tax notes international
Volume 70, Number 7 ■ May 13, 2013

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Reprinted from *Tax Notes Int'l*, May 13, 2013, p. 695

SPECIAL REPORTS

Navigating Offshore Tax Hazards: An Update

by William M. Sharp Sr.

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The U.S. government is continuing its aggressive efforts to eradicate offshore tax abuse and dismantle bank secrecy. However, this full-court press to achieve global tax compliance is no longer just a U.S. initiative; rather, it has morphed into a cooperative undertaking involving many foreign governments, as well as several public and even private sector organizations.

Some of the key drivers underlying this global tax compliance initiative include the impending Foreign Account Tax Compliance Act[1] effective dates, the seemingly perpetual series of offshore-focused formal voluntary disclosure initiatives, the publicly announced endorsement of the still-viable yet informal IRS voluntary disclosure ''practice,''[2] and the recently formalized streamlined compliance program directed at eligible nonresident U.S. taxpayers. Other lesser known yet certainly important drivers include a number of domestic and foreign law and regulatory developments, including the U.S. government's recent adoption of cross-border information sharing regarding U.S. bank accounts maintained by non-U.S. persons,[3] as well as the recently revised proposed regulations for matching U.S. passports to IRS tax records.[4]

Further, the continued proactive attacks directed at offshore tax abuse by both the U.S. and many partnering foreign governments are affecting global tax compliance. In the U.S., administrative efforts aimed at tax compliance include a variety of U.S. Department of Justice initiatives directed at offshore activities, including issuing grand jury proceedings stemming from offshore evidence acquired from new and improved cross-border detection activities[5] and seeking disclosure on both a formal and informal basis from banks otherwise protected by local bank secrecy law. These U.S. enforcement efforts have recently been expanded to the offshore service provider community. An increasingly important element in the DOJ's compliance initiatives is the treasure trove of offshore data mined by the IRS from the various IRS offshore voluntary disclosure programs, not to mention the more prevalent role of offshore-related whistleblowers.

[1]The final FATCA Treasury regulations were released in T.D. 9610, 2013-15 IRB 765, on January 17, 2013. On the treaty partner front, the Luxembourg government announced plans to automatically exchange relevant bank data with its EU partners beginning in 2015. *See Tax Notes Int'l*, Apr. 15, 2013, p. 211; *see also* J. Fontanella-Khan, ''Great Tax Race: Luxembourg Set to Share Companies' Bank Details,'' *Financial Times*, Apr. 29, 2013, *available at* FT.com. In contrast, Austria announced on April 12, 2013, its intention to preserve bank secrecy. *See Tax Notes Int'l*, Apr. 15, 2013, p. 237.

[2]*See* Internal Revenue Manual section 9.5.11.9 (Dec. 2, 2009).

[3]*See* prop. Treas. reg. section 301.6039E-1; *see also* Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland to Improve International Tax Compliance and to Implement FATCA, U.K.-U.S., Sept. 9, 2012.

[4]Prop. Treas. reg. section 301.6039E-1 was released March 26, 2012, in Announcement 2012-11, 2012-13 IRB 611.

[5]*See, e.g.*, the U.S. indictment of Swiss bank Wegelin (Indictment at S1 12 Cr. 02 (JSR), *U.S. v. Wegelin & Co., et al*. (S.D.N.Y. Feb. 2, 2012)).

This article provides practical commentary and insight regarding the state of affairs underlying the issues related to offshore tax compliance. It also provides practical input on how to deal with these issues in representing the private client who either inadvertently or knowingly engaged in global noncompliance conduct and comments as to how emerging drivers affect these cases, as well as how the practitioner can more effectively represent the private client caught in this conundrum.

The 2012 OVDP: Observations and Insight

Overview

On January 9, 2012, the IRS announced the most recent vintage of its continuing offshore compliance series, known as the offshore voluntary disclosure program (OVDP).[6] In summary, the program enables taxpayers with noncompliant offshore holdings to navigate around potential criminal tax hazards and to settle all pending tax, interest, and penalty exposure based on the ''package terms.'' Under the OVDP, taxpayers are required to file amended tax returns and related information returns for the prior eight tax years, including the payment of all determined back taxes based on a reconstruction of all unreported foreign financial activities, together with an accuracy-related penalty, with interest thereon, plus a 27.5 percent offshore penalty in lieu of all other foreign-related reporting penalties.[7] This 27.5 percent ''in lieu of'' penalty replaces all applicable reporting penalties, including the penalty for failure to file Form TD F 90-22.1, ''Report of Foreign Bank and Financial Accounts'' (FBAR), as well as penalties related to other information reporting requirements (for example, Form 5471, ''Information Return of U.S. Persons With Respect to Certain Foreign Transactions,'' or Form 3520, ''Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts''). A discussion of the details of the OVDP is beyond the scope of this article, but many other articles have addressed the program in detail.[8]

OVDP — How Long Will It Last?

While practitioners (including this author) have criticized the OVDP as having an unfair and legally dubious one-size-fits-all penalty prescription, the new program, to its credit, provides for some degree of certainty based on its package terms, summarized above.[9] Further, now that more than a year has passed since it was announced, the program seems to have settled into the IRS playbook, and thus it is plausible that the IRS will continue to maintain this compliance initiative if not in perpetuity then at least for several years, during which the foreign financial institution reporting (and taxation) under FATCA transitions into law through a series of deferred effective dates and as the level of global tax compliance becomes substantially higher.

However, the question remains whether the IRS would ever consider adopting a permanent version of the OVDP. From a fiscal and administration perspective, this makes complete sense: The IRS is establishing an extensive and seemingly permanent OVDP infrastructure in key campuses, such as Philadelphia and Austin, Texas, with many regional voluntary disclosure ''bullpens'' and opt-out centers being established around the country. One possibility, should the IRS adopt a permanent version of the OVDP, would be to adopt a European fiscal approach of a 10-year (instead of an eight-year) lookback, and perhaps elevate the overall offshore penalty amount to 30 percent. Further, in a perfect world, the IRS would abandon its legally dubious one-size-fits-all penalty prescription for this 27.5 percent or 30 percent level; instead, it would provide for a fixed penalty scale linked to objective case characteristics and, separately, allow for ''reasonable cause'' discretion in the context of the voluntary disclosure proceeding.[10]

'Quiet' Filings — Formal vs. Informal

Another beneficial aspect of the OVDP addresses the once-questionable ''quiet'' submissions, which were

[6] IR 2012-5, Jan. 9, 2012.

