Jack Brister

Jack Brister, director of tax and international private client services, has substantial experience in domestic and international tax matters. He is a recognized authority on various U.S. cross-border issues affecting affluent families and their individual members, including tax laws governing foreign trusts and estates. His tax-consulting focus includes advising and planning for the use of offshore trusts and underlying structures, and representation before federal, state, and local tax authorities. He has frequently written and spoken abroad and domestically on such topics.

Before joining ERE, Jack was a partner and director of tax services with Montrose Accounting Company, LLC. He was formerly responsible for the management of domestic and international client engagements at Deloitte & Touche LLP. At Milbank Tweed and Sullivan & Cromwell, he had managed the domestic and international tax-compliance matters, respectively.

Jack is a NY-branch member of the U.K.-based Society of Trust and Estate Practitioners (STEP) and the International Tax Planning Association. He holds a BS from Central Washington University and an MBA in Finance and Tax from Wagner College in Staten Island.

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1. **Why did the IRS issue internal guidance regarding offshore activities now?**

The IRS has had a voluntary disclosure practice in its Criminal Manual for many years. Once IRS Criminal Investigation has determined preliminary acceptance into the voluntary disclosure program, the case is referred to the civil side of IRS for examination and resolution of taxes and penalties. Recent IRS enforcement efforts in the offshore area have led to an increased number of voluntary disclosures. Additional taxpayers are considering making voluntary disclosures but are reportedly reluctant to come forward because of uncertainty about the amount of their liability for potentially onerous civil penalties. In order to resolve these cases in an organized, coordinated manner and to make exposure to civil penalties more predictable, the IRS has decided to centralize the civil processing of offshore voluntary disclosures and to offer a uniform penalty structure for taxpayers who voluntarily come forward. These steps were taken to ensure that taxpayers are treated consistently and predictably.

2. **What is the objective of these steps?**

The objective is to bring taxpayers that have used undisclosed foreign accounts and undisclosed foreign entities to avoid or evade tax into compliance with United States tax laws. Additionally, the information gathered from taxpayers making voluntary disclosures under this practice will be used to further the IRS's understanding of how foreign accounts and foreign entities are promoted to United States taxpayers as ways to avoid or evade tax. Data gathered will be used in developing additional strategies to inhibit promoters and facilitators from soliciting new clients.

3. **Why should I make a voluntary disclosure?**

Taxpayers with undisclosed foreign accounts or entities should make a voluntary disclosure because it enables them to become compliant, avoid substantial civil penalties and generally eliminate the risk of criminal prosecution. Making a voluntary disclosure also provides the opportunity to calculate, with a reasonable degree of certainty, the total cost of resolving all offshore tax issues. Taxpayers who do not submit a voluntary disclosure run the risk of detection by the IRS and the imposition of substantial penalties, including the fraud penalty and foreign information return penalties, and an increased risk of criminal prosecution.

4. **What is the IRS's Voluntary Disclosure Practice?**

The Voluntary Disclosure Practice is a longstanding practice of IRS Criminal Investigation of taking timely, accurate, and complete voluntary disclosures into account in deciding whether to recommend to the Department of Justice that a taxpayer be criminally prosecuted. It enables noncompliant taxpayers to resolve their tax liabilities and minimize their chances of criminal prosecution. When a

taxpayer truthfully, timely, and completely complies with all provisions of the voluntary disclosure practice, the IRS will not recommend criminal prosecution to the Department of Justice.

5. **How do I make a voluntary disclosure and where should I submit my voluntary disclosure?**

A voluntary disclosure is made by following the procedures described in I.R.M. 9.5.11.9. Tax professionals or individuals who want to initiate a voluntary disclosure, should call their local CI office. For a list of CI offices, visit: http://www.irs.gov/compliance/enforcement/article/0,,id=205909,00.html

Taxpayers with questions may call the IRS Voluntary Disclosure Hotline at (215)516-4777, visit www.irs.gov, or contact their nearest CI office.

6. **What form should my voluntary disclosure take?**

You should send a letter to the nearest Special Agent in Charge, IRS Criminal Investigation, stating that you wish to make a voluntary disclosure. Ideally, the letter should contain all your identifying information, including name, address, Social Security Number or other Taxpayer Identification Number, passport number and date of birth, and should also include an explanation of any previously unreported or underreported income or incorrectly claimed deductions or credits related to undisclosed foreign accounts or undisclosed foreign entities, including the reason(s) for the error or omission. It should also include a power of attorney (Form 2848), if you are represented, and daytime contact information for you or your representative. If you have already completed the amended or delinquent returns, those should be submitted with the letter, but it is not necessary to include them with the initial submission if you are unable to do so. At a minimum, however, the initial submission must include the taxpayer's name and identifying information described above. IRS Criminal Investigation will follow up on the facts and circumstances to assess the timeliness, completeness, and truthfulness of the voluntary disclosure.

