VI. Willful or Non-Willful Offshore Omissions? As discussed in the Introduction, and in Part I (the OVDP) and Part II (the New Streamlined Procedures), the IRS' failure to provide clear examples which help illustrate the meaning of "willful conduct" and "non-willful conduct" may result in the failure of the New Procedures to "streamline" the offshore voluntary disclosure process to the disservice of taxpayers and the government.

This Part VI examines the meanings of "willful" and "non-willful." It first discusses the Taxpayer Advocate's recommendation regarding the definition of "willfulness." Next, it reviews the standards of "willfulness" as presented by the United States and taxpayer's counsel, and as determined by the Court in the recent Miami, Florida case which was tried and decided by a jury in Miami, Florida in June, 2014, United States v. Zwerner, Case No. 13-22082-CIV-Altonaga/Simonton (U.S. District Ct. So. Dist. Fla.).

Included are excerpts of some of the existing guidance in determining "willfulness," "non-willfulness," and "reasonable cause" in the Internal Revenue Manual and in IRS publications, including Fact Sheet 2011-13, which was released in connection with the former streamlined procedures

This Part VI then concludes with thoughts as to establishing "non-willfulness" consistent with the Certification of Non-Willfulness in the Streamlined Procedures.

A. The Taxpayer Advocate's Report Suggests Further Guidance and "Voluntary Intentional Violation Of Known Legal Duty" Standard. The IRS' newly announced procedures fail to provide adequate guidance as the difference between "willful" and "non-willful" FBAR violations. The National Taxpayer Advocate's 2013 Report to Congress recommended that the IRS do so, specifically as follows:

> "....the IRS should more expressly define what constitutes "reasonable cause" for purposes of FBAR and provide examples about the difference between willful and non-willful violations based on the taxpayer's background, education level, cultural concerns, etc. The IRS should also clarify that it will not seek a penalty for a willful violation unless it can show "a voluntary intentional violation of a known legal duty." See Ratzlaf v. U.S., 510 U.S. 135 (1994) (U.S. Supreme Court case discussing Bank Secrecy Act violations; however, not dealing with FBAR directly)."

B. The Significant Difference Between Definitions of "Willful" and "Non-Willful" Subject Taxpayers to Uncertainty/Positions of United States and Taxpayer in Recent Zwerner Trial Memoranda and Court's Order. The recent Zwerner case highlights the different legal standards for finding "willfulness." The government asserted that Mr. Zwerner had willfully failed to file FBARs and Zwerner disagreed. A Miami, Florida jury found that Zwerner's failure to file FBARs was "willful.". The case was settled after the verdict was entered.. Under the settlement, Zwerner paid two years' of FBAR maximum 50% penalties, plus two years of penalties for late payment of FBAR penalties, instead of the maximum FBAR penalties for the 3 years for which the jury found him liable.

Prior to trial the United States moved for summary judgment asking the Court find that Zwerner's conduct was "willful" as a matter of law and that the Court should not require actual proof of "willfulness" but, rather find infer willfulness based on the following conduct: (1) Zwerner had intentionally concealed his Swiss bank account, and, (2) Zwerner had been reckless, or "legally blind" in ignoring his FBAR obligations.

Zwerner opposed the United States' Motion for Summary Judgment on the grounds that "willfulness" could not be inferred by a taxpayer's conduct, but, rather it was the"the Government must show through clear and convincing evidence that the defendant committed a "voluntary, intentional violation of a known legal duty."

The following are excerpts from the United States' Motion, Zwerner's Opposition, and the Court's Order.

1. Willfulness as Defined in United States' Motion for Summary Judgment. The United States maintained that the Taxpayer's conduct was "willful" for these reasons: (1) the Taxpayer intentionally concealed the offshore account, and (2) the Taxpayer's actions were willful in that he was reckless or willfully blind in regard to his FBAR reporting obligation. Parts of the United States' Motion read as follows:

a. Zwerner's actions were willful because he intentionally concealed his Swiss bank account**.** The undisputed facts show that Zwerner's failure to file his FBAR forms was willful as a matter of law. As discussed above, willfulness is conduct that is voluntary, rather than accidental or unconscious, and it can be established from conduct meant to conceal sources of income or other financial information. *See Williams*, 489 Fed. Appx. at 658; *Sturman*, 951 F.2d at 1476; *McBride*, 908 F. Supp. 2d at 1205. It is undisputed that Zwerner deliberately concealed his Swiss bank account for approximately 40 years. He readily admitted in his deposition that "this was a -- as far as I was concerned my secret account."...

