IT'S TIME FOR THE IRS TO MAKE MAJOR CHANGES TO ITS CURRENT OFFSHORE TAX COMPLIANCE OPTIONS

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In August 2009, the United States (the "U.S.") and Switzerland ended the era of tax secrecy for U.S. citizens using offshore banks when the U.S. and Switzerland and the U.S. and UBS AG (Switzerland's largest bank) entered into separate but related agreements whereby it was agreed that UBS would provide names of US account holders to the IRS, and the Swiss government agreed to permit such disclosure under their banking laws (the aforementioned agreements are herein referred to as the "UBS Agreements").

Today, nearly six years later, the U.S.' continued offshore enforcement efforts, and new U.S. tax policies have resulted in a vastly different offshore tax environment as U.S. citizens are finding it difficult not to report offshore assets and income.

This article critically examines whether the Internal Revenue Service's ("IRS" or the "Service") current "four offshore compliance options" (the "Four Offshore Options") introduced in 2014, and which began in 2009, are appropriate and whether they are consistent with our system of voluntary tax compliance in light of the experience of taxpayers over the past six years. The Four Options include the 2014 Offshore Voluntary Disclosure Program (the "2014 OVDP") and three "Non-OVDP Procedures": (1) the Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing in the U.S. (the "Streamlined Procedures"), (2) the Delinquent FBAR Submission Procedures (the "FBAR Procedures"), and (3) the Delinquent International Information Return Submission Procedures (the "International Information Return Procedures").

This article does not attempt to discuss all of the terms and conditions under the Four Offshore Options. It does not address the Streamlined Procedures for U.S. taxpayers not residing in the U.S. Nor does it attempt to discuss the various statutory penalties which might apply under the FBAR or income tax statutes. Rather, its focus is on the penalties under the OVDP and Non-OVDP Procedures, and issues relative to the administration of the OVDP and Non-OVDP Procedures.

The conclusion reached is that IRS should listen to the feedback of the tax community, including the National Taxpayer Advocate (the "Taxpayer Advocate"), and make major changes to its Four Offshore Options, consistent with the fair administration of our system of voluntary tax compliance.

The Criminal and Civil Components of the OVDPs

The IRS' 2009, 2011, 2012 and current 2014 OVDP are really two-part programs, having both criminal and civil components. The criminal component is protection from criminal prosecution. The civil component is an agreed civil settlement structure which defines the number of tax years covered, the applicable taxes and interest which will be due, and the civil penalties that will apply.

The criminal component in the OVDPs is the making of a "voluntary disclosure." Under the IRS' Four Offshore Options a "voluntary disclosure" is a term which specifically refers to the longstanding Voluntary Disclosure Practice of the IRS' Criminal Investigation (CI) whereby CI agrees that it will generally not recommend to the Department of Justice that a taxpayer be criminally prosecuted if the taxpayer contacts CI and makes a timely, accurate, complete voluntary disclosure, shows a willingness to cooperate, and makes good faith arrangements to pay in full, applicable taxes, interest and penalties. CI's Voluntary Disclosure Practice is codified in Part 9 ("Criminal Investigations") of the Internal Revenue Manual (IRM) at §9.5.11.9. ("Voluntary Disclosure Practice"). CI administers the "voluntary disclosure" aspect of OVDP submission.

The OVDP's provide taxpayers with a "pre-clearance" procedure administered by CI whereby taxpayers submit specific information identifying themselves, and identifying relevant financial institutions and foreign and domestic entities which were involved with the undisclosed income and assets. CI checks its computer system to be sure that the taxpayers are not already being investigated or audited, and that they are otherwise not disqualified from making a voluntary disclosure under CI's internal procedures. If the taxpayer is not disqualified, CI then issues a letter stating that the taxpayer is preliminarily eligible to proceed to make a voluntary disclosure, and that the taxpayer must thereafter follow the specific steps in the OVDP which requires the submission of an "Offshore Voluntary Disclosure Letter" and an attachment (the disclosure letter and attachment are hereinafter together referred to as the "Disclosure Letter").

In the Disclosure Letter the taxpayer sets forth detailed asset and account information, and answers questions regarding the taxpayer's involvement with the subject foreign institutions and its representatives. The Disclosure Letter also contains questions which request information regarding the flow of funds into and out of foreign and U.S. accounts and entities. During the first OVDP, taxpayers were often interviewed in person by CI Agents; however, since then, in most cases, interviews have been replaced by the Disclosure Letter.

After its receipt of the Disclosure Letter, if the information submitted appears to be complete, CI issues a letter, referred to as "Preliminary Acceptance Letter," to the taxpayer or taxpayer's counsel which sets forth information similar to the following:

> This letter is to inform you that the voluntary disclosure of your client has been received and has been preliminarily accepted as meeting the timeliness requirements of Internal Revenue Manual section 9.5.11.9(4). A voluntary

> disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended.
>
> Acceptance of your client's voluntary disclosure will also depend upon whether it is truthful and complete and whether your client cooperates with the IRS in determining the correct tax liability and makes good faith arrangements with the IRS to pay in full the tax, interest, and penalties determined by the IRS to be applicable. The required cooperation includes the production of all requested documents and the taxpayer submitting to an interview, if requested by-an IRS agent.

After CI has reviewed the Disclosure Letter and has sent the Preliminary Acceptance Letter, the civil component of the OVDP comes into play. However, the "voluntary disclosure" is not complete until the case is civilly resolved. The Preliminary Acceptance Letter describes the civil process as follows:

> Your client's initial voluntary disclosure submission will be forwarded for necessary civil action and the determination of the correct tax liability. ....
>
> Please be aware that your client's voluntary disclosure will not be complete until the above documents have been submitted and your client has cooperated in the processing of the case, including providing requested documents and submitting to any requested interview. Your client's voluntary disclosure will be deemed to be complete when final civil resolution is reached between your client and the IRS.

Each of the OVDP's has contained an "opt out" procedure. An "opt out" is an irrevocable election made by a taxpayer to have standard civil audit processes applied rather than the OVDP's civil settlement structure. A taxpayer who opts out under the OVDP remains within the voluntary disclosure process and therefore retains its assurances regarding criminal prosecution, as long as the taxpayer continues to be truthful and cooperative.

