

TOPICS IN THE SEMINAR INCLUDE:

**The I.R.S. Amnesty Program
&
The New Streamlined Filing
Compliance Procedures**

By

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SEMINAR INTRODUCTION

by Richard S. Lehman, Esq.

Two pieces of
Tax Legislation
have been phased
in over the
last few years



- a. **Foreign Account Tax
Compliance Act (FATCA)**
(Beginning Taxable Year 2011)
- b. **Foreign Financial Institutions
(FFI's) Report On Americans**
(Beginning in 2013)

I.R.S Grants **NEW**



Amnesty Program
(Beginning Taxable Year 2012)

Two pieces of Tax Legislation have been phased in over the last few years

Those two pieces of legislation, together with existing law, now make sure that every U.S. taxpayer's assets and source of income, both foreign and domestic, will be included in an information return or a tax return that **must be filed** with the Internal Revenue Service of the United States.

1. The “FATCA”
2. “FFI” Reporting

EXISTING LAWS

U.S. VOLUNTARY DISCLOSURES

1. Income Tax Return
2. Estate Tax Return
3. Gift Tax Return
4. FBAR Reporting
5. Form 1099
6. Form W-2
7. Information Returns – Numerous

REPORTING INFORMATION FROM U.S. BANKS ALL PAYORS AND FINANCIAL INSTITUTIONS

1. Form W-2 Wages Taxes
2. Form 1099 Investment income

NEW LAWS

U.S. VOLUNTARY DISCLOSURES (BEGINNING TAXABLE YEAR 2011)

FOREIGN ACCOUNT TAX COMPLIANCE ACT ("FATCA")
All Foreign Financial Assets Reported.

INSTITUTIONAL FOREIGN FINANCIAL REPORTING ("FFI") (BEGINNING 2013)

All Foreign Financial Institutions
Complete Reporting all U.S. Accounts

3 Foreign Financial Institution to Withhold Tax
on all U.S. Accounts Thirty (30%) Percent of
Gross Income

Beginning taxable year 2012

AMNESTY

The I.R.S. Amnesty Program works - but
there are legal safeguards and different
levels of payments and taxes.

1.

8-Years Prior Taxes

2.

Pay Tax all Omitted Income

3.

20% Accuracy Penalty On Taxes Due

4.

Interest on Taxes

5.

27.5% Highest Bank Account Value and
Other Asset Values with Omitted Taxes

THIS SECTION:

The I.R.S. New Amnesty Program

Beginning taxable year 2012

1. 8-Years Prior Taxes
2. Pay Tax on all Omitted Income
3. 20% Accuracy Penalty On Taxes Due
4. Interest on Taxes
5. 27.5% Highest Bank Account Value and Other Asset Values with Omitted Taxes

The I.R.S. has provided an open ended Amnesty Program for unreported income and unreported foreign accounts.

- The IRS will be looking for offshore unreported income.
- Several thousand new agents have just been approved.
- The penalties, fines and taxes that can result from unreported foreign income could be life ruining.

Civil Penalties

1. There is a penalty for failing report a direct or indirect financial interest in, or signature authority over any financial account maintained with a financial institution located in a foreign country that exceeds \$10,000.
2. There is a penalty for failing to file an Annual Return to Report large foreign gifts and transactions with Foreign Trusts.
3. There is a penalty for failing to report any ownership interest in foreign trusts.
4. A penalty for certain United States persons who are officers, directors or shareholders in certain foreign corporations who do not report such information to the United States.
5. There is a penalty for U.S. persons that fail to file and report ownership of foreign partnerships

Fraud Penalties

There are Fraud Penalties that result only in Civil Penalties. These penalties can be almost as high as the tax that has been avoided.

1. A fraud penalty for failing to file a tax return.
2. A fraud penalty for failing to pay the amount of tax shown on the return.
3. An accuracy-related penalty on underpayment of tax.

Criminal Penalties

The failure to report and pay taxes on foreign income and bank account by US. Taxpayer can also result in Criminal Penalties.

1. Possible criminal charges related to tax returns include filing a false return and failure to file an income tax return.
2. A person convicted of tax evasion is subject to a prison term of up to five years and a fine of up to \$250,000.
3. Filing a false return subjects a person to a prison term of up to three years and a fine of up to \$250,000.

