Five Routes to U.S. Tax Regularization—Choose with Care to Fit Your Needs

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The implementation of FATCA and the ongoing efforts of the United States Internal Revenue Service and the United States Department of Justice to ensure compliance by those with U.S. tax obligations have raised awareness of U.S. tax and information reporting obligations with respect to non-U.S. sourced income and non-U.S. assets. Understanding that the circumstances of U.S. Person taxpayers with non-U.S. income and non-U.S. assets vary widely, the IRS currently offers several formal options for addressing previous failures to comply with U.S. tax and information return obligations relative to non-U.S. income and assets. Below in outline format is a general discussion of those options, together certain advantages and disadvantages that apply to each.

I. Delinquent FBAR Submission

a. Eligibility: *Delinquent FBAR Submission Procedures 20150514* 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:

1. Have not filed one or more required Report of Foreign Bank and Financial Accounts (currently FinCEN Form 114, previously Form TD F 90-22.1 and either or both often referred to herein simply as "FBAR"),
2. Are not under a civil examination or a criminal investigation by the IRS, and
3. Have not already been contacted by the IRS about the delinquent FBARs,
   - A. Should file the delinquent FBARs according to the FBAR instructions.
   - B. And in addition should follow the steps immediately below.
     - i. Review the current instructions to the FinCEN Form 114,
     - ii. Include a statement explaining why you are filing the FBARs late,
     - iii. All FBARs must now be filed electronically via the FinCEN website at http://bsaefiling.fincen.treas.gov/,
     - iv. On the cover page of the electronic form, select a reason for filing late, and
     - v. If for any reason you are unable to file electronically, contact FinCEN's Regulatory Help line at +1-703-905-3975 to determine possible alternatives to electronic filing.
   - C. 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.
4. Advantages:
   - A. The IRS will not impose a penalty for the failure to file the delinquent FBARs if you properly reported on your U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs, and you have not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted.

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B. Therefore, if this is absolutely, positively the only area in which you are non-compliant, this procedure provides a relatively painless and generally penalty-free way to rectify such noncompliance.

5. Disadvantages:

A. Delinquent submission of FBARs does not resolve any other existing form of U.S. taxation non-compliance including: failure to file other informational returns; failure to report, file and pay taxes on the income from the foreign financial accounts reported on the delinquent FBARs; or relative to any other item due to the U.S. Internal Revenue Service, failure to file or make any other tax-related reports or pay taxes on any other income (U.S. or non-U.S. source).

II. Delinquent International Information Return Submission

a. Eligibility: *Delinquent International Information Return Submission Procedures 20150925* 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:

1. Have not filed one or more required international information returns,
2. Have **reasonable cause** for not timely filing the information returns,
3. Are not under a civil examination or a criminal investigation by the IRS, and
4. Have not already been contacted by the IRS about the delinquent information returns,

A. Should file the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file.

B. Describe your situation in the reasonable cause statement - As part of the reasonable cause statement, taxpayers must also certify that any entity for which the information returns are being filed was not engaged in tax evasion. If a reasonable cause statement is not attached to each delinquent information return filed, penalties may be assessed in accordance with existing procedures.

i. All delinquent international information returns other than Forms 3520 and 3520-A should be attached to an amended return and filed according to the applicable instructions for the amended return.

ii. All delinquent Forms 3520 and 3520-A should be filed according to the applicable instructions for those forms.

iii. A reasonable cause statement must be attached to each delinquent information return filed for which reasonable cause is being requested.

C. 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.

b. Advantages:

1. Taxpayers who have unreported income or unpaid tax are not precluded from filing delinquent international information returns. *Delinquent International Information Return Submission Procedures FAQ 20150925.*
2. The IRS will not impose a penalty for the failure to file the delinquent FBARs if you properly reported on your U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs, and you have not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent. *FBARs are submitted. Delinquent FBAR Submission Procedures 20150514*

c. Disadvantages:

1. Reasonable Cause is determined on a case-by-case basis. The examples the IRS provides for establishing reasonable cause are extremely limited. Regardless, determining "reasonable cause" is based on a consideration of facts and circumstances, so it is necessarily somewhat subjective. Because it is somewhat subjective (and not an objective test), determining "reasonable cause" is to some extent an art and not a science.

