

IRS Issues New Form 14457 and Instructions About Its Comprehensive Domestic and International Voluntary Disclosure Program: Analyzing Key Aspects

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I. Introduction

International tax enforcement has garnered significant attention in recent years, but taxpayers have domestic problems, too. The Internal Revenue Service (“IRS”) announced a comprehensive program in November 2018, which outlined a manner for taxpayers, both entities and individuals, to rectify essentially all types of tax issues on favorable terms. The program, referred to here as the updated voluntary disclosure practice (“UVDP”), was positive in theory, but it lacked initial implementation.¹ Fortunately, the IRS recently issued, in April 2020, the new Form 14457 (*Voluntary Disclosure Practice Preclearance Request and Application*), along with corresponding Instructions. While some issues remain ambiguous, this new IRS guidance clarifies many items and provides a path for taxpayers to pro-actively resolve foreign and/or domestic noncompliance of all varieties.

This article identifies the U.S. tax and information-reporting duties triggered by holding foreign assets, explains several different disclosure programs currently offered by the IRS, reviews the original guidance from the IRS upon announcing the UVDP back in 2018, and analyzes important information added by the IRS in 2020.



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II. Background on International Tax Issues

In order to appreciate the methods by which taxpayers can pro-actively resolve global issues with the IRS on favorable terms, one must first understand basic

international tax and information-reporting duties, as well as a long list of downsides for shirking them.

A. Tax and Disclosure Duties

U.S. citizens and residents have several obligations when they decide to hold a foreign financial account, including, but not limited to, the following:

- They must check the “yes” box on Schedule B (Interest and Ordinary Dividends) to Form 1040 (*U.S. Individual Income Tax Return*) to disclose the existence of the foreign account;
- They must identify the foreign country in which the account is located, also on Schedule B to Form 1040;
- They must declare all income on Form 1040 before depositing it into the foreign account, as well as all passive income later generated by the account, such as interest, dividends, and capital gains;
- They generally must report the account on Form 8938 (*Statement of Specified Foreign Financial Assets*), which is enclosed with Form 1040;
- If the foreign account holds mutual funds, they ordinarily must enclose a Form 8621 (*Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*) with Form 1040;
- In situations where the foreign account is held indirectly by individual taxpayers through a foreign corporation, then they likely need to file Form 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*) and Form 926 (*Return by a U.S. Transferor of Property to a Foreign Corporation*);
- In cases where the foreign account is held through a foreign trust instead, they normally must file a Form 3520 (*Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*) and/or Form 3520-A (*Annual Information Return of Foreign Trust with a U.S. Owner*); and
- They must electronically file a FinCEN Form 114 (*Report of Foreign Bank and Financial Accounts*) (“FBAR”).²

B. Multiple Financial Penalties

Many articles focus on the severity of civil penalties for international non-compliance. That level of detail is unnecessary here. Suffice it to summarize, below, some of the most common punishments imposed by the IRS.

First, taxpayers omitting income from foreign activities and assets often face large U.S. tax liabilities, as well

as significant penalties related directly to the tax underpayments. Examples include negligence penalties equal to 20 percent of the tax debt to the IRS, penalties rising to 40 percent in situations involving undisclosed foreign financial assets, and penalties reaching 75 percent where the IRS can prove civil fraud.³ Taxpayers are also stuck with large interest charges, on both the tax liabilities and penalties.⁴

Second, taxpayers are often overwhelmed by large sanctions for unfiled FBARs. Congress was concerned about widespread FBAR non-compliance for many years; therefore, it enacted stringent penalty provisions in 2004 as part of the American Jobs Creation Act (“Jobs Act”).⁵ Under the law in existence *before* the Jobs Act, the IRS could only assert penalties where it could demonstrate that taxpayers “willfully” violated the FBAR rules.⁶ If the IRS managed to satisfy this high standard, it could impose a relatively small penalty, ranging from just \$25,000 to \$100,000, regardless of the size of the hidden accounts.⁷ Thanks to the Jobs Act, the IRS may now assert a penalty on any person who fails to file a required FBAR, period.⁸ In the case of non-willful violations, the maximum penalty is \$10,000 per incident.⁹ The Jobs Act calls for higher penalties where willfulness exists. Specifically, when a taxpayer willfully fails to file an FBAR, the IRS may assert a penalty of \$100,000 or 50 percent of the balance in the undisclosed account at the time of the violation, whichever amount is larger.¹⁰ Given the multi-million dollar balances in many unreported accounts, given that the IRS can assert a penalty worth 50 percent of the account for every single year that the violation occurs, and given that the IRS can impose both civil and criminal penalties for the same infraction, FBAR penalties can be enormous.¹¹

Third, if a taxpayer fails to file Form 8938 in a timely manner, then the IRS generally will assert a penalty of \$10,000 per violation.¹² The penalty increases to a maximum of \$50,000 if the taxpayer does not rectify the problem quickly after contact from the IRS.¹³

Fourth, additional penalties apply when foreign trusts are involved. Form 3520 must be filed in various circumstances. For instance, a “responsible party” generally must file a Form 3520 within 90 days of certain “reportable events,” such as the creation of a foreign trust by a U.S. person, the transfer of money or other property (directly or indirectly or constructively) to a foreign trust by a U.S. person, and the death of a U.S. person, if the decedent was treated as the “owner” of any portion of the trust under the grantor trust rules, or if any portion was included in the gross estate of the decedent.¹⁴ A U.S.

person also must file a Form 3520 if he receives during a year (directly or indirectly or constructively) any distribution from a foreign trust.¹⁵ The penalty for not filing a Form 3520 is \$10,000 or 35 percent of the so-called “gross reportable amount,” whichever is larger.¹⁶ A Form 3520-A normally must be filed if, at any time during the relevant year, a U.S. person is treated as the “owner” of any portion of the foreign trust under the grantor trust rules.¹⁷ The normal penalty for Form 3520-A violations is the higher of \$10,000 or five percent of the “gross reportable amount.”¹⁸

Fifth, holding an interest in a foreign corporation triggers more complications and potential penalties. Several categories of U.S. persons who are officers, directors, and/or shareholders of certain foreign corporations ordinarily must file a Form 5471 with the IRS.¹⁹ If a person neglects to do so, then the IRS may assert a penalty of \$10,000 per violation, per year.²⁰ This standard penalty increases at a rate of \$10,000 per month, to a maximum of \$50,000, if the problem persists after notification by the IRS.²¹

The penalties described above can be significant, even when considered separately. They can become untenable, though, when the IRS decides to “stack” the penalties, asserting multiple penalties in connection with the same unreported foreign assets or activities. A District Court recently held that “stacking” certain penalties did not violate applicable law or the constitution.²²

C. Endless Assessment Periods

It is important to note that failure to timely file nearly all international information returns (except the FBAR) not only triggers penalties, but also gives the IRS an unlimited period of time to audit the Form 1040 to which the information returns should have been attached, and then assess additional taxes, penalties, and interest. A relatively obscure procedural provision, Code Sec. 6501(c)(8)(A), contains a powerful tool for the IRS. It states that, where a taxpayer does not properly file a long list of international information returns, the assessment-period remains open “with respect to any tax return, event, or period” to which the information returns relate, until three years after the taxpayer ultimately files the information returns.²³ Consequently, if a taxpayer never files, say, a Form 8938 to reveal his interest in foreign financial assets, then the assessment-period never begins to run against the IRS. This obligates taxpayers with undisclosed foreign assets to act, because keeping a low profile and allowing the clock to run out is no longer a realistic option.