[7] *Id.* The package terms have been embedded in the recent formal voluntary disclosure programs since adoption of the 2009 version in March 2009 with some variations. The most recent program, the OVDP, expands the lookback period from six years to eight years, and the FAQ guidance under both the current program and the predecessor formal programs clearly specifies that the IRS is directed to follow the fixed lookback period (in the case of the 2009 program, the 2003 through 2008 tax years, and for the 2011 program, the 2003 through 2010 tax years). The IRS has also publicly stated its commitment to offering and sticking to the package terms. For example, a taxpayer accepted by the IRS in the 2009 program would have the certainty of knowing that all reviewed activities would be limited to the 2003 through 2008 tax years. The same holds true for the OVDP but on an eight-year immediate-term rolling years basis. *See* William M. Sharp Sr. and Larry R. Kemm, ''IRS Reduces Penalties on Offshore Voluntary Disclosures,'' *Tax Notes Int'l*, Apr. 6, 2009, p. 7; and William M. Sharp Sr. and Larry R. Kemm, ''IRS Guidance on Offshore Voluntary Disclosures: Further Refinements,'' *Tax Notes Int'l*, May 18, 2009, p. 595.

[8] *See* William M. Sharp Sr., Larry R. Kemm, and William T. Harrison III, ''The 2012 Offshore Voluntary Disclosure Program: Analysis, Insight, and Intrigue,'' *Tax Notes Int'l*, Aug. 13, 2012, p. 681.

[9] *Id.*

[10] *See* Sharp et al., *supra* note 8; and William M. Sharp Sr., Larry R. Kemm, and Andrea D. de Cortes, ''The 2011 Voluntary Disclosure Initiative: Truly the 'Last, Best Chance'?'' *Tax Notes Int'l*, Mar. 14, 2011, p. 865. *See* the text accompanying notes 22 and 27 *infra*.

informally discouraged in the 2009 and 2011 programs.[11] In its frequently asked questions, the 2012 program confirms that submissions under the IRS voluntary disclosure ''practice'' may still constitute valid voluntary disclosures as far as resolving criminal tax exposure but does not guarantee that criminal treatment will be avoided. The OVDP also cautions that such submissions will not be eligible for the certainty of the OVDP's penalty framework.[12] This good news raises the question of when the noncompliant client should pursue remedial relief under the IRS voluntary disclosure ''practice'' instead of filing under the OVDP.

Whether a U.S. taxpayer with noncompliant offshore holdings should pursue the formal OVDP or should file remedial returns under the IRS voluntary disclosure practice is an issue that requires considerable professional judgment by the tax practitioner, particularly on the issue of ''willfulness.'' This judgment must take into account all facts and circumstances, including all items of evidence — whether in the form of banking or tax-related documentation, third-party statements, or the taxpayer's own statements. The practitioner is well advised to first evaluate all factual and legal aspects of the case before rendering final advice to a client who at first blush could consider forgoing participation in the OVDP and instead filing under the IRS disclosure practice. Clients in this position should be cautioned that time and effort must be spent in this evaluation phase to develop an effective advisory report.

Submitting a practice filing (versus entering the formal program) can turn into a nightmare for all involved if the practitioner has been given incorrect information, misinterprets the law as applicable to the facts, or does not have a complete file of what actually occurred with respect to the noncompliant offshore activities. Omitting a single offshore account from the disclosure package could not only cause the practice submission to be rejected during the assumed examination process, but depending on the facts, could also lead to a criminal investigation with a follow-on criminal referral to the DOJ, as well as expose the taxpayer to substantially higher taxes and penalties. Although having an incomplete file or other glitch in the context of an OVDP case filing does not insulate the filing taxpayer from criminal or increased civil exposure, in the context of a ''defective'' practice filing, the IRS may be less forgiving. And as a practical matter, some practitioners who advise clients to pursue the practice alternative incorrectly believe that merely filing amended tax returns and late FBARs will be sufficient and that such a filing requires less critical thinking than a submission under the OVDP. This is not so.

Whether for a defective IRS practice filing or a declined OVDP submission, as discussed below, the practitioner must keep in mind that no statute of limitations applies with respect to civil fraud and nonfiler cases,[13] and in the international arena other exceptions exist to the ordinarily applicable three-year statute of limitations[14] (whether based on the 25 percent gross income omission rule or other provisions). Although most IRS practice filings are submitted for three or six years, and usually not for earlier years, the point remains that unlike the OVDP ''package terms'' with their committed rolling eight-year lookback period,[15] on examination of a practice amended return package, the IRS would not be confined by the OVDP package terms' limited lookback period.

The practitioner needs to keep in mind that a practice submission also must include any FBARs that were previously required to be filed. These filings must be made in addition to other Title 26 information reports since FBAR reporting is based on Title 31 and thus is statutorily a separate title of the United States Code with its own sets of hazards and risk factors. In summary, the practitioner needs to carefully develop the evaluation file for purposes of moving ahead with a practice submission given the myriad hazards such a filing presents.

OVDP Declination Hazards

Another key topic that has emerged over the past few years is what happens when the initial preclearance is submitted under the OVDP and the taxpayer is declined from the program. Even more worrisome is what happens when the taxpayer received preclearance approval to enter the OVDP, but then upon submission of the offshore voluntary disclosure letter (OVDL), which provides the IRS with material information on all the taxpayer's offshore accounts and activities, has his case declined. There have been many questions raised by practitioners as to under what circumstances the IRS can issue pre-clearance approval but then later issue a declination before or even after the OVDL stage.

As to the former question, being declined at the preclearance stage has been a risk since the 2009 program

[11] *See* FAQs 15 and 16 of the 2012 offshore voluntary disclosure program and 2011 offshore voluntary disclosure initiative, as well as FAQs 10 and 49 of the 2009 offshore voluntary disclosure program.

[12] *Id.*

[13] *See* section 6501(c)(1) and Treas. reg. section 301.6501(c)-1. All section references are to the Internal Revenue Code of 1986 as amended or the Treasury regulations promulgated thereunder.

[14] *See* section 6501(a) and Treas. reg. section 301.6501(a)-1(a).