> Of course, consistent with such an effort to keep the account a secret, Zwerner failed to report the account on an FBAR form for the years at issue. Without ever mentioning the account to his own CPA, there would have been no way Zwerner could have reported the account to the government as required.
>
> The undisputed facts therefore show that Zwerner deliberately engaged in "conduct meant to conceal or mislead sources of income or other financial information." *Williams*, 489 Fed. Appx. at 658. This is enough to establish willfulness under 31 U.S.C. § 5321 regardless of whether Zwerner specifically knew of the FBAR reporting requirements. As discussed above, for a violation to be willful, the relevant inquiry is whether the failure to disclose the required information itself was purposeful rather than inadvertent, not whether the individual subjectively believed they did possesses the legal duty to file an FBAR. *See Williams*, 489 Fed. Appx. at 558-660; McBride, 908 F. Supp. 2d at 1204-1212.

Regardless, Zwerner had at least constructive knowledge of the FBAR reporting requirements. He signed his tax returns for all the years at issue, under the penalty of perjury, affirming that he reviewed their contents. As discussed above, those returns explicitly referred to the FBAR form by name while asking whether a taxpayer had an interest in any foreign accounts.

b. Zwerner's actions were willful in that he was reckless or willfully blind.

Zwerner's failure to comply with the FBAR reporting requirements was at the very least reckless or willfully blind. As discussed above, the willfulness requirement in FBAR penalties may be met by showing the taxpayer's reckless disregard of the reporting requirements, rather than known violations of it. *McBride*, 908 F. Supp. 2d at 1204; *see also Williams*, 489 Fed. Appx. at 659-60. Zwerner's actions qualify under that standard. Zwerner purposely never mentioned the existence of his Swiss bank account to the CPA who prepared his tax returns. Moreover, he falsely answered questions from his CPA inquiring as to foreign accounts or income. In addition, Zwerner claims to have never reviewed Part III of Schedule B of his tax returns, which dealt with foreign financial accounts, or to have read the instructions to IRS Form 1040, including the instructions to Schedule B.[1] Therefore, even if for purposes of this motion, one believes that year after year Zwerner ignored the relevant sections of his tax returns, by ignoring those sections and by failing to inform his accountant of the Swiss bank account, Zwerner's conduct satisfies the willfulness requirement of Section 5321(a)(5)(C) because he "recklessly ignore[d] the risk that conduct is illegal by failing to investigate whether the conduct is legal." *McBride*, 908 F. Supp. 2d at 1209.

2. Wilfulness as Defined in Taxpayer's Opposition Motion. Taxpayer-Zwerner maintained that his conduct was not "willful" because "willful" means a voluntary intentional violation of a known legal duty and not any lesser standard, and Zwerner was not aware of the duty to file an FBAR at any relevant time. Parts of the Taxpayer's Opposition to the Motion for Summary Judgement read as follows:

To prove willfulness in either a civil or a criminal FBAR case, the Government must show through clear and convincing evidence that the defendant committed a "voluntary, intentional violation of a known legal duty." *See United States v. Sturman*, 951 F.2d 1466, 1476 (6th Cir. 1991); IRS Internal Reference Manual, I.R.M. 4.26.16.4.5.3 at ¶6 (July 1-2008); IRS CCA 200603026 (Jan. 20, 2006). ...

The context here makes clear that "willful" means a voluntary intentional violation of a known legal duty and not any lesser standard. Here, there is plenty of evidence that Zwerner

[1] *Id.* at 144-45, 148-151.

