had not filed FBARs, recently started filing delinquent FBARs (as directed by the 2009 OVDP instructions). GAO believes the IRS could also examine a selection of first time FBAR filings to determine the date offshore accounts were opened to determine the potential magnitude of this issue.[30]

The Way Forward

GAO determined that the IRS's offshore programs have been effective in compelling taxpayers to disclose their unreported offshore income. Through these programs, the IRS has collected more than $5.5 billion, brought tens of thousands of taxpayers into compliance, and gained increased information on offshore noncompliance. However, it remains uncertain as to the number of additional U.S. taxpayers that may remain noncompliant. In conclusion, the GAO Report recommends that the IRS (1) use offshore data to identify and educate taxpayers who might not be aware of their reporting requirements; (2) explore options for employing a methodology to more effectively detect and pursue quiet disclosures and implement the best option; and (3) analyze first-time offshore account reporting trends to identify possible attempts to circumvent monies owed and take action to help ensure compliance. The IRS agreed with all of GAO's recommendations.

Deposits and withdrawals to the foreign account can reveal intentions and knowledge of various individuals involved. Those who do not participate in the OVDP should be prepared to respond to government inquiries regarding the manner in which deposits and/or withdrawals were made to/from the foreign account(s); the mechanics of how deposits/withdrawals were made; the form in which deposits/withdrawals occurred (*i.e.,* cash, check, wire, travelers' check, *etc.*); amounts that were withdrawn/deposited each time; when such deposits/withdrawals occurred; where such deposits/withdrawals occurred; whether there were there limitations on the amounts that could be deposited/withdrawn; and documents received a deposit/withdrawal occurred (*i.e.,* receipt, credit memo, debit memo, *etc.*)?

There will also be inquiries as to whether the foreign accounts remain open and if not, where the funds were transferred when the account(s) were closed. Some taxpayers closed accounts and wire transferred the funds directly to a domestic account. Others closed accounts and transferred the funds through various means to other foreign accounts. Further questions often lay within the responses to each of the foregoing questions. Decisions regarding something other than participating should be carefully considered depending upon the taxpayers' responses to each of the foregoing questions. If discovered before any voluntary disclosure submission, a purely civil resolution is anything but certain.

Foreign account information is flowing into the IRS under tax treaties, through submissions by whistleblowers, from others who participated in previous offshore voluntary disclosure programs who have been required to identify their bankers and advisors. Additional information is becoming available as the government mines information received under the Foreign Account Tax Compliance

Act (FATCA) and from Foreign Financial Asset Reporting (Form 8938). Foreign institutions in Asia, the Middle East and elsewhere continue to advise their account holders to consult U.S. tax advisors regarding the IRS voluntary disclosure program and their U.S. tax reporting relating to their foreign financial accounts. Such institutions will take whatever action is necessary to avoid being indicted, beginning with the delivery of account holder information to the U.S. government.

GAO has identified methods by which the IRS offshore enforcement efforts can be further enhanced. These efforts are designed to uncover noncompliant taxpayers who, for whatever reason, have been waiting for what they perceive to be a more reasonable resolution. U.S. taxpayers who have not come into compliance should immediately consult competent tax professionals and determine the best method of immediately getting into compliance—waiting is not a viable option.

Endnotes

[1] *IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion,* GAO-13-318 (Mar. 27, 2013). *See www.gao.gov/products/GAO-13-318.*

[2] The 2003 offshore program stemmed from a series of John Doe summonses issued to a variety of financial and commercial businesses to obtain information on U.S. persons who held credit, debit or other payment cards issued by offshore banks. The IRS used records from the summonses to trace the identities of taxpayers whose use of these payment cards may have been related to hiding taxable income; this drew many other taxpayers to the offshore program.

[3] The 2009 OVDP coincided with events that helped attract a large number of taxpayers to the program. On February 18, 2009, UBS AG, a global financial services firm headquartered in Switzerland, entered into a deferred prosecution agreement confirming the account of a whistleblower and acknowledging that its employees participated in a scheme to actively assist and facilitate U.S. taxpayers' concealment of taxable income. As part of the deferred prosecution agreement, UBS agreed to turn over identities and account information on a limited number of clients. Later that month, the Department of Justice (DOJ) petitioned the U.S. District Court in Miami for an order enforcing a John Doe summons, seeking turnover of information on approximately 52,000 undisclosed accounts. By August 2009, the IRS and DOJ announced they had reached a settlement agreement with Switzerland. The agreement required Swiss authorities to give the IRS the names of approximately 4,450 U.S. clients with accounts at UBS, pursuant to a request under the USA-Switzerland income tax treaty. All parties agreed to keep confidential the specific criteria by which the 4,450 accounts would be selected until after the 2009 OVDP deadline passed. This created uncertainty among UBS account holders as to whether their names were on the list to be disclosed. The IRS gave taxpayers until October 15, 2009, to enter the program. IRS publicity about the program and correspondence sent by UBS to all U.S. account holders emphasized the several criminal and civil penalties applicable to taxpayers who did not make voluntary disclosures before Switzerland turned over the account data.