However, once a taxpayer has opted out, the civil penalties under the OVDP will no longer apply. Instead, the IRS may examine the subject returns, and may propose such taxes and penalties as it may find applicable. Taxpayers then have IRS appeals' rights and the right to contest proposed taxes and penalties in court.

The IRS' position regarding "opt outs" is described as follows in 2014 OVDP FAQ #51:

> ..in some cases the results under the OVDP may appear too severe given the facts of the case. In other cases, this is less clear. In these less clear cases, the IRS will protect its interests and the integrity of the voluntary disclosure

> program. In these cases, the IRS will likely conduct full scope examinations. We anticipate that opting out will be appropriate for a discrete minority of cases. Moreover, to the extent that issues are found in a full-scope examination that were not disclosed by the taxpayer, those issues may be the subject of review by Criminal Investigation. In either case, opting out is at the sole discretion of the taxpayer and the taxpayer will not be treated in a negative fashion merely because he chooses to opt out.

The IRS' "Opt Out and Removal Guide" makes it clear that under the OVDPs, the scope of the IRS' examination of the taxpayer's returns is generally limited to offshore accounts and related issues. However, upon opting out, the IRS makes a determination as to the scope of the resulting exam, which may remain limited or could become a full scale exam. The examining IRS agent writes a case summary, recommends penalties to be applied and makes a recommendation as to the scope of the exam. The examiner's recommendations are reviewed by a committee of managers which makes the final decisions on the recommendations.

The experience of taxpayers under the opt out procedures, consistent with the above language in FAQ #51, is that the Service will generally not deviate very much from the OVDP penalty structure except in cases where the OVDP penalty appears clearly excessive when compared to statutory penalties which would apply outside of the OVDP. Most taxpayers won't opt out due to the likelihood the Service won't significantly reduce penalties and due to the risk of a full-scale examination. As a result, the IRS achieves the ability to process the OVDP cases in a uniform manner and conserve its resources. As a further result, the OVDP effectively inseparably links the criminal and civil components. Outside of the OVDP, once a voluntary disclosure is made, the taxpayer resolves all civil tax liabilities and penalties based on the facts of that taxpayer's case, rather than based on a pre-determined penalty.

As discussed herein, CI is not a participant in the Non-OVDP Procedures. None of the Non-OVDP Procedures meets the definition of a "voluntary disclosure." Therefore, taxpayers who proceed to file returns under the Streamlined Procedures, the FBAR Procedures and the International Information Return Procedures don't receive any assurances that they won't be referred for criminal prosecution in the event their returns are examined.

2009, 2011, 2012 and 2014 Serial OVDPs

The 2014 OVDP is the fourth and latest in what has become a series of OVDPs. Its predecessors were the 2009, 2011, and 2012 OVDPs. A brief description of the predecessor OVDPs is followed by a review of the key aspects of the 2014 OVDP and the Non-OVDP Procedures, both of which were introduced on June 18, 2014.

2009 OVDP

In March 2009, as the U.S. was negotiating the UBS Agreements, the 2009 OVDP was introduced. The 2009 OVDP was announced as a "one-time" program, intended to attract taxpayers who were aware of the highly publicized UBS Agreements and events surrounding them.

These excerpts from a statement by then IRS Commissioner Doug Shulman, were released as part of the roll-out of the 2009 OVDP. They reflect the "carrot and stick" approach of the 2009 OVDP and its successor OVDPs:

> ***My goal has always been clear — to get those taxpayers hiding assets offshore back into the system***.
>
> ***The goal is to have a predictable set of outcomes to encourage people to come forward and take advantage of our voluntary disclosure practice while they still can***.
>
> ***In the guidance to our people, we draw a clear line between those individual taxpayers with offshore accounts who voluntarily come forward to get right with the government and those who continue to fail to meet their tax obligations. People who come in voluntarily will get a fair settlement***.
>
> ***We have instructed our agents to resolve these taxpayers' cases in a uniform, consistent manner. Those who truly come in voluntarily will pay back taxes, interest and a significant penalty, but can avoid criminal prosecution***.
>
> ***At the same time, we have also provided guidance to our agents who have cases of unreported offshore income when the taxpayer did not come in through our voluntary disclosure practice. In these cases, we are instructing our agents to fully develop these cases, pursuing both civil and criminal avenues, and consider all available penalties including the maximum penalty for the willful failure to file the FBAR report and the fraud penalty***.
>
> ***For taxpayers who continue to hide their head in the sand, the situation will only become more dire.***

The 2009 OVDP generally required taxpayers who had not filed FBARs to report and pay unpaid income taxes for a 6-year period, plus a 20% income tax penalty on the unpaid taxes. It also imposed a 20% "offshore penalty" which was usually the most significant component in terms of the cost to settling taxpayers. The offshore penalty was computed based on the highest aggregate value of unreported offshore account and assets during such 6 year period.

The offshore penalty was not based upon any statutory penalty contained in the Internal Revenue Code or upon any FBAR related penalty in Bank Secrecy Act. Rather, it was designed by the IRS to be a penalty which would be perceived by taxpayers and their advisors as a "fair" compromise, taking into account all of the civil penalties which the IRS might otherwise impose under both the Internal Revenue Code and th Bank Secrecy Act, taking into account that the IRS was permitting taxpayers to come forward and make a voluntary disclosure rather than possibly being subject to criminal prosecution.

The tax environment at the time the 2009 OVDP was announced was such that for the first time, U.S. taxpayers with accounts at a Swiss bank found themselves being the subject of intense scrutiny. They were fearful because they were aware, based upon widespread television and press coverage, that criminal charges were being brought against some UBS account holders. They were aware that UBS account holders who were being criminally investigated were not being permitted to resolve their cases under the OVDP. In this context, many of those who were eligible to enter the 2009 OVDP found it to be a "good deal" with no other alternative.

As part of the UBS Agreements, UBS sent letters to its U.S. account holders, advising them to consider making a voluntary disclosure under the 2009 OVDP. Such was the offshore tax environment in 2009.

The 2009 OVDP ran from March 23, 2009-October 15, 2009. According to a Government Accounting Office (the "GAO") study, "Offshore Tax Evasion," released in March 2013 (the "GAO Study"), the 2009 OVDP attracted approximately 15, 000 disclosures and collected approximately $4.1 billion.