Amnesty - Cost

The present Amnesty program provides a tax, interest and penalty framework.

1. Individuals must pay their taxes on any unreported income,
2. Pay a 20% penalty on the total unpaid taxes, and interest on the amounts due.
3. In addition, individuals must pay a one time penalty of 27.5 percent of the highest aggregate balance at any one point in time of their foreign bank accounts or entities

Eligibility

Taxpayers who have undisclosed offshore accounts or assets are eligible to apply for IRS Criminal Investigation's Voluntary Disclosure Practice and penalty regime for an eight year maximum disclosure period.

- Corporations, partnerships, and trusts and other entities are eligible to make voluntary disclosures.

Amnesty Not Available – Investigation Commenced

If the IRS has initiated a civil examination, regardless of whether it relates to undisclosed foreign accounts or undisclosed foreign entities, the taxpayer will not be eligible to come in under the Amnesty.

Eligibility

Taxpayers who reported and paid tax on all their taxable income for prior years but did not file FBARs should file the delinquent FBAR reports according to the FBAR instructions and attach a statement explaining why the reports are filed late.

- The IRS will not impose a penalty for the failure to file the delinquent FBARs if there are no underreported tax liabilities,

Payment

The terms of the Amnesty require the taxpayer to pay the tax, interest and accuracy related penalty and other penalties with their submission.

- 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.

Amnesty Documents

- Copies of previously filed original (and, if applicable, previously filed amended) federal income tax returns for tax years covered by the voluntary disclosure.
- Complete and accurate amended federal income tax return
- A completed Foreign Account or Asset Statement for each previously undisclosed foreign account or asset during the voluntary disclosure period.

Amnesty Documents

- A check payable to the Department of Treasury in the total amount of tax, interest, accuracy-related penalty, and if applicable, the failure to file and failure to pay penalties, for the voluntary disclosure period.
 - a) The total amount of tax, interest and penalties as described above cannot be paid, submit a proposed payment arrangement and a completed Collection Information Statement.
- For those applicants disclosing offshore financial accounts with an aggregate highest account balance in any year of \$500,000 or more, copies of offshore financial account statements reflecting all account activity for each of the tax years covered by your voluntary disclosure.
- Properly completed and signed agreements to extend the period of limitations.

The Amnesty Penalty Framework

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, regardless of the form of the taxpayer's ownership or the character of the asset.

- The penalty applies to all assets directly owned by the taxpayer, including financial accounts holding cash, securities or other custodial assets, tangible assets such as patents or stock or other interests in a U.S. foreign business.
- If such assets are indirectly held or controlled by the taxpayer through an entity, the penalty may be applied to the taxpayer's interest in the entity or, if the Service determines that the entity is an alter ego or nominee of the taxpayer, to the taxpayer's interest in the underlying assets.

The Amnesty Penalty Framework

The values of accounts and other assets are aggregated for each year and the penalty is calculated at 27.5% percent of the highest year's aggregate value during the period covered by the voluntary disclosure. If the taxpayer has multiple accounts or assets where the highest value of some accounts or assets is in different years, the values of accounts and other assets are aggregated for each year and a single penalty is calculated at 27.5% percent of the highest year's aggregate value.

The 5% Penalty

Taxpayers who meet all four of the following conditions will be entitled to the reduced 5% offshore penalty

- (a) did not open or cause the account to be opened (unless the bank required that a new account be opened, rather than allowing a change in ownership of an existing account, upon the death of the owner of the account);
- (b) have exercised minimal, infrequent contact with the account, for example, to request the account balance, or update account holder information such as a change in address, contact person, or email address,
- (c) have, except for a withdrawal, closing the account and transferring the funds to an account in the United States, not withdrawn more than \$1,000 from the account in any year for which the taxpayer was on compliant, and
- (d) can establish that all applicable U.S. taxes have been paid on funds deposited to the account (only account earnings have escaped U.S. taxation).

How To Reduce The Penalty For Many Clients

This is becoming extremely important in my practice because it is the way in which I am able to help some people reduce their bank penalties which are extremely high.

Question 17

of the IRS Questionnaire

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

For taxpayers who reported and paid tax on all their taxable income for prior years but did not file FBARs, you should file the delinquent FBAR reports according to the instructions (send to Department of Treasury, Post Office Box 32621, Detroit, MI 48232.0621) and attach a statement explaining why the reports are filed late.

