



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

March 9, 2016

The Honorable John A. Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Mark J. Mazur
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

RE: Comments on the 2014 Offshore Voluntary Disclosure Program and the Streamlined Programs

Dear Messrs. Koskinen, Wilkens and Mazur:

The American Institute of CPAs (AICPA) applauds the Internal Revenue Service (IRS) for making available the Offshore Voluntary Disclosure Programs (OVDP) and the Streamlined Filing Compliance Procedures which allow U.S. taxpayers to voluntarily disclose their previously unreported offshore assets and become fully compliant with U.S. tax law on a continuing basis. The remarkable success of these programs is greatly attributable to their fairness and the absence of unnecessarily punitive penalties on those taxpayers eligible to participate.

The AICPA believes that making certain minor revisions to the terms of the 2014 Offshore Voluntary Disclosure Program and the Streamlined Filing Compliance Procedures would both increase the number of taxpayers participating and improve the fairness and equity of the programs.

For the 2014 Offshore Voluntary Disclosure Program, we recommend that the IRS:

- 1) Restore the previous practice of not requiring an upfront payment of the miscellaneous offshore penalty by taxpayers.
- 2) Apply the 50% miscellaneous "Super" penalty only to accounts held at institutions listed on the Foreign Financial Facilitators List.
- 3) Allow the waiver of the passive foreign investment company (PFIC) computations for small account cases.

The Honorable John A. Koskinen
The Honorable William J. Wilkins
Mr. Mark J. Mazur
March 9, 2016
Page 2 of 6

For the Streamlined Filing Compliance Procedures, we recommend that the IRS:

- 1) Modify the penalty base to include only those assets associated with tax non-compliance.
- 2) Expand the Streamlined Filing Compliance Procedures to include certain classes of non-willful individuals who are currently ineligible for either the Streamlined Foreign Offshore Procedures (SFOP) or the Streamlined Domestic Offshore Procedures (SDOP).
- 3) Provide additional guidance in the SFOP and SDOP filing instructions to taxpayers on the specific factors the IRS will consider in judging whether their non-compliance was willful.

We provide below more detailed descriptions of these recommendations and our rationale for supporting them.

2014 Offshore Voluntary Disclosure Program

1) The AICPA recommends that the IRS restore the previous practice of not requiring an upfront payment of the miscellaneous offshore penalty by taxpayers.

In all previous versions of the OVDP (2009, 2011 and 2012 programs), payment of the miscellaneous penalty was not required prior to execution of the closing agreement, at which time the amount of the penalty was fixed and agreed to by both the IRS and the taxpayer. The 2014 OVDP, according to Frequently Asked Question (FAQ)¹ 25, requires that taxpayers include payment for this penalty, along with any tax and other penalty amounts due, at the time they submit any delinquent tax returns and other necessary documents to participate in the program.

We are concerned that taxpayers who fails to reach an agreement with the IRS and choose to withdraw from the OVDP could not receive back their pre-payment of the miscellaneous offshore penalty. While FAQ 25 indicates that all payments made are subject to the limitations of section 6511,² the referenced section provides rules for credit or refund of “tax” imposed, which would appear to exclude this penalty. Even if the penalty was covered by section 6511, there is a strict statute limitation of 2 years. Resolution (or eventual withdrawal) of an OVDP submission will often take significantly longer than 2 years.

The IRS should restore the previous requirement that payment of the miscellaneous offshore penalty occur only upon execution of a closing agreement.

¹ [Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014.](#)

² All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury Regulations promulgated thereunder.

The Honorable John A. Koskinen
The Honorable William J. Wilkins
Mr. Mark J. Mazur
March 9, 2016
Page 3 of 6

2) *The AICPA recommends that the 50% miscellaneous “Super” penalty apply only to accounts held at institutions listed on the Foreign Financial Facilitators List.*

Starting with the 2014 revisions to the OVDP, the previous miscellaneous offshore penalty of 27.5% was increased to 50% if any of a taxpayer’s accounts were held at a foreign financial institution or other facilitator which was generally a) under investigation by the IRS or the Department of Justice, b) cooperating with the IRS or the Department of Justice, or c) the subject of a court-approved “John Doe summons.”

In many cases, a taxpayer will have held a nominal dollar amount account at an institution that meets this criteria, but the overwhelming bulk of the assets were held at foreign financial institutions who would otherwise still meet the eligibility requirements for the lower 27.5% penalty.

We believe that the IRS should apply the 50% “super” penalty rate to only those accounts held at institutions meeting the criteria for inclusion on the Foreign Financial Facilitators List as of the date the taxpayer either files a request for preclearance under 2014 OVDP FAQ 23 or the initial voluntary disclosure letter and attachment under 2014 OVDP FAQ 24, whichever is earlier.

3) *The AICPA recommends that the IRS allow the waiver of PFIC computations for small account cases.*

A significant number of OVDP cases involve accounts which held foreign mutual funds or other securities which are considered PFICs under U.S. tax law. Outside the OVDP, auditors have discretion on whether to require a taxpayer to perform PFIC calculations. Frequently, where the examiner believes that the tax liability is relatively small, the calculations will be waived. Under the OVDP, examiners have refused to process cases unless the calculations are performed, either by IRS personnel or in most cases by the taxpayers themselves. This policy results in an excessive and unnecessary expenditure of resources by the taxpayers, their representatives and the IRS for a comparatively small additional tax liability.

We believe that the Revenue Agent or Group Manager should have the authority to waive the PFIC calculations where the amount of additional tax compared to the time, effort and cost involved is minimal.