[15] *See* ''Offshore Voluntary Disclosure Program Submission Requirements,'' *available at* http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Submission-Requirements. This was also the case for the 2009 OVDP, which mandated its lookback period to 2003 to 2008 and specifically excluded earlier years by way of its public announcements and its own set of FAQs, as discussed in note 7 *supra*.

was formally announced on March 24, 2009 (and stems back to the 2003 offshore voluntary compliance initiative and also to the old walk-through or ''noisy'' tenders).[16] In general, even when the facts are fully developed, issues are fully analyzed, and a pre-clearance is filed with full knowledge of what should be known, the risk of a declination always exists because the practitioner can never confirm that every single possible fact is known.

For example, the practitioner (or the client) would not be aware of an unknown government investigation or IRS examination that was pending at the time of the filing of the pre-clearance application. A declination will most certainly occur at the pre-clearance review stage if the taxpayer is already under IRS civil examination or under IRS criminal investigation, or if the IRS has detected independently that the taxpayer has illegal source income. These are all standard unforeseen hazards that practitioners grapple with in any case. Other common hazards include whether a taxpayer has been turned in by a third party, such as a whistleblower, or whether the U.S. government has detected the taxpayer's noncompliance through a database search or in cooperation with other governmental units, whether domestic (for example, a DOJ referral of information to the IRS) or foreign (for example, information provided to the IRS from a tax treaty partner).

In short, in developing a client's case, there is a limit to what practitioners can know, and even in cases in which appropriate professional judgment is exercised with all facts fully developed and issues thoroughly analyzed, the risk of the unknown could result in a declination. And as noted above, this risk has always been present with a voluntary disclosure proceeding, even prior to the pre-2009 informal voluntary disclosure program. It is also a risk that on filing such a remedial package, the IRS Service Center could readily flag the submission package for review by a revenue agent, and on undertaking appropriate checks, a prior examination or investigation could be flagged. Again, this risk should be fully understood by the client before submitting any voluntary disclosure.

Another potential hazard is that after the IRS pre-clearance has been issued, the case could be declined when additional OVDP materials are submitted. Under a recent modification to the OVDP administrative procedures, the IRS now apparently reserves the right to decline a case even after a submitting taxpayer is pre-cleared.[17] This includes being declined after the taxpayer submits the OVDL revealing all the material facts and issues. This shift in policy would apparently allow the IRS to issue a declination at any point in the OVDP process short of the taxpayer entering into a Form 906 closing agreement.

It seems that the IRS now reserves the unilateral right to decline any taxpayer based on information that it might later receive. This shift is unwarranted and smacks of a bait and switch. Perhaps more troublesome is a potential case in which the IRS, after the taxpayer comes in, initiates an examination the week before the taxpayer signs Form 906. Would that justify a declination? According to informal comments made by IRS and DOJ officials, one example of when a taxpayer may be declined from the OVDP after receiving a pre-clearance is when the DOJ possessed information before the pre-clearance was issued but shared the information with the IRS only after either pre-clearance was issued or after the clearance letter was issued in reply to the taxpayer submitting the OVDL (but before a closing agreement was completed).

Assuming there has been a change of OVDL administrative policy, this would represent a huge infringement of taxpayer rights, bordering on what could be called a bait-and-switch tactic — promising one set of terms but delivering another. Further, it raises questions as to the legal basis on which the IRS could pre-clear a noncompliant taxpayer — and even issue a full clearance letter in response to a submitted OVDL package — but then later rescind such clearance. It also is contrary to the years of IRS announcements regarding the fairness and equitability of the administration of the OVDP and its predecessor programs. This administrative shift, if in fact a national policy, should be reconsidered given the potential legal problems associated with such a position.

New OVDP Forms

The IRS recently also issued two new forms apparently directed at standardizing the OVDP process, and specifically directed at the OVDL segment of this process. Although not yet formally announced on the IRS website as this article went to press, in March 2013 the IRS issued Form 14457, ''Offshore Voluntary Disclosure Letter,'' and a corollary template known as Form 14454, ''Offshore Voluntary Disclosure Program Letter

[16] *See* William M. Sharp Sr. and Larry R. Kemm, ''IRS Guidance on Offshore Voluntary Disclosures: Further Refinements,'' *Tax Notes Int'l*, May 18, 2009, p. 595.

[17] The justification for such a change may be rooted in the IRS's statement that ''pre-clearance does not guarantee a taxpayer acceptance into the OVDP.'' Historically, it was understood by practitioners that such acceptance would be declined only in cases in which a truthful, timely, and complete disclosure was not made, if unlawful income was applicable, or ''timeliness'' issues were applicable. *See*, *e.g.*, FAQ 23. The DOJ has acknowledged this policy shift in a recent *Forbes* article, although according to Kathryn Keneally, assistant attorney general for the DOJ's Tax Division, the Justice Department will consider all facts and circumstances, including the fairness of pursuing a criminal charge against a taxpayer who was declined by the IRS after making substantial disclosures. Janet Novak, ''Taxpayers Who Lost Offshore Account Amnesty Promised Fair Treatment,'' *Forbes*, Apr. 11, 2013, *available at* http://www.forbes.com/sites/janetnovack/2013/04/11/taxpayers-who-lost-offshore-account-amnesty-promised-fair-treatment/.

(Footnote continued in next column.)

Attachment.''[18] The IRS should issue a formal announcement soon providing additional explanation as to the nature and usage of these newly released forms.

While these forms attempt to standardize the information set forth in Form 14457 and the requested attachment, practitioners need to be very cautious in preparing these new forms (assuming the IRS formally announces their adoption) because some portions of the forms require not just checking the box but also an appropriate explanation to ensure that the disclosure is accurate, truthful, and complete. By analogy, when the check-the-box election entity classification rules were finalized in 1997[19] and the seemingly simplistic Form 8832 was released, practitioners were concerned about potential misuse of the seemingly simplified form given the complexity of the underlying entity classification regulations. Similarly, in the case of these two new IRS forms, practitioners must exercise great caution to ensure that they are completed properly based on all case facts with an appropriate analysis thereof.

To Opt Out or Not?

