



Chief Counsel

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Offshore Compliance Options including OVDP and the Streamlined Filing Compliance Procedures

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Objectives

- Broadly summarize Offshore Compliance Options Available to U.S. Taxpayers
- Describe the Offshore Voluntary Disclosure Program (OVDP)
- Describe the Streamlined Filing Compliance Procedures and the key differences between Streamlined Domestic Offshore (SDO) and Streamlined Foreign Offshore (SFO)
- Briefly highlight delinquent FBAR filing procedures and delinquent international information return filing procedures



Four Offshore Compliance Options

1. OVDP
 - Transition Streamlined
2. Streamlined Filing Compliance Procedures
 - Streamlined Foreign Offshore
 - Streamlined Domestic Offshore
3. Delinquent FBAR Submission Procedures
4. Delinquent International Information Return Submission Procedures

Reference: Options Available for U.S. Taxpayers with Undisclosed Foreign Financial Assets on IRS.gov



Offshore Compliance Options on IRS.gov

The screenshot shows the IRS website interface. At the top left is the IRS logo. To the right are links for 'Subscriptions' and 'Language', and a search bar. Below these are navigation tabs: 'Filing', 'Payments', 'Refunds', 'Credits & Deductions', 'News & Events', 'Forms & Pubs', and 'Help & Resources'. On the left side, there is a vertical menu with categories: 'Employees', 'Self-Employed', 'International Taxpayers' (highlighted), 'Military', 'Parents', 'Seniors & Retirees', and 'Students'. The main content area features the title 'Options Available For U.S. Taxpayers with Undisclosed Foreign Financial Assets' with icons for heart, share, and print. The text explains that FATCA implementation has raised awareness of U.S. tax and information reporting obligations for non-U.S. investments. It lists four options for addressing previous failures to comply: 1. [Offshore Voluntary Disclosure Program](#); 2. [Streamlined Filing Compliance Procedures](#); 3. [Delinquent FBAR submission procedures](#); and 4. [Delinquent international information return submission procedures](#). A note at the bottom states that each option is explained below and encourages consulting with a professional. The page is dated 'Page Last Reviewed or Updated: 14-May-2015'.



Statistics

- OVDP
 - Over 54,000 OVDP disclosures
 - Over \$8 billion collected
- Streamlined
 - More than 30,000 taxpayers made submissions since 2012
 - About 2/3 since expanded criteria in June 2014

Source of statistics- IR-2015-116 (10/16/2015)



OVDP – Key terms for all programs

- Preclearance through CI (not required)
- Amended/delinquent returns for disclosure period
 - Pass on criminal prosecution
 - Pay back taxes, accuracy-related penalty and/or delinquency penalties, and miscellaneous offshore penalty (MOP)
- IRS “certifies” the submission
 - Less than an examination
 - Review of amended returns
 - Review financial records
 - Verify FBAR reporting
 - Taxpayer cooperation essential



OVDP – Key terms for all programs

- Miscellaneous Offshore Penalty (MOP)
 - Determine Highest Aggregate Balance (HAB)
 - All assets related to tax noncompliance
 - Compute the MOP based on HAB (MOP % x \$ in HAB)
- Close case with Form 906 Closing Agreement
 - Identifies offshore income
 - Includes accuracy-related or delinquency penalties
 - Applies MOP to specific year

Summary of OVDP Evolution

	2009 Offshore Voluntary Disclosure Program	2011 Offshore Voluntary Disclosure Initiative	2012 Offshore Voluntary Disclosure Program	Modified 2012 Offshore Voluntary Disclosure Program
CI protection	Yes	Yes	Yes	Yes
Information required for preclearance by CI	Name, address, date of birth, and TIN	Name, address, date of birth, and TIN	Name, address, date of birth, and TIN	Name, address, date of birth, TIN, telephone number, identifying information of all financial institutions at which undisclosed accounts were held, and identifying information of all foreign and domestic entities (e.g., corporations, partnerships, LLCs, trusts, foundations) through which undisclosed accounts were held
Penalty terms	Miscellaneous Title 26 offshore penalty of 20% in lieu of other applicable penalties	Miscellaneous Title 26 offshore penalty of 25% in lieu of other applicable penalties Reduced penalty of 5% offered to taxpayers meeting certain criteria deemed to be non-willful conduct Reduced penalty of 12.5% for taxpayers with accounts with balances below \$75,000	Miscellaneous Title 26 offshore penalty of 27.5% in lieu of other applicable penalties Reduced penalty of 5% offered to taxpayers meeting certain criteria deemed to be non-willful conduct Reduced penalty of 12.5% for taxpayers with accounts with balances below \$75,000	Miscellaneous Title 26 offshore penalty of 27.5% in lieu of other applicable penalties The miscellaneous offshore penalty increases to 50% if the taxpayer has or had an undisclosed foreign financial account held at a foreign financial institution or if the account was established with the help of a facilitator where the institution or facilitator has been publicly identified as being under investigation or cooperating with a government investigation.
Covered period	6 years	8 years	8 years	8 years
Closing agreement	Yes	Yes	Yes	Yes
Relief for taxpayers who did not timely elect to defer U.S. income tax on undistributed income earned by certain registered Canadian retirement and savings plans	No	No	Yes	Yes

are used or cited as precedent.



