

Presenting a live 90-minute webinar with interactive Q&A

Streamlined Offshore Voluntary Disclosure Program: Avoiding Aggressive Enforcement Regime and Significant Penalties

Leveraging the New OVDP Process for Claiming Non-Willful Failure to File

TUESDAY, JUNE 2, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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IRS Issues New FBAR Penalty Guidance (SBSE-04-0515-0025)

On Friday the IRS released new guidance on how examiners should determine the amount of any penalty for the failure to file an FBAR (Report of Foreign Bank Account, FinCEN Form 114). The guidance is effective for all open cases as of May 13, 2015. It does not appear to apply directly to cases in the Offshore Voluntary Disclosure Program (OVDP), but it will impact clients' decisions as to whether or not to opt-out of OVDP, or whether or not to enter OVDP in the first place.

Under the guidance examiners are instructed to make a determination of willfulness for each year of the examination. If multiple years are involved, and the conduct is willful, the total penalty amount for all years under examination is generally limited to 50 percent of the highest aggregate balance of all unreported foreign financial accounts. However, if the "facts and circumstances" justify it, an examiner may recommend a penalty of more or less than 50 percent, but in no circumstances will the penalty exceed 100% of the highest aggregate balance. Since there have been instances where the IRS has threatened penalties of 150% or more this finally places a limit on the maximum civil penalties. Presumably this was done, in part, to undercut any argument by taxpayers that the penalty violated the Constitutional prohibition against "excessive fines" that was raised in the *Zwerner* case in Florida. Examiners will continue to coordinate with Fraud Technical Advisors (FTA) if they have reason to believe a criminal referral may be appropriate.

If the examiner determines that the conduct was non-willful then in most cases the penalty will be limited to \$10,000 for each year regardless of the number of unreported financial accounts. Previously the IRS position was that it would assert a penalty of \$10,000 per year, per account. The guidance does provide that in some cases the "...facts and circumstances (considering the conduct of the person required to file, and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting nonwillful penalties for each year is not warranted." Examiners may in those cases assert a single penalty not to exceed \$10,000 for one year only. The starting point for all nonwillful calculations, however will be the "mitigation guidelines" set forth in IRM 4.26.16.4.6 et. seq.

On the other hand, the guidance indicates that depending on the facts and circumstances, multiple \$10,000 penalties for each year may be appropriate. In no event may the total penalties be greater than 50% of the highest aggregate balance for all years under examination. While all of this leaves a fair amount of discretion with the IRS examiner, it does suggest that there are "norms" for FBAR penalties. However, given that the actual amount of the penalties will be determined based upon "facts and circumstances" there remains a good deal of leeway for effective advocacy to keep the FBAR penalties as low as possible, and to keep them from reaching the maximum guideline amounts.

The guidance provides that it is the examiner who makes a recommendation as to amount, and type of FBAR penalty that is appropriate, and the group manager who makes the final determination, after consultation with an Operating Division FBAR Coordinator. The guidance makes clear (despite what our tax lawyers have been told in the past) that it is not the FBAR Coordinator who makes the decision. In addition, except in cases where the recommendation is to assert a willfulness penalty, IRS Counsel review is not required.

The guidance also provides a lengthy checklist of items which must be included in all civil FBAR penalty case files. Perhaps most important to tax attorneys, and our clients, will be the summary memorandum

explaining the FBAR violations. This memo is required to be provided to the taxpayer, and will be an invaluable tool, either in litigation or in protesting the FBAR penalty to the IRS' Appeals Division.

If you have unreported offshore accounts or other tax problems, call the tax litigation attorneys at Brager Tax Law Group, A.P.C.

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