2. Penalties may be imposed if the Service does not accept the explanation of reasonable cause. *Delinquent International Information Return Submission Procedures FAQ 20150925.*

A. 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). *Delinquent International Information Return Submission Procedures FAQ 20150925.*

i. 1.6038A-4

ii. Treas. Reg. § 1.6664–4: Reasonable cause and good faith exception to section 6662 - Facts and circumstances taken into account—(1) In general. The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. Generally, the most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability.

a. Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer.

b. An isolated computational or transcriptional error generally is not inconsistent with reason- able cause and good faith. Reliance on an information return or on the advice of a professional tax advisor or an appraiser does not necessarily demonstrate reasonable cause and good faith. Similarly, reasonable cause and good faith is not necessarily indicated by reliance on facts that, unknown to the taxpayer, are incorrect. Reliance on an information return, professional advice, or other facts, however, constitutes reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith

c. Generally, a taxpayer knows, or has reason to know, that the information on an information return is incorrect if such information is inconsistent with other information reported or otherwise furnished to the taxpayer, or with the taxpayer's knowledge of the transaction.

iii. *Reasonable Cause – FS-2011-13: Information for U.S. Citizens or Dual Citizens Residing Outside the U.S. – 20140212*. 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:

a. The reasons given for not meeting your tax obligations;

b. Your compliance history;

c. The length of time between your failure to meet your tax obligations and your subsequent compliance; and

d. 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:

a. Your education;

b. Whether you have previously been subject to the tax;

c. Whether you have been penalized before;

d. Whether there were recent changes in the tax forms or law that you could not reasonably be expected to know; and

e. 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.

iv. *Reasonable Cause – FS-2011-13: Information for U.S. Citizens or Dual Citizens Residing Outside the U.S. – 20140212.* 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.

v. *Reasonable Cause – FS-2011-13: Information for U.S. Citizens or Dual Citizens Residing Outside the U.S. – 20140212.* 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.

3. Delinquent International Information Return Submission does not resolve any existing US income tax issues, and if issues with the taxpayer's US income taxes exist the taxpayer is subject to all the US income tax penalties and FBAR reporting non-compliance penalties.

4. If the service does not accept your explanation of reasonable cause you will be subject to the - Penalties for Non-Compliance with International Foreign Bank and Financial Account Reporting Requirements **– *IRM 4.26.16***

d. Penalties for Non-Compliance with International Foreign Bank and Financial Account Reporting Requirements – *IRM 4.26.16*

1. Non-Willfulness Penalty - For violations occurring after October 22, 2004, a new penalty applies to individuals as well as businesses. 31 U.S.C. § 5321(a)(5)(A). A penalty, not to exceed USD 10,000, may be imposed on any person who violates or causes any violation of the FBAR filing and recordkeeping requirements.

2. Willfulness Penalty – Calculation: up to the greater of USD 100,000 or 50% of the amount in the account at the time of the violation, 31 U.S.C. § 5321 (a)(5).

3. Mitigation Threshold Conditions

   A. The person has no history of past FBAR penalty assessments and no history of criminal tax or BSA convictions for the preceding ten years;

   B. No money passing through any of the foreign accounts associated with the person was from an illegal source or used to further a criminal purpose;

   C. The person cooperated during the examination (i.e., the Service did not have to resort to a summons to obtain non-privileged information; the taxpayer responded to reasonable requests for documents; meetings, and interviews; or the taxpayer back-filed correct reports); and,

   D. The Service did not sustain a civil fraud penalty against the person for an underpayment for the year in question due to the failure to report income related to any amount in a foreign account.

4. Mitigation of Non-Willful (NW) Penalties

   A. Level I-NW - If the aggregate balance of all accounts held during the year does not exceed USD 50,000, then the penalty for each violation is USD 500, not to exceed a total of USD 5,000 in penalties.