[4] During the 2011 program, the IRS and the DOJ were building cases against tax evasion involving foreign banks in several countries, including Switzerland, Liechtenstein, Israel and India. Many 2011 program participants came forward as a result of criminal enforcement activity and a John Doe summons issued to HSBC, a global banking and financial services firm headquartered in the United Kingdom, with significant business operations in Hong Kong and Asia.

[5] *Id.,* at 10. The 2012 program, which is still open at present does not have an end date, is expected to draw participants based on further criminal enforcement activity against foreign banks and opportunities for additional John Doe summonses that are being built by IRS and DOJ with information from past offshore programs. Also during this time, as the Foreign Account Tax Compliance Act (FATCA) becomes fully implemented, IRS expects to have increased information reporting from certain taxpayers and from foreign financial institutions on offshore accounts.

[6] *Id.,* at 10, Table 1.

[7] *Id.*

[8] *Id.*

[9] A five-percent penalty was generally allowed if taxpayers did not open or cause the account to be opened, had no account use, and had paid all applicable U.S. taxes on funds deposited to the accounts, with only account earnings having escaped U.S. taxation. In later program years, minimal account activity was allowed, for example, to update address information, or to withdraw a minimal amount of funds, defined as less than $1,000 in any program year for which the taxpayer was noncompliant. This limit did not include transfers back to the United States upon closing an offshore account. Less than five percent of 2009 OVDP participants received one of the mitigated offshore penalties, 12.5 percent or five percent

[10] *See* Charles P. Rettig, Practice, *IRS Offshore Voluntary Disclosure Program: Opt-Outs, a Revised FBAR and Rescissions of Pre-Clearance Letters by Criminal Investigation*, J. Tax Practice and Procedure, Apr.–May 2013, at 17.

[11] *IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion,* GAO-13-318 (Mar. 27, 2013). *See www.gao.gov/products/GAO-13-318,* at 13. The GAO review of the 2009 OVDP Closed Cases (Individual Taxpayers) as of November 29, 2012, revealed that taxpayers agreeing to the 20-percent penalty represented 96 percent of closed cases with penalties remitting $2.786 billion in penalty dollars having a median penalty amount of $116,393; taxpayers agreeing to the 12.5-percent penalty represented less than less than one percent of closed cases with penalties remitting $0.002 billion in penalty dollars having a median penalty amount of $5,831; taxpayers agreeing to the five-percent penalty represented four percent of closed cases with penalties remitting $0.021 billion in penalty dollars having a median penalty amount of $18,478; and all penalty rates remitting an aggregate in total penalty dollars of $2.810 billion and a median penalty amount of $107,949.

[12] *Id.,* at 14, Figure 3.

[13] From the 19,337 participants in the 2009 OVDP, GAO identified 10,439 closed examination cases as of November 29, 2012, which were used for their penalty analysis.

[14] *IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion,* GAO-13-318 (Mar. 27, 2013). *See www.gao.gov/products/GAO-13-318,* at 13, Table 2 and Table 3.

[15] *Id.,* at 15.

[16] *Id.,* at 15–16.

[17] *Id.,* at 16.

[18] *Id.,* at 17.

Endnotes

[19] *Id.,* at 25.
[20] *Id.,* at 24.
[21] *Id.,* at 25.
[22] *Id.,* at 26.
[23] *Id.,* at 23.
[24] *Williams,* CA-4, No. 10-2230 (2012) and *McBride,* DC-Utah, No. 2:09-cv-00378 (2012).
[25] *Supra* note 14, at 26. IRS Form 1040, Schedule B, Line 7a includes a yes/no question asking taxpayers if, at any time during the tax year, they had 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. The figure contains IRS estimates of the number of forms in which a taxpayer answered "yes" to this question. Under the BSA, U.S. residents or citizens with a financial interest or signature authority over one or more foreign financial accounts with a total of more than $10,000 are required to annually file form TD F 90-22.1 Report of Foreign Bank and Financial Accounts (FBAR) with Treasury. The FBAR must be filed for the calendar year by June 30 of the following year.
[26] *Id.,* at 27.
[27] *Id.,* at 27.
[28] *Id.,* at 27.
[29] *Id.,* at 26.
[30] *Id.,* at 28.