2011 OVDP

There were no IRS offshore disclosure options from the close of the 2009 OVDP on October 15, 2009 until February 8, 2011, when the IRS announced the 2011 OVDP.

The following are excerpts of statements of IRS Commissioner Shulman which introduced his second OVDP:

> ***The situation will just get worse in the months ahead for those hiding assets and income offshore. This new disclosure initiative is the last, best chance for people to get back into the system.***...
>
> ***This initiative offers them the chance to get certainty about how their case will be handled. Just as importantly, those who truly come in voluntarily can avoid criminal prosecution as well.***

The 2011 OVDP was very similar in structure to the 2009 OVDP. However, unlike the first OVDP, the 2011 OVDP increased the offshore penalty from 20% to 25%, and covered a prior period of 8

years rather than 6 years. While the 2011 OVDP added a category of reduced penalties, they applied only under very narrow circumstances and are not discussed here. According to the GAO Study, the 2011 OVDP attracted approximately 18,000 disclosures and collected approximately $1.4 billion through December 31, 2012. The 2011 OVDP closed on September 9, 2011.

2012 OVDP

The 2011 OVDP proved not to be the last OVDP. Rather, on January 9, 2012, after only four months following the close of the 2011 OVDP, the IRS introduced the 2012 OVDP. The 2012 OVDP was the last OVDP introduced by Commissioner Shulman, whose comments in announcing it included the following:

> ***Our focus on offshore tax evasion continues to produce strong, substantial results for the nation's taxpayers.... We have billions of dollars in hand from our previous efforts, and we have more people wanting to come in and get right with the government. This new program makes good sense for taxpayers still hiding assets overseas and for the nation's tax system.***
>
> ***As we've said all along, people need to come in and get right with us before we find you...We are following more leads and the risk for people who do not come in continues to increase.***

The terms of the 2012 OVDP were similar to those in the 2011 OVDP. However, the offshore penalty was once again increased, this time, to 27.5% (from 25% in the 2011 OVDP). In addition, for the first time, the 2012 OVDP had no deadline, although the IRS warned that it might be closed at any time.

2014 OVDP and Non-OVDP Procedures-Streamlined Procedures, FBAR Procedures, and International Information Return Procedures

2014 OVDP

The 2012 OVDP was never formally terminated; rather, through modifications, it was "morphed" into the 2014 OVDP. As described by the IRS, the 2012 OVDP was "a continuation of the program introduced in 2012 with modified terms, but for purposes of referring to this modified program, it may be referred to as the 2014 OVDP" (and it will be referred to herein as the "2014 OVDP"). The 2014 OVDP was announced on June 18, 2014, together with the announcement of significantly expanded Streamlined Procedures, making them a significant part of the current offshore compliance process.

Then new IRS Commissioner John Koskinen's June 18, 2014 announcement of the 2014 OVDP, the expansion of the Streamlined Procedures, and the introduction of the revised Delinquent FBAR and International Information Return Procedures, was in part as follows:

> ***The steps we're outlining today include an expanded streamlined filing compliance process and important modifications to our Offshore Voluntary Disclosure Program, or OVDP. The combined effect of these revisions will be to allow more taxpayers to participate.***
>
> ***Our aim is to get people to disclose their accounts, pay the tax they owe and get right with the government. At the same time, for important categories of these non-willful people with offshore issues, a compliance regime that is too harsh won't net the desired result.***
>
> ***In addition, we want to send a message to anyone who continues to willfully and aggressively evade our tax laws by hiding money overseas that they will pay a higher price for that noncompliance. Even though we're tightening components of the OVDP, we still believe it's a better deal than the alternative, because if we find you, you will face higher penalties and, as the record shows, could face criminal prosecution and jail time.***
>
> ***We want everyone to know that we are continuing our efforts to track down people still out there who are hiding assets overseas. More information on these accounts is coming in every day. For example, Swiss banks are cooperating through a program put in place last year by the Department of Justice. I would note that Justice recently reached an historic agreement with Credit Suisse. Also, more banks around the world will be coming forward with information on their U.S. customers beginning July 1. That's when reporting requirements under the Foreign Account Tax Compliance Act, or FATCA, go into effect. It's clear that the days of hiding assets in accounts overseas are coming to an end. There is no reason not to come into compliance***
>
> ***For me as a tax administrator, the bottom line on what we're announcing today is about fairness. For our system of voluntary tax compliance to work right, the average taxpayer who abides by the law has to be confident that everyone is being held to a similar standard.***

Under the 2014 OVDP, the IRS maintained the 2012 OVDP's 27.5% offshore penalty, and added a new 50% penalty, applicable in cases where there was public disclosure of the IRS investigating a party directly related to the taxpayers non-compliance. Consistent with the prior OVDPs, the offshore penalty in the 2014 OVDP applies to "OVDP assets" which is defined in 2014 OVDP FAQ #35 as follows:

> ***The offshore penalty is intended to apply to all of the taxpayer's offshore holdings that are related in any way to tax non-compliance, regardless of the form of the taxpayer's ownership or the character of the asset ("OVDP assets"). OVDP assets include all assets directly or indirectly owned by the taxpayer, including financial accounts holding cash, securities or other custodial assets; tangible assets such as real estate or art; and intangible assets such as patents or stock or other interests in a U.S. or foreign business***. ..Tax noncompliance includes failure to report gross income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset.

For the first time, the 2014 OVDP required payment of the offshore penalty at the time of the submission of the OVDP documents, rather than at the close of the OVDP submission and examination process.

2014 Streamlined Submission Procedures

The Streamlined Procedures were intended to apply to taxpayers who: (1) believe the OVDP penalties are too harsh as applied to them because their offshore tax non-compliance was "non-willful" and, (2) don't require the assurances that they will not be criminally referred, as is provided under the OVDPs. The Streamlined Procedures significantly expanded predecessor "streamlined procedures" which were introduced in September 2012, but which did *not* apply to U.S. residents and were intended to apply only to certain "low compliance risk" taxpayers.

Under the Streamlined Procedures, the offshore penalty is five (5%) percent of the highest aggregate balance during the immediately preceding 6 years (rather than 8 prior years, as under the OVDP), a significant decrease from the 27.5%/50.0% offshore penalty in the OVDP. Only 3 prior years of amended income tax returns must be filed (rather than 8 prior years, as under the OVDP), and 6 prior years' of delinquent FBARs must be filed (rather than 8 prior years, as under the OVDP).