   B. Level II-NW – If the aggregate balance of the accounts is over USD 50,000, but less than USD 250,000, the penalty is, per violation, the lesser of USD 5,000 or 10% of the highest balance in the account during the year for which the account should have been reported.

   C. Level III-NW - For violations regarding an account exceeding USD 250,000, the penalty per violation is the statutory maximum of USD 10,000.

5. Mitigation of Willfulness Penalties

   A. Level I – If the maximum aggregate balance for all accounts to which the violations relate did not exceed USD 50,000 – Penalty the greater of USD 1,000 per violation or 5% of the maximum balance during the year of the account to which the violations relate for each violation.

   B. Level II If Level I does not apply and if the maximum balance of the account to which the violations relate at any time during the calendar year did not exceed USD 250,000, Penalty – the greater of USD 5,000 per violation or 10% of the maximum balance during the calendar year for each Level II account.

   C. Level III – If the maximum balance of the account to which the violations relate at any time during the calendar year exceeded USD 250,000 but did not exceed USD 1,000,000 – Penalty – the greater of (a) or (b): (a) 10% of the maximum bal-

ance during the calendar year for each Level III account, or (b) 50% of the closing balance in the account as of the last day for filing the FBAR.

III. Non-Resident Streamlined Filing

a. Eligibility: (1-5) *Streamlined Filing Compliance Procedures – 20150806;* (6-8) *Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing Outside the United States 20150812*

1. Taxpayer must be an Individual or an Estate of an Individual (no corporations, partnerships, LLCs)
2. Taxpayers must certify that conduct was not willful.
   A. 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. For a further discussion of what constitutes "willfulness," please see below under Resident Streamlined Filing – Disadvantages.
   B. Regardless, determining "willfulness" is based on a consideration of facts and circumstances. Therefore, it is necessarily somewhat subjective. Because it is somewhat subjective (and not an objective test), determining "willfulness" is to some extent an art and not a science.
3. Taxpayer cannot be under civil or criminal examination by IRS.
4. Taxpayer needs a valid Taxpayer Identification Number.
5. Taxpayer must pay previous penalty assessments on previously filed delinquent or amended returns.
6. Non-Residency Requirement - During any one or more of the most recent three years for which the U.S. tax return due date (or properly applied for extended due date) has passed and the U.S. individual citizen or lawful permanent resident did not have a U.S. abode AND was physically outside the U.S. for at least 330 full days.
   A. Determine an Individual's abode pursuant to I.R.C. § 911 and its regulations. Neither temporary presence of the individual in the U.S. nor maintenance of a dwelling in the U.S. by an individual necessarily mean that the individual's abode is in the U.S. See IRS Publication 54 for information on the meaning of "abode."
7. Failed to report the income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) with respect to a foreign financial account; and
8. For each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed:
   A. If a U.S. tax return has not been filed previously, submit a complete and accurate delinquent tax return using Form 1040, U.S. Individual Income Tax Return, together with the required information returns (e.g., Forms 3520, 5471, and 8938) even if these information returns would normally be filed separately from the Form 1040 had the taxpayer filed on time, or
   B. If a U.S. tax return has been filed previously, submit a complete and accurate amended tax return using Form 1040X, Amended U.S. Individual Income Tax Return, together with the required information returns (e.g., Forms 3520, 5471, and 8938) even if these information returns would normally be filed separately from the Form 1040 had the taxpayer filed a complete and accurate original return.

b. Advantages:

1. A taxpayer who is eligible to use these Streamlined Foreign Offshore Procedures and who complies with all of the instructions outlined below will not be subject to failure-

to-file and failure-to-pay penalties, accuracy-related penalties, information return penalties, or FBAR penalties. Even if returns properly filed under these procedures are subsequently selected for audit under existing audit selection processes, the taxpayer will not be subject to failure-to-file and failure-to-pay penalties or accuracy-related penalties with respect to amounts reported on those returns, or to information return penalties or FBAR penalties, unless the examination results in a determination that the original tax noncompliance was fraudulent and/or that the FBAR violation was willful.