was not aware of the duty to file an FBAR at any relevant time.[2] In defining willfulness to include recklessness in the FBAR context, both cases are inconsistent with long-established precedent defining willfulness in tax and Bank Secrecy Act cases, and with the IRS position as expressed in the CCA and the *Internal Revenue Manual*. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) ("In this light, we count it significant that § 5322(a)'s omnibus "willfulness" requirement, when applied to other provisions in the same subchapter, consistently has been read by the Courts of Appeals to require both "knowledge of the reporting requirement" *and* a "specific intent to commit the crime," *i.e.,* "a purpose to disobey the law." (citing *United States v. Bank of New England, N.A.,* 821 F.2d 844, 854–859 (1st Cir. 1987) ("willful violation" of § 5313's reporting requirement for cash transactions over $10,000 requires "voluntary, intentional, and bad purpose to disobey the law"); *United States v. Eisenstein,* 731 F.2d 1540, 1543 (11th Cir. 1984) ("willful violation" of § 5313's reporting requirement for cash transactions over $10,000 requires " 'proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime.' " (quoting *United States v. Granda,* 565 F.2d 922, 926 (5th Cir. 1978))); I.R.M. 4.26.16.4.5.3 at ¶6 (July 1, 2008); IRS CCA 200603026 (Jan. 20, 2006).

Nor can the Government establish willfulness as a matter of law solely by pointing to Zwerner's signature on his tax returns. In *United States v. Mohney*, relied on by *Williams*, the court held that while the signature is prima facie evidence that the signer knows the contents of the return, a taxpayer's signature on a return "does not in itself prove his knowledge of the contents but knowledge may be inferred from the signature along with the surrounding facts and circumstances . . . ." *United States v. Mohney*, 949 F.2d 1397, 1407 (6th Cir. 1991). Consistent with this rule, the IRS's position, as set forth in the *Internal Revenue Manual*, is that "[t]he mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness." I.R.M. 4.26.16.4.5.3 at ¶6 (July 1-2008). Here, there is credible sworn testimony that Zwerner did not read the text on the returns, and did not understand what was on those papers. Most taxpayers do not read their return carefully, especially language on a schedule that does not relate to any numbers on their return, and where, as here, the return is prepared by a Certified Public Accountant. Consistent with this rule, the IRS's position, as set forth in the *Internal Revenue Manual*, is that "[t]he mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness." I.R.M. 4.26.16.4.5.3 at ¶6 (July 1-2008). Here, there is credible sworn testimony that Zwerner did not read the text on the returns, and did not understand what was on those papers. Most taxpayers do not read their return carefully, especially language on a schedule that does not relate to any numbers on their return, and where, as here, the return is prepared by a

[2] The Tarrago letter and Voluntary Disclosure Program submission (portions of which are attached to, and referenced in, the Government's Motion) by Zwerner reflect only Zwerner's knowledge at the time of signing those documents, presumably as part of the requirement of acknowledgment of wrongdoing or contrition required by the IRS. Neither says he was aware of this duty when the filings were to be made, and he swears he was not.

Certified Public Accountant. To impose a constructive knowledge regime on FBAR penalties in this way would render the willfulness requirement meaningless."

3. Court's Conclusion: Under Either Willfulness Standard Facts Must Be Determined by Jury. The Court denied the Motion for Summary Judgement, concluding that "under either intent standard, genuine issues of material fact remained in dispute," which required findings of fact by a jury**.** Parts of the Court's Order read as follows:

> The Government's Motion asks the Court to decide there are no triable issues of fact that Zwerner's conduct was willful. The United States contends Zwerner is liable for willful conduct, and thus should be subject to the maximum civil penalty. (*See* Mot. 15–22). The definition of willfulness asserted by the United States includes reckless disregard. (*See id*. 17 ("'willfulness' may be satisfied by establishing the individual's reckless disregard of a statutory duty, as opposed to acts that are known to violate the statutory duty at issue." (quoting *United States v. McBride*, 908 F. Supp. 2d 1186, 1204 (D. Utah 2012))). In *McBride*, the district court inferred willfulness from: the taxpayer's signature on his tax returns indicating constructive knowledge of relevant tax statutes, his familiarity with the accounting firm's promotional materials informing him of a duty to comply with FBAR requirements, and his disregard of the concerns he had over the legality of the accounting firm's strategies. *See id.* 908 F. Supp. 2d at 1205–06, 1208, 1210 (enforcing civil penalties against a taxpayer for willfully failing to comply with FBAR reporting requirements); *see also United States v. Williams*, 489 F. App'x 655, 659–60 (4th Cir. 2012) (finding willful blindness and reckless conduct after a taxpayer had signed his tax return and was on inquiry notice of the FBAR reporting requirement but nonetheless failed to file). The United States maintains willfulness "does not require proof that the party knew he was acting wrongly." (Mot. 17 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57–58 (2007) (citations omitted) (holding that liability for willfully failing to comply with the Fair Credit Reporting Act extends to both known violations and violations based on reckless disregard of a statutory duty))).
>
> Zwerner emphasizes a showing of willfulness requires a "voluntary, intentional violation of a known legal duty." *United States v. Sturman*, 951 F.2d 1466, 1476 (6th Cir. 1991) (quoting *Cheek v. United States*, 498 U.S. 192, 192 (1991)). The Sixth Circuit in *Sturman* acknowledged "willfulness can be inferred from a conscious effort to avoid learning about reporting requirements." *Id*. (citation omitted) (applying the statutory willfulness standard in a criminal conviction for a taxpayer's failure to file an FBAR Form 90-22.1).[3] In *Cheek*, involving a conviction for income tax evasion and failure to file income tax returns, the Supreme Court held:

[3]The civil and criminal statutes governing the filing of FBARs both use the term "willful." *See* 31 U.S.C. §§ 5321, 5322. A "term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (citation omitted).

> [a] good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made due to the complexity of the tax laws, . . . is the voluntary, intentional violation of a known legal duty.498 U.S. at 192 (alterations added; internal citations omitted).
>
> Under either intent standard, genuine issues of material fact remain in dispute. While Zwerner admits he intended his foreign account to be a private, secret account, he states it was not done to avoid paying U.S. taxes. (*See* Zwerner Dep. 91:5–92:17, 138:7–143:13, 161:21–162:5, 163:25–164:8). Zwerner insists he did know of any FBAR reporting obligations when he filed his tax returns from 2004 to 2007, as he was under the mistaken impression that funds earned or held overseas did not need to be declared and taxed. (*See id.* 138:14–141:19). Furthermore, Zwerner states he did not declare the foreign account on his accountant's tax organizer form because he believed: he did not have signatory authority over the account, he only had an indirect interest in the account, he did not know if he earned foreign income annually, and the funds initially deposited into the account were earned overseas. (*See id.* 66:14– 25, 94:12–20; 139:6–141:19, 160:12–162:1, 163:8–164:12).
>
> Whether Zwerner willfully failed to file FBARs for tax years 2004 to 2007 clearly remains an issue to be decided by the trier of fact.. *See McCormick v. United States*, 500 U.S. 257, 270 (1991) ("It goes without saying that matters of intent are for the jury to consider.") (citation omitted). Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment **[ECF No. 21]** is **DENIED**.

C. Guidance in the Internal Revenue Service's Manual and IRS Statements: "Willful Conduct," "Negligence," and Reasonable Cause. The Internal Revenue Manual provides the following guidance to IRS Agents with respect to supporting finding of "willfulness".

1. Determining Willfulness. The Internal Revenue Manual at Part IV "Examining Process," Ch. 26 "Bank Secrecy Act," Section 16, "Report of Foreign Bank and Financial Accounts (FBAR) reads as follows:

> **4.26.16.4.5.3 (07-01-2008)**
> **FBAR Willfulness Penalty - Willfulness**
>
> 1. The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.
> 2. A finding of willfulness under the BSA must be supported by evidence of willfulness.

3. The burden of establishing willfulness is on the Service.
4. If it is determined that the violation was due to reasonable cause, the willfulness penalty should not be asserted.
5. Willfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements. In the FBAR situation, the only thing that a person need know is that he has a reporting requirement. If a person has that knowledge, the only intent needed to constitute a willful violation of the requirement is a conscious choice not to file the FBAR.
6. 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 reporting and record keeping requirements. An example that might involve willful blindness would be a person who admits knowledge of and fails to answer a question concerning signature authority at foreign banks on Schedule B of his income tax return. This section of the return refers taxpayers to the instructions for Schedule B that provide further guidance on their responsibilities for reporting foreign bank accounts and discusses the duty to file Form 90-22.1. These resources indicate that the person could have learned of the filing and record keeping requirements quite easily. It is reasonable to assume that a person who has foreign bank accounts should read the information specified by the government in tax forms. The failure to follow-up on this knowledge and learn of the further reporting requirement as suggested on Schedule B may provide some evidence of willful blindness on the part of the person. For example, the failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved may lead to a conclusion that the violation was due to willful blindness. The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness.
7. Willfulness can rarely be proven by direct evidence, since it is a state of mind. It is usually established by drawing a reasonable inference from the available facts. The government may base a determination of willfulness in the failure to file the FBAR on inference from conduct meant to conceal sources of income or other financial information. For FBAR purposes, this could include concealing signature authority, interests in various transactions, and interests in entities transferring cash to foreign banks.
8. The following examples illustrate situations in which willfulness may be present:

a. A person admits knowledge of, and fails to answer, a question concerning signature authority over foreign bank accounts on Schedule B of his income tax return. When asked, the person does not provide a reasonable explanation

for failing to answer the Schedule B question and for failing to file the FBAR. A determination that the violation was willful likely would be appropriate in this case.

b. A person files the FBAR, but omits one of three foreign bank accounts. The person had closed the omitted account at the time of filing the FBAR. The person explains that the omission was due to unintentional oversight. During the examination, the person provides all information requested with respect to the omitted account. The information provided does not disclose anything suspicious about the account, and the person reported all income associated with the account on his tax return. The willfulness penalty should not apply absent other evidence that may indicate willfulness.

c. A person filed the FBAR in earlier years but failed to file the FBAR in subsequent years when required to do so. When asked, the person does not provide a reasonable explanation for failing to file the FBAR. In addition, the person may have failed to report income associated with foreign bank accounts for the years that FBARs were not filed. As with example a. above, a determination that the violation was willful likely would be appropriate in this case.

d. A person received a warning letter informing him of the FBAR filing requirement, but the person continues to fail to file the FBAR in subsequent years. When asked, the person does not provide a reasonable explanation for failing to file the FBAR. In addition, the person may have failed to report income associated with the foreign bank accounts. As with examples a. and c. above, a determination that the violation was willful likely would be appropriate in this case.

--**Evidence to Consider In Establishing Willfulness.** The Internal Revenue Manual sets out the following extensive list of evidence which it will consider to help it establish "willfulness" for FBAR penalty purposes.

4.26.16.4.5.4 (07-01-2008)
FBAR Willfulness Penalty - Evidence

Documents that may be helpful in establishing willfulness include:

Copies of documents from the administrative case file (including the Revenue Agent Report) for the income tax examination that show income related to funds in a foreign bank account was not reported.

A copy of the signed income tax return with Schedule B attached (showing whether or not the box pertaining to foreign accounts is checked or unchecked).

Copies of statements for the foreign bank account.

Notes of the examiner's interview with the foreign account holder/taxpayer about the foreign account.

Any documents that would support fraud (see IRM 4.10.6.2.2 for a list of items to consider in asserting the fraud penalty).

Correspondence with the account holder's tax preparer that may address the FBAR filing requirement.

Documents showing criminal activity related to the non-filing of the FBAR (or non-compliance with other BSA provisions).

Promotional material (from the promoter or offshore bank).

Statements for debit or credit cards from the offshore bank (which could show if the account holder was using funds from the offshore account to cover everyday living expenses in a manner that would conceal the source of the funds).

Printouts from CARS that show that the FBAR was not filed.

Copies of any FBARs (or CARS printouts of FBARs) that were previously filed by the account holder.

Copies of tax returns (or REVUES/BRTVUs) for at least three years prior to the opening of the offshore account and for all years after the account was opened. (To show any significant drop in reportable income after the account was opened, three years prior to the opening of the account would be requested in order to give the examiner a better idea of what the account holder typically would have reported as income prior to opening the foreign account).

Copies of Information Document Requests with items that were not provided by the account holder highlighted and explanations given as to why the requested information was not provided.

Copies of debit or credit card agreements and fee schedules with the foreign bank (which may show a significantly higher cost than typically associated with cards from domestic banks).

Copies of debit and credit card statements prior to the opening of the foreign account (to show that the account holder did or did not routinely use such cards for everyday living expenses, keeping in mind these statements may be difficult to obtain if the foreign account was opened many years ago).

Copies of any investment management or broker's agreement and fee schedules with the foreign bank (which may show significantly higher costs than costs associated with domestic investment management firms or brokers).

The account holder's written explanation of why the FBAR was not filed (if the account holder wishes to provide such a statement). Otherwise, note in the workpapers whether the account holder was given an opportunity to provide such a statement.

Copies of any previous warning letters issued to the account holder.