7. **I'm currently under examination. Can I come in under voluntary disclosure?**

No. If the IRS has initiated a civil examination, regardless of whether it relates to undisclosed foreign accounts or undisclosed foreign entities, the taxpayer will not be eligible to come in under the IRS's Voluntary Disclosure Practice.

8. **I have an offshore merchant account upon which I have not reported all of the income. Can I come in under the IRS's voluntary disclosure practice?**

Yes. Taxpayers with unreported income from an offshore merchant account can make a voluntary disclosure.

9. I have properly reported all my taxable income but I only recently learned that I should have been filing FBARs in prior years to report my personal foreign bank account or to report the fact that I have signature authority over bank accounts owned by my employer. May I come forward under the voluntary disclosure practice to correct this?

The purpose for the voluntary disclosure practice is to provide a way for taxpayers who did not report taxable income in the past to voluntarily come forward and resolve their tax matters. Thus, If you reported and paid tax on all taxable income but did not file FBARs, do not use the voluntary disclosure process.

For taxpayers who reported and paid tax on all their taxable income for prior years but did not file FBARs, you should file the delinquent FBAR reports according to the instructions and attach a statement explaining why the reports are filed late. Send copies of the delinquent FBARs, together with copies of tax returns for all relevant years, by September 23, 2009, to the Philadelphia Offshore Identification Unit at:

Internal Revenue Service
11501 Roosevelt Blvd.
South Bldg., Room 2002
Philadelphia, PA 19154
Attn: Charlie Judge, Offshore Unit, DP S-611

The IRS will not impose a penalty for the failure to file the FBARs.

10. What if the taxpayer has already filed amended returns reporting the additional unreported income, without making a voluntary disclosure (i.e., quiet disclosure)?

The IRS is aware that some taxpayers have attempted so-called “quiet” disclosures by filing amended returns and paying any related tax and interest for previously unreported offshore income without otherwise notifying the IRS. Taxpayers who have already made “quiet” disclosures may take advantage of the penalty framework applicable to voluntary disclosure requests regarding unreported offshore accounts and entities. Those taxpayers must send previously submitted documents, including copies of amended returns, to their local CI office by September 23, 2009. (See FAQ 5).

Taxpayers are strongly encouraged to come forward under the Voluntary Disclosure Practice to make timely, accurate, and complete disclosures. Those

taxpayers making "quiet" disclosures should be aware of the risk of being examined and potentially criminally prosecuted for all applicable years.

The IRS has identified, and will continue to identify, amended tax returns reporting increases in income. The IRS will be closely reviewing these returns to determine whether enforcement action is appropriate.

11. Is a taxpayer who sought relief under the IRS's Voluntary Disclosure Practice before this internal guidance was issued, eligible for the terms described in this internal guidance?

Yes. If a taxpayer sought relief under the IRS's Voluntary Disclosure Practice before this internal guidance was issued he or she may be eligible, as long as the voluntary disclosure has not yet resulted in an assessment.

12. How does the penalty framework work? Can you give us an example?

Assume the taxpayer has the following amounts in a foreign account over a period of six years. Although the amount on deposit may have been in the account for many years, it is assumed for purposes of the example that it is not unreported income in 2003.

Year	Amount on Deposit	Interest Income	Account Balance
2003	$ 1,000,000	$ 50,000	$ 1,050,000
2004		$ 50,000	$ 1,100,000
2005		$ 50,000	$ 1,150,000
2006		$ 50,000	$ 1,200,000
2007		$ 50,000	$ 1,250,000
2008		$ 50,000	$ 1,300,000

(NOTE: This example does not provide for compounded interest, and assumes the taxpayer is in the 35-percent tax bracket, files a return but does not include the foreign account or the interest income on the return, and the maximum applicable penalties are imposed.)

If the taxpayer comes forward and has their voluntary disclosure accepted by the IRS, they face this potential scenario:

They would pay $386,000 plus interest. This includes:

- Tax of $105,000 (six years at $17,500) plus interest,
- An accuracy-related penalty of $21,000 (i.e., $105,000 x 20%), and
- An additional penalty, in lieu of the FBAR and other potential penalties that may apply, of $260,000 (i.e., $1,300,000 x 20%).

If the taxpayer didn't come forward and the IRS discovered their offshore activities, they face up to $2,306,000 in tax, accuracy-related penalty, and FBAR penalty. The taxpayer would also be liable for interest and possibly additional penalties, and an examination could lead to criminal prosecution.