III. Current Disclosure Programs Offered by the IRS

The IRS has introduced several programs to address different types of taxpayer non-compliance, both domestic and international. A comprehensive review of all disclosure programs could fill volumes and lull readers to sleep. Therefore, this article solely focuses on the programs in existence as of mid-2020.

A. International Programs Available

Taxpayers, after learning of their international duties and the consequences of noncompliance described above, often start exploring ways to resolve issues with the least amount of pain. As of the writing of this article, the options consist of participating in the Streamline Foreign Offshore Procedure (“SFOP”), Streamline Domestic Offshore Procedure (“SDOP”), Delinquent International Information Return Submission Procedures (“DIIRSP”), or Delinquent FBAR Submission Procedure (“DFSP”). These four programs, all introduced in 2014, share certain characteristics, but they differ in important ways.²⁴

1. SFOP

In order to be eligible for the SFOP, a taxpayer (who is a U.S. citizen or Green Card holder) must meet the following criteria: (i) he was physically outside the United States for at least 330 days in one or more of the past three years; (ii) he did not have an “abode” in the United States during the relevant year; (iii) he either did not file annual Forms 1040 with the IRS or filed annual Forms 1040 that did not properly report all income from everywhere in the world; (iv) he might have also failed to file proper international information returns; (v) the violations were the result of “non-willful” conduct; (vi) neither the IRS nor the DOJ has initiated a civil examination or criminal investigation of the taxpayer or a related party; and (vii) the taxpayer is an individual (or the estate of an individual), because the SFOP is not open to entities. Under the SFOP, taxpayers are only required to file Forms 1040 or Forms 1040X for the past three years, international information returns for the past three years, and FBARs for the past six years. The taxpayer must pay all tax liabilities and interest charges stemming from the Forms 1040 or Forms 1040X, but the IRS does not impose any penalties whatsoever on taxpayers who successfully resolve matters through the SFOP.

2. SDOP

The SDOP is similar to the SFOP, with three critical distinctions. First, participants in the SDOP do not satisfy the foreign-residency requirement; that is, they spent too much time in the United States. Second, they must have filed timely Forms 1040 with the IRS each year, but neglected to report all worldwide income and/or enclose all required international information returns. Finally, if taxpayers are accepted into the SDOP, the IRS does not waive all penalties, imposing instead a so-called “off-shore” penalty equal to five percent of the highest total value of all non-compliant assets during the relevant six-year period.

3. DIIRSP

The DIIRSP provides that taxpayers who/which have not filed one or more international information returns can file them, on a penalty-free basis, if the taxpayers (i) previously filed U.S. tax returns each year, reporting all income, (ii) have “reasonable cause” for not timely filing the information returns, (iii) are not under a civil examination or a criminal investigation by the IRS or DOJ, and (iv) have not already been contacted by the IRS about the delinquent information returns. The guidance that the IRS later issued about the DIIRSP, in the form of Frequently Asked Questions (“FAQs”), relaxed the eligibility criteria somewhat. FAQ #1 expressly states that the existence of unreported income in earlier years does *not* necessarily exclude a taxpayer from the DIIRSP:

FAQ #1—QUESTION. Are the Delinquent International Information Return Submission Procedures announced on June 18, 2014 different from the [previous] procedures?

FAQ #1—ANSWER. Yes. The IRS eliminated 2012 OVDP FAQ 18, which gave automatic penalty relief, *but was only available to taxpayers who were fully tax compliant.* The Delinquent International Information Return Submission Procedures clarify how taxpayers may file delinquent international information returns in cases where there was reasonable cause for the delinquency. *Taxpayers who have unreported income or unpaid tax are not precluded from filing delinquent international information returns*

4. DFSP

The DFSP is geared toward taxpayers who/which previously filed timely U.S. tax returns each year reporting

all worldwide income (including income generated by foreign accounts), yet neglected to file annual FBARs. The DFSP allows such taxpayers to rectify FBAR issues without incurring any penalties. The rationale here is that taxpayers willfully hiding foreign accounts do not report income from such accounts on their annual U.S. tax returns and pay the resulting taxes.

B. General Programs Available

The four programs described above solely pertain to situations where a taxpayer has noncompliance related to *foreign* income or assets. However, two programs exist that permit taxpayers to rectify foreign and/or domestic matters.

1. Quiet Disclosure Process

The IRS has warned taxpayers since it began introducing its recent wave of voluntary disclosure programs back in 2009 *not* to circumvent such programs by making a so-called “quiet disclosure.” This essentially means taxpayers pro-actively resolving issues with the IRS by filing amended tax returns and/or information returns, without officially participating in a recognized disclosure program, with hopes that the IRS will process the returns in the regular course, not start an audit, and not impose penalties. The IRS repeatedly announced that it planned to identify and harshly sanction attempted “quiet disclosures.”²⁵

With the recent introduction of the UVDP, though, the IRS completely changed course, telling taxpayers that it is acceptable to make a “quiet disclosure,” provided that there is no risk of criminality.²⁶ The IRS stated the following in this regard:

Voluntary disclosure is a long-standing practice of the IRS to provide taxpayers with criminal exposure a means to come into compliance with the law and potentially avoid criminal prosecution ... This memorandum [announcing the UVDP] updates that voluntary disclosure practice. *Taxpayers who did not commit any tax or tax related crimes and do not need the voluntary disclosure practice to seek protection from potential criminal prosecution can continue to correct past mistakes using the procedures mentioned above or by filing an amended or past due tax return.* When these returns are examined, examiners will follow existing law and guidance governing audits of the issues.²⁷

Tax professionals were suspicious about this drastic reversal of position by the IRS, so they asked pointed questions of a high-ranking IRS official during a recent tax conference. The official confirmed that the IRS changed its earlier position, thereby condoning what many call the quiet disclosure process (“QDP”).²⁸

2. UVDP

The focus of this article, the UVDP, was introduced by the IRS in November 2018 and recently clarified in April 2020. Details of the UVDP are analyzed below.

IV. UVDP—Initial Guidance in November 2018

The UVDP applies to all types of taxes, including income, gift, estate, employment, excise, *etc.* It also covers both international and purely domestic matters. According to the IRS, the objective of the UVDP is “to provide taxpayers concerned that their conduct is willful or fraudulent, and that may rise to the level of tax and tax-related criminal acts, with a means to come into compliance with the law and potentially avoid criminal prosecution.”²⁹

The IRS first issued limited guidance with respect to the UVDP, in the form of a single “memorandum” published in November 2018. This, of course, triggered questions, many of which remained unanswered until April 2020, when the IRS released additional data. This segment of the article examines *only the original indications from the IRS.*

A. Initial Settlement Terms and Guidance

The IRS originally indicated that it would apply the following “civil resolution framework” to all cases, which quickly sparked complaints about “uncertainty” and “significant grey area.”³⁰

1. Disclosure Period; Relevant Years

In terms of scope, cases generally will cover the most recent six closed tax years. There are several exceptions to this general rule. For instance, if the IRS and taxpayer cannot resolve a case by mutual agreement, then the Revenue Agent “has discretion to expand the scope to include the full duration of the noncompliance and may assert maximum penalties under the law with the approval of management.”³¹ Moreover, in situations where the noncompliance lasted fewer than six years, the scope can be limited to just those years with issues. Going the

other way, with the IRS’s consent, taxpayers might be allowed to expand the UVDP disclosure period to more than six years. Taxpayers might want a longer period in order to correct tax issues with foreign governments that mandate more years, to rectify tax matters occurring before the acquisition or sale of an entity, to disclose taxable and/or reportable gifts in earlier years, *etc.*³²