Copies of any prior Revenue Agent Reports that may show a history of noncompliance.

An explanation, in the workpapers, as to why the examiner believes that the account holder's failure to file the FBAR was willful.

Two sets of cash Ts (a reconciliation of the taxpayer's sources and uses of funds) with one set showing any unreported income in foreign accounts that was identified during the examination and the second set excluding the unreported income in foreign accounts.

4.26.16.4.5.5 (07-01-2008)

2. <u>Negligence</u>. The IRM addresses "negligence," which as relates to FBAR non-compliance is applicable generally to institutions rather than individuals. However, the reference may furnish guidance and provides as follows:

IRM 4.26.16.4.3.1 (07-01-2008) "Negligence"

"(3) Use general negligence principles in determining whether or not to apply the negligence penalty. Treas. Reg. 1.6664-4, Reasonable Cause and Good Faith Exception to § 6662 penalties, may serve as useful guidance in determining the factors to consider. Although this tax regulation does not apply to FBARs, the information it contains may still be helpful in determining whether the FBAR violation was due to reasonable cause and not due to negligence."

3. Reasonable Cause. Penalty relief for "reasonable cause" is applicable to most penalties under the Internal Revenue Code and to FBARs. Herein are some definitions, including that in Fact Sheet 2011-13, specifically applicable to FBARs and in the IRM, not specifically applicable to FBARS.

A. **<u>FS-2011-13, December 2011</u>.** In connection with the introduction of the 2012

streamlined procedures for non-resident U.S. taxpayers, the IRS released IRS Fact Sheet FS 2011-13 (December 2011) which provided examples of reasonable cause for failure to file tax returns, information returns or FBARs. FS 2011-13 was cited in the 2013 Taxpayer Advocate Report as an example of the available guidance as to "reasonable cause" under the voluntary compliance programs.

1. FS 2011-13 Reasonable Cause for Income Tax Penalties: Reasonable cause for failure to file income tax returns or to pay income tax in FS 2011-13 reads as follows:

"Whether a failure to file or failure to pay is due to reasonable cause is based on a consideration of the facts and circumstances. Reasonable cause relief is generally granted by the IRS when you demonstrate that you exercised ordinary business care and prudence in meeting your tax obligations but nevertheless failed to meet them. In determining whether you exercised ordinary business care and prudence, the IRS will consider all available information, including:

-The reasons given for not meeting your tax obligations;
-Your compliance history;
-The length of time between your failure to meet your tax obligations and your subsequent compliance; and
-Circumstances beyond your control.

Reasonable cause may be established if you show that you were not aware of specific obligations to file returns or pay taxes, depending on the facts and circumstances. Among the facts and circumstances that will be considered are:

-Your education;
- Whether you have previously been subject to the tax;
- Whether you have been penalized before;
-Whether there were recent changes in the tax forms or law that you could not reasonably be expected to know; and
-The level of complexity of a tax or compliance issue.

You may have reasonable cause for noncompliance due to ignorance of the law if a reasonable and good faith effort was made to comply with the law or you were unaware of the requirement and could not reasonably be expected to know of the requirement."

2. FS 2011-13 Reasonable cause for FBAR violations. Reasonable cause for failure to FBAR violations in FS 2011-13 reads as follows:

"Factors that might weigh in favor of a determination that an FBAR violation was due to reasonable cause include reliance upon the advice of a professional tax advisor who was informed

of the existence of the foreign financial account, that the unreported account was established for a legitimate purpose and there were no indications of efforts taken to intentionally conceal the reporting of income or assets, and that there was no tax deficiency (or there was a tax deficiency but the amount was de minimis) related to the unreported foreign account. There may be factors in addition to those listed that weigh in favor of a determination that a violation was due to reasonable cause. No single factor is determinative.