2014 OVDP Key Modifications

- Increase information required for preclearance (FAQ 23)
- 50% offshore penalty in connection with public disclosures (FAQ 7.2)
 - Accounts with foreign financial institutions
 - Account established or maintained by a facilitator
- Eliminate the existing reduced penalty categories for certain non-willful taxpayers (FAQs 52 and 53)
- Payment of the offshore penalty at the time of the OVDP submission (FAQ 7)

Reference FAQ 1.1 for all significant changes to the 2012 OVDP.



2014 OVDP Key Modifications (cont.)

- Submit all account statements (voluminous account records may be provided on a CD) (FAQs 25 and 25.2)
- Changes to asset base and elimination of valuation discounts (FAQs 31 through 41)
- Emphasizes that protection from criminal prosecution is contingent on cooperation through the end of the process



Opt Out and Removal

- Statute extensions requested with OVDP submission in the event of opt out/removal - (FAQs 25 and 43)
- Cases that cannot be resolved in OVDP with a Form 906 (FAQ 51)
 - Opt Out - Taxpayer's choice
 - Removal - Service's choice
 - Procedures in place – see Opt Out and Removal Guide (link to guide is embedded in FAQ 51)



OVDP – Other Topics

- DOJ's Swiss Bank Program
 - 78 non-prosecution agreements with Swiss Banks
 - <https://www.justice.gov/tax/swiss-bank-program>
 - Swiss Bank Program yielded client-specific information from banks
 - IRS will leverage information for compliance efforts
- Recent additions to FAQ 7.2
- Cross-checking OVDP FAQ 23 preclearance requests
 - Follow through or lack thereof after preclearance requests may identify taxpayers with compliance issues



OVDP and Collection

- Program requires full payment of tax, interest and penalties including MOP (FAQ 7)
- Raise inability to full pay early in process (FAQ 20)
 - Form 433-A/B required
 - Propose payment arrangement with Collection's concurrence
 - Burden on taxpayer to establish inability to full pay
 - Filing bankruptcy before certification process may derail certification process



OVDP and Foreign Pension Issues

- If a practitioner takes the perspective that a foreign pension other than a Canadian RRSP/RRIF is excluded from the OVDP penalty base, provide the legal position with the OVDP submission



How do taxpayers handle mistakes made in earlier OVDP submissions?

- Request supplemental disclosure through current OVDP
 - Option 1: Provide new disclosure directly to CI
 - Option 2: Contact examiner who handled original disclosure, provide facts and any requested documents, and examiner will obtain program management concurrence



Reasons for 2014 Streamlined

- OVDP penalty structure was harsh for certain taxpayers
- Taxpayers who disagreed with penalty structure were:
 - Filing “quiet disclosures”
 - Entering OVDP then opting out
 - Remaining non-compliant
- 2012 Streamlined had narrow eligibility requirements
- 2014 Streamlined modifications greatly expanded eligibility



Modifications to Streamlined

“Our goal is to ensure we have struck the right balance between emphasis on aggressive enforcement and focus on the law-abiding instincts of most U.S. citizens who, given the proper chance, will voluntarily come into compliance and willingly remedy past mistakes.”

“We are considering whether our voluntary programs have been too focused on those willfully evading their tax obligations and are not accommodating enough to others who don’t necessarily need protection from criminal prosecution because their compliance failures have been of the non-willful variety.”

(Commissioner Koskinen, 6/18/14 , Quote from U.S. Council for Int’l Business – OECD Int’l Tax Conference)



Streamlined Procedures Eligibility

- U.S. Individuals and estates only
- Failed to report foreign financial assets or pay all tax due in respect of those assets
- Able to certify failures are related to non-willful conduct
- Not currently under IRS examination or criminal investigation
- Have a valid Taxpayer Identification Number



SSN/TIN required for submissions

If a taxpayer is not eligible for a Social Security Number (SSN) and does not already have an ITIN:

- Submit an application for an ITIN along with the required tax returns, information returns, and other documents filed under these Streamlined Procedures.
- Search “ITIN” on www.irs.gov for more information.

