

Part V: Minimizing Risk of Criminal Prosecution Under the New Streamlined and Delinquent Filing Procedures By Meeting Requirements for a Voluntary Disclosure in IRM 9.5.11.9. Four voluntary disclosure procedures comprise the newly announced 2014 Offshore Voluntary Disclosure Procedures. Two of the new voluntary disclosure procedures apply to taxpayers who have offshore assets and omitted income or unpaid tax, i.e., the OVDP and the Streamlined Procedures. Two other of the new voluntary disclosure procedures apply to taxpayers who haven't omitted taxable income and have paid all taxes but have failed to file offshore information returns, i.e., the Delinquent FBAR and Delinquent International Information Return Procedures.

This Part V considers the longstanding voluntary disclosure procedures under IRM 9.5.11.9. Voluntary disclosure under IRM 9.5.11.9 are not one of the four "New Procedures" and are not mentioned on the IRS' Website as being one of the voluntary disclosure options available to taxpayers desiring to make voluntary offshore disclosures. This Part V suggests that voluntary disclosures under IRM 9.5.11.9, as its requirements are suggested herein to be met in today's offshore enforcement environment, is a viable fifth offshore voluntary disclosure procedure which should be considered carefully by taxpayers.

A. Background. The New Streamlined and Delinquent FBAR/Information Return procedures are "voluntary disclosures," just as are submissions under the OVDP. However, unlike the case with OVDP submissions, there is no protection from civil examination or from criminal prosecution for taxpayers making voluntary disclosures under the Streamlined or Delinquent FBAR/Information Return procedures. Rather, each of these three options result in voluntary disclosures which will be subject to IRS examination if selected for audit. Further, any such examination may result in the imposition of civil penalties and criminal prosecution.

Similar to the dilemma which was faced by taxpayers who considered "opting out" after entering the 2012 OVDP, there is a reluctance to use the Streamlined Procedures due to the possibility of the IRS imposing "draconian civil penalties." The Taxpayer Advocate Report uses the term "draconian" and it applies. The magnitude and scope of civil penalty exposure is outlined at 2014 FAQ 5. The civil penalties outside of the OVDP can be significantly in excess of those in the OVDP. This point was recently driven home in the June, 2014 Miami, Florida case, United States v. Zwerner which resulted in multi-year maximum FBAR penalties. Examples of multi-year FBAR and civil fraud penalties are set out in 2012 FAQ 51.2. There is little IRS guidance or case law precedent relative to offshore penalties under Title 31 of the U.S. Code. However, the IRS has been aggressively asserting, assessing, and threatening to assert these penalties on those who remain outside of the tax disclosure system.

Taxpayers against whom these penalties are assessed must then contest them, and incur the cost and expense to do so, with results of any challenge uncertain.

The New Procedures fail to provide any assurances that the IRS won't impose penalties if it examines Delinquent FBAR submissions and the examining agent concludes that the submissions do not qualify under the procedures. For example, if the IRS determines that there was an existing

IRS investigation, or omitted income, or, perhaps if the IRS disagrees with the reasonable cause statement and finds the FBAR was intentionally not filed, it might impose civil and criminal penalties.

Under the Delinquent International Information Return Procedures, if the IRS examines the returns and disagrees with the reasonable cause statement, concludes that the reporting entities were used for tax evasion, or finds omitted income or unpaid taxes, it might impose civil and criminal penalties.

Therefore, taxpayers seeking assurances not provided under the four New Procedures may look to make voluntary offshore disclosures outside of the four New Procedures. The procedures under IRM 9.5.11.9 are considered herein.

This Part V is intended to be considered by taxpayers who:

1. Desire to eliminate the risk of criminal prosecution to the extent that risk would be eliminated in the OVDP;
2. In good faith believe that their offshore non-compliance was non-willful or with reasonable cause;
3. Don't want to accept the 27.5% OVDP offshore penalty;
4. Accept civil audit - selection risk and accept that their returns might be examined under a heightened audit selection process;
5. Accept that the offshore penalties which may result may be in excess of the OVDP 27.5% penalty and are willing to accept that finding or contest it through available IRS administrative appeals procedures or in court; and
6. Understand that if the IRS agrees that the offshore non-compliance was non-willful the FBAR penalties would be reduced to \$10,000 per year per account and will be eliminated entirely if non-willful conduct and reasonable cause for the non-filing is established. These taxpayers may find that these penalties are more appropriate than those in the OVDP or under the Streamlined Procedures.