The civil liabilities potentially include:

- The tax and accuracy-related penalty, plus interest, as described above,
- FBAR penalties totaling up to $2,175,000 for willful failures to file complete and correct FBARs (2003- $100,000, 2004 - $100,000, 2005 - $100,000, 2006 - $600,000, 2007 - $625,000 and 2008 - $650,000),
- The potential of having the fraud penalty (75 percent) apply, and
- The potential of substantial additional information return penalties if the foreign account or assets is held through a foreign entity such as a trust or corporation and required information returns were not filed.

Note that if the foreign activity started more than six years ago, the Service may also have the right to examine additional years.

13. What years are included in the 6-year period?

A taxpayer is expected to file correct delinquent or amended tax returns for tax year 2008 back to 2003.

14. What are some of the criminal charges I might face if I don't come in under voluntary disclosure and the IRS finds me?

Possible criminal charges related to tax returns include tax evasion (26 U.S.C. § 7201), filing a false return (26 U.S.C. § 7206(1)) and failure to file an income tax return (26 U.S.C. § 7203). The failure to file an FBAR and the filing of a false FBAR are both violations that are subject to criminal penalties under 31 U.S.C. § 5322.

A person convicted of tax evasion is subject to a prison term of up to five years and a fine of up to $250,000. Filing a false return subjects a person to a prison term of up to three years and a fine of up to $250,000. A person who fails to file a tax return is subject to a prison term of up to one year and a fine of up to $100,000. Failing to file an FBAR subjects a person to a prison term of up to ten years and criminal penalties of up to $500,000.

15. What are some of the civil penalties that might apply if I don't come in under voluntary disclosure and the IRS finds me? How do they work?

The following is a summary of potential reporting requirements and civil penalties that could apply to a taxpayer, depending on his or her particular facts and circumstances.

- A penalty for failing to file the Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, commonly known as an "FBAR"). United States citizens, residents and certain other persons must annually report their direct or indirect financial interest in, or signature authority (or other authority that is comparable to signature authority) over, a financial account that is maintained with a financial institution located in a foreign country if, for any calendar year, the aggregate value of all foreign accounts exceeded $10,000 at any time during the year. Generally, the civil penalty for willfully failing to file an FBAR can be as high as the greater of $100,000 or 50 percent of the total balance of the foreign account. See 31 U.S.C. § 5321(a)(5). Nonwillful violations are subject to a civil penalty of not more than $10,000.

- A penalty for failing to file Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts. Taxpayers must also report various transactions involving foreign trusts, including creation of a foreign trust by a United States person, transfers of property from a United States person to a foreign trust and receipt of distributions from foreign trusts under section 6048. This return also reports the receipt of gifts from foreign entities under section 6039F. The penalty for failing to file each one of these information returns, or for filing an incomplete return, is 35 percent of the gross reportable amount, except for returns reporting gifts, where the penalty is five percent of the gift per month, up to a maximum penalty of 25 percent of the gift.

- A penalty for failing to file Form 3520-A, Information Return of Foreign Trust With a U.S. Owner. Taxpayers must also report ownership interests in foreign trusts, by United States persons with various interests in and powers over those trusts under section 6048(b). The penalty for failing to file each one of these information returns or for filing an incomplete return, is five percent of the gross value of trust assets determined to be owned by the United States person.

- A penalty for failing to file Form 5471, Information Return of U.S. Person with Respect to Certain Foreign Corporations. Certain United States persons who are officers, directors or shareholders in certain foreign corporations (including International Business Corporations) are required to report information under sections 6035, 6038 and 6046. The penalty for failing to file each one of these information returns is $10,000, with an additional $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return.

- A penalty for failing to file Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. Taxpayers may be required to report transactions between a 25 percent foreign-owned domestic corporation or a foreign corporation engaged in a trade or business in the United States and a related party as required by sections 6038A and 6038C. The penalty for failing to file each one of these information returns, or to keep certain records regarding reportable transactions, is $10,000, with an additional $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return.

- A penalty for failing to file Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation. Taxpayers are required to report transfers of property to foreign corporations and other information under section 6038B. The penalty for failing to file each one of these information returns is ten percent of the value of the property transferred, up to a maximum of $100,000 per return, with no limit if the failure to report the transfer was intentional.

- A penalty for failing to file Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships. United States persons with certain interests in foreign partnerships use this form to report interests in and transactions of the foreign partnerships, transfers of property to the foreign partnerships, and acquisitions, dispositions and changes in foreign partnership interests under sections 6038, 6038B, and 6046A. Penalties include $10,000 for failure to file each return, with an additional $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return, and ten percent of the value of any transferred property that is not reported, subject to a $100,000 limit.

- Fraud penalties imposed under sections 6651(f) or 6663. Where an underpayment of tax, or a failure to file a tax return, is due to fraud, the taxpayer is liable for penalties that, although calculated differently, essentially amount to 75 percent of the unpaid tax.