If a taxpayer is eligible for an SSN and does not have one, first obtain an SSN before making a submission under the Streamlined Procedures. If a taxpayer eligible for an SSN makes a Streamlined Submission without an SSN, the return will be processed subject to penalties applicable outside of the Streamlined Procedures.



Certifications for 2014 Streamlined

- Form 14654 – SDO
 - Requires foreign financial asset information for 6 year period
 - Includes computation of MOP
- Form 14653 – SFO
- Forms have been revised several times in the last 2 years
 - Feb. 2016: revision emphasize that taxpayers MUST include narrative statement of facts and provide guidance on providing a complete narrative
 - Latest version - June 2016



Certifications required on Forms 14653 and 14654

Both forms require taxpayers to agree to terms and represent certain facts:

- Retaining records for 6 years and providing records upon request
- Representing that failures were due to non-willful conduct
- Acknowledging possibility of examination



Definition of “Non-Willful” for Streamlined Procedures

“Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.”

- Based on facts and circumstances of each case
- No one fact controls analysis
- Press coverage includes 2014 TNT 212-7, document 2014-26106 (11/3/2014)



Statement of Facts for Non-Willful Certifications

- Written statement signed under penalties of perjury
- Certifying non-willful conduct with respect to all foreign activities and assets
- Provide reasons for the income and information reporting failures
- Specifically identify professional advisor and advice relied upon



Explaining Non-Willful Conduct

SFO FAQ #6 and SDO FAQ #13 provide guidance

- Provide specific reasons and background
- Include the whole story including favorable and unfavorable facts
- Explain the source of funds in all foreign financial accounts/assets
- Explain contacts with the account/asset including withdrawals, deposits, and investment/management decisions



Explaining Non-Willful Conduct (cont'd)

- What if I checked no on Schedule B?
- What if I owned or controlled a foreign entity?

You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.		Yes	No
Part III Foreign Accounts and Trusts (See instructions on back.)	7a At any time during 2015, did you have a financial interest in or signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions		
	If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements		
	b If you are required to file FinCEN Form 114, enter the name of the foreign country where the financial account is located ► 		
	8 During 2015, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See instructions on back		



SFO vs. SDO

SFO – Streamlined Foreign Offshore

- Meet non-residency requirement
- Provide delinquent or amended income tax returns (Form 1040/1041)
- Forms 1040NR are not accepted
- No penalties

SDO – Streamlined Domestic Offshore

- Do not meet SFO residency requirements
- Must have filed income tax returns before submitting amended returns through procedures
- 5% penalty on assets reportable on FBAR/F. 8938
(explained infra)



SFO Non-Residency Requirements

Individuals who are U.S. citizens or lawful permanent residents

- In any one or more of the most recent three years
 - Not have a U.S. abode and
 - Physically outside the United States for at least 330 full days
- Both taxpayers on joint return must meet residency requirements
- Snowbird Issue– some taxpayers fail SFO if present in US more than 35 days/year but cannot use SDO because they did not file income tax returns



SDO Miscellaneous Offshore Penalty

5% Title 26 miscellaneous offshore penalty applied to assets:

- in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year
- in the covered tax return period if the asset should have been, but was not, reported on a Form 8938 for that year
- in the covered tax return period if the asset was properly reported for that year, but gross income in respect of the asset was not reported in that year

See SDO FAQ 6

Year end account/asset values are used to aggregate assets

Exceptions for assets:

- Accounts with no financial interest are excluded (e.g. mere signature authority)- see SDO FAQ 1
- Canadian RRSP/RRIF accounts – see SDO FAQ 8



SFO Hypothetical

Mr. Smith was born in the United States but moved to Canada with his parents when he was five years old, lived there ever since, and does not have a U.S. abode. Assume Mr. Smith meets the non-residency requirement applicable to individuals who are U.S. citizens or lawful permanent residents.

Can Mr. Smith use Streamlined SFO? If so, what should he submit?



SDO Hypothetical

Acct #1 - tax non-compliant

Acct #2 – tax compliant

Rental Property – tax non-compliant

Land – tax compliant

Assume:

TP failed to file all
FBARs/F8938s

	2008	2009	2010	2011	2012	2013
For. Bank Acct #1	1,400,000	1,850,000	1,400,000	1,500,000	1,900,000	2,050,000
For. Bank Acct #2	200,000	200,000	200,000	200,000	200,000	200,000
Total	<u>1,600,000</u>	<u>2,050,000</u>	<u>1,000,000</u>	<u>1,700,000</u>	<u>2,100,000</u>	<u>2,250,000</u>

HAB Year: 2013

MOP Penalty: \$112,500 ($\$2,250,000 \times 5\%$)

Streamlined looks at FFAs for last 6 years FBAR and 3 years income tax/F8938

Not to be used or cited as precedent.