The following topics are discussed in this Part V:

1. IRM 9.5.11 is the basis upon which the 2014 OVDP affords protection against criminal prosecution to OVDP participants.

2. The OVDP doesn't provide any greater protection from recommendations for criminal prosecution than a voluntary disclosure made outside of the OVDP as long as the disclosure outside of the OVDP meets the requirements of a voluntary disclosure under IRM 9.5.11.

3. Disclosures made under IRM 9.5.11 require more than the mere filing of amended returns and require notification of Criminal Investigation.

4. The requirements of a Voluntary Disclosure under IRM 9.5.11.

B. Reasons Why IRM 9.5.11 Should Today Remain a Viable "Fifth" Option for Voluntary Offshore Disclosures. Voluntary disclosures made under IRM 9.5.11 should be viable and should present a fifth voluntary disclosure option which is in addition to the four options under the New Procedures based upon the following analysis.

1. IRM 9.5.11 is the basis upon which the 2014 OVDP affords protection against criminal prosecution to OVDP participants.

A. FAQ 3 expressly states that the 2014 OVDP is a civil "counterpart" to Criminal Investigation's longstanding voluntary disclosure policy. Two components comprise the OVDP: (1) a criminal component, which is IRM 9.5.11, and (2) a civil component, the OVDP. FAQ 3 reads in part:

2014 FAQ 3

Question 3: "How does this program differ from the IRS's longstanding voluntary disclosure practice or the 2009 OVDP and 2011 OVDI?"

Answer: "The Voluntary Disclosure Practice is a longstanding practice of IRS Criminal Investigation whereby CI takes timely, accurate, and complete voluntary disclosures into account in deciding whether to recommend to the Department of Justice that a taxpayer be criminally prosecuted. It enables noncompliant taxpayers to resolve their tax liabilities and minimize their chance of criminal prosecution. When a taxpayer truthfully, timely, and completely complies with all provisions of the voluntary disclosure practice, the IRS will not recommend criminal prosecution to the Department of Justice for any issue relating to tax noncompliance or failure to file Report of Foreign Bank and Financial Accounts (commonly known as an FBAR reported on FinCEN Form 114, previously Form TD F 90-22.1).

This current offshore voluntary disclosure program is a counterpart to Criminal Investigation's Voluntary Disclosure Practice. ... it addresses the civil side of a taxpayer's voluntary disclosure of foreign accounts and assets by defining the number of tax years covered and setting the civil penalties that will apply."

B. 2014 FAQ12 states that taxpayers eligible under IRM 9.5.11 are eligible under the OVDP. 2014 FAQ 12 expressly provides that if a taxpayer meets the requirements of IRM 9.5.11, the taxpayer is eligible for the OVDP, as follows:

2014 FAQ 12

Question: Who is eligible to make a voluntary disclosure under this program?

Answer: Taxpayers who have legal source funds invested in undisclosed OVDP assets (see FAQ 35) and meet the requirements of IRM 9.5.11.9 are eligible to apply for IRS Criminal Investigation's Voluntary Disclosure Practice and the OVDP penalty regime.

2. The OVDP doesn't provide any greater protection from recommendations for criminal prosecution than a voluntary disclosure made outside of the OVDP as long as the disclosure meets the requirements of a voluntary disclosure made pursuant to IRM 9.5.11. 2014 FAQ 51.3 sets forth the specific components of a voluntary disclosure which meets the requirements in IRM 9.5.11, such that IRS' Criminal Investigation will not recommend a case to the DOJ for prosecution. A disclosure must be "complete, accurate and truthful" regardless of it is made a part the OVDP.

There is no "guarantee" of non-referral under IRM 9.5.11 and there is none under the OVDP (although as a practice, a disclosure meeting the requirements of IRM 9.5.11 almost never results in a referral). FAQ 51.3 reads:

2014 FAQ 51.3

Question: "If I opt out of the OVDP and undergo a regular examination, is there a chance my case could be referred back to Criminal Investigation for penalties or prosecution?"