- **The IRS will not impose a penalty for the failure to file the delinquent FBARs if there are no underreported tax liabilities and the FBARs for 2010 are due on June 30, 2011 and must be filed by that date.**

IRS Question 50

The Voluntary Disclosure examiners do not have discretion to settle cases for amounts less than what is properly due and owing. However, because the 25 percent offshore penalty is a proxy for the FBAR penalty, other penalties imposed under the Internal Revenue Code, and potential liabilities for years prior to 2003, there may be cases where a taxpayer making a voluntary disclosure would owe less if the special offshore initiative did not exist.

- Under no circumstances will taxpayers be required to pay a penalty greater than what they would otherwise be liable for under the maximum penalties imposed under existing statutes.

The Amnesty Program must be handled by professionals who know what they are doing.

- There are legal safeguards and different levels of payments and taxes.
- There is a one time payment on Unreported Bank Deposits that can be assessed at penalties ranging from 0% to 27.5% of the Deposit.
- Obtain every tax right you are entitled to.

**The Amnesty Program Can Be Terminated At Any Time
By The Internal Revenue Service.**

— Streamlined Filing Compliance Procedures —

IRS Makes Changes To Offshore Bank And Foreign Asset Disclosure Programs



By Richard S. Lehman Esq.

I.R.S. Streamlined Filing Compliance Procedures

- The Internal Revenue Service announced major changes in its offshore voluntary compliance programs, providing new options to help both taxpayers residing overseas and those residing in the United States.
- These changes will provide thousands of people a new avenue to come into compliance with their U.S. tax obligations.
- The expanded streamlined procedures are intended for U.S. taxpayers whose failure to disclose their offshore assets are non willful.

I.R.S. Streamlined Filing Compliance Procedures

- This is an extremely important and valuable I.R.S. Program.
- It allows almost every American who has been afraid to step forward and disclose their foreign assets to the U.S. taxing authorities to do so with minimized penalties on unpaid taxes and unfiled information returns.

The Purpose of The New I.R.S. Streamlined Procedures

The streamlined filing compliance procedures are available to taxpayers certifying that their failure to report foreign financial assets and pay all tax due in respect of those assets did not result from willful conduct on their part.

The Purpose of The New I.R.S. Streamlined Procedures

The streamlined procedures are designed to provide to taxpayers in such situations:

1. a streamlined procedure for filing amended or delinquent returns and
2. terms for resolving their tax and penalty obligations. These procedures will be available for an indefinite period until otherwise announced. This means that just as the Internal Revenue Service has suddenly announced this highly beneficial “settlement tool”, the Internal Revenue Service can withdraw the program.

Eligible taxpayers need to act quickly.

The Purpose of The New I.R.S. Streamlined Procedures

General eligibility for the streamlined procedures:

- The streamlined filing compliance procedures, (the “Streamlined Procedures”), are designed for only individual taxpayers, including estates of individual taxpayers.
- The Streamlined Procedures are available to both U.S. individual taxpayers residing outside the United States and U.S. individual taxpayers residing in the United States.
- Taxpayers using either the Streamlined Foreign Offshore Procedures or the Streamlined Domestic Offshore Procedures will be required to certify, in accordance with the specific instructions set forth below, that the failure to report all income, pay all tax and submit all required information returns, including FBARs, was due to non willful conduct.

Not Eligible

- Not all taxpayers will be eligible for the streamlined procedures.
- Taxpayers who are already under a civil examination of a taxpayer's returns for any taxable year, (regardless of whether the examination relates to undisclosed foreign financial assets), will not be eligible to use the streamlined procedures.
- Taxpayers under examination may consult with their agent. Similarly, a taxpayer under criminal investigation by IRS Criminal Investigation is also ineligible to use the streamlined procedures.

Quiet Disclosures

- Taxpayers eligible to use the Streamlined Procedures who have previously filed delinquent or amended returns in an attempt to address U.S. tax and information reporting obligations with respect to foreign financial assets (so called “Quiet disclosures”) may still use the streamlined procedures. However, any penalty assessments previously made with respect to those filings will not be abated.
- Receipt of the returns will not be acknowledged by the IRS and the streamlined filing process will not culminate in the signing of a closing agreement with the IRS. However, the check will be cashed. No formal confirmation of acceptance will be provided by the I.R.S.