2. Civil Fraud Penalties

Generally, the IRS will assert a civil fraud penalty, equal to 75 percent of the tax liability, to the one year during the disclosure period with the highest tax liability. For taxpayers filing amended returns, the fraud penalty derives from Code Sec. 6663, while for non-filers it originates in Code Sec. 6651(f).³³ In “limited circumstances,” Revenue Agents may apply the civil fraud penalty to more than one year, up to all six years, “based on the facts and circumstances of the case.”³⁴ The example provided by the IRS is a situation where a taxpayer and Revenue Agent cannot agree on the tax liability as part of the UVDP process. Additionally, Revenue Agents can impose civil fraud penalties “beyond six years” if taxpayers fail to cooperate and resolve the audit by agreement.³⁵

3. Penalties Unrelated to Income Taxes

The IRS explained that penalties related to non-income-tax matters (*e.g.*, excise, employment, gift, or estate taxes) will be resolved “based on the facts and circumstances with [Revenue Agents] coordinating with appropriate subject matter experts.”³⁶

4. FBAR Penalties

The IRS announced that FBAR penalties, possibly including those for “willful” violations, will be asserted pursuant to the existing guidelines in the Internal Revenue Manual.³⁷

5. Ability to Request Reduced Penalties

Taxpayers are “not precluded” from (i) seeking an accuracy-related penalty under Code Sec. 6662 in the amount of 20 percent of the tax liability, instead of a civil fraud penalty at 75 percent, or (ii) requesting non-willful FBAR penalties, in place of willful ones. However, given the purpose of the UVDP, the acceptance of lesser penalties by the IRS will be “exceptional,” and taxpayers must present “convincing evidence” to justify a reduction.³⁸

6. Perhaps No Information Return Penalties

Contrary to the harsh stance by the IRS regarding the disclosure period, civil fraud penalties, and FBAR penalties, taxpayers might escape sanctions for unfiled information

returns. The IRS will not automatically assess these under the UVDP. Moreover, Revenue Agents can consider the application of other penalties, such as civil fraud penalties and FBAR penalties, in resolving information return infractions.³⁹

7. Challenging the IRS Within the UVDP

The IRS stated that taxpayers retain the right to request reconsideration of the issues by the Appeals Office. This was positive news for taxpayers, although difficult to reconcile with warnings from the IRS that taxpayers could face grave consequences if they fail to “promptly and fully cooperate” in the UVDP process, disagree with the Revenue Agent on the appropriate tax liability, and/or refuse to execute a written agreement with the IRS to conclude matters.⁴⁰

8. Revoking Participation

The IRS indicated that it will develop procedures for Revenue Agents to “revoke” a taxpayer from the UVDP under certain circumstances.⁴¹ A high-ranking IRS official later provided some relief in this regard, explaining at a major tax conference that Revenue Agents will give ample warning of lack of cooperation before taking steps to “revoke” a “preliminary acceptance” letter previously issued to a taxpayer.⁴²

9. Payment of Liabilities

The UVDP procedures also imply that taxpayers can participate only if they can pay the full freight: “In general, the [IRS] expects that voluntary disclosures will be resolved by agreement with full payment of all taxes, penalties, and interest for the disclosure period.”⁴³ This posture by the IRS under the UVDP is inconsistent with the historic manner in which the IRS has addressed the payment issue. For example, under earlier disclosure programs, the IRS expressly allowed taxpayers to become fully compliant, notwithstanding the fact that they lacked the financial wherewithal to make the IRS whole:

If I don't have the ability to full pay, can I still participate in this program?

Yes. The terms of this program require the taxpayer to pay with his submission the tax, interest, offshore penalty, and accuracy-related penalty, and, if applicable, the failure-to-file and failure-to-pay penalties. However, it is possible for a taxpayer who is unable to make full payment of these amounts to request the IRS to consider other payment arrangements. If you cannot pay the total amount of tax, interest, offshore

penalty, and other penalties required, submit your proposed payment arrangement and [complete financial data]. 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 foreign, 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 to be entitled to the penalty structure of this program.⁴⁴

V. UVDP—New Guidance in April 2020

After nearly one-and-a-half years of silence, the IRS provided new guidance about the UVDP, by releasing in April 2020 the “revised and retitled” Form 14457 (*Voluntary Disclosure Practice Preclearance Request and Application*) and corresponding Instructions.⁴⁵ Commentators quickly underscored the importance of this new data, indicating that “[t]he IRS quietly released its new voluntary disclosure practice form and instructions to little fanfare, but practitioners will want to pay close attention to a significant amount of new details.”⁴⁶ This portion of article analyzes the latest from the IRS.

A. Procedural Details

The IRS has expanded on the step-by-step UVDP process, explaining the following:

- *Step 1.* Taxpayers must complete and send, to the “Voluntary Disclosure Coordinator,” *via* fax or mail, *only* Part I of Form 14457, which is called the “Preclearance Request.” Taxpayers are not required to sign Part I, and they should not enclose relevant tax returns, information returns, payments, or other documents. The IRS emphasizes that filing Part I is now “mandatory” for all taxpayers desiring to participate in the UVDP.
- *Step 2.* The Criminal Investigation Division (“CI”) reviews Part I. If all is acceptable, then CI notifies taxpayers of “Preclearance” and assigns a “Case Control Number” to the disclosure. The IRS expects the initial work by CI to take at least 30 days and perhaps more than 60 days.
- *Step 3.* Taxpayers complete and send, again to the “Voluntary Disclosure Coordinator,” but this time only by mail, Part II of Form 14457, which is titled the “Voluntary Disclosure.” Taxpayers generally must file Part II within 45 days of receiving “Preclearance”

from CI, though the IRS contemplates the possibility of granting one 45-day extension to taxpayers upon written request. Taxpayers should not enclose relevant tax returns, information returns, payments, or other documents with Part II. Unlike Part I, taxpayers must execute Part II of Form 14457. This has the following significance. First, taxpayers are certifying that they will continue cooperating with the IRS with respect to assessing and making good faith arrangements to pay the taxes, penalties, and interest resulting from the UVDP. Second, taxpayers are declaring, under penalties of perjury, that all information provided to the IRS as part of the UVDP is true, accurate, and complete to the best of their knowledge. The Instructions mandate that taxpayers personally execute Part II, as “[a] representative by means of a power-of-attorney cannot sign the voluntary disclosure on behalf of the taxpayers.”⁴⁷

- *Step 4.* CI processes the data in Part II, and if all remains copacetic, it grants “Preliminary Acceptance” to taxpayers and routes the case to the appropriate office of the Examination Division. Thereafter, a Revenue Agent contacts the taxpayers and begins his review, which follows “standard Examination procedures.”⁴⁸

B. Part I of Form 14457

Much of the basic information demanded by the IRS on Part I is mundane, but taxpayers might not have anticipated several items.