2. FBARs have a 6 year statute of limitations, and during the streamline disclosure the taxpayer files their delinquent FBAR for each of the most recent 6 years for which the FBAR due date has passed. Therefore, the taxpayer will not have any remaining exposure to penalties for non-compliance with FBAR requirements after completing the streamline disclosure.

3. Cheaper than full OVDP.

c. Disadvantages: See Resident Streamlined filing below.

IV. Resident Streamlined Filing

a. Eligibility: (1-5) *Streamlined Filing Compliance Procedures – 20150806;* (6-8) *Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing in the United States 20150925*

1. Taxpayer must be an Individual or an Estate of an Individual (no corporations, partnerships, LLCs)

2. Taxpayers must certify that conduct was NOT WILLFUL.

3. Taxpayer cannot be under civil or criminal examination by IRS.

4. Taxpayer needs a valid Taxpayer Identification Number.

5. Taxpayer must pay previous penalty assessments on previously filed delinquent or amended returns.

6. Taxpayer fails to meet the applicable non-residency requirement described in section III. below (for joint return filers, one or both of the spouses must fail to meet the applicable non-residency requirement described in III. below)

7. Taxpayer has previously filed a U.S. tax return (if required) for each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed

8. Taxpayer has failed to report gross income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) and/or one or more international information returns (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, and 8621) with respect to the foreign financial asset

b. Advantages

1. Reduced Penalty – Streamlined Penalty is 5% of all reportable but unreported foreign financial assets in which the taxpayer has a financial interest. *Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing in the United States FAQ 20150716 (FAQ 1).*

A. Calculating 5 Percent Penalty - Begin the computation by identifying the assets included in the penalty base for each of the last six years. These assets include:

i. For each of the six years in the covered FBAR period, all foreign financial accounts (as defined in the instructions for FinCEN Form 114) in which the taxpayer has a personal financial interest that should have been, but

were not reported, on an FBAR; For each of the three years in the covered tax return period, all foreign financial assets (as defined in the instructions for Form 8938) in which the taxpayer has a personal financial interest that should have been, but were not, reported on Form 8938.

ii. For each of the three years in the covered tax return period, all foreign financial accounts/assets (as defined in the instructions for FinCEN Form 114 or IRS Form 8938) for which gross income was not reported for that year.

Once the assets in the penalty base have been identified for each year, enter the value of the taxpayer's personal financial interest in each asset as of December 31 of the applicable year on the Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures (Form 14654). For any year in which a foreign financial account was FBAR compliant and (for the most recent three years) in which a foreign financial asset was both Form 8938 and Form 1040 compliant, the amount entered on the form will be zero. Once the asset values have been entered on the form, add up the totals for each year and select the highest aggregate amount as the base for the 5- percent penalty. *Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing in the United States FAQ 20150716 (FAQ 6)*

2. FBARs have a 6 year statute of limitations, and during the streamline disclosure the taxpayer files their delinquent FBAR for each of the most recent 6 years for which the FBAR due date has passed. Therefore, the taxpayer will not have any remaining exposure to penalties for non-compliance with FBAR requirements after completing the streamline disclosure.

3. Cheaper legal and accounting fees than Full OVDP

c. Disadvantages:

1. Non-compliance must be Non-willful.

2. Determining "willfulness" is based on a consideration of facts and circumstances. Therefore, it is necessarily somewhat subjective. Because it is somewhat subjective (and not an objective test), determining "willfulness" is to some extent an art and not a science.

3. Below is some "guidance" from the Internal Revenue Manual ("IRM"). The IRM is the official source of instructions to IRS personnel relating to the organization, administration and operation of the IRS. The IRM contains directions to IRS employees relative to such employees carrying out their responsibilities in administering IRS obligations. Procedures set forth in the IRM are not mandatory and are not binding on the IRS. The Internal Revenue Manual itself is not the law. The general rule is that neither the taxpayer nor the IRS is bound by the Internal Revenue Manual. Nevertheless, the IRM offers insights into IRS procedures.

A. I.*R.M. § 4.26.16.4.5.3* - Willfulness –

i. The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.

ii. A finding of willfulness under the BSA must be supported by evidence of willfulness.

iii. The burden of establishing willfulness is on the Service.

iv. If it is determined that the violation was due to reasonable cause, the willfulness penalty should not be asserted.