The OVDP contains a specific procedure by which taxpayers who have been admitted into the formal program may elect to opt out of the program and thus bypass the application of the package terms resolution of the case.[20] The OVDP package terms include the eight-year lookback period for filing amended or dilatory returns and related FBARs and the certainty of the appropriate determined tax, accuracy penalty, and of course the one-size-fits-all 27.5 percent offshore penalty in lieu of all other penalties (note that the 27.5 percent penalty is reduced in some narrow circumstances, but those circumstances are highly fact sensitive and limited in their scope).[21] By revoking all agent discretion under the 2009 program,[22] the IRS has essentially put a straitjacket on its field agents as well as IRS counsel to preclude those representatives from engaging in what would be viewed as appropriate administration of the statute, regulations, and case law to more effectively and equitably resolve a taxpayer's penalty profile on a reasonable discretionary basis.[23]

For example, consider a fact pattern in which the taxpayer worked with her longtime professional return preparers and provided all facts, data, and information regarding foreign corporate, financial, and other offshore holdings. And suppose further that the professional return preparers did not fully report on appropriate tax and information returns all aspects of what was disclosed to them by the taxpayer. On discovering this oversight, the taxpayer was advised to pursue relief under the voluntary disclosure program (not necessarily the most appropriate course of action but let's assume this was the advice rendered). The taxpayer was precleared, issued an IRS Criminal Investigation division clearance letter, and thereafter before entering into a closing agreement suggested that ''reasonable cause'' existed to mitigate the 27.5 percent penalty exposure.[24] Also suppose that the FBAR penalty mitigation guidelines set forth in the Internal Revenue Manual also would have mitigated this exposure well below the 27.5 percent prescriptive offshore penalty.[25]

Another example of clear-cut non-willfulness arises in the context of a taxpayer who is an accidental American citizen. A so-called accidental citizen is an individual who was born to foreign parents in the U.S. or was born abroad but to a parent who is an American citizen.[26] In this example, the taxpayer has a U.S. passport but has lived only a limited number of years in the U.S., and for most of his life has lived and continues to live abroad. Suppose further that the taxpayer's nonresident alien family members donated large gifts of foreign-situs securities and cash to the taxpayer. Finally, assume further that the taxpayer was not sophisticated with respect to U.S. tax matters, and while he understood the necessity to file and pay U.S. tax, he never understood the U.S. worldwide system of taxation or the need to file Forms 3520 and FBARs. He may have even sought professional tax return assistance, but his U.S. tax return preparer did not flag these issues. Though the taxpayer clearly has compliance shortfalls because of his own misunderstanding of the law (or return preparer nonfeasance), it seems inappropriate that this basic pattern automatically will be characterized as willfulness and that it will subject the taxpayer to a 27.5 percent offshore penalty under the

[18]At the time this article went to press, Form 14457 and Form 14454 had temporarily been removed from the IRS website, although the draft forms were available on other nongovernmental websites.

[19]Treas. reg. section 301.7701-3.

[20]*See* FAQ 51 and the Memorandum for the Commissioner, ''Guidance for Opt Out and Removal of Taxpayers from the Civil Settlement Structure of the 2009 Offshore Voluntary Disclosure Program (2009 OVDP) and the 2011 Offshore Voluntary Disclosure Initiative (2011 OVDI),'' issued June 1, 2011.

[21]*See* FAQs 52 and 53.

[22]Through what was then known as FAQ 35 but is currently included in FAQ 51. The IRS acknowledged authorization of IRS agent discretion in 2009 OVDP cases so long as certain conditions were met, for example, cases where a lower penalty was discussed and documented before February 11, 2011. *See* http://www.irs.gov/pub/irs-drop/ovdi_memo_use_of_discretion_3-1-11.pdf.

[23]For further discussion calling for a more equitable administration of the IRS voluntary disclosure programs, see Sharp et al., *supra* note 8.

[24]*See* section 6664(c); section 6039F(c)(2); section 6038D(g); section 6038B(c)(2); and 31 U.S.C. section 5321(a)(5)(B)(ii).

[25]IRM section 4.26.16.4.6 (July 1, 2008).

[26]There are also quasi-accidental citizens who acquired a green card through the ''lottery'' (that is, luck of the draw) and later became eligible to become a U.S. citizen given that the taxpayer started living abroad most of the time (and thus jeopardized his green card status).

OVDP. This inequitable result stemming from the blind application of the OVDP would be even more unfair if the taxpayer fell just short of qualifying for the new streamlined procedure for nonresident U.S. taxpayers, as explained below.

To provide an efficient use of government and taxpayer resources, it would seem appropriate and beneficial to resolve the reasonable cause issue within the confines of the OVDP. However, since the revocation of the field discretion that previously informally existed,[27] this is no longer possible. Affected taxpayers must undergo the opt-out procedure, and thereafter the IRS will open an examination file, conduct an appropriate level of examination, render a determination, and the taxpayer will have IRS Appeals rights should the determination be unacceptable to the taxpayer.[28] However, taxpayers must keep in mind that FBAR penalties, as well as most information penalties, are not prepayment assessment penalties; that is, there is no route to the Tax Court in a case involving a Form 3520, Form 5471, or similar Title 26 reporting penalty.[29] Similarly, under Title 31, the FBAR penalty may not be adjudicated in a prepayment Tax Court context; rather, the U.S. government has the burden of filing a lawsuit in federal court seeking collection from the taxpayer against whom the FBAR assessment has been made (the Tax Court has no jurisdiction over FBAR assessments).

What all this means is that the practitioner should carefully evaluate all facts and analyze all issues before rendering advice regarding a client's potential opt-out decision. Given that the IRS will no longer entertain ''reasonable cause'' cases within the confines of the OVDP, substantial opt-out cases are inevitable; it is likely that at some point such cases will substantially clog what is already a busy IRS workplan as well as the docket of IRS counsel and IRS Appeals. Certainly, a more efficient and effective administrative proceeding can be developed associated with the OVDP as opposed to forcing an opt-out.

For many taxpayers who have nominal or nonexistent criminal tax exposure, venturing into the OVDP could represent an ill-advised choice given the near certainty of a one- to two-year OVDP proceeding, the necessity to opt out, and the possible burden of a several-month, if not potentially multiple-year, examination and follow-up IRS Appeals proceeding. In this case it may be more advisable to pursue compliance through the IRS offshore voluntary disclosure practice as described above. Further, if the returns are picked up for examination, and assuming the IRM's voluntary disclosure practice is satisfied in the submission package, the taxpayer should be no worse off than if he had gone through the 2012 formal program, opted out, and then found himself again in the full exam phase.