In terms of what type of taxpayers can participate, Part I asks taxpayers to check the box indicating individual, partnership, corporation, trust, or executor of estate.⁴⁹ The Instructions expand on this notion, stating that the UVDP “is available to individuals (U.S. Citizens, Green Card Holders, Non-Resident Aliens, Expatriates, etc.) and business entities (Corporations, Partnerships, LLCs, Trusts, Estates).”⁵⁰

Part I confirms that the UVDP broadly covers all types of matters, breaking them down into the following categories: domestic, offshore, estate and gift taxes, employment taxes, virtual currency, and the catch-all, “other issues.”⁵¹

The IRS is interested in questions of nationality and travel, too. Part I instructs individuals to provide “all passport numbers and countries.”⁵² The Instructions, predictably, go into more detail, demanding (i) number and country of issuance for all current passports, (ii) information about all passports that have expired within the past decade, and (iii) if the individual holds multiple

passports, a statement of whether he ever entered the United States using a foreign passport.⁵³

Another focus of the IRS is entities, foreign and domestic. Part I requires taxpayers to reveal all entities that were “in any way related” to the noncompliance during the disclosure period, along with all entities that the taxpayers owned, controlled, or benefitted from, directly or indirectly, including nominee entities used to conceal the ownership of non-compliant assets.⁵⁴ The Instructions contain two examples, which supply more detail about what the IRS is seeking:

Example 1 (Domestic). Taxpayer, a U.S. citizen, was the sole shareholder and chief executive of a domestic corporation. The taxpayer, on occasion, requested that clients write checks in his personal name instead of in the name of the corporation. Taxpayer deposited these checks directly into his personal bank account and willfully failed to capture these transactions in his corporate books and failed to report the income on the corporation’s tax returns. When submitting a preclearance request, the taxpayer should disclose the name of the entity and its EIN (Part I, Line 7), list any noncompliant bank account(s) and associate it with the entity (Part I, Line 10).

Example 2 (Offshore). Taxpayer, a U.S. citizen, formed a corporation in Country A and transferred to it cash used to open a brokerage account in Country B. Taxpayer did not properly disclose to the bank that the beneficial owner of the corporation is a U.S. citizen. In addition, the taxpayer filed income tax returns that failed to disclose the creation, capitalization, and existence of the corporation, the foreign bank account (including failure to file FBARs), and any income reportable under Code Sec. 951 (Subpart F income). When submitting a preclearance request, the taxpayer should disclose the name of the entity (Part I, Line 7), noncompliant bank account(s) the entity held and associate it with the entity (Part I, Line 10).⁵⁵

The IRS also wants lots of information about problematic financial accounts. Part I demands data about all non-compliant domestic and/or foreign financial accounts that taxpayers owned, controlled, or benefitted from, directly or indirectly through entities, at any time during the entire disclosure period.⁵⁶ For purposes of the UVDP, an account is considered “non-compliant” if it generated income that was not reported on U.S. tax

returns, received previously untaxed funds, and/or was not properly declared on an FBAR or Form 8938.⁵⁷ The concept of previously untaxed funds might be unclear, so the Instructions contain the following illustration:

Taxpayer A owns a restaurant as a sole proprietorship. Taxpayer A reports all credit card receipts but only 20% of cash receipts. Taxpayer A deposited net credit card receipts into an account at Alpha Bank and the unreported cash into an account at Beta Bank. Later, Taxpayer A transferred some funds from the Beta Bank account into an account at Delta Bank. The Alpha Bank account is tax compliant. Assume all income from the Delta Bank account was reported. For purposes of reporting noncompliant financial accounts, Taxpayer A only needs to list the account at Beta Bank because that account directly received previously untaxed funds.⁵⁸

C. Part II of Form 14457

Part II features a few noteworthy items. First, it confirms that taxpayers can participate in the UVDP, despite the fact that they lack the money necessary to pay the resulting taxes, penalties, and/or interest. In this regard, Part II offers the following box for taxpayers to check: “Inability to pay in full.”⁵⁹

Part II also warns that taxpayers will be ineligible for the UVDP if their participation is not truly voluntary. It obligates taxpayers to disclose whether (i) anyone (including a foreign government or foreign financial institution) indicated that their records were susceptible to being remitted to the U.S. government upon request, (ii) they, directly or through an agent, submitted a pleading or other document to a foreign court or authority opposing disclosure of financial records, and (iii) if so, they provided copies to the U.S. Attorney General, as required by law.⁶⁰ The Instructions clarify that, for purposes of the UVDP, a timely application is one made before the IRS has started a civil examination or criminal investigation of a taxpayer, before the IRS has received data from a third party (*e.g.*, an informant, John Doe summons, foreign government, *etc.*) about the taxpayer’s noncompliance, and before the IRS has acquired data about the noncompliance from a criminal enforcement action, such as a search warrant or grand jury subpoena.⁶¹

Finally, Part II requires taxpayers to provide a “narrative” that might unnerve them and their tax/legal advisors. The narrative is divided into three parts, with one focused on the “personal and professional background”

of the taxpayers, another centered on professional advisors and all other individuals who aided in the non-compliance, and the final part broadly demanding “a thorough discussion of all ... willful failures to report income, pay tax, and submit all required information returns and reports.”⁶²

D. Marijuana Money Ineligible

As explained above, the UVDP is open to nearly all types of taxpayers with all sorts of noncompliance. The IRS has drawn the line, though, indicating that taxpayers with pot-related problems need not apply. The IRS guidance is somewhat obtuse on this point, but taxpayers will get the message. The Instructions first state that taxpayers should not use the UVDP “if the source of the unreported income is from any illegal source.”⁶³ Then, they go on to clarify that “[i]ncome from activities determined to be legal under state law but illegal under federal laws is considered illegal source income for purposes of the [UVDP].”⁶⁴

E. Civil Penalties

The information about civil penalties in Form 14457 and the related Instructions issued in April 2020 is very similar to the initial IRS guidance in November 2018.

With respect to penalties triggered by unreported income, the Instructions indicate that (i) the IRS will assert a fraud penalty for at least one year, (ii) the one-year limit is contingent upon taxpayers fully cooperating with the UVDP process, (iii) the IRS applies the civil fraud penalty in place of accuracy-related penalties under Code Sec. 6662 and delinquency penalties under Code Sec. 6651, and (iv) the IRS can also apply estimated tax penalties under Code Sec. 6654, because they are computational in nature and a substitute for interest charges.⁶⁵ The Instructions contain the following examples regarding income-related penalties:

Taxpayer submits six years of amended returns: one fraud penalty on the year with the highest tax liability and no accuracy-related penalties for the other five years.

Taxpayer submits six years of delinquent returns: one fraudulent failure to file penalty on the year with the highest tax liability with no delinquency penalties on the other five years.