- A penalty for failing to file a tax return imposed under section 6651(a)(1). Generally, taxpayers are required to file income tax returns. If a taxpayer fails to do so, a penalty of 5 percent of the balance due, plus an additional 5 percent for each month or fraction thereof during which the failure continues may be imposed. The penalty shall not exceed 25 percent.

- A penalty for failing to pay the amount of tax shown on the return under section 6651(a)(2). If a taxpayer fails to pay the amount of tax shown on the return, he or she may be liable for a penalty of .5 percent of the amount of tax shown on the return, plus an additional .5 percent for each additional month or fraction thereof that the amount remains unpaid, not exceeding 25 percent.

- An accuracy-related penalty on underpayments imposed under section 6662. Depending upon which component of the accuracy-related penalty is applicable, a taxpayer may be liable for a 20 percent or 40 percent penalty.

16. Why did the IRS pick 6 months?

The March 23, 2009 memorandum communicating the approved penalty framework for resolving the civil side of offshore voluntary disclosures is effective for 6 months because the Service intends to re-evaluate the framework at that time. Six months is a reasonable time to close out a number of voluntary disclosures, evaluate our experience and the feedback from the practitioner community, and decide whether or how to continue the practice going forward.

17. What happens at the end of 6 months? Will I get a better deal if I wait to see what the IRS does at the end of 6 months?

Taxpayers should not wait until the end of the 6-month period to make their voluntary disclosures as there is no guarantee that the taxpayer will still be eligible or that the current penalty terms will be available after 6 months.

Taxpayers who wait until the end of the 6-month period run the risk that they will be disqualified from the Voluntary Disclosure Practice. The IRS has stepped up its enforcement efforts, including the use of John Doe summonses, to identify taxpayers using offshore accounts and entities to avoid tax. In addition, the IRS continues to receive information from whistleblowers and other taxpayers making voluntary disclosures. If the IRS receives specific information about a taxpayer's noncompliance before the taxpayer attempts to make a voluntary disclosure, the disclosure will not be timely and the taxpayer will not be eligible for the criminal and civil penalty relief available under the voluntary disclosure practice. Finally, taxpayers run a substantial risk that the uniform penalty structure described in the internal guidance will not be available past the 6-month deadline or that the terms will be less beneficial to taxpayers.

18. What should I do if I am having difficulty obtaining my records from overseas?

Our experience with offshore cases in recent years is that taxpayers are successful in retrieving copies of statements and other records from foreign banks when they genuinely attempt to do so. If assistance is needed, the agent assigned to a case will work with the taxpayer in preparing a request that should be acceptable to the foreign bank. The penalty framework described in the March 23 memorandum will apply to all voluntary disclosures in process within the 6-month timeframe, so difficulty in completing a voluntary disclosure started during that period will not disqualify a cooperative taxpayer from the penalty relief. The key is to notify the Service of your intent to make a voluntary disclosure as soon as possible, and in any event, by September 23, 2009.

19. Are entities, such as corporations, partnerships and trusts eligible to make voluntary disclosures?

Yes, entities are eligible to participate in the IRS's Voluntary Disclosure Practice.

20. Does the twenty percent penalty apply to entities? Does the twenty percent penalty apply only to cash and securities held in foreign accounts or entities or to tangible and intangible assets as well?

The twenty percent penalty applies to entities. The twenty percent penalty applies to all assets (or at least the taxpayer's share) held by foreign entities (e.g., trusts and corporations) for which the taxpayer was required to file information returns, as well as all foreign assets (e.g., financial accounts, tangible assets such as real estate or art, and intangible assets such as patents or stock or other interests in a U.S. business) held or controlled by the taxpayer.

21. Are taxpayers required to complete a questionnaire as part of the voluntary disclosure practice?

There is no specific questionnaire for taxpayers to complete.

22. Is there a list of questions taxpayers are expected to answer as part of the voluntary disclosure process?

There is no standard list of questions for these cases. The Service may require an interview with the taxpayer making a voluntary disclosure, depending on the facts of each case.

23. When determining the highest amount in each undisclosed foreign account for each year or the highest asset balance of all undisclosed foreign entities for each year, what exchange rate should be used?

Convert foreign currency by using the foreign currency exchange rate at the end of the year. In valuing currency of a country that uses multiple exchange rates, use the rate that would apply if the currency in the account were converted into United States dollars at the close of the calendar year. Each account is to be valued separately.

24. Will I have to file or amend my old tax returns?

Yes. Any tax return not filed during the previous 6-year period that was otherwise required to be filed by law, must be filed by the taxpayer. In addition, any inaccurate returns for any of the 6 years must be amended by the taxpayer.