The offshore penalty base under the Streamlined Procedures generally applies to all assets which should have been, but were not reported on an FBAR (FinCen Form 114) or Form 8938 (Statement of Specified Foreign Financial Assets), such as the following:

- financial accounts held at foreign financial institutions;
- financial accounts held at a foreign branch of a U.S. financial institution;
- foreign stock or securities not held in a financial account;
- foreign mutual funds; and
- foreign hedge funds and foreign private equity funds.

The penalty base for the Streamlined Procedures is narrower than that for the OVDP. In particular, it does not include tangible assets, such as real estate, which are directly held by individuals rather than by entities. Specified financial assets which the taxpayer indirectly owns in disregarded entities are considered to be owned by the taxpayer rather than by the entity.

If the IRS has initiated a civil or criminal examination of taxpayer's returns for any taxable year, the taxpayer will not be eligible to use the Streamlined Procedures.

Taxpayers who file under the Streamlined Procedures must fill out a 4 page form which includes information necessary to compute the 5% offshore penalty.

Finally, taxpayers using the Streamlined Procedures must file a Form 14654, "Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures" (the Streamlined Certification Form"), which requires a taxpayer to provide:

> ... specific reasons for your failure to report all income, pay all tax, and submit all required information returns, including FBARs. If you relied on a professional advisor, provide the name, address, and telephone number of the advisor and a summary of the advice.

The Streamlined Certification Form contains the following statement and acknowledgment (the "Non-Willful Certification"):

> **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.**

Unlike the 2014 and all prior OVDPs, taxpayers who file under the Streamlined Procedures do not receive any assurances that their returns will not be examined, or that they will not be subject to significant civil penalties, fines, or criminal liability if they are audited. The Non-Willful Certification includes the following acknowledgment (just following the certification of non-willfulness quoted above):

> ***I recognize that if the Internal Revenue Service receives or discovers evidence of willfulness, fraud, or criminal conduct, it may open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even referral to Criminal Investigation.***

Although tax returns filed under the Streamlined Procedures are filed with the IRS to the attention of the IRS' Streamlined Domestic Offshore unit in Austin, Texas, the IRS maintains that they are processed "like any other returns." The processing and auditing of returns submitted under the Streamlined Procedures is explained by the IRS as follows:

> Tax returns submitted under either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will be

> processed like any other return submitted to the IRS. Consequently, receipt of the returns will not be acknowledged by the IRS and the streamlined filing process will not culminate in the signing of a closing agreement with the IRS.
>
> Returns submitted under either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will not be subject to IRS audit automatically, but they may be selected for audit under the existing audit selection processes applicable to any U. S. tax return and may also be subject to verification procedures in that the accuracy and completeness of submissions may be checked against information received from banks, financial advisors, and other sources. ***Thus, returns submitted under the streamlined procedures may be subject to IRS examination, additional civil penalties, and even criminal liability, if appropriate***. Taxpayers who are concerned that their failure to report income, pay tax, and submit required information returns was due to willful conduct and who therefore seek assurances that they will not be subject to criminal liability and/or substantial monetary penalties should consider participating in the Offshore Voluntary Disclosure Program and should consult with their tax professional or legal advisers.

As stated above, the IRS does not acknowledge receipt of returns filed under the Streamlined Procedures or enter into a formal "closing agreement" as under the OVDPs. Further, if the IRS does not examine the taxpayer's returns in an audit, the taxpayer will not receive any agreement or form which signifies to them that their returns are "closed" or are otherwise accepted. After returns are filed under the Streamlined Procedures, if the IRS has no questions regarding the submission, the taxpayer may never hear anything from the IRS regarding the status of the returns submitted.

Taxpayers who are eligible for treatment under the streamlined procedures and who have submitted a Disclosure Letter under the OVDP (or any predecessor offshore voluntary disclosure program) prior to July 1, 2014, but who have not finalized their OVDP submissions with a fully executed OVDP closing agreement, are entitled to request treatment under the Streamlined Procedures, through "Transition Treatment." Those taxpayers are not required to opt out of the OVDP, but are be required to provide a Non-Willful Certification. As part of the OVDP process, the IRS considers the request for Transition Treatment and determines whether or not to incorporate the streamlined penalty terms in the OVDP closing agreement. Where Transition Treatment is granted, all terms of the OVDP remain the same except the miscellaneous offshore penalty, which is reduced to 5%.

Taxpayers who have finalized their OVDP submissions by a closing agreement executed by the IRS and by the Taxpayer are not eligible for the Transition Treatment or the Streamlined Procedures.

2014 Delinquent FBAR Submission Procedures

The IRS made the FBAR Procedures clearly separate and distinct from the OVDP. It grouped them together with the other two Non-OVDP Procedures, i.e., the Streamlined Procedures and the International Information Return Procedures.

The FBAR Procedures are available to:

> ***Taxpayers who do not need to use either the OVDP or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax***, but who:
>
> - have not filed a required Report of Foreign Bank and Financial Accounts (FBAR) (FinCEN Form 114, previously Form TD F 90-22.1),
>
> - are not under a civil examination or a criminal investigation by the IRS, and
>
> - have not already been contacted by the IRS about the delinquent FBARs

Taxpayers are required to provide a reason the FBAR is filed late. Delinquent FBARs filed under the FBAR Procedures may be examined by the IRS and an examination may result in referral for criminal prosecution.

The FBAR Procedures continue the prior policies from 2012 FAQ #17, in providing that no FBAR or other penalty will be applied if all foreign account income was property reported and there are no associated tax liabilities.

Nothing in their eligibility requirements limits the FBAR Procedures to returns where no related income was omitted. With regard to the IRS' examination of FBARs filed under the FBAR Procedures, the IRS states:

> FBARs will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

2014 Delinquent International Return Submission Procedures

As with the FBAR Procedures, the IRS made the International Information Return Procedures clearly separate and distinct from the OVDP. The International Information Return Procedures are available to:

> ***Taxpayers who do not need to use the OVDP or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax***, but who:
>
> - have not filed one or more required international information returns,
> - ***have reasonable cause for not timely filing the information returns***,
> - are not under a civil examination or a criminal investigation by the IRS, and
> - have not already been contacted by the IRS about the delinquent information returns

Taxpayers must include a reasonable cause statement with the delinquent international returns.