OVDP and Streamlined Refinements

- **FAQs**
 - Refined, modified, new FAQs added based on feedback from stakeholders
- **Form changes and new forms (e.g., Form 14708)**



FAQs for Streamlined and Delinquent Return Procedures

- Initial Streamlined FAQs released on 10/8/14, additional FAQs released 7/16/15 and 1/7/16
- Key FAQs for SDO
 - FAQ 1: Assets included in penalty base
 - Assets in which taxpayer had no financial interest are not included in penalty base
 - FAQ 4: Valuing entities
 - Disregarded entities- look through to the underlying financial accounts
 - Corporations- use stock value (no discounts per FAQ 5)
 - FAQ 7: Allows recently compliant taxpayers (2013, 2012, 2011) to enter Streamlined and pay 5% for earlier years
 - Recurring pattern for certain Swiss account holders



FAQs (cont'd)

- SFO FAQ 7 and SDO FAQ 14 provide a procedure for a joint filer to make an individual Streamlined submission
 - Joint amended income tax returns with only one signature
 - Amended income tax returns must reflect increase in tax
 - Explain circumstances
 - Write “SFO FAQ 7” or “SDO FAQ 14” in red ink on amended returns and certification form



Streamlined FAQs (cont'd)

- SFO FAQ 9 and SDO FAQ 16 provide a procedure for correcting mistakes in earlier Streamlined submissions
 - Explain all facts and circumstances concerning the error in the original Streamlined submission
 - Opportunity to self-correct before IRS identifies issue and initiates examination
 - On certification form write “amended” in red ink
 - On tax returns write “Amended Streamlined Domestic Offshore” or “Amended Streamlined Foreign Offshore”



Rev. Proc. 2014-55

Certain Canadian Retirement Plans

- Rev. Proc. 2014-55 provides procedures for Canadian retirement plans
 - Deemed treaty election for eligible taxpayers
 - Form 8891 obsolete
 - FBARs and Form 8938 still required
- 2014 OVDP and Streamlined FAQs take into account Rev. Proc. 2014-55
 - SDO FAQ 12 addresses reconsideration process for SDO submissions that paid MOP on RRSP accounts
 - Form 14708



Streamlined – Post Submission

- Unlike OVDP, Streamlined Procedures cases do not involve Service personnel certifying submissions and do not culminate in a closing agreement
- Streamlined Procedures attempt to normalize return processing
 - Returns are processed by Submission Processing
 - Returns may be selected for examination



Trending Problems Observed with Streamlined Submissions

- Insufficient narrative statement of fact
 - Provide a complete story
 - See SFO FAQ 6 and SDO FAQ 13 for guidance
- OVDP MTM PFIC computation used for Streamlined submissions
- Filing Forms 1040NR



Trending Problems (cont'd)

- Related parties selecting different compliance paths (OVDP and Streamlined) attempting to allocate ownership of asset
 - Example of impermissible allocation: Father, Brother, and Sister all have signature authority over same Swiss bank account. Bank account has \$1,000,000 balance for all years. Father enters OVDP and claims he's 50% owner of account, paying MOP at rate of 27.5% on \$500,000. Brother and Sister make SDO submissions, each paying SDO MOP at rate of 5% on \$250,000 each.



Trending Problems (cont'd)

- Mistakes with SDO penalty base

“A foreign financial asset is subject to the 5-percent miscellaneous offshore penalty in a given year in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year. A foreign financial asset is subject to the 5-percent miscellaneous offshore penalty in a given year in the covered tax return period if the asset should have been, but was not, reported on a Form 8938 for that year. A foreign financial asset is also subject to the 5-percent miscellaneous offshore penalty in a given year in the covered tax return period if the asset was properly reported for that year, but gross income in respect of the asset was not reported in that year.”
quote from <https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-in-the-united-states>



Trending Problems – Mistakes with SDO Penalty (cont'd)

- Submissions that fail to include in the SDO penalty base foreign financial assets that were not reported on FBARs but were tax compliant
 - Some representatives are pointing out their creativity with footnotes
 - Other representatives do not make their creativity clear and later argue including tax compliant accounts in SDO penalty base is “unfair”



Trending Problems – Mistakes with SDO Penalty (cont'd)

- Failure to include assets in the penalty base may result in
 - IRS reversing beneficial penalty provisions of procedures
 - Examination
- What should a representative do if an asset was omitted from the SDO penalty base?
 - Follow the procedures in SDO FAQ 14 to provide an amended certification



Recurring Practitioner Question about Non-willful Certifications

Question: Does feedback on non-willful certifications for OVDP Transition Streamlined requests indicate how the Service reviews non-willful certifications for new Streamlined submissions?