25. Besides federal income tax returns, what forms or other returns must be filed?

- Copies of original and amended federal income tax returns for tax periods covered by the voluntary disclosure;

- Complete and accurate amended federal income tax returns (or original returns, if not previously filed) of the taxpayer for all tax years covered by the voluntary disclosure;

- An explanation of previously unreported or underreported income or incorrectly claimed deductions or credits related to undisclosed foreign accounts or undisclosed foreign entities, including the reason(s) for the error or omission;

- If the taxpayer is a decedent's estate, or is an individual who participated in the failure to report the foreign account or foreign entity in a required gift or estate tax return, either as executor or advisor, complete and accurate amended estate or gift tax returns (original returns, if not previously filed) necessary to correct the underreporting of assets held in or transferred through undisclosed foreign accounts or foreign entities;

- Complete and accurate amended information returns required to be filed by the taxpayer, including, but not limited to, Forms 3520, 3520-A, 5471, 5472, 926 and 8865 (or originals, if not previously filed) for all tax years covered by the voluntary disclosure, for which the taxpayer requests relief; and

- Complete and accurate Form TD F 90.22-1, *Report of Foreign Bank and Financial Accounts*, for foreign accounts maintained during calendar years covered by the voluntary disclosure.

26. If I had an FBAR reporting obligation for years covered by the voluntary disclosure, what version of the Form TD F 90-22.1 should I use to report my interests in foreign accounts?

Taxpayers should use the current version of Form TD F 90-22.1, (revised in October 2008), to file delinquent FBARs to report foreign accounts maintained in prior years. The taxpayer may, however, rely on the instructions for the prior version of the form (revised in July 2000) for purposes of determining who must file to report foreign accounts maintained in 2007 and prior calendar years. Under both versions of the form, citizens and residents must file.

27. If I don't have the ability to full pay can I still participate in the IRS's Voluntary Disclosure Practice?

Yes. The March 23, 2009 guidance requires the taxpayer to fully pay all taxes and interest for all years covered, and the Voluntary Disclosure penalty, as well as all other unpaid, previously assessed liabilities, when the signed closing agreement is returned to the Service. However, it is possible for a taxpayer who is unable to make full payment at that time to submit a request that includes other payment arrangements acceptable to the IRS.

The burden will be on the taxpayer to establish inability to pay, to the satisfaction of the IRS, based on full disclosure of all assets and income sources, domestic and offshore, under the taxpayer's control. Assuming that the IRS determines that the inability to fully pay is genuine, the taxpayer must work out other financial arrangements, acceptable to the IRS, to resolve all outstanding liabilities, in order to be entitled to the penalty relief set forth in the March 23, 2009 guidance.

28. If the taxpayer and the IRS cannot agree to the terms of the closing agreement, will mediation with Appeals be an option with respect to the terms of the closing agreement?

No. The penalty framework and the agreement to limit tax exposure to the most recent 6 years are package terms. If any part of the penalty framework is unacceptable to the taxpayer, the case will be examined and all applicable penalties may be imposed. Any tax and penalties imposed by the Service on examination may be appealed, but not the Service's decision on the terms of the closing agreement applying the penalty framework.

29. I have a client who may be eligible to make a voluntary disclosure. What are my responsibilities to my client under Circular 230?

The IRS expects taxpayers to seek qualified legal advice and representation in connection with considering and making a voluntary disclosure. If a taxpayer seeks the advice of a tax practitioner but nonetheless decides not to make a voluntary disclosure despite the taxpayer's noncompliance with Untied States tax laws, Circular 230, section 10.21, requires the practitioner to advise the client of the fact of the client's noncompliance and the consequences of the client's noncompliance as provided under the Code and regulations.

30. Can I talk to the IRS without revealing my client's identity?

Hypothetical situations present a potential for misunderstanding that exists when there is no assurance that the hypothetical contains all relevant facts. In addition, tax practitioners should be aware that posing a situation as a hypothetical does not satisfy the requirements of making a voluntary disclosure. If the IRS receives information relating specifically to the taxpayer's undisclosed foreign accounts or undisclosed foreign entities while the hypothetical question is pending, the taxpayer may become ineligible to make a voluntary disclosure.

If practitioners have questions about the terms of the voluntary disclosure program, they should contact the IRS Voluntary Disclosure Hotline at (215) 516-4777, visit www.irs.gov, or contact their nearest CI office with questions. For a list of CI offices, visit:
http://www.irs.gov/compliance/enforcement/article/0,,id=205909,00.html

Internal Revenue Service
United States Department of the Treasury

Statement from IRS Commissioner Doug Shulman on Offshore Income

March 26, 2009

My goal has always been clear — to get those taxpayers hiding assets offshore back into the system. We recently provided guidance to our examination personnel who are addressing voluntary disclosure requests involving unreported offshore income. We believe the guidance represents a firm but fair resolution of these cases and will provide consistent treatment for taxpayers. The goal is to have a predictable set of outcomes to encourage people to come forward and take advantage of our voluntary disclosure practice while they still can.