The Offshore Voluntary Disclosure Program

- If a Taxpayer is concerned that his or her failure to report income, pay tax and submit required information returns was due to willful conduct and who wants more assurances that they will not be subject to criminal inactivity and/or substantial monetary penalties, that taxpayer should consider participating in the Offshore Voluntary Disclosure Program (OVDP) and should consult with their professional tax or legal advisers.

This Offshore Voluntary Compliance Program is a separate I.R.S. Program that waives certain serious penalties but asserts a much higher overall penalty than the Streamlined Procedure and it assures taxpayers that they will have a perfectly clean slate.

A dark wood desk with a blue pen and a brass object.

**Eligibility Procedures
& Requirements**

**U.S. TAXPAYERS RESIDING
IN THE UNITED STATES**

Eligibility Procedures

U.S. Residents

1. Must be a U.S. tax resident in the U.S.
2. The taxpayer must have previously filed a U.S. tax return for each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed;
3. The taxpayer must have failed to report gross income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR and or one or more international information returns, such as forms reporting gifts from foreign persons, forms or U.S. taxpayers that have ownership in foreign corporations and forms disclosing all of the taxpayers foreign income producing assets.
4. Such failures must have resulted from non willful conduct. 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.

Eligibility Procedures

The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.

A finding of willfulness must be supported by evidence of willfulness. The burden of establishing willfulness is on the Internal Revenue Service and if it is determined that the violation was due to reasonable cause, the willfulness penalty should not be asserted.

The Benefits of The Streamlined Procedure

1. Seek Professional Advise

A taxpayer who is eligible to use these Streamlined Foreign Offshore Procedures and who complies with all of the instructions will not be subject to failure to file, and failure to pay penalties, accuracy related penalties, information return penalties, or FBAR penalties.

Specific Instructions for the Streamlined Foreign Offshore Procedures

1. For each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed:
 - If a U.S. tax return has not been filed previously, submit a complete and accurate delinquent tax return using Form 1040, U.S. Individual Income Tax return, together with the required information returns (e.g., Forms 3520, 5471 and 8938) even if these information returns would normally be filed separately from the Form 1040 had the taxpayer filed on time, or
 - If a U.S. tax return has been filed previously, submit a complete and accurate amended tax return using Form 1040X, Amended U.S. Individual Income Tax Return, together with the required information returns (e.g., Forms 3520, 5471 and 8938) even if these information returns would normally be filed separately from the Form 1040 had the taxpayer filed a complete and accurate original return.

The Certification

Taxpayers must complete and sign a statement certifying:

1. that you are eligible for the Streamlined Domestic Offshore Procedures;
2. that all required FBARs have now been filed (see instruction 9 below);
3. that the failure to report all income, pay all tax, and submit all required information returns, including FBARs, resulted from non willful conduct; and that the miscellaneous offshore penalty amounts is accurate.
4. Together with the required accurate returns, the taxpayer must submit payment of all tax due as reflected on the tax returns and all applicable statutory interest with respect to each of the late payment amounts. The taxpayer's identification number must be included on the check and the taxpayers may receive a balance due notice or a refund if the tax or interest is not calculated correctly.
5. Submit payment of miscellaneous offshore penalty as defined above.
6. For each of the most recent 6 years for which the FBAR due date has passed, file delinquent FBARs according to the FBAR instructions and include a statement explaining that the FBARs are being filed as part of the Streamlined Filing Compliance Procedures.

The Penalty

- The Title 26 miscellaneous offshore penalty is equal to 5 percent of the highest aggregate year-end balance / value of the taxpayer's foreign financial assets that are subject to the miscellaneous penalty,
- A taxpayer who is eligible to use these Streamlined Domestic Offshore Procedures and who complies with all of the instructions below will be subject only to the Title 26 miscellaneous offshore penalty and will not be subject to accuracy related penalties, information return penalties or FBAR penalties.

I.R.S. Specific Instructions

Include at the top of the first page of each delinquent or amended tax return and at the top of each information return “Streamlined Foreign Offshore” written in red to indicate that the returns are being submitted under these procedures.

Complete and sign a statement on the Certification by U.S. Person Residing Outside of the U.S. certifying

- 1) that you are eligible for the Streamlined Foreign Offshore Procedures;
- 2) that all required FBARs have now been filed; and
- 3) that the failure to file tax returns, report all income, pay all tax, and submit all required information returns, including FBARs, resulted from non willful conduct.