Streamlined Filing Compliance Procedures

1) *The AICPA recommends that the penalty computation in the SDOP apply only to offshore assets connected to unreported income.*

A primary purpose of the Streamlined Filing Compliance Procedures is to provide a simpler and less costly method of coming into compliance for taxpayers whose failure to report foreign financial assets was due to non-willful conduct. In many cases, the unreported assets may have

The Honorable John A. Koskinen
The Honorable William J. Wilkins
Mr. Mark J. Mazur
March 9, 2016
Page 4 of 6

generated no taxable income during the period of noncompliance (such as a non-interest bearing account) or the taxable income may have previously been reported properly on a taxpayer's original, timely filed tax return.

Under the OVDP, "The offshore penalty is intended to apply to all of the taxpayer's offshore holdings that are related in any way to tax non-compliance"³ and tax non-compliance is defined as "failure to report gross income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset."⁴

The absence of a similar provision excluding assets for which there was no tax non-compliance from the penalty base used in the SDOP seems contrary to the spirit and intent of the program. We believe that the IRS should exclude from the penalty base any assets which did not generate reportable income or for which the gross income was properly reported, even if the assets were omitted from a timely filed Form 8938, *Statement of Foreign Financial Assets* or FinCEN Form 114, *Report of Foreign Bank and Financial Accounts*.

2) *The AICPA recommends that any otherwise non-willful taxpayer ineligible for the SFOP is allowed to participate in the SDOP.*

The American Bar Association (ABA) and others have identified several classes of individuals whose failure to file was likely non-willful, but are currently ineligible for either of the Streamlined options. One example, which the IRS has acknowledged, is referred to as a "Canadian snowbird." These are taxpayers who are often U.S. citizens solely by birth but have spent most of their lives living in Canada. As "snowbirds," they likely are not physically absent from the U.S. for more than 330 days during a calendar year and thus ineligible for the SFOP. However, they have also probably never filed a U.S. tax return (and were unaware of the requirement to file) and thus are ineligible for the SDOP.

While these individuals are eligible to file delinquent FinCEN Forms 114 via the Delinquent Return Procedures, there is no current way for them to correct a failure to report income and pay the required U.S. tax other than the OVDP. Given that their failure to file was clearly non-willful, we are unaware of any policy or other reason to exclude them from a Streamlined Filing Procedure.

We believe that allowing any non-willful taxpayer who is ineligible for the SFOP to take advantage of the SDOP is a fair and equitable solution. Under the SDOP, these non-willful taxpayers would have a requirement to pay the 5% penalty, pay any tax owed on their unreported income and thus become compliant with U.S. tax law on an ongoing basis.

³ [Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014.](#)

⁴ [Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014.](#)

The Honorable John A. Koskinen
The Honorable William J. Wilkins
Mr. Mark J. Mazur
March 9, 2016
Page 5 of 6

3) *The AICPA recommends that the IRS provide additional details on the specific factors which are considered by them in making a determination of a taxpayer's non-willfulness.*

The eligibility requirements for both the SFOP and the SDOP are that taxpayers must certify via either Form 14653, *Certification by U.S. Person Residing Outside of the United States for Streamlined Foreign Offshore Procedures* or Form 14654, *Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures* that their failure to report any income, pay any tax or file any required information returns was non-willful. The current instructions for these forms state that taxpayers must provide specific reasons for their failure and that filings deemed incomplete or insufficient will not qualify for the program's favorable terms. However, virtually no guidance is available to help taxpayers or their advisors know what specific factors are considered by the IRS in making their determination.

We believe that providing a non-inclusive list of items that are potentially relevant will greatly assist taxpayers in determining their eligibility and will allow taxpayers to properly complete the required documentation. In a letter to you dated October 14, 2015, the ABA provided suggested language for such a listing which we believe is appropriate. We have reproduced that suggested language below:

“Specific facts, whether beneficial or adverse to you, may include discussion of all or some of the following factors: your age; educational background; health; language barriers; mental capacity issues; communication with professional advisors; ties to country where financial assets are located; foreign and domestic tax compliance history; source of funds; and involvement with withdrawals, deposits or investment decisions relating to the account.”⁵

Summary

The AICPA is recommending several minor revisions to the terms of the 2014 Offshore Voluntary Disclosure Program and the Streamlined Filing Compliance Procedures that we believe will increase participation in these programs, allow more taxpayers to become compliant with their tax filing and reporting obligations, and provide greater fairness and equity for those participants.

The AICPA is the world's largest member association representing the accounting profession, with more than 412,000 members in 144 countries and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

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⁵ [American Bar Association Section of Taxation - Comments on 2014 Offshore Voluntary Disclosure Program and the Streamlined Programs.](#)

The Honorable John A. Koskinen
The Honorable William J. Wilkins
Mr. Mark J. Mazur
March 9, 2016
Page 6 of 6

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please feel free to contact me at (801) 523-1051 or tlewis@sisna.com; Blake Vickers, Chair, AICPA International Taxation Technical Resource Panel, at (713) 753-5493 or blake.vickers@kbr.com; or Jonathan Horn, Lead Technical Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204 or jhorn@aicpa.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Troy K. Lewis". The signature is written in a cursive, flowing style.

Troy K. Lewis, CPA, CGMA
Chair, AICPA Tax Executive Committee

cc: Douglas W. O'Donnell, Commissioner, Large Business and International, Internal Revenue Service
Theodore Setzer, Assistant Deputy Commissioner (International), Large Business and International, Internal Revenue Service