Taxpayer submits three years of delinquent returns and three years of amended returns: a single penalty

for either fraud or fraudulent failure to file on the year with the highest tax liability with no accuracy-related or delinquency penalties on the other five years.⁶⁶

The Instructions confirm that the IRS will not automatically assert information return penalties and that this issue will be resolved, in the discretion of the Revenue Agent, taking into account other penalties assessed against the taxpayer as part of the UVDP and whether the taxpayers agree to settle the UVDP with the Revenue Agent.⁶⁷

Likewise, the Instructions state that potential penalties related to excise taxes and estate and gift taxes “will be handled based on the facts and circumstances of the case.”⁶⁸ The IRS remains undecided with respect to employment tax penalties, though, explaining that penalties likely will be similar to income tax penalties, but “[f]urther guidance is pending.”⁶⁹

Finally, when it comes to unreported foreign accounts, the Instructions exhibit some circular reasoning, stating that “[w]illful FBAR penalties will apply to all cases involving FBAR noncompliance where facts and law support the assertion of a willful FBAR penalty.”⁷⁰

F. Take Nonwillful Violations Elsewhere

Form 14457 and the Instructions contain language throughout alerting taxpayers that the IRS designed the UVDP exclusively for “willful” violations. Samples follow:

- “Objective. The [UVDP] provides taxpayers whose conduct involved *willful* tax or tax-related noncompliance with a means to come into compliance with the tax law and avoid potential criminal prosecution.”⁷¹
- “Taxpayers will be required to provide a narrative statement of facts detailing their *willful* conduct in Part II of Form 14457.”⁷²
- “You should consider applying for the [UVDP] if you engaged in *willful* noncompliance that exposes you to criminal liability for tax and tax-related crimes, you meet the eligibility requirements (discussed next), and you wish to come into tax compliance and avoid potential criminal prosecution.”⁷³
- “Form 14457 should be filed when you have determined you have *willful* conduct that you believe may rise to the level of tax and tax-related crimes and wish to come into compliance to try and avoid potential criminal tax prosecution.”⁷⁴

- “Noncompliance. Includes all tax and tax-related *willful* failures to report income, pay tax, and submit all required information returns and reports (including FBARs).”⁷⁵

G. Participation Without Full Payment

The IRS acknowledges in the Instructions that it has “historically required” taxpayers participating in disclosure programs to make full payment of all taxes, penalties, and interest.⁷⁶ However, the IRS has changed its mind since November 2018 when it comes to the UVDP, now allowing taxpayers to participate even if they lack the cash, provided that they make a complete financial disclosure and convince the IRS that full payment is unfeasible.⁷⁷ The Instructions are a little short on the details, however, which might leave taxpayers uneasy about their chances of escaping payment of the full freight:

The burden is on the taxpayer to establish inability to pay, to the satisfaction of the IRS, based on full disclosure of all assets and income, domestic and foreign, under the taxpayer’s control. If 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.⁷⁸

H. Making Advance Payments to the IRS

The IRS is clear about one thing, taxpayers should *not* enclose payments when they are filing Part I or Part II of Form 14457 with the “Voluntary Disclosure Coordinator.” The first opportunity to make an “advance payment” comes after CI has granted “preliminary acceptance” and taxpayers are waiting, perhaps for long periods of time, for a Revenue Agent to be assigned to the case and complete the examination. The Instructions tell taxpayers to send payments, at the correct time, only to a particular IRS office in Austin, Texas, clearly labeling them for the “Voluntary Disclosure Practice.”⁷⁹ The Instructions emphasize that, while the IRS understands the desire to make advance payments to stop accrual of interest charges, it does not share that sentiment when it comes to tax and information returns. The Instructions warn taxpayers only to send checks, on a year-by-year basis, to the designated IRS office, but not returns or other documents.⁸⁰ The Instructions further caution taxpayers that they might not be able to subsequently recover overpayments if the Revenue Agent is particularly slow in

resolving matters, indicating that “[t]hese payments are advance payments; consequently, credit or refund of the payments is subject to the limitations of Section 6511.”⁸¹

I. Participation by Estates

The IRS explains in the Instructions that it “does not encourage” use of the UVDP for decedents, even if they engaged in willful noncompliance when they were alive, because criminal liability generally ends upon the death of an individual.⁸² Nonetheless, the IRS recognizes that sometimes “extraordinary circumstances” warrant participation of a decedent in the UVDP, such as when other taxpayers related to the decedent are doing so.⁸³ In such cases, the executor or personal representative of the estate will be required to supply a detailed narrative explaining the decedent’s noncompliance.⁸⁴ Moreover, the Instructions warn that, if the executor or personal representative were personally willful in administering the estate, then he must explain his own conduct and intent, as well as who controls the underlying records of the decedent and the estate.⁸⁵

J. Promotion of Alternatives

As explained above, Form 14457 and the corresponding Instructions expressly state numerous times that the UVDP is aimed at taxpayers with “willful” violations. They also tell taxpayers whose bad conduct does not rise to the level of tax crimes that they should pursue other avenues, as follows: “You can correct less serious non-compliance by filing amended or past due tax returns.”⁸⁶ The Instructions feature a list of “Other Compliance Options,” which consist of the SFOP, SDOP, DIIRSP, DFSP, and QDP.⁸⁷

K. Cooperation with the Process

A hallmark in essentially every voluntary disclosure program is mandatory full cooperation by participating taxpayers, and the UVDP is no different. What is unique, though, is the manner in which the IRS defines the concept of “cooperation” here. Taxpayers are expected to assist in determining their tax liability and filing obligations, submit all required tax and information returns, and fully pay or make acceptable payment arrangements.⁸⁸ This is standard stuff. However, the Instructions also mandate that taxpayers “[c]ooperate with the IRS in investigating *any professional enablers who aided in the noncompliance*.”⁸⁹ The Instructions further indicate that cooperation, in the context of the

UVDP, entails taxpayers promptly and fully responding to all Information Document Requests, submitting to IRS interviews, providing access to relevant third-party witnesses, granting bank secrecy waivers, and settling all issues with the Revenue Agent by agreement.⁹⁰

L. Joint Return Issues

Many couples file joint Forms 1040, and sometimes only one of the spouses is involved with noncompliance. The IRS understands this, which is why it developed special procedures in such cases. The Instructions indicate that “[c]riminal liability depends on individual conduct and intent,” such that the actions or inactions of one spouse are not necessarily attributable to the other.⁹¹

Options exist where only one spouse was a wrongdoer. Both spouses can apply for the UVDP together, make a full disclosure of all assets and activities, and clarify in the “narrative” portion of Part II which spouse was responsible for the noncompliance. The IRS explains that “making a joint voluntary disclosure will ease the administrative burden of the subsequent civil examination.”⁹²

Another possibility is for the compliant spouse to refuse to participate in the UVDP altogether. The Instructions discourage this, putting potential “innocent spouses” on notice of the following reality:

If a spouse who had filed a “Married Filing Joint” tax return for a year included in the disclosure period chooses not to enter [UVDP] because she believes she has no criminal exposure, the IRS will consider the facts and circumstances of each case to determine if the non-applying spouse may be liable for any taxes or penalties. The IRS may examine the spouse that does not make a voluntary disclosure.⁹³

M. Disclosure Periods; Relevant Years

The Instructions offer significant guidance regarding the scope of the normal UVDP case, along with potential expansion in certain circumstances. The Instructions confirm that the ordinary disclosure period will be the prior six years for which the taxpayer has filed a timely tax return or the filing deadline (including extensions) has passed.⁹⁴ They also clarify that the date on which to determine the disclosure period is when the taxpayer files Part II, not Part I, of Form 14457.⁹⁵

The Instructions contain three exceptions to the standard six-year disclosure period, as follows. First, if

a taxpayer fails to fully cooperate, as broadly defined above, then the Revenue Agent can use his own discretion to expand the disclosure period to cover “the full duration of the noncompliance” and, with management approval, “may assert maximum penalties under the law.”⁹⁶ The Revenue Agent also can ask CI to “revoke” a taxpayer’s preliminary acceptance in UVDP, such that he can conduct an audit, applying all normal procedures, assessment periods, periods, *etc.*⁹⁷ Second, if the noncompliance did not occur during each of the prior six years, then the UVDP can address only the relevant years.⁹⁸ Third, at the request of cooperative taxpayers, the IRS might allow them to enlarge the disclosure period, to cover more than six years, for reasons that would benefit the taxpayers in another context.⁹⁹

The Instructions offer the following examples to clarify disclosure period issues:

Taxpayer A makes a voluntary disclosure relating to willful noncompliance spanning the last 20 years. Taxpayer A fully cooperates and provides amended returns correcting all matters for the most recent six years. If Taxpayer A comes forward in January 2018, the disclosure period will include tax years 2011-2016. If Taxpayer A comes forward in December 2018, the disclosure period will include tax years 2012-2017.