The delinquent international information returns filed under the International Information Return Procedures may be examined by the IRS, and an examination may result in referral for criminal prosecution.

The IRS issued Delinquent International Information Return FAQ #1, which further explains the procedures, as follows:

> The IRS eliminated 2012 OVDP FAQ 18, which gave automatic penalty relief, but was only available to taxpayers who were fully tax compliant. The Delinquent International Information Return Submission Procedures clarify how taxpayers may file delinquent international information returns in cases where there was reasonable cause for the delinquency. ***Taxpayers who have unreported income or unpaid tax are not precluded from filing delinquent international information returns***. ***Unlike the procedures described in OVDP FAQ 18, penalties may be imposed under the Delinquent International Information Return Submission Procedures if the Service does not accept the explanation of reasonable cause***. The longstanding authorities regarding what constitutes reasonable cause continue to apply, and existing procedures concerning establishing reasonable cause, including requirements to provide a statement of facts made under the penalties of perjury, continue to apply. See, for example, Treas. Reg. § 1.6038-2(k)(3),

> Treas. Reg. § 1.6038A-4(b), and Treas. Reg. § 301.6679-1(a)(3). (emphasis provided).

With regard to the IRS' examination of international information returns filed under the International Information Return Procedures, the IRS states:

> Information returns filed with amended returns will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

OVDP and Non-OVDP Policies: Commentary, Analysis and Recommendations

The IRS' OVDPs have evolved over the past six years such that they seem to have taken on a life of their own. The supposed one-time OVDP introduced in 2009 keeps coming back. the OVDPs are not publicized as amnesty programs; however, based upon this description in a 1998 Joint Committee Pamphlet on "Tax Amnesty" the OVDPs are the narrowest form of a tax amnesty program:

> There are theoretically several types of tax amnesty programs. The narrowest form of amnesty would require taxpayers to pay all taxes, interest, and civil penalties, but would forgive criminal penalties. The goal of this form of amnesty (as well as the variants of it described below) is both to collect taxes owing from prior years and to place on the tax rolls those who had previously escaped taxation.

Based upon the above description, the OVDP's have all been amnesty programs whereas, the Non-OVDP Procedures are not amnesty programs because they not only fail to provide any form of forgiveness of taxes, interest or penalties, they also fail to provide any assurances that participants won't be prosecuted.

The 1998 Joint Committee Report on Tax Amnesty, consistent with the 2014 National Taxpayer Advocate Report to Congress (the "Taxpayer Advocate's Report"), discusses the importance of the perception of "fairness" to a voluntary system of tax compliance as follows:

> ***Perhaps above all, the government objective should be to strive to maintain a tax system that is broadly viewed as fair to all. The high level of voluntary compliance with the tax laws, as compared to numerous other countries, is one of the greatest assets of the Federal tax system, and such voluntary compliance will no doubt be aided by fostering fairness in the tax code. Views differ as to the fairness of a general tax amnesty***.

Commentary, analysis and recommendations regarding revisions to the IRS Four Offshore Disclosure Options are as follows:

1. Reduction of Penalties Along Lines Recommended by Taxpayer Advocate. Penalties are the focal point of the offshore compliance options, and they are a major reason the OVDP and Streamlined Procedures are viewed as unfair. The Taxpayer Advocate's Report has recommended significant reductions in the offshore penalties. The OVDP and Streamlined Procedures' punitive penalties for failure to file information returns are unnecessary.

As part of its offshore enforcement efforts, the IRS has jumped with both feet into the business of creating penalties which are not related or proportionate to the amount of omitted foreign income. The IRS has effectively legislated its own system of tax penalties, and is not only enforcing, but is making tax laws. This has led to a fundamental unfairness described by the Taxpayer Advocate as follows:

> ..the IRS's OVD programs turned the statutory scheme on its head while eroding trust for the IRS and eroding taxpayer rights, such as the rights to pay no more than the correct amount of tax...

Prior to the IRS' creation of the OVDP and Streamlined offshore penalties, for the most part, income tax penalties were imposed on omitted income, were proportionate to the amount of income omitted, and were resolved on a case by case basis. Under the IRS' offshore programs, the IRS is enforcing a uniform penalty framework, with its unique review procedures, wherein there is little, if any independent discretion in the IRS personnel who hear the appeals. While these penalty and appeals procedures may technically be affording "due process" to taxpayers, there is a widespread perception that taxpayers are being "railroaded" into accepting virtually unappealable penalties. The Taxpayer Advocate agrees that Offshore Voluntary Disclosure (OVD) programs violates taxpayer rights stating:

> ..the ***perceived unfairness, and lack of transparency and due process in the OVD programs violates the IRS' recently-adopted Taxpayer Bill of Rights***. Those rights include the right to be informed, the right to challenge the IRS' position and be heard, the right to appeal an IRS decision in an independent forum, and the right to a fair and just tax system.

The Taxpayer Advocate has also expressed its concern that the IRS has not shown that the increased penalties which have come with every succeeding OVDP will have a positive impact on future tax compliance, stating:

> .. various studies by TAS and others are consistent with what the IRS and Congress found in 1989 - ***penalties promote voluntary compliance when they are perceived as fair and administered in a way that is consistent with fundamental taxpayer rights. Otherwise, they are more likely to erode***

> ***voluntary compliance***, wasting IRS resources and decreasing government revenues.

If the IRS reviews and significantly modifies the offshore penalties, it will go a long way towards remedying the current defects in its Offshore Compliance Options.

2. The Offshore Penalties Under the OVDP and Streamlined Procedures Are Not Necessarily "Good Deals". The IRS' message since the introduction of the 2009 OVDP has been that the OVDP's are the "best deal" for those who haven't yet come forward. In support of its contention, the IRS lists ***all potential civil and criminal tax and FBAR penalties*** which may apply to a taxpayer who has willfully not reported, including criminal penalties, and contrasts them to the penalty in the OVDP. The OVDP penalty is less than the maximum possible penalties. Further, once admitted to an OVDP, the taxpayer will likely never go to jail unless the taxpayer is untruthful, or otherwise fails to comply with the terms and conditions of the OVDP.