FBAR Statute of Limitations

Regarding the U.S. administration of the OVDP as well as opt-out and related cases, a key issue is the applicable statute of limitations for FBAR filings. In general, under Title 31, the U.S. may review and may take action on any FBAR under a six-year statute of limitations.[30] However, the IRS apparently has informally developed a policy that would reopen what would otherwise be a closed statute by execution of the FBAR consent form, ''Consent to Extend the Time to Assess Civil Penalties Provided by 31 U.S.C. Section 5321 for FBAR Violations,'' on the theory that such execution is a waiver of a defense. In Title 26, it is black-letter law that the execution of Form 872, ''Consent to Extend the Time to Assess Tax,'' with respect to an otherwise closed year will not under any circumstances open that closed year.[31] For the IRS to reach an interpretation to the contrary under Title 31 without adequate statutory, regulatory, or even case law support seems beyond the scope of IRS authority.

Further, IRS representatives, including field agents and IRS counsel, have informally commented over the years that similar to the treatment of closed years under Title 26, under Title 31 the execution of the FBAR consent form would not reopen an otherwise closed year, even after the execution of Form 872. If the IRS presses this position, it is unlikely it would prevail in court. Taking a step back from such a technical perspective and reflecting on sound tax administration, this appears to be another unfortunate situation in which the IRS has suddenly engaged in what amounts to a bait-and-switch tactic by articulating a policy position that is contrary to decades of practice. This position is also likely to trigger the cessation of many otherwise ongoing OVDP proceedings that would have resulted in an amicable and efficient resolution. Cautious taxpayers might choose to decline to extend the applicable statute of limitations, thus prompting an assessment of the FBAR penalty and requiring the U.S.

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[27]As discussed in the text accompanying note 22 *supra*, such discretion was initially granted under FAQ 35 of the 2009 voluntary disclosure program. The resolution of the ''reasonable cause'' issue typically hinges on whether the taxpayer voluntarily disregarded a known legal duty or the failure to file was a result of mere negligence or inadvertence. For a timely review of the willfulness issue in the context of FBAR cases, see S. Toscher and L. Strachan, ''Proving Willfulness in Civil FBAR Cases,'' *Los Angeles Lawyer* at 15 (Apr. 2013).

[28]*See supra* note 20.

[29]*See* IRM section 8.11.

[30]31 U.S.C. section 5321(b)(1).

[31]*See* section 6501(c)(4):

> Where, *before the expiration* of the time prescribed in this section for the assessment of any tax imposed by this title . . . both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. [Emphasis added.]

to bring action in federal court to seek collection of a penalty that otherwise could have been settled in a pre-assessment context. The IRS should seriously rethink this apparent change in its position for the reasons stated above.

The New Streamlined Compliance Procedure

Overview

On August 31, 2012, the IRS posted on its website the new streamlined filing compliance procedures for some nonresident, nonfiling U.S. taxpayers.[32] This announcement was preceded by a June 26, 2012, IRS announcement[33] indicating that such a program would go into effect on September 1, 2012. The August 31 announcement was made just in the nick of time.

The new program is predicated on the IRS's recognition that in the case of many U.S. taxpayers who have been living abroad for several years, entering the formal OVDP is not necessarily appropriate. The IRS acknowledges that such taxpayers may have simply lost sight of their U.S. return filing obligations, including the obligation to file FBARs, and have only recently become aware of these filing obligations. The new streamlined procedure has been very popular. Apparently several hundred streamlined applications had already been filed with the Austin, Texas, IRS Service Center before August 31, 2012, and since that time, several thousand cases have been filed with the Austin campus.

In summary, those eligible for the streamlined program are U.S. taxpayers who have resided outside the U.S. since January 1, 2009, who have not filed any tax returns since the 2009 tax year, and who can demonstrate a low level of compliance risk.[34] Determination of the level of compliance risk is a function of an IRS review of the submitted returns and accompanying documents. Generally, a low risk will be associated with simple returns showing little or no U.S. tax, but in any event no tax in excess of $1,500 for each of the three years submitted under the new program — though other factors as discussed below could cause an applicant to be deemed high risk.[35]

If the level of tax is higher than $1,500, the submission will not be automatically treated as a high-risk submission, but will likely be subject to a more scrutinized level of review as opposed to an expedited review.[36] Such a submission could be subject to a full examination. The IRS indicates that the level of risk may increase if certain factors are present:

- if any returns submitted through the program claim a refund;
- if material economic activity takes place in the U.S.;
- if the taxpayer is noncompliant in his country of residence;
- if the taxpayer is under audit or investigation by the IRS;
- if FBAR penalties have been previously assessed against the taxpayer or if the taxpayer previously received an FBAR warning letter;
- if the taxpayer has a financial interest or authority over financial accounts located outside his country of residence;
- if the taxpayer has a financial interest in entities located outside his country of residence;
- if the taxpayer has U.S.-source income; or
- if other indications of sophisticated tax planning or avoidance are present.[37]

The IRS has informally stated publicly that the $1,500 tax amount per year is a bright line but that a submission will not be rejected for streamlined processing if this is the only high-risk factor.[38] Consistent with this informal position, in March 2013 the IRS issued a series of frequently asked questions regarding the streamlined filing compliance program.[39] In these new FAQs, the IRS specifies that if a given year's tax liability exceeds $1,500, the taxpayer is not necessarily ineligible to participate in the program.[40] The caveat to this seemingly good news in new FAQ 1 is that a tax amount due in excess of $1,500 per year may result in the case being treated as a higher risk, and thus subject to a more thorough or even a full examination even though it may remain eligible to participate in the program. The IRS guidance cautions that if factors exist in the nonresident taxpayer's case file that would indicate a higher risk level, consideration should be given to filing under the 2012 OVDP.[41] It is important for practitioners to note that if the streamlined filing is made, the OVDP is no longer available; however, if the

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[32] *Available at* http://www.irs.gov/uac/Instructions-for-New-Streamlined-Filing-Compliance-Procedures-for-Non-Resident-Non-Filer-US-Taxpayers.

[33] IR-2012-65.

[34] *See supra* note 32.

[35] *Id.*

[36] *See* FAQ 1 of the Frequently Asked Questions Regarding the Streamlined Filing Compliance Procedures for Non-Resident,

(Footnote continued in next column.)

Non-Filer Taxpayers, *available at* http://www.irs.gov/Individuals/International-Taxpayers/FAQReStreamlinedFilingCompliance ProceduresNRNFTPs.

[37] *See supra* note 32.

[38] For example, IRS senior officials made comments to this effect at the 31st annual International Tax Conference, sponsored by the Florida Institute of Certified Public Accountants and the Florida Bar in Miami on January 10-11, 2013.