Answer: "Yes. Criminal Investigation's Voluntary Disclosure Practice provides a recommendation that you not be prosecuted for violations up to the date of your disclosure. If your disclosure is ultimately determined to have not been complete, accurate, and truthful, *or* if you commit a crime after the date of your voluntary disclosure, you are potentially subject to penalties and prosecution."

3. Disclosures made under IRM 9.5.11 require more than the mere filing of amended returns without notifying Criminal Investigation. The 2014 FAQs make it clear that so called "quiet disclosures" won't provide assurances against criminal prosecution because they are not considered to be "voluntary disclosures" under IRM 9.5.11. Based upon the FAQ "quiet disclosures" are defined by the IRS as those which involve the filing of amended returns without any involvement with Criminal Investigation.

FAQ 15 reads in part:

2014 FAQ 15

Question: “The IRS is aware that some taxpayers have made “quiet disclosures” by filing amended returns, by filing delinquent FBARs, and paying any related tax and interest for previously unreported income from OVDP assets (see FAQ 35) without otherwise notifying the IRS. ...Unlike a voluntary disclosure through the OVDP, quiet disclosures provide no protection from criminal prosecution and may lead to civil examination and the imposition of all applicable penalties.”

C. Elements of a Voluntary Disclosure Under IRM 9.5.11.9. The short-hand requirements for a voluntary disclosure under IRM 9.5.11.9 are that the disclosure be: (1) timely, (2) truthful, and (3) complete, and the taxpayer must be (4) “cooperative.” The requirements as they appear in the IRM are:

IRM 9.5.11.9 (as last reviewed or updated August 18, 2012) reads in part as follows:

“TAX CRIMES - GENERAL

Voluntary Disclosure Practice

“(1) It is currently the practice of the IRS that a voluntary disclosure will be considered along with all other factors in the investigation in determining whether criminal prosecution will be recommended. This voluntary disclosure practice creates no substantive or procedural rights for taxpayers, but rather is a matter of internal IRS practice, provided solely for guidance to IRS personnel. Taxpayers cannot rely on the fact that other similarly situated taxpayers may not have been recommended for criminal prosecution.

(2) A voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended. This practice does not apply to taxpayers with illegal source income.

(3) A voluntary disclosure occurs when the communication is truthful, timely, complete, and when:

a. the taxpayer shows a willingness to cooperate (and does in fact cooperate) with the IRS in determining his or her correct tax liability; and

b. the taxpayer makes good faith arrangements with the IRS to pay in full, the tax, interest, and any penalties determined by the IRS to be applicable.

(4) A disclosure is timely if it is received before:

a. 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;

- b. the IRS has received information from a third party (e.g., informant, other governmental agency, or the media) alerting the IRS to the specific taxpayer's noncompliance;
- c. the IRS has initiated a civil examination or criminal investigation which is directly related to the specific liability of the taxpayer; or
- d. the IRS has acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena)."

(5) Any taxpayer who contacts the IRS in person or through a representative regarding voluntary disclosure will be directed to Criminal Investigation for evaluation of the disclosure. Special agents are encouraged to consult Area Counsel, Criminal Tax on voluntary disclosure issues."

D. Voluntary Disclosures Under IRM 9.5.11 in Today's Offshore Environment. The words in IRM 9.5.11, similar to the words in the U.S. Constitution, are relatively few, and have not undergone significant changes over the years. However, as with the Constitution, IRM 9.5.11.9 remains viable because its four broad and simple principles have the elements of an enduring voluntary disclosure framework. The four elements are: The disclosure must be (1) timely, (2) truthful, and (3) complete, and the taxpayer must be (4) "cooperative." These principles have been construed and adapted to the evolving and dynamic tax enforcement environment over the years and they are construed in this Article as they seemingly must be applied in today's aggressive offshore enforcement environment, including OVDP procedures, offshore investigations, FATCA, and offshore account inter-governmental agreements and information sharing procedures.

There are no hard and fast rules which will dictate the minimum requirements necessary to satisfy the requirements of IRM 9.5.11 in today's offshore enforcement environment. Therefore, since we know that the current OVDP submission requirements meet the requirements in IRM 9.5.11 we will assume that a voluntary disclosure made other than in the OVDP, and containing the same information as is required under the OVDP, if submitted to Criminal Investigation ("CI"), will meet the requirements of IRM 9.5.11. Further, once CI evaluates the voluntary disclosure, it should then make a determination that criminal prosecution will not be recommended just as it would under the OVDP.