The Taxpayer Advocate has questioned the IRS' premise that the OVDP's are a "good deal," as follows:

> For taxpayers who believe the IRS can prove they willfully violated the disclosure statute and who might otherwise be subject to criminal prosecution, this is probably a good deal. Even in criminal cases, however, the government has had difficulty obtaining a penalty of more than 50 percent of the highest account balance, at least where the taxpayer has tried to correct the problem.

Consistent with the foregoing, last year, after a jury in Miami found a three-year "willful" violation of FBAR reporting requirements, the government settled prior to the taxpayer's appeal, applying the FBAR penalty to two out of the three years rather than to all three years. Thus, even after a trial "win," the government didn't impose the maximum possible FBAR penalties.

The IRS' pledge to treat those who come forward later more harshly than those who came forward early was undermined by introduction of the Streamlined Procedures' 5% penalty. Taxpayers who previously resolved their cases under the OVDP's 20%, 25% or 27.5% penalty structures, who may have been "non-willful," and who didn't need the criminal protection afforded by the OVDP may have wished they had waited for the Streamlined Procedures because they paid more by coming forward earlier. That isn't what the IRS promised them.

The Taxpayer Advocate addressed this defect in the current procedures as follows:

> It is difficult to see how such an approach will encourage future compliance by them or by anyone else. Instead, it creates an incentive for anyone facing potentially severe penalties to wait for the government to become more

> reasonable, which is inconsistent with the objective of promoting fair compliance.

The Taxpayer Advocate recommended that taxpayers with closed cases under prior OVDPs be permitted to receive the same treatment as similarly-situated taxpayers in subsequent IRS programs. This recommendation also seems fair and in the interests of sound tax administration.

3. The Streamlined Procedures Can't Be Administered Effectively by the IRS or Taxpayers Because The IRS Has Refused to Define "Non-Willful". Even though the critical eligibility requirement of the Streamlined Procedures is that the taxpayer's conduct be "non-willful," the IRS has not defined "non-willful." Case law does not clearly define the terms and different definitions used by the IRS and by taxpayers lead to opposite conclusions as to whether conduct is "willful" or "non-willful." As a result, the IRS could disagree with the Taxpayer's assertion of "non-willfulness," examine the return and impose significant civil and even criminal penalties.

The Taxpayer Advocate's Report states:

> **the** ***IRS has made a deliberate and conscious decision not to do define and distinguish "willful conduct" from "non-willful conduct***."

It is understandable that the IRS wants to be in a position to assert "willful" violations when it litigates and therefore doesn't want to agree with a taxpayer-friendly definitions of "willful" and "non-willful." However, it isn't acceptable for the IRS to refuse to define "willful" and "non-willful" when it is the critical element of the Streamlined Procedures, and the consequences to taxpayers may be so significant.

4. The Delinquent International Information Procedures Lead Taxpayers to Believe That They Benefit by Using Them and Fail to Clearly Explain the IRS' Narrow Interpretation of "Reasonable Cause". The International Information Return Procedures fail to provide any benefits to taxpayers who use them. They don't provides assurance against criminal prosecution or assurances that the IRS will agree that the taxpayer demonstrated "reasonable cause." Nor do the International Information Return Procedures make it clear to taxpayers that the IRS will rarely find that "reasonable cause" exists for a delinquently filed return under its published criteria.

The Service does not define "reasonable cause" specifically for the Delinquent International Information Return Procedures, and uses general authority instead. Generally, to demonstrate "reasonable cause" a taxpayer must demonstrate that the taxpayer exercised "ordinary business care and prudence in determining his or her tax obligations but nevertheless failed to comply with those obligations." However, the IRS' international penalty handbook imposes further obligations of diligence on taxpayers who engage in international transactions, as follows:

> Reasonable cause applies to most, but not all, of the penalties. However, taxpayers who conduct business or transactions offshore or in foreign

> countries have a responsibility to exercise ordinary business care and prudence in determining their filing obligations and other requirements. *It is not reasonable or prudent for taxpayers to have no knowledge of, or to solely rely on others for, international transactions*.

Taxpayers who read and use the International Information Return Procedures likely have no idea how difficult it is to establish "reasonable cause." If an IRS examiner disagrees with the taxpayer then the taxpayer will have little recourse, especially if IRS Appeals merely "rubber stamps" offshore penalty decisions. Court trials are costly alternatives with uncertain result.

Finally, the IRS' procedures don't tell taxpayers that if "reasonable cause" can be shown, no statutory penalty applies! Therefore, a taxpayer with reasonable cause doesn't really need special procedures and rules to file an amended return. Its just not right for the IRS to have a specific offshore filing procedure which offers no benefits to taxpayers who use them, and, worse, can result in taxpayers using them being criminally prosecuted.

5. The IRS has not defined the differences between "reasonable cause" and "non-wilful" conduct or the importance of establishing "reasonable cause." By their terms, the FBAR Procedures should apply regardless of whether there is an omission of income from the unreported foreign account. The procedures state that taxpayers are permitted to use the FBAR Procedures, if they "don't need to use" the Streamlined Procedures or the OVDP. The phrase "need to use" seems inappropriate since taxpayers never "*need to use* the Streamlined Procedures or the OVDP." The phrase, if interpreted as meaning "The FBAR Procedures are available if a taxpayer *doesn't desire to use the OVDP or the Streamlined Procedures*," which interpretation makes the FBAR Procedures available to taxpayers with unreported foreign accounts, whether or not there is related omitted income.

However, there is confusion because under the prior procedures of 2012 OVDP FAQ #17 , FBARs could only be filed without a penalty outside of the OVDP if there was no related unreported income from the unreported foreign account and all taxes were paid; otherwise taxpayers were to file FBARs under the 2012 OVDP even if there was as little as one ($1.00) dollar of omitted income from the foreign account. The IRS has not issued a 2014 Delinquent FBAR Procedures FAQ which would be analogous to Delinquent International Information Return FAQ #1 cited above. The analogous FBAR FAQ would, if issued, expressly provide that FBARs may be filed under the FBAR Procedures whether or not all income was reported.

Perhaps the IRS hasn't clarified the issue because it hasn't decided what to do if a delinquent FBAR is filed under the FBAR Procedures and there is omitted income. Will it examine the FBAR? Will it impose an FBAR penalty based upon the account's value? How will the FBAR be treated vis-a-vis its treatment under the Streamlined Procedures, if the conduct was non-willful? A clarification as to the scope of the FBAR Procedures would be very helpful.