B. I.*R.M. § 4.26.16.4.5.3* – Evidence of Willfulness

i. 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.

ii. 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 recordkeeping 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 recordkeeping 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.

iii. 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

C. I*.R.M. § 4.26.16.4.5.3* - The following examples illustrate situations in which willfulness may be present:

i. 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.

ii. 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.

iii. 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.

iv. 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.

4. Only cleans up 3 (possibly 4) years of tax returns.

A. Taxes are generally required to be assessed within three years after a taxpayer's return was filed, whether or not it was timely filed. In the case of a Substantial Omission of an amount equal to 25 percent of the gross income reported the statute of limitations is six (6) years. In the case of a false or fraudulent return filed with the intent to evade tax, or if the taxpayer fails to file a required return, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time. I.R.C. § 6501.

B. The HIRE Act changes the statute of limitations for the assessment of tax if a taxpayer fails to file, or files substantially incomplete, certain IRS international-related information returns. The change applies to the following information returns: Form 5471, Form 8865, Form 8858, Form 5472, Form 926, Form 8621, and Form 3520-A. This change is significant because any failure to fully comply with any one of these filing requirements keeps the statute of limitations open indefinitely relative to the entire return and to assessments on the entire return — not just with respect to those items required to have been reported on the information return. *What's New in Tax, HIRE Act Dramatically Changes the Potential for an Indefinite Statute of Limitations, KPMG LLP, 2010 - (HIRE_Act_SOL.pdf).*

C. *Jt Comm Staff, Tech Expln of Rev Provisions in HIRE Act JCX-4-10* - Modification of statute of limitations for significant omission of income in connection with foreign assets (sec. 513 of the bill and secs. 6229 and 6501 of the Code). Effective Date - The provision applies to returns filed after the date of enactment as well as for any other return for which the assessment period specified in section 6501 has not yet expired as of the date of enactment.

i. Hire act enacted March 18, 2010. (Applies to returns filed after March 18, 2010 and Applies to returns with substantial omissions filed after March 18, 2004)

5. Do not qualify if you have not filed a US tax return for the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed

V. Full Offshore Voluntary Disclosure Proceedings

a. Eligibility: The disclosure must be VOLUNTARY: *IRM 9.5.11.9*

1. The IRS has not initiated a civil examination or criminal investigation of the taxpayer, or has notified the taxpayer that it intends to commence such an examination or investigation.
2. The IRS has not received information from a third party (e.g., informant, other governmental agency, or the media) alerting the IRS to the specific taxpayer's noncompliance.
3. The IRS has not initiated a civil examination or criminal investigation, which is directly related to the specific liability of the taxpayer.
4. The IRS has not acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena).

b. Advantages:

1. Upon completion of the full OVDP, a taxpayer will generally have assurance that he is, at least through the end of the period covered by the OVDP, compliant with US income tax and FBAR requirements.
2. Absent such assurance, the stakes are high for a taxpayer who remains non-compliant with U.S. law concerning a foreign account or foreign income. Failure to timely file an FBAR is subject to assessment of a civil penalty of 50% of the highest balance in the foreign account for each of the open years of the statute of limitations. Failure to timely file an FBAR can also be prosecuted. Income from a foreign account not reported on an income tax return is subject to assessment of income tax and penalty, and interest. The penalty is 20% of the tax or, in egregious cases, 75% of the tax for fraud. Willful failure to report income on an income tax return is also subject to prosecution. *To OVDP Or Not To OVDP - Compliance Options For Holders Of Foreign Accounts Forbes 20140705.* Moreover, failure to file various foreign activity disclosure forms other than the FBAR can result in severe penalties ranging from USD 10,000 per year per form, and the case of the disclosure form required relative to: certain transfers by a U.S. Person to a foreign trust or receipt by a U.S. Person of a distribution from a foreign trust, up to 35% of the amount transferred to the foreign trust by the U.S. Person or received from the foreign trust by a U.S. Person; and relative to receipt by a U.S. Person of a transfer by gift (donation) from a non-U.S. Person (or a foreign corporation or partnership) or receipt by a U.S. Person of a transfer from a foreign estate, up to 25% of the amount so received.
3. A taxpayer can qualify for full OVDP if that taxpayer's non-compliance was willful.