[39] *Available at* http://www.irs.gov/Individuals/International-Taxpayers/FAQReStreamlinedFilingComplianceProcedures NRNFTPs.

[40] *Id.*

[41] *Id.*

voluntary disclosure filing has been made on or before August 31, 2012, with IRS acceptance thereof, it is possible to opt out of that program and then file under the streamlined procedure.[42]

Another consequence of a streamlined application being treated as a higher level of compliance risk is the IRS's publicly stated intention that in some cases, presumably those linked to a full examination, more than three years of filings may be required. As noted above, for a low-risk streamlined case, the taxpayer is only required to file the past three years of dilatory federal income tax returns plus associated information returns such as Form 3520 or Form 5471, as well as six years of delinquent FBARs.[43]

A key concern regarding streamlined filings is the potential risk of criminal prosecution. The August 31, 2012, IRS announcement states that if this concern exists, taxpayers should be aware that the new procedure does not provide protection from criminal prosecution if the IRS and the DOJ later determine that the particular circumstances as disclosed in the streamlined filing warrant such prosecution.[44] In such cases taxpayers are cautioned to pursue the OVDP, but after they consult with their legal advisers. As noted above, once a streamlined application is made, the OVDP is no longer available.

From the practitioner's perspective, this critical issue needs to be fully vetted, including a review of all relevant facts, development of all key legal issues, and in general, an assessment of the potential criminal tax exposure of a given case. In submitting the streamlined filing, it may be prudent to draft the submission in a manner that complies with the IRS voluntary disclosure practice as set forth in the IRM[45] in order to mitigate the potential criminal tax exposure. But again, the key point here is to carefully evaluate and professionally assess the nature and level of risk in order to enable the taxpayer to render a fully informed decision.

Recent Regulatory Developments

Overview

In addition to the voluntary disclosure developments discussed above and the other global tax compliance initiatives, including FATCA, discussed below, the IRS has been busy during the past year in issuing regulations to further address global tax compliance. Following is a summary of two of these more material regulatory developments, one of which affects U.S. taxpayers and the other nonresident aliens.

Reissuance of Proposed Regs

Section 6039E requires the Treasury secretary to promulgate regulations related to the collection of information from individuals applying for a U.S. passport or U.S. permanent residency visa. The initial proposed regulations under this statutory mandate were published back in 1992, and those regulations provided guidance for both passport and permanent resident applicants to provide specific information when making appropriate applications.[46] The 1992 regulations also provided guidance regarding the specified federal agencies that are required to provide certain information to the IRS.

Unlike the earlier version, the 2012 regulations do not provide information reporting rules for taxpayers submitting permanent residency visa applications (commonly known as green cards), nor do the new regulations address passport renewals even though section 6039E specifically refers to such renewals.[47] Instead, the new proposed guidance applies only to individuals applying for U.S. passports and requires only basic information to be reported.[48]

Given the U.S. government's focus on offshore administration and enforcement, particularly directed at U.S. citizen and green card holders with overseas accounts, it is somewhat surprising that the IRS has been so lax in pushing this regulations project since 1992. Nevertheless, the new proposed regulations provide a strong signal that the IRS will begin matching up passport applications in the case of U.S. citizens, and it is virtually certain that additional regulations will be released to focus on permanent residence visa applications.

In the context of the voluntary disclosure arena, every practitioner has been asked by a noncompliant U.S. citizens living abroad, ''How would I ever be caught given that I don't intend to return to the U.S. (but intend to keep my passport)?'' Of course, U.S. legal counsel cannot ethically represent such an ongoing noncompliant taxpayer, but it is fair to say that upon the next passport issuance, the section 6039E matchup could occur and this likely would flag an examination if not a criminal investigation. Finally, given the section 6039E statutory language, it is likely that both U.S. passport renewals and green card applications/renewals will be addressed in prospective section 6039E regulation projects. Of course FATCA also is intended to

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[42] *Id.* Such an opt-out from OVDP to streamlined status apparently is not available for OVDP cases accepted after August 31, 2012.

[43] *See supra* note 32.

[44] *Id.*

[45] *See* IRM section 9.5.11.9, as discussed *supra* in '''Quiet' Filings — Formal vs. Informal.''

[46] 57 *Fed. Reg.* 61373, Dec. 24, 1992.

[47] Prop. Treas. reg. section 301.6039E-1 was released March 26, 2012, in Announcement 2012-11, 2012-13 IRB 611.

[48] For more on this topic, see REG-208274-86; 77 *Fed. Reg.* 3964-3966.

track such overseas Americans maintaining foreign financial accounts, as further discussed below.

Nonresident Alien Deposit Interest

On April 17, 2012, the Treasury Department issued final regulations that by and large adopted the proposed regulations addressing the reporting of bank deposit interest paid to nonresident aliens.[49] This is a very interesting quid pro quo cooperative arrangement with relevant foreign jurisdictions. Since FATCA was enacted, it is understandable that relevant foreign jurisdictions would want something additional in return for complying with that new FATCA legislation. The new regulations would allow the transfer of information by the United States to relevant foreign countries that are interested in addressing offshore evasion by their own residents and need this banking data to assess evasion issues.[50]

The new regulations highlight the U.S. government policy to attack offshore tax evasion by putting pressure on foreign persons who maintain U.S. financial accounts and are not otherwise complying with their home country tax reporting rules.[51] The preamble to the final regulations links this policy purpose in a parallel manner to the U.S. attack on U.S. taxpayers maintaining noncompliant offshore accounts and evading U.S. tax.[52] Treasury and the IRS have previously indicated that the ability of the U.S. to combat U.S. taxpayer tax evasion is directly linked to helping foreign countries maintain their own tax laws in a reciprocal and bilateral manner.

Another key policy reason cited in the preamble to the final regulations is that the new regulations should provide a higher level of cooperation among governments with respect to the FATCA implementation starting in 2014.[53] In other words, foreign governments that are benefitted by the new regulations will have some degree of reciprocity given the implementation of FATCA by such governments; the new regulations formalize the quid pro quo of such foreign governments being able to receive U.S. tax information regarding their home country residents in return.