Further, the FBAR Procedures do not expressly advise taxpayers that there is no FBAR penalty under applicable statutes if there is "reasonable cause" for the late filing of an FBAR. If there is "reasonable cause" then delinquent FBARs should be able to filed under the FBAR Procedures, or as any other FBAR is filed, because there won't be any statutory penalty. (There is an FBAR penalty of $10,000 penalty per account per year if "reasonable cause" ***is not established***, but the taxpayer can establish that the failure to file the FBAR was *"non-willful*").

Finally, the FBAR Procedures do not advise taxpayers who must file delinquent FBARs using FinCen Form 114 that they should take care in filling out the Form 114, making certain to include in the Form 114 not only the "reason" for the late filing, but to also include any and all facts which may establish "reasonable cause." If the IRS examines the Form 114, the explanation for the reason the FBAR is filed late may be extremely important to the taxpayer.

6. Taxpayers Filing Returns Under Non-OVDP Procedures Should Not Be Subject to Criminal Prosecution. Those taxpayers who come forward in good faith and file returns under the Non-OVDP Procedures may be criminally prosecuted if the IRS examines their returns. Assurances of no criminal prosecution should not be reserved for those who enter the OVDPs. Neither actual nor threatened criminal prosecution are sound tax policies to apply to taxpayers who follow special procedures and voluntarily come forward and file returns in reliance on them.

The following are suggestions to assure that Non-OVDP participants are not criminally prosecuted:

A. Make Pre-Clearance Procedures Available. To provide assurances that returns filed under the Non-OVDP Procedures satisfy the "timeliness" requirement for a "voluntary disclosure" the Service should make the OVDP pre-clearance procedures available to Non-OVDP participants. Otherwise, taxpayers who file returns under the Streamlined Procedures may unknowingly be ineligible, for example, if at the time of the Streamlined submission, the IRS has received information that the specific taxpayer has an unreported account at a foreign bank

B. Require Sufficient Disclosure to Make a Submission Complete or Consider Current Required Streamlined Disclosure Sufficient. To provide assurances that returns filed under the Non-OVDP Procedures satisfy the "completeness" requirement for a "voluntary disclosure," the Service should either: (1) agree that filings under the Streamlined procedures will not be subject to criminal penalties absent intentionally false filings, or (2) increase the information necessary to be provided under the Streamlined Procedures (to the level of information required under the OVDP, if necessary) such that CI's disclosure requirements are met.

C. Require Continued Taxpayer Cooperation. For those seeking assurances of no criminal prosecution, the IRS should require Taxpayer cooperation as under the OVDP. "Cooperation" is an element of a "voluntary disclosure." It is reasonable for taxpayers to provide in exchange for the benefit taxpayers receive.

7. IRS Should Provide Assurances That Those Entering the 2014 OVDP May Opt Out Without Being Prejudices For Not Filing Under the Streamlined Procedures. The 2014 OVDP is the first OVDP which is expressly intended for those who "willfully" violated offshore tax reporting laws and who desire protection from criminal prosecution. Therefore, taxpayers who enter the OVDP and who later desire to "opt-out" of the civil penalty structure may be concerned that the examining agents will not consider lesser penalties because the taxpayer has, for practical purposes, admitted to "willful" misconduct by virtue of entering the OVDP rather than filing under the Streamlined Procedures. Taxpayers who have requested Transition Relief, i.e., have first filed under the OVDP and are requesting Streamlined Procedure penalties, are having their returns and Non-Willful Certifications intensely scrutinized by multi-layer levels of review. There is reason to be concerned that the IRS will scrutinize returns of those opting out in the same manner, so as to deny reduced penalties and so as to assure that the IRS can process returns most efficiently. The IRS should expressly state that taxpayers who opt out will not be deemed to have made an admission that they have willfully violated offshore tax laws by entering the OVDP, and should make it clear to taxpayers that their decision to make a voluntary disclosure and receive protection against criminal prosecution under the OVDP won't otherwise be used against them in considering civil penalties under an opt out.

8. The Streamlined Procedures don't contain any "opt out". Unlike the OVDP, there is no "opt out" under the Streamlined Procedures. As a result, taxpayers who believe that their non-compliance is non-willful and would prefer to be subject to penalties which may be imposed under the Internal Revenue Code and banking statutes rather than to the penalties under the Streamlined Procedures, are forced to file amended returns outside of all of the IRS' "Four Options."

The IRS should either provide a Streamlined "opt-out" or state that it won't treat returns filed outside of the "Four Options" any more harshly than Streamlined and returns filed under those procedures.

9. The IRS' Should Explain the Non-OVDP Filing Audit Selection Process. According to the IRS, returns filed by taxpayers under the Streamlined Procedures, the FBAR Procedures and the International Information Return Procedures are not subject to any special examination procedures, but instead are examined, if at all, under the IRS' "existing audit selection processes." This may be true, but its difficult to believe. The "reasonable cause" explanation which is required under the International Information Return Procedures would seemingly be reviewed in certain cases. Further, under the Streamlined Procedures, the returns are not submitted to the Service Center at which the taxpayer would file returns generally, but, rather are directed to an IRS Streamlined Disclosure unit in Texas. It seems logical that they are subject to some type of special examination process.

Moreover, if returns filed under the Non-OVDP Procedures, in particular, the Streamlined Procedures are only examined sporadically and as with any return which is filed, then why are the returns of those taxpayers who had filed to be eligible for Streamlined Transition Treatment being

scrutinized by special groups and multiple layers of review? This seems to be punitive treatment applied to the taxpayers who in good faith filed under the OVDP's.

The Service should provide a further explanation of the phrase "existing audit selection process" so that the Non-OVDP Procedures are transparent and can be evaluated for fairness.

10. With full implementation of FATCA, there may be few real distinctions between foreign and domestic non-compliance and extreme penalties for foreign non-compliance may become clearly inappropriate. FATCA was enacted in 2010 by Congress to target non-compliance by U.S. taxpayers using foreign accounts. FATCA requires foreign financial institutions to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities with U.S. owners. The goal of FATCA is global transparency regarding international financial information. According to the 2014 Taxpayer Advocate Report, technology necessary to fully implement the exchange and matching features of FATCA which will identify non-filers based upon FATCA information matched against information on U.S. tax forms will not be released for use until 2016 at the earliest.