c. Disadvantages:

1. Some consider the OVDP requirements to be punitive. *IRS - Offshore Voluntary Disclosure Program FAQ 20150715– T*he taxpayer must:
    A. Cooperate in the voluntary disclosure process, including providing information on foreign accounts and assets, institutions and facilitators, and signing agreements to extend the period of time for assessing Title 26 liabilities and FBAR penalties
    B. Pay 20-percent accuracy-related penalties under IRC § 6662(a) on the full amount of your offshore-related underpayments of tax for eight (8) years
    C. Pay failure-to-file penalties under IRC § 6651(a)(1-2), if applicable
    D. Pay, in lieu of all other penalties that may apply to the undisclosed foreign accounts, assets and entities, including FBAR and offshore-related information return penalties and tax liabilities for years prior to the voluntary disclosure period, a miscellaneous Title 26 offshore penalty equal to 27.5 percent (or 50 percent in circumstances described in FAQ 7.2) of the highest aggregate value of OVDP

assets as defined in FAQ 35 during the period covered by the voluntary disclosure (the 27.5 percent and 50 percent penalties are together referred to in these FAQs as the "offshore penalty"). Whether a taxpayer will be subjected to the 27.5% versus the 50% offshore penalty is determined as follows:

i. The taxpayer will be subject to the 50% offshore penalty if, at the time of submitting his preclearance letter to IRS Criminal Investigation, an event has occurred constituting a public disclosure that the foreign financial institution, or another person who facilitated the taxpayer's account at the foreign financial institution, is under investigation, or is cooperating in an investigation, by the IRS or the U.S. Department of Justice concerning accounts beneficially owned by U.S. persons, of has been identified in a John Doe summons concerning such accounts. The U.S. Department of Justice publishes a list of such foreign financial institutions. If the 50% penalty applies to any of a taxpayer's foreign financial accounts, it applies to all of his foreign financial accounts. *To OVDP Or Not To OVDP - Compliance Options For Holders Of Foreign Accounts Forbes 20140705.* For a current list of such foreign financial institutions published by the U.S. Department of Justice, please see: https://www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators

ii. Otherwise the offshore penalty will be 27.5%; and

iii. It is important to note that whether a foreign financial institution is or is not on such U.S. Department of Justice list (and therefore, whether the 27.5% or the 50% offshore penalty applies) is determined *at the time one submits their preclearance letter to IRS Criminal Investigations*. Therefore, if the financial institution is not on such U.S. Department of Justice list at the time the preclearance letter is submitted, but is added to such list thereafter, the taxpayer will, nevertheless, continue to get the benefit of the lower 27.5% offshore penalty.

E. Submit full payment of any Title 26 tax liabilities for years included in the offshore disclosure period (8 years), applicable interest, an offshore penalty, accuracy- related penalties for offshore-related underpayments, and, if applicable, the failure-to-file and failure-to-pay penalties or, if the taxpayer is unable to make full payment, make good faith arrangements with the IRS to pay in full (see FAQ 20 for more information) (note: the suspension of interest provisions of IRC § 6404(g) do not apply to interest due in this program)

F. Execute a Closing Agreement on Final Determination Covering Specific Matters, Form 906

G. Agree to cooperate with IRS and Department of Justice offshore enforcement efforts, if requested, by providing information about financial institutions and other facilitators who helped the taxpayer establish or maintain an offshore arrangement.

H. If foreign entities held OVDP assets (see FAQ 35), provide complete and accurate information returns (or amended returns, if applicable) required to be filed, including but not limited to Forms 3520, 3520-A, 5471, 5472, 926, 8865, and 8938 for all tax years included in the voluntary disclosure.

2. Needless to say, it requires significant competent professional assistance (including legal assistance) to complete a full OVDP. Therefore, one will generally incur high legal and accounting fees.