In the guidance to our people, we draw a clear line between those individual taxpayers with offshore accounts who voluntarily come forward to get right with the government and those who continue to fail to meet their tax obligations. People who come in voluntarily will get a fair settlement. We set up a penalty framework that makes sense for them — they need to pay back-taxes and interest for six years, and pay either an accuracy or delinquency penalty on all six years. They will also pay a penalty of 20 percent of the amount in the foreign bank accounts in the year with the highest aggregate account or asset value. Just to be clear, this is 20 percent of the highest asset value of an account anytime in the past six years. This gives taxpayers — and tax practitioners — certainty and consistency in how their case will be handled.

We have instructed our agents to resolve these taxpayers' cases in a uniform, consistent manner. Those who truly come in voluntarily will pay back taxes, interest and a significant penalty, but can avoid criminal prosecution.

At the same time, we have also provided guidance to our agents who have cases of unreported offshore income when the taxpayer did not come in through our voluntary disclosure practice. In these cases, we are instructing our agents to fully develop these cases, pursuing both civil and criminal avenues, and consider all available penalties including the maximum penalty for the willful failure to file the FBAR report and the fraud penalty.

We believe this is a firm, but fair resolution of these cases. It will make sure that those who hid money offshore pay a significant price, but also allow them to avoid criminal prosecution if they come in voluntarily. As we continue to step up our international enforcement efforts, this is a chance for people to come clean on their own. Our guidance to the field is for the next six months only, after which we will re-evaluate our options.

For taxpayers who continue to hide their head in the sand, the situation will only become more dire. They should come forward now under our voluntary disclosure practice and get right with the government.

Page Last Reviewed or Updated: April 02, 2009

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, D.C. 20224

Small Business/Self-Employed Division
Large and Mid-Size Business Division

March 23, 2009

MEMORANDUM FOR SBSE EXAMINATION AREA DIRECTORS
LMSB INDUSTRY DIRECTORS

FROM: Faris R. Fink
Deputy Commissioner, SBSE

Barry B. Shott
Deputy Commissioner, LMSB International

SUBJECT: Emphasis on and Proper Development of Offshore Examination Cases, Managerial Review, and Revocation of Last Chance Compliance Initiative

The purpose of this memorandum is to ensure examinations with offshore transactions and/or entities continue to be emphasized and receive priority treatment during the examination process. This memorandum also provides for managerial oversight of offshore cases, and revokes the Last Chance Compliance Initiative.

Offshore Case Development

The IRS Strategic Plan for 2009-2013 outlines the Service's commitment to meet the challenges of international tax administration and of allocating compliance resources to target existing and emerging high-risk areas. Similarly, both the SBSE Examination Program Letter and the Servicewide Approach to International Tax Administration documents address our continuing commitment to prioritize and investigate abusive offshore transactions designed to defeat our tax system.

Offshore cases sent to the field are work of the highest priority. Examiners should utilize the full range of information gathering tools in properly developing offshore issues, with special emphasis on detecting unreported income. This includes interviewing taxpayers, making third party contacts, and timely issuing summonses to taxpayers and third parties. In particular, examiners should request foreign-based information through exchange of information under applicable treaties and tax

information exchange agreements (TIEAs) in any cases where the taxpayers have accounts or transactions in countries with such agreements. Examiners should be alert to the badges of fraud and consult with Fraud Technical Advisors in developing cases for criminal referrals or the assertion of the civil fraud penalty. Counsel is available to assist SBSE and LMSB personnel as needed. Attachment 1 contains a brief summary of potential foreign information reporting requirements and civil penalties that could apply to a taxpayer depending on his/her particular facts and circumstances.

Managerial Oversight

Managers should ensure that income and penalty considerations are sufficiently developed and documented during both unagreed and Embedded Quality reviews. Cases should be discussed with employees regarding the need for additional income probes, use of indirect methods of proof to reconstruct income, penalty development and/or other considerations as necessary.

Revocation of Last Chance Compliance Initiative

Effective as of the date of this memorandum, the Service will no longer afford taxpayers the opportunity to minimize their exposure to penalties through the terms of the Last Chance Compliance Initiative (LCCI). All notices and letters with respect to the LCCI and relevant portions of IRM sections 4.26.16, 4.26.17 and 25.6.23 are in the process of being obsoleted. On any currently open examinations where the LCCI terms have already been offered, taxpayers will be afforded the opportunity to resolve their cases under LCCI if they respond to the examiner within 15 days of their prior notification.

Attachment

Attachment 1

The following summary of potential reporting requirements and civil penalties is not necessarily all encompassing, and it is unlikely that any one taxpayer would be subject to all of the reporting obligations or penalties listed below:

(1) Penalties for failure to comply with the Bank Secrecy Act requirement that United States persons report their financial interest in, or authority over, financial accounts located in a foreign country.