> Factors that might weigh against a determination that an FBAR violation was due to reasonable cause include whether the taxpayer's background and education indicate that he should have known of the FBAR reporting requirements, whether there was a tax deficiency related to the unreported foreign account, and whether the taxpayer failed to disclose the existence of the account to the person preparing his tax return. As with factors that might weigh in favor of a determination that an FBAR violation was due to reasonable cause, there may be other factors that weigh against a determination that a violation was due to reasonable cause. No single factor is determinative."
>
> IRM 20.1.1.3.2 A definition of "reasonable cause" in the IRM penalty handbook at IRM 20.1.1.3.2 . The definition in the IRS penalty section though not directly applicable to FBARs or title 31, provides some guidance as the "reasonable cause" which may be important to the explanation of the "non-willful" conduct. It reads as follows .
>
> **20.1.1.3.2 (11-25-2011)**
> **Reasonable Cause**
>
> " (1) Reasonable cause is based on all the facts and circumstances in each situation and allows the IRS to provide relief from a penalty that would otherwise be assessed. Reasonable cause relief is generally granted when the taxpayer exercised ordinary business care and prudence in determining their tax obligations but nevertheless failed to comply with those obligations."
>
> (5) Taxpayers have reasonable cause when their conduct justifies the non-assertion or abatement of a penalty. Each case must be judged individually based on the facts and circumstances at hand. Consider the following in conjunction with specific criteria identified in the remainder of this subsection:
>
> * What happened and when did it happen?
> * During the period of time the taxpayer was non-compliant, what facts and circumstances prevented the taxpayer from filing a return, paying a tax, and/or otherwise complying with the law?
> *How did the facts and circumstances result in the taxpayer not complying?
> *How did the taxpayer handle the remainder of their affairs during this time?

* Once the facts and circumstances changed, what attempt did the taxpayer make to comply?

(6) Reasonable cause does not exist if, after the facts and circumstances that explain the taxpayer's noncompliant behavior cease to exist, the taxpayer fails to comply with the tax obligation within a reasonable period of time.

3. 20.1.1.3.2.2.4 (12-11-2009)
Mistake was Made

The taxpayer may try to establish reasonable cause by claiming that a mistake was made. Generally, this is not in keeping with the ordinary business care and prudence standard and does not provide a basis for reasonable cause.

However, the reason for the mistake may be a supporting factor if additional facts and circumstances support the determination that the taxpayer exercised ordinary business care and prudence but nevertheless was unable to comply within the prescribed time.

Information to consider when evaluating a request for an abatement or non-assertion of a penalty based on a mistake or a claim of ignorance of the law includes, but is not limited to:

*When and how the taxpayer became aware of the mistake,
*The extent to which the taxpayer corrected the mistake,
*The relationship between the taxpayer and the subordinate (if the taxpayer delegated the duty),
*If the taxpayer took timely steps to correct the failure after it was discovered, and
*The supporting documentation.

3. Reliance on Erroneous Advice.

20.1.1.3.2.2.5 (11-25-2011)
Erroneous Advice or Reliance

Each request for penalty relief should be reviewed thoroughly to determine the exact basis of the taxpayer's request.

Is the taxpayer claiming they did not comply due to specific advice they received from someone, whether orally or in writing, or

Is the taxpayer claiming they relied on someone else to comply on their behalf?

Certain sections of the Internal Revenue Code and Treasury Regulations provide relief from certain penalties based on erroneous advice. See IRM 20.1.1.3.3.4, Advice, to first determine if a statutory exception or administrative waiver applies.

If the taxpayer states they relied on written or oral advice from the Service but do not qualify for relief in accordance with the criteria in IRM 20.1.1.3.3.4.1, Written Advice from the IRS, or IRM 20.1.1.3.3.4.2, Oral Advice from the IRS, refer to IRM 20.1.1.3.2.2, Ordinary Business Care and Prudence, to determine if the taxpayer exercised ordinary business care and prudence in relying on the Service's advice.

The taxpayer may try to establish reasonable cause by claiming they relied on another party to comply on their behalf or that another party provided erroneous advice. Generally, this is not a basis for reasonable cause, particularly for filing or paying obligations, since the taxpayer is responsible for meeting their tax obligations and that responsibility cannot be delegated. However, other factors to consider include:

Was the taxpayer unable to comply because they did not have access to their own records? See IRM 20.1.1.3.2.2.3, Unable to Obtain Records.

Was the failure to comply due to a change in the tax law the taxpayer could not reasonably be expected to know? See IRM 20.1.1.3.2.2.6, Ignorance of the Law.

Consider all facts and circumstances presented by the taxpayer to determine if, despite the exercise of ordinary business care and prudence, the taxpayer nevertheless was unable to comply.