Once FATCA is fully implemented, if it turns up a significant number of taxpayers: (1) who have violated offshore reporting laws, (2) who aren't "willful and aggressive evaders," and, (3) as to whom the OVDP penalties are inappropriate. The IRS will have to deal with these taxpayers in some manner which makes administrative sense.

The non-reporting of income from a domestic accounts most often isn't treated extraordinarily. Rather, as taxpayers know, the IRS computers simply "match" information from 1099's, W-2's and other sources. If income appears not to have been reported, then, in most cases, the IRS sends computer generated notices to taxpayers with a bill for tax and interest, and perhaps penalties. Taxpayers aren't penalized based on the value of the account in onshore cases. Its difficult to imagine that non-compliance relative to foreign accounts would be handled differently once all accounts, domestic and foreign, are being reported via networks of computers. Rather, it seems more plausible that the existing "matching" programs will simply include foreign accounts. In such a case, it won't be practical, consistent or fair to impose significant penalties based upon the values of foreign accounts rather than on income not reported in the case of unreported foreign accounts, while income based lower penalties are imposed on taxpayers who have failed to report income from domestic accounts. Moreover, those who are voluntarily filing under the OVDP and Non-OVDP may well wonder why they so filed, if, out of administrative necessity, the IRS changes its approach to penalties for those who don't voluntarily report offshore accounts and who are detected under FATCA.

11. The IRS' enforcement arsenal is sufficient in the case of "willful and aggressive tax evaders" without imposing threats and excessive penalties as a means of bringing taxpayers into the voluntary system of tax compliance. The IRS rhetoric with the introduction of each OVDP and with the 2014 modifications and introduction of the Streamlined Procedures, is to the effect that the IRS

is going after "willful and aggressive tax evaders." However, nothing in the current procedures or in the OVDP really distinguishes "tax criminals" from those who don't fit that notion.

Criminal tax evaders who are really most like "criminals" are those persons who are using tax havens and various tax schemes to divert funds which would otherwise be subject to U.S. tax to accounts in the tax haven countries. "Willful and aggressive" activities in the offshore context should include schemes involving significant evasion of U.S. originated income, such as the formation of shell corporations and the diversion of income from active U.S. businesses or from activities of the taxpayers in the U.S. Those taxpayers who own foreign bank accounts and have conducted legitimate businesses which their families historically owned and operated in the foreign jurisdictions, and which, often reported and paid taxes in the foreign jurisdiction are not fairly labeled "willful and aggressive."

Many taxpayers are effectively "trapped" by their prior actions or by their families' prior businesses in foreign jurisdictions and find themselves not knowing how to "come into compliance" with the U.S. laws. A punitive statutory scheme and threatening words likely do little to bring these taxpayers into the system voluntarily, or in a way in which they believe is fair. Most of these taxpayers seem to be otherwise tax compliant, aren't diverting U.S. income out to their home country, and, except for the offshore historical business or accounts, are tax compliant.

The Taxpayer Advocate's Report, as "taxpayer friendly" as it is, uses the term "bad actors" to describe taxpayers who willfully have not reported their offshore accounts; respectfully, that term should be eliminated as the "bad actors" are, for the most part, really just taxpayers who are not yet in the system.

In the spirit of full and honest disclosure, it must be admitted that the IRS itself, Congress, and practitioners were all lax in enforcing offshore tax reporting rules prior to the events of September 11th, 2001. The relative non-enforcement of FBAR penalties prior to 2009 has been well documented. The turn-about in enforcement represents a sea change in the tax enforcement culture. As would be expected with any cultural change, it takes time for people to adjust. An approach with "less stick and more carrot" may well be in order.

If the goal is truly to bring taxpayers back into the system of voluntary compliance, then its time the IRS take a hard look at how things are today, listen to the well intentioned feed-back of the tax community outside of the IRS, and make changes which are appropriate given the current status of offshore enforcement and compliance. Those who remain outside of the system and are truly "willful and aggressive" tax evaders, will likely have to be dealt with outside of the OVDP and Non-OVDP Procedures.

Conclusion

The IRS' offshore enforcement actions, U.S. tax policies and the responses of taxpayers and their advisors have resulted in an unprecedented turn-about in offshore tax compliance. In its efforts to accommodate taxpayers who were not yet in compliance, the IRS made major changes to its existing OVDP with the 2014 OVDP, the Streamlined Procedures, the FBAR Procedures and the International Information Return Procedures.

The 2014 OVDP remains as the only offshore disclosure option which provides assurances that participants won't be subject to criminal prosecution. However, while harsh penalties and a lack of real appeals rights have been the major objections with prior OVDPs, the 2014 OVDP did not address these concerns and likely exacerbated them.

None of the Non-OVDP Procedures provide assurances to taxpayers who use them that they will not be criminally prosecuted if their returns are examined. The Non-OVDP Procedures, are just that, mere "procedures" which don't offer the protection against criminal prosecution afforded by a "voluntary disclosure." The IRS shouldn't be encouraging taxpayers to file returns under the Non-OVDP Procedures, when, prior to the June, 2014 introduction of the Non-OVDP Procedures, the Service itself has made it clear that it was discouraging taxpayers from making "quiet disclosures" and that it would taxpayers who made quiet disclosures harshly to discourage the practice.

The Streamlined Procedures should be withdrawn since the IRS refuses to provide clear guidance to taxpayers which will allow them to determine "willful" from "non-willful" conduct, and since taxpayers using them receive absolutely no assurances against criminal prosecution. Further, if the offshore 5% penalty under the Streamlined Procedures is greater than applicable statutory penalties, there is no "opt out" from the Streamlined Procedures.

The International Information Return Procedures don't contain a single benefit to taxpayers filing returns using them, and the IRS has not advised taxpayers whether the FBAR Procedures are intended to be broadly applicable so that they apply whether there is omitted income or not. If they are broadly applicable, then it is unclear how the Streamlined Procedures differ from FBAR Procedures, other than that the Streamlined Procedures provide a 5% offshore penalty whereas there is no automatically imposed penalty under the FBAR Procedures.

Its time for the IRS to make major changes to its four offshore tax compliance options in the interest of our system of federal tax administration.