U.S. citizens, residents, and certain other persons, must annually report their financial interest in, or signature authority (or other authority that is comparable to signature authority) over, a financial account (such as a bank or investment account) that is maintained with a financial institution located in a foreign country if, for any calendar year, the aggregate value of all foreign accounts exceeded $10,000 at any time during the year. This reporting requirement is met by filing Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, commonly known as an "FBAR"). FBARs are filed with a Department of the Treasury facility located in Detroit and are not to be filed with tax returns; the filing date for FBARs is June 30th. The requirement to file FBARs is in the regulations under 31 U.S.C. § 5314 (which is a provision of the Bank Secrecy Act). Generally, the civil penalty for willfully failing to file an FBAR can be as high as the greater of $100,000 or 50 percent of the total balance of the foreign account. Criminal penalties may also apply. Refer to IRM 4.26.16.4 for additional FBAR penalty considerations.

(2) Fraud Penalties (Sections 6651(f) and 6663):

Where an underpayment of tax, or a failure to file a tax return, is due to fraud, the taxpayer is liable for penalties that, although calculated differently, essentially amount to 75 percent of the unpaid tax.

(3) Failure to File Tax Return (Section 6651):

When a taxpayer is required to file a tax return and does not do so on or before the due date of the return, Section 6651(a)(1) imposes a penalty of 5 percent of the net tax amount required to be shown on the tax return for each month (or fraction of a month) that the return is late. The maximum penalty is 25 percent. This penalty is increased to 15%, with a maximum of 75%, if the taxpayer's failure to file is fraudulent.

(4) Failure to Pay Tax Penalties (Sections 6651(a)(2) and 6651(a)(3)):

When a taxpayer fails to timely pay the amount of tax shown on the return, Section 6651(a)(2) imposes a late payment penalty equal to .5 percent of the late payment for

each month (or part of a month) that the payment is late. The maximum penalty is 25 percent.

When a taxpayer fails to pay a tax that is required to be (but was not) shown on a return within 21 days after the date of the Service's notice and demand for that tax, Section 6651(a)(3) imposes a penalty of .5 percent for each month (or part thereof) that the assessment remains unpaid. The maximum penalty is 25 percent.

(5) Accuracy- Related Penalty (Section 6662):

The accuracy-related penalty for underpayments is imposed at the rate of 20 percent on the portion of any underpayment of tax required to be shown on a return attributable to negligence, a substantial understatement of tax, a substantial overstatement of pension liabilities or a substantial estate or gift tax valuation understatement. The accuracy-related penalty with respect to a substantial valuation misstatement can be as high as 40 percent.

(6) Penalties for failure to file certain information returns (Sections 6035, 6038, 6038A, 6038B, 6038C, 6039F, 6046, 6046A, and 6048):

Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations. U.S. persons who are officers, directors, or shareholders in certain foreign corporations (including, for example, an International Business Corporation used in an offshore scheme) report information required by Sections **6035, 6038, and 6046**, and compute income from controlled foreign corporations under Sections 951–964. The penalty for failing to file each one of these information returns is $10,000, with an additional $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return.

Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business. Reports transactions between a 25% foreign-owned domestic corporation or a foreign corporation engaged in a trade or business in the United States and a related party as required by Sections **6038A and 6038C**. The penalty for failing to file each one of these information returns, or to keep certain records regarding reportable transactions, is $10,000, with an additional $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return.

Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation. Reports transfers of property to a foreign corporation and to report information under Section **6038B**. The penalty for failing to file each one of these information returns is ten percent of the value of the property transferred, up to a maximum of $100,000 per return, with no limit if the failure to report the transfer was intentional.

Form 3520, Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts. Reports various transactions involving foreign trusts, including creation of a foreign trust by a U.S. person, transfers of property from a U.S. person to a foreign trust, and receipt of distributions from foreign trusts under Section **6048.** This return also reports the receipt of gifts from foreign entities under Section **6039F.** The penalty for failing to file each one of these information returns, or for filing an incomplete return, is 35 percent of the gross reportable amount, except for returns reporting gifts, where the penalty is five percent of the gift per month, up to a maximum penalty of 25 percent of the gift.

Form 3520-A, Annual Information Return of Foreign Trust with a U.S. Owner. Reports ownership interests in foreign trusts, by U.S. persons with various interests in and powers over such trusts under Section **6048(b).** The penalty for failing to file each one of these information returns, or for filing an incomplete return, is five percent of the gross value of trust assets determined to be owned by the U.S. person.

Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships. U.S. persons with certain interests in foreign partnerships use this form to report interests in and transactions of the foreign partnerships, transfers of property to the foreign partnerships, and acquisitions, dispositions, and changes in foreign partnership interests under Sections **6038, 6038B, and 6046A**. Penalties include $10,000 for failure to file each return, with an additional $10,000 added for each month the failure continues beginning 90 days after the taxpayer is notified of the delinquency, up to a maximum of $50,000 per return, and ten percent of the value of any transferred property that is not reported, subject to a $100,000 limit.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

DEPUTY COMMISSIONER

March 23, 2009

MEMORANDUM FOR COMMISSIONER, LARGE AND MID-SIZE BUSINESS DIVISION
COMMISSIONER, SMALL BUSINESS/SELF-EMPLOYED DIVISION

FROM: Linda E. Stiff
Deputy Commissioner for Services and Enforcement

SUBJECT: Authorization to Apply Penalty Framework to Voluntary Disclosure Requests Regarding Unreported Offshore Accounts and Entities

The purpose of this memorandum is to set forth a penalty framework to be applied to voluntary disclosure requests containing offshore issues. The outlined framework will be applied to all such requests that have been submitted to the IRS and are not yet resolved, and will remain in effect for six months from the date of this memorandum. All voluntary disclosure requests are mandatory work.

As Criminal Investigation (CI) makes preliminary determinations that taxpayers are eligible to make voluntary disclosures, it will forward voluntary disclosure requests with offshore implications to the Philadelphia Offshore Identification Unit (POIU) for civil processing. Those requests will be distributed to and worked by examiners who specialize in offshore examinations. All resulting closing agreements will be reviewed and executed as prescribed by existing delegation orders.

Effective as of the date of this memorandum, you are authorized to execute agreements to resolve the tax liabilities related to offshore issues of taxpayers who make voluntary disclosure requests in the following manner:

(1) Assess all taxes and interest due going back six years (exception: where an account/entity was formed or acquired within the six year look back period, taxes and interest will be assessed starting with the earliest year in which an account was opened/acquired or entity formed). Require the taxpayer to file or amend all returns, including information returns and Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, commonly known as an "FBAR",

(2) Assess either an accuracy or delinquency penalty on all years (no reasonable cause exception may be applied), and

(3) In lieu of all other penalties that may apply, including FBAR and information return penalties, assess a penalty equal to 20% of the amount in foreign bank accounts/entities in the year with the highest aggregate account/asset value.

If, (a) the taxpayer did not open or cause any accounts to be opened or entities formed, (b) there has been no activity in any account or entity (no deposits, withdrawals, etc.) during the period the account/entity was controlled by the taxpayer, and (c) all applicable U.S. taxes have been paid on the funds in the accounts/entities (where only account/entity earnings have escaped U.S. taxation), then the penalty in (3) is reduced to 5%.

The terms outlined herein are only applicable to taxpayers that make voluntary disclosure requests, and who fully cooperate with the IRS, both civilly and criminally.

cc: Acting Chief Counsel
Senior Advisor to the Commissioner
Commissioner, Tax Exempt and Government Entities
Chief, Criminal Investigation

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, D.C. 20224

Small Business/Self-Employed Division
Large and Mid-Size Business Division
Criminal Investigation Division

March 23, 2009

MEMORANDUM FOR SBSE EXAMINATION AREA DIRECTORS
LMSB INDUSTRY DIRECTORS
CI DIRECTORS OF FIELD OPERATIONS

FROM: Faris R. Fink
Deputy Commissioner, SBSE

Barry B. Shott
Deputy Commissioner, LMSB International

Victor Song
Deputy Chief, Criminal Investigation

SUBJECT: Routing of Voluntary Disclosure Cases

The purpose of this memorandum is to alert you to a change in the processing of voluntary disclosure requests containing offshore issues. All voluntary disclosure requests are mandatory work.

All incoming voluntary disclosure requests will continue to initially be screened by Criminal Investigation (CI) to determine if the taxpayer is eligible to make a voluntary disclosure. Refer to IRM 9.5.11.9 for questions pertaining to taxpayer eligibility. For voluntary disclosure requests containing only domestic issues, where CI has preliminarily determined taxpayer eligibility, CI will continue to forward those requests to the appropriate Area/Industry PSP for civil processing.

Effective as of the date of this memorandum, voluntary disclosure requests containing offshore issues, where CI has preliminarily determined taxpayer eligibility, will now be forwarded by CI to the Philadelphia Offshore Identification Unit (POIU) for civil processing. Additionally, any voluntary disclosures with offshore issues that are currently in Area/Industry case inventories (whether or not there has been prior taxpayer contact by SBSE or LMSB) should also be forwarded to the POIU.

The address for the POIU follows:

Internal Revenue Service
11501 Roosevelt Blvd.
South Bldg., Room 2002
Philadelphia, PA 19154
Attn: Charlie Judge, Offshore Unit, DP S-611