As mentioned above, the U.S. government will not provide banking information to any country if the IRS determines that the country is not maintaining adequate legal protections to ensure the confidentiality of information.[54] The IRS is maintaining a fair amount of leverage under the new regulations because, as noted above, some countries will be the recipients of automatic exchange of information, such as the current arrangement between the U.S. and Canada for sharing deposit interest income information. Other jurisdictions will be subject to a specific request procedure in order to obtain the U.S. bank account information.

It is noteworthy that Treasury and the IRS are expected to publish a revenue procedure that will implement the final regulations by listing the countries having appropriate information exchange agreements with the U.S.[55] Further, the procedure will list all the countries that are deemed to have an appropriate automatic exchange relationship for data collected under the new regulations.[56] Finally, to ease the burden on applicable U.S. financial institutions, the proposed regulations have removed the requirement that such institutions provide a statement to nonresident aliens informing them that information may be furnished to the government of the country where the recipient resides, but as a matter of sound banking policy, such a warning should nonetheless be included.[57]

FATCA: What's the Next Move?

On January 1, 2014, the global FATCA reporting regime will become effective and those foreign financial institutions that have entered into foreign financial institution agreements with the U.S. government will be required to identify all U.S. customers. To the extent those customers do not permit disclosure, they will be asked to leave the particular bank and the bank must report certain data regarding those recalcitrant account holders to the U.S.[58] As this article goes to press, a substantial wave of American clients who hold accounts abroad are being asked by their banks to consent to such a full disclosure to the U.S., presumably given the imminent FATCA reporting effective date.

For Switzerland, which has been on the front line of the U.S. attack on bank secrecy, FATCA represents a unique challenge to noncompliant U.S. account holders maintaining Swiss financial accounts. Under proposed Swiss legislation, and as a follow-up to the so-called Model II intergovernmental agreement, virtually all Swiss banks will be required to enter into foreign financial agreements with the U.S.[59] This proposed Swiss legislation is subject to review and approval by the Swiss parliament and may be subject to the Swiss referendum process, which would be triggered assuming

[49]T.D. 9584, May 14, 2012.

[50]Treas. reg. section 1.6049-8. For more on this topic, see Marie Sapirie, ''Final U.S. Regs Require Reporting of Deposit Interest,'' *Tax Notes Int'l*, Apr. 23, 2012, p. 313.

[51]*Id.*

[52]*See supra* note 48.

[53]*Id.*

[54]*Id.*

[55]*Id.*

[56]*Id.*

[57]*Id.*

[58]Treas. reg. section 1.1471-4(d)(6).

[59]Agreement Between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA (the Switzerland-U.S. IGA), Switzerland-U.S., Part B, article 3, para. 1.a), Feb. 15, 2013.

parliament passes this legislation and thereafter at least 50,000 Swiss citizens sign a petition to mandate such a referendum. Assuming this legislation is ultimately enacted, only a small number of Swiss banks would be free from the FATCA reporting regime. Accordingly, those Swiss banks not otherwise exempted from the FATCA reporting requirements will most certainly enter into foreign financial institution agreements with the U.S.[60]

The ultimate disclosure ramifications of FATCA on the Swiss banking community are substantial and mark a further erosion of Swiss bank secrecy. For example, for a nonexempt Swiss bank that has entered into a foreign financial institution agreement, aggregate data concerning recalcitrant account holders must be provided to the U.S. government.[61] Once this data is received, it is virtually certain that the U.S. would make a request to that particular banking institution under the treaty (as discussed below) for all customer data and information of those clients.[62] Such a treaty disclosure request would be very broad, assuming adoption of the September 2009 protocol, as discussed below, and would effectively include identifying and all other information related to those account holders under such a disclosure.

In some cases, specific foreign-based banks have initiated internal bank policies requiring an opinion of U.S. tax counsel to confirm U.S. tax compliance, and are no longer accepting a Form W-9 or even copies of U.S. tax returns or a CPA's confirmation as verification of such U.S. tax compliance. The U.S. government has likely used its treasure trove of OVDP data to ask some foreign-based banks to adopt such an internal compliance program. As a result, practitioners are seeing more FATCA-driven voluntary disclosure cases. Another byproduct is that U.S. tax counsel is being engaged more frequently to conduct a U.S. tax compliance due diligence review of U.S. taxpayers who hold foreign accounts. This request comes either at the insistence of the foreign bank or from a U.S. taxpayer who wants to sleep well at night.

As many foreign financial institutions that are heavily affected by the FATCA compliance initiative are preparing for the January 1, 2014, effective date, these institutions are learning that American taxpayers are not always so easy to identify. U.S. citizenship is not the only indicator of U.S. person status for U.S. tax purposes, because green card status and substantial presence status ordinarily result in U.S. person status. There is also the issue of dual nationals; such dual status can raise special challenges to FATCA participating banks. For example, suppose a bank has a thorough permanent records file for a client whose French passport is on file, but the client also has a U.S. passport that was not disclosed to the bank. And suppose the bank notes a cellphone with a +1-212 prefix, which would signify a U.S. connection.[63] Even this single indication of U.S. status could be enough to cause the bank to probe further.[64]

Continuing Enforcement Actions

Another key component under this catchall category of developments that is driving global tax enforcement is the recent moves deployed by the DOJ with IRS support. As indicated in recent press reports, the DOJ has leaned on several foreign financial institutions as well as foreign fiduciaries to seek additional data and information regarding American tax noncompliance.[65] This DOJ deployment to combat offshore tax abuse was evidenced by a series of grand jury proceedings during the past few years, and also was aided by the May 11, 2012, DOJ request for administrative assistance under the Liechtenstein-U.S. tax information exchange agreement.[66] In recent months the DOJ, with IRS support, has pressed other foreign governments, including the Swiss government, to maneuver targeted banks into compliance by requiring them to either obtain a written legal opinion from an American tax attorney regarding the compliance of an American customer of such bank or to discharge the American clients from the bank.

Much of this global enforcement effort has been directed at both Switzerland and Liechtenstein, and in the case of Switzerland, most press reports indicate that a global settlement with all Swiss banks is unlikely and that a series of individual settlements will be sought instead.[67] In summary, the Swiss-based banks would be generally categorized into four subsets:

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[60]Swiss law does not allow Swiss banks to share this information with the central government; therefore, Switzerland has elected to enter into an intergovernmental agreement with the United States following the Model II approach.

[61]Switzerland-U.S. IGA, *supra* note 59, Part B, article 3, para. 1.b)(i).

[62]*Id.*

[63]Treas. reg. section 1.1471-4(c)(5)(iv)(B)(iv).