Assume Taxpayer A, in [the example] above, filed for an extension to file her 2017 tax return until October 15, 2018. If the taxpayer comes forward in June 2018 before filing her 2017 return, the disclosure period will include tax years 2011-2016. If the taxpayer filed her 2017 return in May 2018 before making a disclosure in June 2018, the disclosure period will include tax years 2012-2017.

Taxpayer A makes a voluntary disclosure relating to willful noncompliance spanning the last 20 years. Taxpayer A does not cooperate during the civil examination. The [IRS] is not limited to a six-year disclosure period and may examine all of the years with noncompliance. With management approval, the examiner will potentially assert maximum penalties for all tax years.

Taxpayer B makes a voluntary disclosure in January 2018 relating to willful noncompliance that occurred only during the most recent 4 tax years. Taxpayer B fully cooperates. Thus, his disclosure period includes

tax years 2013-2016, the 4 years where there was noncompliance.

Taxpayer B makes a voluntary disclosure in January 2018 relating to willful noncompliance in tax years 2008 through 2015. Taxpayer B fully cooperates and clearly establishes that he is in compliance with all tax and information requirements for the most recent tax year that was filed (2016). Taxpayer B’s disclosure period will be limited to 2011-2015, the first five years of the disclosure period.¹⁰⁰

N. Pursuing Advisors

The IRS is not subtle about its intention of using data collected through the UVDP to pursue what it considers bad actors. As indicated earlier, the Instructions require taxpayers to “[c]ooperate with the IRS in investigating *any professional enablers who aided in the noncompliance.*”¹⁰¹

On that same score, the Instructions clarify that taxpayers must provide the IRS with lots of data about advisors in the “narrative” portion of Part II. Specifically, the IRS demands the following: (i) Identity of all “professional advisors and facilitators” (including attorneys, accountants, financial planners, private bankers, consultants, and the like) that provided any services to the taxpayer during the disclosure period, “regardless of their connection to or knowledge of your noncompliance”; (ii) Full contact information for all such individuals; (iii) Explanation about the type of advice and/or services that the individuals provided; (iv) Statement as to “whether you fully disclosed your noncompliance and/or if they helped facilitate it”; (v) Description of all interactions among the individuals related to the noncompliance; and (vi) List of all individuals who maintained records for the taxpayer.¹⁰² The Instructions indicate that, in supplying the preceding information, taxpayers do not need to waive the attorney-client privilege with its current counsel: “You are not required to summarize legal advice concerning your voluntary disclosure from attorneys currently representing you” in connection with the UVDP.¹⁰³

O. Seeking “Preclearance” Only

As mentioned above, the IRS indicates that taxpayers whose actions were non-willful and do not rise to the level of a tax crime should pursue disclosure alternatives other than the UVDP, such as the SFOP, SDOP, DIIRSP, DFSP, and QDP.¹⁰⁴ On a related note, the Instructions

obliquely convey that taxpayers have the ability to (i) first file Part I under the UVDP to determine whether the IRS is already aware of their noncompliance, (ii) get “preclearance” from the IRS, and (iii) then rectify issues with the IRS under a program other than the UVDP. The Instructions state the following in this regard: “Submitting a preclearance request will not prohibit you from subsequently seeking other compliance options [but] the IRS may seek information concerning compliance for a taxpayer that makes a preclearance request and then uses another compliance option.”¹⁰⁵ However, the Instructions clarify that taxpayers cannot back out once they have filed Part II of Form 14457. They state that after a taxpayer files Part II “there is no option to retrieve it” and CI will reject it or preliminary accept it, period.¹⁰⁶

Taxpayers with solely domestic noncompliance, as well as those with international violations who/that are ineligible for the SFOP, SDOP, DIIRSP, and/or DFSP, will first face the critical decision of whether to do nothing and simply hope to avoid detection by the IRS, file materials through the QDP, or apply for the UVDP.

P. Participation Without Identification Number

Some taxpayers who want to approach the IRS through *other* disclosure programs are essentially unable to do so because they lack a Social Security Number (“SSN”) or individual taxpayer identification number (“ITIN”). For instance, the IRS provides the following guidance with respect to the SFOP:

I am eligible for a [SSN] but do not have one at this time. May I make a submission to the Streamlined Filing Compliance Procedures without an SSN? If I make a submission without an SSN, what are the consequences?

If you are eligible for an SSN but do not have one, you may *not* use the Streamlined Filing

Compliance Procedures. The terms of the Streamlined Filing Compliance Procedures require a valid Taxpayer Identification Number (TIN). For U.S. citizens, resident aliens, and certain other individuals, the proper TIN is a valid SSN. If you make a submission to the Streamlined Filing Compliance Procedures without a valid SSN, then the IRS may process your returns after assigning an [Internal Revenue Service Number] ... But taxpayers that make submissions to the Streamlined Filing Compliance Procedures without valid SSNs are *not* eligible for the favorable penalty provisions of the Streamlined Filing Compliance Procedures. The IRS will process such returns subject to penalties applicable outside of the Streamlined Filing Compliance Procedures.¹⁰⁷

The IRS seems to have adopted a different stance with respect to the UVDP. Taxpayers generally are required to input their “identification number” on Part I of Form 14457. However, the Instructions grant a reprieve, stating that “[i]f you do not have a taxpayer identification number, please explain.”¹⁰⁸ This implies that the IRS contemplates certain taxpayers without an SSN or ITIN participating in the UVDP.

Q. Possibility of Criminal Charges

Although unnerving and discouraging for taxpayers, the Instructions state that neither applying for the UVDP nor fully participating in it guarantees taxpayers immunity from criminal charges. Indeed, the Instructions explain that a “voluntary disclosure will not automatically guarantee immunity from prosecution” and it “will be considered along with all other facts and circumstances in determining whether criminal prosecution will be recommended for tax and tax related crimes covering the disclosure period.”¹⁰⁹

R. Expectation of Post-UVDP Compliance

The UVDP, like most disclosure programs, creates an expectation of future compliance by participating taxpayers. This makes sense because, after a taxpayer fully comprehends his tax-related duties, he essentially lacks excuses for any future violations. The Instructions solidify this notion, warning that “[t]axpayers will be expected to comply with U.S. law for all tax years after the disclosure period and file returns according to standard filing procedures.”¹¹⁰

S. Demand for Details

The Instructions leave no doubt that the IRS is seeking details and trying to prevent taxpayers from cherry-picking the facts that they reveal. For instance, when it comes to the required narrative in Part II of Form 14457, the Instructions indicate the following:

Include the whole story with all favorable and unfavorable facts, including the entire history of noncompliance from inception to the present. You **must** provide specific facts explaining your willful compliance failures. You **must** address the source of all unreported income. You **must** address the use of nominees, alter egos, and any other methods used to conceal your willful noncompliance.¹¹¹

The Instructions further require taxpayers to supply lots of data about each entity involved in any way with the noncompliance, including the name, identity of all owners and their ownership percentages, an organizational chart diagramming all ownership, and a “complete story” about their role in the noncompliance.¹¹²

Taxpayers must provide a similar level of detail when they are embroiled in offshore issues. The Instructions demand disclosure of the source of all foreign funds, an explanation of all control over and/or transactions with foreign accounts or entities (*e.g.*, withdrawals, deposits, loans, and investment or management decisions), and a “complete story” about all noncompliant foreign assets.¹¹³

T. Scope of UVDP Procedures

Perhaps the most famous program offered by the IRS, the Offshore Voluntary Disclosure Procedure (“OVDP”), closed in September 2018. Logic dictates that numerous taxpayers were in the midst of resolving their *international* noncompliance matters with the IRS as of that date and that such cases would be completed pursuant to the terms of the OVDP.