Answer: The review of non-willful certifications in OVDP Transition Streamlined cases is different from the review of new Streamlined submissions.



Delinquent FBAR Procedures

- File all FBARs electronically with FinCEN
 - <http://bsae filing.fincen.treas.gov/main.html>
 - BSA e-filing system offers an instruction booklet that provides line by line instructions for filing FBARs
- On cover page select reason for filing late
- Include statement explaining why filing late



May 13, 2015 FBAR Interim Guidance

- Interim guidance discusses general approach for FBAR penalties
- Penalties are “based on the facts and circumstances of each case”
- Attachment 1, heading (2) “Penalty for Willful Violations”
 - “In most cases the total penalty ... will be limited to 50 percent of the highest aggregate balance...”
 - “Examiners may recommend a penalty that is higher or lower than 50 percent of the highest aggregate account balance ... In no event will the total penalty amount exceed 100 percent of the highest aggregate balance... .”
- Highest aggregate balance occurs on any day during the reporting year



May 13, 2015 FBAR Interim Guidance

- Attachment 1, heading (3) “ Penalty Amount for Nonwillful Violations”
 - “For most cases involving multiple nonwillful violations, examiners will recommend one penalty for each open year ... and the penalty for each year will be limited to \$10,000.”
 - “In no event will the total amount of the penalties for nonwillful violations exceed 50 percent of the highest aggregate balance of all unreported foreign financial accounts... .”
- See 2014 OVDP FAQ 50.1 for application to OVDP FAQ 50 analysis



Delinquent Information Return Procedures

Taxpayers who:

- have not filed required international information returns,
- have reasonable cause,
- are not under civil examination/criminal investigation, and
- have not been contacted about the delinquent information returns

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

- Normalizes handling delinquent information returns
- Penalties may be imposed if the Service does not accept the explanation of reasonable cause

Summary of Offshore Compliance Options

	Offshore Voluntary Disclosure Program	Streamlined Filing Compliance Procedures		Delinquent FBAR Procedure	Delinquent International Information Return Procedure
		U.S. Persons Living Outside the United States	U.S. Persons Living Inside the United States		
Taxpayers for whom the compliance option is designed	Bad actors	Persons living outside the United States who were not aware of their U.S. tax obligations	Non-willful actors	Persons not seeking treatment under OVDP or Streamlined Procedures but who failed to file FBARs	Persons not seeking treatment under OVDP or Streamlined Procedures but who failed to file international information returns
Penalty terms	Miscellaneous Title 26 offshore penalty of 27.5% in lieu of other applicable penalties	No Penalties	Miscellaneous Title 26 offshore penalty of 5% in lieu of other applicable penalties	No automatic penalties; taxpayer provides statement of why late	No automatic penalties; taxpayer provides statement of reasonable cause
Covered period	8 years	3 years for income tax returns; 6 years for FBARs	3 years for income tax returns; 6 years for FBARs	Up to taxpayer	Up to taxpayer
CI protection	Yes	No	No	No	No
Closing agreement	Yes to be used or cited as precedent.	No	No	No	No



OVDP and Streamlined Resources

- IRS.gov
 - <http://www.irs.gov/Individuals/International-Taxpayers/Options-Available-For-U-S--Taxpayers-with-Undisclosed-Foreign-Financial-Assets>
- FAQs
- OVDP and Streamlined Hotline
267-466-0020 (new phone number)



FBAR Resources

FinCEN website:

www.FinCEN.gov

• FinCEN Resource Center:

1-800-767-2825 or (703) 905-3591

FRC@fincen.gov



Webinar Resources

- Webinar on filing FBARs (June 4, 2014)
 - <http://www.irsvideos.gov/ElectronicFBAR/>
- Webinar on Streamlined Filing Compliance Procedures (May 11, 2016)
 - <https://www.webcaster4.com/Webcast/Page/490/14723>
 - If link does not work, email Dean Burke at Dean.C.Burke@irs.gov for more information
- Webinar on “Overseas Filings for US Taxpayers” covering filing requirements, claiming the Foreign Earned Income Exclusion and Foreign Tax Credit, and foreign financial account reporting requirements (May 25, 2016)
 - <https://www.webcaster4.com/Webcast/Page/490/14725>



Questions from Audience