The steps to be taken in submitting a voluntary disclosure under IRM 9.5.11.9 for an offshore disclosure might be as follows (each situation must be carefully considered on its own facts):

1. Submit a pre-clearance letter to Criminal Investigation. A pre-clearance letter if received, will tell the taxpayer that there are no investigations which would make the taxpayer ineligible and assures that a disclosure is "timely." The pre-clearance request should make it clear that the taxpayer is requesting the letter so as to be eligible to make an offshore voluntary disclosure

under the Streamlined Procedures, or under the Delinquent FBAR/Information Return Procedures, as all of these procedures require that the taxpayer not be under civil or criminal exam. The OVDP procedures for pre-clearance in 2014 FAQ 23 set out the information which is provided to CI for an OVDP pre-clearance. They illustrate the information which would sufficiently inform CI in any offshore voluntary disclosure made today. If pre-clearance is received, the next steps would follow as with the OVDP. If pre-clearance is not received, it is recommended that appropriate counsel be consulted (further steps are not considered here).

2. A complete, truthful submission package is assembled. A “complete” disclosure in today’s offshore environment is a detailed set of documents which requires significant time and attention to detail. Nonetheless, the OVDP submission requirements set the standard for a “complete” disclosure. It is recommended that disclosures contain the same information as under the OVDP. In addition, since the submission under IRM 9.5.11 may well be part of a request that the civil penalties be as under the Streamlined Procedures, or that they not be applied for reasonable cause, those parts of the submission requirements for a Streamlined Submission should be considered and submitted if appropriate. For example, statements of “reasonable cause” for late filings and certifications of “non-willfulness” should be considered.

3. Coordination and Filing Through or With the Full Knowledge of CI. The taxpayer’s counsel would arrange with Criminal Investigation to receive the voluntary disclosure under 9.5.11.6. In the recent Zwerner case, it appears that counsel for Zwerner met with CI, but then they (or subsequent counsel) filed amended returns without documenting that CI was consulted and, in any event, the returns were not filed with CI. The government there maintained that a “voluntary disclosure” had not occurred. The above-referenced FAQs make it clear that the CI must be contacted by the Taxpayer and returns must be submitted with CI’s participation, at its direction or in accordance with its procedures.

4. Full Payment Up Front May Be Required. Since the 2014 OVDP now requires full payment of all income taxes and offshore penalties with the submission, a consistent filing under IRM 9.5.11 would include the 5% offshore penalty (or none if reasonable cause is asserted) plus all income taxes due for prior years. This would address the “cooperation” requirement.

5. Other Cooperation. Since “cooperation” is required, the taxpayer should consult with CI as to the extent of cooperation and should be prepared to sign a cooperation statement or agree to the same cooperation as under 2014 FAQs 7 and 25.

6. Consider Requesting CI to Permit Filing Under Streamlined Procedures Subsequent to Clearance If Possible. Taxpayer’s counsel may discuss with CI whether the returns can be filed pursuant to instructions for filing under the Streamlined Procedures once CI agrees that the requirements of IRM 9.5.11.6 are met. Otherwise, the returns will be filed outside of the Streamlined Procedures. In either event they would be then subject to regular examination procedures, although the IRS might decide to give heightened review to these submissions, or it

might examine each such submission. In any event, the taxpayer at that point should be assured that criminal prosecution is no more likely than had the submission been through the OVDP.

E. Conclusions as to IRM 9.5.11 Offshore Disclosure Outside of OVDP. Taxpayers should be encouraged to come forward and to make voluntary offshore disclosures. However, the three New Procedures other than the OVDP leave taxpayers without assurances that they won't disclose voluntarily only to face criminal prosecution later. Therefore, taxpayers who: (1) are concerned with criminal prosecution as a possible threat or reality, (2) in good faith believe that their offshore violations were non-willful and that they should receive lower penalties than under the OVDP, and (3) who are willing to risk the assessment of civil penalties greater than those which would apply under the OVDP and under the Streamlined Procedures, should consider making a voluntary disclosure outside of the New Procedures and under the voluntary disclosure procedures in IRM 9.5.11.9 so as to eliminate the possibility of criminal prosecution to the extent possible.

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