The IRS has different plans when it comes to pending disclosures involving only *domestic* issues. The Instructions to Form 14457 state that the IRS generally “will apply [the UVDP] procedures to all *domestic* voluntary disclosures received *prior to* September 28, 2018, [which are] currently under examination.”¹¹⁴ Taxpayers falling into this category might claim that the IRS is subjecting them to an unfair bait and switch, depending on the circumstances.

The Instructions also explain, in a roundabout manner, that taxpayers who previously participated in the OVDP and who filed incomplete or inaccurate information as part thereof cannot later rectify matters through the UVDP. The Instructions state the following about potential crossover: “If you participated in the OVDP, you are not eligible to use the [UVDP] where the OVDP disclosure period includes one or more overlapping tax years with the [UVDP] disclosure period.”¹¹⁵

U. IRS Recognizes That This Is a Big Endeavor

Many taxpayers likely will not realize just how much analysis and background work goes into participating in the UVDP, fully and accurately completing Part I and Part II of Form 14457, and then defending positions before a Revenue Agent during an audit, but the IRS does. Indeed, the Instructions estimate that, while amounts will vary depending on the circumstances of each taxpayer, gathering the necessary data and filling out Form 14457, alone, will take approximately 59 hours.¹¹⁶

VI. Conclusion

Taxpayers with solely domestic noncompliance, as well as those with international violations who/that are ineligible for the SFOP, SDOP, DIIRSP, and/or DFSP, will first face the critical decision of whether to do nothing and simply hope to avoid detection by the IRS, file materials through the QDP, or apply for the UVDP. Each option has its risks. Taxpayers electing to pursue absolution through the UVDP should understand that the new Form 14457 and related Instructions, while informative, create murkiness on some key issues. These include the amount and type of civil penalties, possibility of criminal sanctions, size of disclosure period, ability to pay less than the full liability, *etc.* Taxpayers also must grasp that, even if they ultimately reach an acceptable result with the IRS, participation in the UVDP likely will be a long process, requiring disclosure of significant data about their activities, assets, income, advisors, mindset, spouses, and more. Consequently, before taxpayers take any actions with the IRS regarding past noncompliance, they should carefully vet all options, with specialized legal counsel, under the protection of the attorney-client privilege.

ENDNOTES

- * Hale defends businesses and individuals in tax audits, tax appeals, and Tax Court litigation, involving domestic and international issues. You can reach Hale by phone at (404) 658-5441 or by email at hale.sheppard@chamberlainlaw.com.
- ¹ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ² For a detailed analysis of common filing requirements, see Hale E. Sheppard, *The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance*, INT'L TAX J., 2012, at 11; Hale E. Sheppard, *Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules After IRS Issues Final Regulations*, INT'L TAX J., 2015, at 25; Hale E. Sheppard, *Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting*, INT'L TAX J., 2016, at 5; Hale E. Sheppard, *Canadian Retirement Plans: What Does Revenue Procedure 2014-55 Mean for U.S. Tax Deferral, Form 8891, Form 8938, and the FBAR?* INT'L TAX J., 2016, at 25; and Hale E. Sheppard, *Unlimited Assessment-Period for Form 8938 Violations: Ruling Shows IRS's Intent to Attack Multiple Tax Returns*, TAXES, 2017, at 31; Hale E. Sheppard, *Extended Assessment Periods and International Tax Enforcement: Rafizadeh v. Commissioner, Unreported Foreign Assets, and Use of FATCA Weapons*, TAXES, 2018, at 35 and 44 J. INT'L TAXATION 25 (2018).
 - ³ Code Sec. 6662; Code Sec. 6663.
 - ⁴ Code Sec. 6621.
 - ⁵ The American Jobs Creation Act, P.L. 108-357 (Oct. 22, 2004).
 - ⁶ 31 USC §5321(a)(5)(A) (as in effect before Oct. 22, 2004).
 - ⁷ 31 USC §5321(a)(5)(B)(ii) (as in effect before Oct. 22, 2004).
 - ⁸ 31 USC §5321(a)(5)(A).
 - ⁹ 31 USC §5321(a)(5)(B)(i). This penalty cannot be asserted if the taxpayer was "non-willful" and there was "reasonable cause" for the violation. See 31 USC §5321(a)(5)(B)(ii).
 - ¹⁰ 31 USC §5321(a)(5)(C)(i).
 - ¹¹ 31 USC §5321(d) ("A civil penalty may be imposed under [31 U.S.C. § 5321(a)] with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.").
 - ¹² Code Sec. 6038D(d)(1); Reg. §1.6038D-8(a).
 - ¹³ Code Sec. 6038D(d)(2); Reg. §1.6038D-8(c).
 - ¹⁴ Code Sec. 6048(a)(1); Code Sec. 6048(a)(4).
 - ¹⁵ Code Sec. 6048(c)(1).
 - ¹⁶ Code Sec. 6677(a).
 - ¹⁷ Code Sec. 6048(b)(1). The grantor trust rules are located in Code Secs. 671 to 679.
 - ¹⁸ Code Sec. 6677(b).
 - ¹⁹ Code Sec. 6038; Reg. §1.6038-2; Code Sec. 6046; Reg. §1.6046-1; Code Sec. 6679; Reg. §301.6679-1; Instructions to Form 5471.
 - ²⁰ Code Sec. 6038(b)(1); Reg. §1.6038-2(k)(1)(i); Code Sec. 6046(f); Reg. §1.6046-1(k).
 - ²¹ Code Sec. 6038(b)(2); Reg. §1.6038-2(k)(1)(ii); Code Sec. 6046(f); Reg. §1.6046-1(k).
 - ²² Hale E. Sheppard, *What Garrity Teaches About FBARS, Foreign Trusts, "Stacking" of International Penalties, and Simultaneously Fighting the U.S. Government on Multiple Fronts*, J. TAX PRAC. & PROC., 2019, at 27.
 - ²³ Code Sec. 6501(c)(8)(B) contains a limitation, stating that the assessment period will remain open only with respect to "the item or items" related to the late Form 8938 if the taxpayer can demonstrate that the violation was due to reasonable cause and not due to willful neglect.
 - ²⁴ Hale E. Sheppard, *Alarming U.S. Tax Rules and Information-Reporting Duties for Foreign Retirement Plans and Accounts: Analyzing Problems and Solutions*, 129 J. TAXATION 14 (2018) (explaining the four remaining international disclosure programs, as well as the now defunct Offshore Voluntary Disclosure Program).
 - ²⁵ See, e.g., Robert B. Stack and Douglas M. Andres, *Expedited Opt-Out Needed for OVDI Participants Who Owe No Tax*, 2012 TAX NOTES TODAY 21-12 (Jan. 30, 2012) (stating that the taxpayer "is worried that requesting retroactive treaty relief through the letter ruling process could be deemed a quiet filing, [the taxpayer] decides to enter the OVDI."); Robert Goulder, *Quiet Disclosures Get No Love from IRS*, 2010 TAX NOTES TODAY 90-1 (May 11, 2010); Marie Sapirie, *Charges Against HSBC Bank Bermuda Client Raise Quiet Disclosure Questions*, 201 TAX NOTES TODAY 98-1 (May 20, 2011); U.S. Government Accountability Office, *IRS Has Collected Billions of Dollars, but May Be Missing Continued Evasion*, GAO-13-318 (2013) (explaining that IRS intends to increase efforts to identify and penalize "quiet disclosures").
 - ²⁶ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ²⁷ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ²⁸ Andrew Velarde, *Noncooperation in Voluntary Disclosure Won't Blindside Taxpayer*, Tax Analysts Document 2019-9094 (March 12, 2019) (comments by John Cardone, Director of Withholding and International Individual Compliance, LB&I Division).
 - ²⁹ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³⁰ Nathan J. Richman and Andrew Velarde, *Uncertainty May Weigh Down New Voluntary Disclosure Regime*, Tax Analysts Doc. 2019-4599 (Feb. 8, 2019).
 - ³¹ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³² IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³³ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³⁴ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³⁵ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³⁶ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³⁷ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018). The IRS cites Internal Revenue Manual §§4.26.16 and 4.26.17.
 - ³⁸ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ³⁹ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ⁴⁰ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ⁴¹ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ⁴² Andrew Velarde, *Noncooperation in Voluntary Disclosure Won't Blindside Taxpayer*, Tax Analysts Document 2019-9094 (March 12, 2019) (comments by John Cardone, Director of Withholding and International Individual Compliance, LB&I Division).
 - ⁴³ IRS Memorandum LB&I-09-1118-014 (Nov. 20, 2018).
 - ⁴⁴ Offshore Voluntary Disclosure Program, Frequently Asked Question #20; see also Internal Revenue Service, *Offshore Voluntary Disclosure Initiative Collection Procedure*, Tax Analyst Doc. 2015-22100.
 - ⁴⁵ Form 14457 (*Voluntary Disclosure Practice Pre-clearance Request and Application*) (April 2020).
 - ⁴⁶ Andrew Velarde, *IRS Gives New Answers About Eligibility for Voluntary Disclosure*, Tax Analysts Doc. No. 2020-18821 (May 13, 2020); see also Andrew Velarde, *IRS Has New Answers on What Voluntary Disclosure Entails*, Tax Analysts Doc. No. 2020-18450, 2020 Tax Notes Today International 94-2 (May 14, 2020).
 - ⁴⁷ Form 14457, Instructions, at 14.
 - ⁴⁸ Form 14457, Instructions, at 8.
 - ⁴⁹ Form 14457, at 1.
 - ⁵⁰ Form 14457, Instructions, at 6.
 - ⁵¹ Form 14457, at 1.
 - ⁵² Form 14457, at 1.
 - ⁵³ Form 14457, Instructions, at 12.
 - ⁵⁴ Form 14457, at 2; Form 14457, Instructions, at 12.
 - ⁵⁵ Form 14457, Instructions, at 12.
 - ⁵⁶ Form 14457, at 3.
 - ⁵⁷ Form 14457, Instructions, at 12.
 - ⁵⁸ Form 14457, Instructions, at 13.
 - ⁵⁹ Form 14457, at 3.
 - ⁶⁰ Form 14457, at 4.
 - ⁶¹ Form 14457, Instructions, at 7.
 - ⁶² Form 14457, at 4 and 5.
 - ⁶³ Form 14457, Instructions, at 7.
 - ⁶⁴ Form 14457, Instructions, at 7.
 - ⁶⁵ Form 14457, Instructions, at 8.
 - ⁶⁶ Form 14457, Instructions, at 8.
 - ⁶⁷ Form 14457, Instructions, at 8.
 - ⁶⁸ Form 14457, Instructions, at 8.
 - ⁶⁹ Form 14457, Instructions, at 8.
 - ⁷⁰ Form 14457, Instructions, at 8.

