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IRS 'Amnesty'...But Prosecuted Anyway?

Some people considering an IRS voluntary disclosure of their foreign income and assets don't do so because they fear prosecution. This seems counter-intuitive. Indeed, the best way to avoid prosecution for undisclosed foreign income or accounts is unquestionably to enter the IRS program.



Yet some fear prosecution precisely **because** of the tepid protection the IRS seems to offer. The IRS says most people won't be prosecuted. See [A3 of 2012 OVDP FAQs](#). That isn't the same as a guarantee and in itself is kind of unsettling.

In truth however, it is **almost** a guarantee. I just wish the IRS would actually use the g word. I still think some people don't believe they will be treated fairly or that somehow after they have come forward there will be a bait and switch.

Ever since 2009 when the IRS started its disclosure program, taxpayers have raised this concern. In 2009, I believe some people may not have come forward because the IRS did not guarantee that there would be absolutely no prosecution. For some, that was enough to cause them to remain quiet.

As it turned out, though, the 2009 program went smoothly. So did the 2011 program, and now the 2012 program. See [Undisclosed Foreign Bank Accounts? They're Even More Explosive Now](#). Although it is true that all three IRS programs have made the same tepid no-prosecution promise, many lawyers can now report that no one gets prosecuted.

In fact, many of the most sensitive cases in 2009 sailed through just fine. After that, clients and lawyers alike became more secure. The prosecution risk once in the program is nonexistent or at least nearly so.

There was one troubling development, though. A small number of taxpayers were evidently pre-cleared but then later rejected from the program. It is discussed here: [Can Israelis Still Get IRS Amnesty?](#) Some have noted that it seems unlikely that even these people will be prosecuted.

Many tax lawyers have been highly critical of this IRS reversal, which undermines the program. Since then, the IRS appears to have backed off considerably. The IRS has focused on the unique situation involving a Bank Leumi investigation.

It also impacted very few people, said the IRS. But worries remain. Indeed, some have noted the apparent mismatch between the IRS and the DOJ, both of which have a role in tax prosecutions.

As a technical matter, it is apparently possible for the U.S. Attorney to initiate prosecution without first obtaining Tax Division approval. See [U.S. Attorney Manual 6-4.243](#). Even the IRS manual can stir up concern. It says that a voluntary disclosure is a fact to **consider** but that it does not **automatically** guarantee immunity from prosecution. See [Internal Revenue Manual 9.5.11.9\(2\)](#).

But the reality is that it is highly, highly unlikely that an OVDP participant would face prosecution. Has it ever happened? Not that I am aware. It seems more than wrongheaded to not enter the IRS program because of prosecution fears.

Indeed, in the very near future—if it is not here already—there will be no place to hide from IRS scrutiny. Whether you think the IRS program is fair, it remains the best way by far to avoid the cost, heartache and danger of potential criminal liability.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.