Submit payment of all tax due as reflected on the tax returns and all applicable statutory interest with respect to each of the late payment amounts. Your taxpayer ID number must be included in your check.

U.S. Taxpayers Residing Outside The United States

1. Taxpayers must meet the applicable non-residency requirements; and
2. have failed to report the income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR with respect to a foreign financial account, and such failures resulted from non willful conduct.
 - Individual U.S. citizens or lawful permanent residents, or estate of U.S. citizens or lawful permanent residents will meet the applicable non residency requirement if, in any one or more of the most recent three years for which the U.S. tax return due date (or properly applied for extended due date) has passed, the individual did not have a return due date (or properly applied for extended due date) has passed, the individual did not have a U.S. abode and the individual was physically outside the United states for at least 330 full days.

The Concept of Willfulness

In tax law “willfulness” has its own definition and it is an important definition for every taxpayer. That is because a taxpayer who “willfully” filed or did not file accurate tax information can be subjected to numerous very expensive penalties and even criminal liability.

The Concept of Willfulness

- According to the IRS Manual, the innocent failure of an unsophisticated Taxpayer to know the filing requirements for international transactions, coupled with other factors, such as the lack of any efforts taken to conceal the existence of the accounts could not lead to a conclusion that the violation was due to willful blindness. The mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness.

The Concept of Willfulness

- Willfulness can rarely be proved by direct evidence, since it is a state of mind. It is usually established by drawing a reasonable inference from the available facts.
- The government may base a determination of willfulness in the failure to file the FBAR on inference from conduct meant to conceal sources of income or other financial information.
- For FBAR purposes, this could include concealing signature authority, interests in various transactions, and interest in entities transferring cash to foreign banks

Internal Revenue Service Document

The Service issued a legal memorandum in connection with its international enforcement programs. One of the issues addressed was the proper interpretation of the “willfulness” standard in the context of civil FBAR penalties.

The Service’s directness on this point was remarkable.

“The first question was whether the phrase willful violation (or willfully causes any violation) has the same definition for both the civil penalty and the criminal penalty.

- The answer by the I.R.S. was “yes”.

Factors to consider in determining intentional disregard include, but are not limited to:

- i. Whether the failure to file timely or the failure to include correct information is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely or repeatedly failing to include correct information;
- ii. Whether correction was promptly made on discovery of the failure;
- iii. Whether the filer corrects a failure to file or a failure to include correct information within 30 days after the date of any written request from the Internal Revenue Service to file or correct; and
- iv. Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely or to include correct information on an information return.

Statements from decided cases regarding “Willfulness”

The Supreme Court has long held that, in tax cases, “willfulness” requires proof of an intentional violation of a known legal duty, meaning that there must be some evidence beyond recklessness that a taxpayer was aware of the relevant reporting requirements.

- A showing that the defendant acted with “careless disregard” is not adequate.
- Willfulness is an entirely subjective determination.

Statements from decided cases regarding “Willfulness”

1. Under some statutes, an act is “willful” only if done malevolently, wickedly and criminally.
2. Under other types of statutes, it suffices that the act was performed consciously and voluntarily, rather than inadvertently or accidentally.

Between these two formulations, “willful” has been given various other meanings, although shades of difference often times diminish when the probe extends beneath the surface.

- Because of its inherent instability, only the most careful consideration of the term “willful” in its legislative context can provide satisfactory assurance that eventually it will take on its proper cast.

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Mr. Lehman began his career in tax law with a law degree from Georgetown University, a Master's Degree in tax law from New York University, and two years of clerking for the Honorable William M. Fay, a Judge on the United States Tax Court in Washington, D.C. Mr. Lehman spent several years as the senior attorney of the Interpretive Division of the Chief Counsel's office at the Internal Revenue Service, the IRS's internal law firm.

Mr. Lehman has had extensive experience with all areas of the Internal Revenue code that apply to **American taxpayers** and **non-resident aliens** and **foreign corporations** investing or conducting business in the United States, as well as U.S. citizens and domestic corporations investing abroad.

Richard works with other lawyers, accountants, business leaders and individuals who are struggling to find their way through the complexities of United States Tax Law.



**Value can be lost without good
professional advice.**

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