- ⁷¹ Form 14457, Instructions, at 6 (emphasis added).
- ⁷² Form 14457, Instructions, at 6 (emphasis added).
- ⁷³ Form 14457, Instructions, at 6 (emphasis added).
- ⁷⁴ Form 14457, Instructions, at 7 (emphasis added).
- ⁷⁵ Form 14457, Instructions, at 13 (emphasis added).
- ⁷⁶ Form 14457, Instructions, at 10.
- ⁷⁷ Form 14457, Instructions, at 10. Taxpayers must file Form 433-A (*Collection Information Statement for Wage Earners and Self-Employed Individuals*) and/or Form 433-B (*Collection Information Statement for Business*), as appropriate.
- ⁷⁸ Form 14457, Instructions, at 10.
- ⁷⁹ Form 14457, Instructions, at 10.
- ⁸⁰ Form 14457, Instructions, at 10.
- ⁸¹ Form 14457, Instructions, at 12.
- ⁸² Form 14457, Instructions, at 9.
- ⁸³ Form 14457, Instructions, at 9.
- ⁸⁴ Form 14457, Instructions, at 9.
- ⁸⁵ Form 14457, Instructions, at 13.
- ⁸⁶ Form 14457, Instructions, at 7.
- ⁸⁷ Form 14457, Instructions, at 8.
- ⁸⁸ Form 14457, Instructions, at 7.
- ⁸⁹ Form 14457, Instructions, at 7 (emphasis added).
- ⁹⁰ Form 14457, Instructions, at 8–9.
- ⁹¹ Form 14457, Instructions, at 10.
- ⁹² Form 14457, Instructions, at 10.
- ⁹³ Form 14457, Instructions, at 10.
- ⁹⁴ Form 14457, Instructions, at 9.
- ⁹⁵ Form 14457, Instructions, at 9.
- ⁹⁶ Form 14457, Instructions, at 9.
- ⁹⁷ Form 14457, Instructions, at 11.
- ⁹⁸ Form 14457, Instructions, at 9.
- ⁹⁹ Form 14457, Instructions, at 9.
- ¹⁰⁰ Form 14457, Instructions, at 9.
- ¹⁰¹ Form 14457, Instructions, at 7 (emphasis added).
- ¹⁰² Form 14457, Instructions, at 12.
- ¹⁰³ Form 14457, Instructions, at 12.
- ¹⁰⁴ Form 14457, Instructions, at 8.
- ¹⁰⁵ Form 14457, Instructions, at 11.
- ¹⁰⁶ Form 14457, Instructions, at 11.
- ¹⁰⁷ See www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures-for-u-s-taxpayers-residing-outside-the-united-states-frequently-asked-questions-and-answers, last visited May 25, 2020 (emphasis added). An Internal Revenue Service Number is a nine-digit number issued by the IRS to individuals who file a return or make a payment without providing an SSN or ITIN.
- ¹⁰⁸ Form 14457, Instructions, at 12.
- ¹⁰⁹ Form 14457, Instructions, at 6.
- ¹¹⁰ Form 14457, Instructions, at 8 and 10.
- ¹¹¹ Form 14457, Instructions, at 14 (emphasis in original).
- ¹¹² Form 14457, Instructions, at 14.
- ¹¹³ Form 14457, Instructions, at 14.
- ¹¹⁴ Form 14457, Instructions, at 6 (emphasis added).
- ¹¹⁵ Form 14457, Instructions, at 7.
- ¹¹⁶ Form 14457, Instructions, at 14.



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