20.1.1.3.2.2.6 (11-25-2011)
Ignorance of the Law

In some instances taxpayers may not be aware of specific obligations to file and/or pay taxes. The ordinary business care and prudence standard requires that taxpayers make reasonable efforts to determine their tax obligations. See IRM 20.1.1.3.2.2, Ordinary Business Care and Prudence.

Reasonable cause may be established if the taxpayer shows ignorance of the law in conjunction with other facts and circumstances. For example, consider:

The taxpayer’s education,
If the taxpayer has previously been subject to the tax,
If the taxpayer has been penalized before,
If there were recent changes in the tax forms or law which a taxpayer could not reasonably be expected to know, and

The level of complexity of a tax or compliance issue.
Reasonable cause should never be presumed, even in cases where ignorance of the law is claimed.

The taxpayer may have reasonable cause for noncompliance due to ignorance of the law if:

A reasonable and good faith effort was made to comply with the law, or
The taxpayer was unaware of a requirement and could not reasonably be expected to know of the requirement.

D. Establishing "non-willfulness" under the Certification of Non-Willfulness in the Streamlined Procedures. The IRS has left to taxpayers the job of determining whether their offshore violations are "willful" or whether they are "non-willful." The Certification is straight forward. Since it is of such importance, here is one last look:

> "My failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct. I understand that non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.

A taxpayer must not only certify to the "non-willful" conduct but must provide the specific reasons which support that certification. As is the case with providing reasonable cause statements in the case of income tax penalties, in the case of the offshore penalties, it is required that a considerable expenditure of time, effort and thought be expended. Otherwise, it usually will not be possible to successfully demonstrate that the taxpayer's conduct was non-willful.

In preparing an explanation of non-willful conduct to submit under the Streamlined Procedures, first, the taxpayer's "story" must be told. Then it must be examined for truthfulness, completeness, and veracity. The story must contain sufficient statements to demonstrate that the taxpayer met the Ratzlaf standard of not having "intentionally violated a known duty" to file the FBARs or other offshore returns. However, meeting that standard is not enough. The explanation which will be accepted or would prevail if tried in court, will include a full consideration and discussion and explanation demonstrating why the taxpayer's conduct was not "willfully blind."

If the taxpayer doesn't address willful blindness, in all likeliness, an IRS examining agent will if the returns or offshore submissions are examined. The taxpayer may decide not to include a discussion regarding "willful blindness" and to instead only state that the conduct was "non-willful." In such as case, the cautious taxpayer will be sure to have examined facts and issues which might show "willful blindness" so that in the event of an IRS examination, the taxpayer isn't caught unaware, surprised, or discredited. If the taxpayer's certification of non-willful conduct is rejected, the IRS agent could propose harsh penalties, refer the matter to consideration for criminal prosecution, or

propose penalties which are greater than the 5% under the Streamlined Procedures but otherwise are reasonable to the taxpayer, and perhaps are less than the 27.5% or 50% under the OVDP.

As part of the due diligence in preparing a non-willful explanation, the taxpayer should consider: speaking with any tax preparers involved, examining all account records, speaking with all other persons who were involved with the account, and otherwise being assured that the explanation provided is consistent with, and supported by account and other documents, tax and information returns, and responses which would be provided to an IRS Agent who might inquire.

In formulating the explanation for the Certification of non-willful conduct, it becomes clear that the support is lacking, that the case for "willful blindness" is stronger than first thought, or there are facts which make the "non-willful" certification incredible, further consideration must be given as to the best manner to proceed.

If the Certification can still be made in good faith (i.e., the "willful blindness" isn't such that the taxpayer cannot maintain in good faith that he met the legal standard for "non-willfulness"), the taxpayer may decide to proceed with the Streamlined submission, make a voluntary disclosure outside of the streamlined procedures and under IRM 9.5.11.9, or submit a voluntary disclosure under the 2014 OVDP. A voluntary disclosure submitted outside of the OVDP might be examined, or it might never be selected for examination. Further, a "non-willful" statement, if submitted as part of a disclosure outside of the OVDP or Streamlined Procedures, may be enough for an examining agent to allow the returns to be processed without penalties. Finally, the taxpayer who can demonstrate non-willful conduct and who submits a voluntary disclosure outside of the OVDP will have the right to contest an IRS determination in an administrative appeal or at trial. The voluntary disclosure options each have consequences which should be carefully considered.

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