[64]The significance of a U.S. telephone number can vary, however, depending on the negotiated terms of an applicable intergovernmental agreement.

[65]''Liechtenstein Shall Provide Data to the U.S.,'' *Neue Zürcher Zeitung*, *available at* http://www.nzz.ch/aktuell/wirtschaft/wirtschaftsnachrichten/liechtenstein-liefert-daten-in-die-usa-1.18060808; Press Release, United States Department of Justice, ''Court Authorizes IRS to Seek Records from UBS Relating to U.S. Taxpayers With Swiss Bank Accounts'' (Jan. 28, 2013) (on file with the author).

[66]For a more detailed discussion of the background and significance of the May 11, 2012, DOJ request for administrative assistance, see Larry R. Kemm, William M. Sharp Sr., and William T. Harrison III, ''Liechtenstein and the U.S.: The Long Road to Full Disclosure,'' *Tax Notes Int'l*, July 23, 2012, p. 355.

[67]Although it is fair to state that only the government negotiators know whether such a non-global or global framework will emerge.

- the 12 targeted banks revealed in various press reports over the past year;
- the larger pool of Swiss-connected banks that have U.S. customers who are noncompliant;
- the Swiss-based banks who have no U.S. customers but are going to participate in FATCA because of U.S. investment connections; and
- a category of Swiss banks that have no U.S. customers, U.S. investments, or other U.S. connections and are thus not subject to FATCA.

Although at this point the ultimate resolution of Switzerland-U.S. disputes is purely speculative, based on available press reports, it appears that the U.S. and Swiss governments will not enter into a global settlement covering all Swiss banks.[68] Rather, each bank will be pressed to negotiate its own separate agreement with the DOJ (with the caveat that all data must be turned over in accordance with the Switzerland-U.S. treaty). The latter point is easier said than done given that the legality of turning over Swiss bank data is severely handicapped by the ''tax fraud or the like'' standards set forth in article 26 of the treaty.[69]

Additionally, only if, as, and when the U.S. Senate ratifies the September 23, 2009, protocol will the Swiss government be able to sanction a broader turnover of U.S. customer information. This even includes instances of a behavioral pattern basis, which was recently adopted as a vehicle for turning over data by the Swiss government. Even if the U.S. Senate adopts the 2009 treaty protocol, the data turned over will likely be restricted to information and documents existing on or after September 23, 2009, and is not likely to include information for past years. A significant issue that arises in connection with this point is whether the bank's ''permanent file'' would also be subject to the handover under the protocol, specifically the account opening documents, Form A, and other relevant items.

Liechtenstein Informal Information Requests

In late March 2013 the DOJ issued an informal request to selected Liechtenstein-based fiduciaries requesting certain statistical information regarding the conduct of American taxpayers who reportedly held through Liechtenstein structures noncompliant and unreported foreign financial accounts.[70] The timing of the informal request by the DOJ, with a potential formal request to follow under the Liechtenstein-U.S. TIEA, is no coincidence in light of the special amendment to Liechtenstein law made in 2012.[71] This amendment allows the U.S. to submit requests under the TIEA for not only tax years beginning in 2009, the effective date of the TIEA, but also for years stretching as far back as 2001. However, this formal request must have been made no later than April 30, 2013.

This two-step approach of first requesting statistical data informally and then submitting the formal request under the TIEA was also deployed by the DOJ in connection with the Liechtensteinische Landesbank proceeding in May 2012. It is interesting to note that in the case of Liechtensteinische Landesbank, the formal request only began tracking the 2004 year going forward; the DOJ did not request documents going back as early as 2001, which would have been permissible under Liechtenstein law.

The informal DOJ request apparently was directed to 21 specified Liechtenstein-based fiduciary firms, and not based on what would be described as a ''behavioral pattern'' request that was permitted under Lichtenstein law following the 2012 legislative modifications. What is interesting about this informal request, and a possible formal follow-up TIEA request, is that many American taxpayers who held noncompliant Liechtenstein accounts certainly became compliant through the various offshore voluntary disclosure programs over the past few years. Thus, it is virtually certain that the DOJ, through cooperation with the IRS, has an amount of offshore data that can be described as a treasure trove for purposes of identifying specified Liechtenstein-based fiduciaries and other advisers.

What is also revealing about the DOJ informal request is the extent to which fiduciaries openly provide data and information regarding Liechtenstein structures, such as *stiftungs*, used by American taxpayers to hold Liechtenstein or Swiss accounts. Those structured arrangements would, in most cases, also involve a Swiss adviser to the extent the structure held a Swiss bank account. This of course could broaden the level of review by the DOJ and IRS with respect to not only Liechtenstein-based service providers but also Swiss-based service providers and Swiss-based banks. As this article goes to press, no formal DOJ request has been announced.

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[68]''No Global Solution for Swiss Banks,'' *Tages Anzeiger*, Mar. 24, 2013, *available at* http://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/Keine-Globalloesung-fuer-Schweizer-Banken/story/27279374?comments=1.

[69]For a discussion of the relevant laws implicated in a turnover to the U.S. of banking documents by the Swiss government, see Walter H. Boss and William M. Sharp Sr., ''The Swiss-U.S. 'Turnover' Ground Rules: A Technical Update,'' *Tax Notes Int'l*, Nov. 7, 2011, p. 423.

[70]Dylan Griffiths, ''U.S. Seeks Answers in Liechtenstein on Tax Cheats,'' Bloomberg, Mar. 24, 2013, *available at* http://www.bloomberg.com/news/2013-03-24/u-s-seeks-answers-in-liechtenstein-on-tax-cheats.html.

[71]*See supra* note 65.

Conclusion

With so many active moving parts, 2013 may very well be the watershed year resulting in the final pathway to global tax compliance and the elimination of offshore tax abuse facilitated by bank secrecy. At the bilateral and multinational levels and the statutory, legislative, and administrative levels, the many global tax initiatives are seemingly converging on the same landscape. While this elevated and more intensified push toward global compliance is not unexpected, the U.S. government and its foreign counterparts should engage in appropriate conduct to assure the legal rights of affected taxpayers and also to provide a fair and level playing field. Along these lines, the U.S. should revisit some of its more haphazard administrative positions, such as the FBAR statute waiver position. The U.S. should also reassess its opt-out policy for pending voluntary disclosure cases to avoid what would be a sheer clogging of both the IRS Appeals and litigation arenas. ◆