In Choosing OVDP or Streamlined, Consider IRS Streamlined Audits

by Robert W. Wood and Scott B. Weese

Robert W. Wood

Scott B. Weese

Robert W. Wood practices law with Wood LLP (http://www.WoodLLP.com) and is the author of *Taxation of Damage Awards and Settlement Payments*, *Qualified Settlement Funds and Section 468B*, and *Legal Guide to Independent Contractor Status*, all available at http://www.TaxInstitute.com. Scott B. Weese is an associate with Wood LLP.

In this article, Wood and Weese discuss streamlined audit programs and the willfulness standard for disclosure of foreign bank accounts.

Offshore income and account disclosures to the IRS continue, but even with all the activity, what to expect remains uncertain. The streamlined program, first announced in June of 2014,[1] was a welcome relief for many taxpayers with undeclared foreign accounts who had faced unpalatable choices that included the offshore voluntary disclosure program, so-called quiet disclosures,[2] or the hope of not being caught.

Of those, only the OVDP offers finality and predictability. Yet it comes at a heavy price: eight years of tax returns, eight years of foreign bank account reports, payment of taxes, interest, and a 20 percent accuracy penalty on all taxes. The kicker, though, is a 27.5 percent penalty (or 50 percent in some circumstances)[3] on the highest aggregate balance of all foreign accounts for the prior eight years.

The materials are then audited if necessary to confirm that the filings are correct and to provide additional materials that the IRS might need. The process ends with a closing agreement. But as many practitioners can attest, after spending years in the program and then writing a painful check, some clients wonder if the security was worth the price.

The advent[4] of the streamlined programs brought new, alluring options. In exchange for three years of returns, six years of FBARs, and a possible 5 percent penalty on foreign accounts,

[1]The IRS revised the OVDP at the same time they created the new streamlined programs. These 2014 revisions increase the offshore penalty from 27.5 percent to 50 percent if the taxpayer's accounts were held with an ever-growing list of "bad" banks and financial advisers. IRS press release, "IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come Into Compliance" (June 18, 2014).

[2]That is, disclosing their foreign accounts outside the protection of any program.

[3]IRS, *supra* note 1; IRS, "Foreign Financial Institutions and Facilitators."

[4]More accurately, an expansion of a more limited streamlined option under the 2012 OVDP that was available to some taxpayers living outside the United States.

taxpayers can now come into compliance. The catch is that taxpayers must certify, under penalties of perjury, that their mistakes were non-willful. If the IRS has reason to doubt your word, it can be painful.

Between the various amnesty programs, the IRS has already collected more than $10 billion. And with the Foreign Account Tax Compliance Act, even those who have been slow to answer the IRS's call are coming in. Financially, the comparison between the OVDP and streamlined programs can be stark: 27.5 percent versus 5 percent on the penalty rates, 20 percent penalty on taxes due versus 0 percent, and five fewer returns to file. Understandably, many taxpayers have an easier time deciding to file streamlined rather than OVDP.

Still, there is a decided difference between them. In some ways, the IRS gives you what you pay for. The OVDP (in effect) precludes criminal prosecution and ends in a closing agreement. In contrast, streamlined filers can face a civil audit, or conceivably (though unlikely) even prosecution.

But while one can reasonably expect a streamlined audit to be difficult, that information is not terribly helpful for a taxpayer trying to choose between disclosure programs. Are streamlined audits more taxing than OVDP reviews? Longer? Cheaper? The certification that streamlined submissions require is more revealing than almost any other tax filings, and comes with its own worry about penalties of perjury. And although it seems reasonable to expect an audit to happen within a year or two of filing, the IRS has up to six years (the FBAR statute of limitations, assuming non-willfulness) to go after you. That is a long time to worry. Knowing what to consider and expect, even in general terms, could help taxpayers make better choices.

A key for any streamlined filer is to be non-willful; indeed, one must certify that. Negligence, inadvertence, or mistakenness are all OK, but intent to conceal or evade taxes is not. The certification requires the taxpayer to:

> provide specific reasons for your failure to report all income, pay all tax, and submit all required information returns, including FBARs. If you relied on a professional advisor, provide the name, address, and telephone number of the advisor and a summary of the advice. If married taxpayers submitting a joint certification have different reasons, provide the individual reasons for each spouse separately in the statement of facts.[5]

You may believe your inadvertence was non-willful, but the IRS could disagree. And FATCA has given the IRS a treasure trove of data. If you knew you were supposed to report, the IRS may say you were willful. Moreover, the IRS uses a "willful blindness" concept. Essentially, it is a conscious effort to avoid learning about the IRS or FBAR reporting.[6]

Willfulness involves a voluntary, intentional violation of a known legal duty. In taxes, it applies for civil and criminal violations. The failure to learn of filing requirements, coupled with efforts to conceal the facts, can spell willfulness. Watch out for conduct meant to conceal, such as:

- setting up trusts or corporations to hide your ownership;
- filing some tax forms and not others;
- keeping two sets of books;
- telling your bank not to send statements;
- using code words over the phone;
- cash deposits and cash withdrawals; and
- moving money from one bank to another when banks don't want undisclosed U.S. accounts.

Even if you can explain one failure to comply, repeated failures can elevate conduct from inadvertent neglect into reckless or deliberate disregard. Those taxpayers who have not yet made the OVDP versus streamlined choice should consider their facts carefully. Most taxpayers who filed a streamlined disclosure will not be audited. But those who are should be careful about how to respond and precisely how to conduct the audit.

[5] IRS, "Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing Outside the United States: Frequently Asked Questions and Answers," at Question No. 13.

[6] IRM section 4.26.16.6.8.1(5).

I. Streamlined Program

A. Domestic Versus Foreign

The streamlined program is actually two programs: the Streamlined Domestic Offshore Procedures, and the Streamlined Foreign Offshore Procedures, usually referred to as "domestic" and "foreign" streamlined, respectively. They have similar eligibility requirements, but there are three key differences.

The foreign streamlined program is available only to taxpayers residing outside of the United States for more than 330 days during any one of the prior three years[7] and only if the United States is not their "abode" within the meaning of section 911(d)(3) and reg. section 1.911-2(b).[8] Thus, the foreign streamlined program is essentially intended for expats. It is a liberalized continuation of the 2012 OVDP streamlined option for people living abroad.[9]

The domestic streamlined program requires a 5 percent miscellaneous offshore penalty. The foreign streamlined program has no penalty. Both are often a good deal, especially compared with an OVDP penalty edging towards 50 percent for an increasing number of taxpayers.[10]

Finally, the domestic streamlined program allows only *amended* tax returns. The foreign streamlined program allows you to file original tax returns. Expats who are busy complying with their home (foreign country) tax obligations have a reasonable explanation for not remembering to file taxes in what is, essentially, the "foreign" United States. But for taxpayers living in the United States, forgetting to file a tax return is much less understandable, and for the IRS, much less forgivable.

B. Filing Requirements

Once eligibility is settled and a taxpayer is sorted into the domestic or foreign program, what are the next steps? The basics are straightforward, and match up with the relevant statutes of limitation for non-willful taxpayers.[11] The programs also require specific IRS forms on which the taxpayer will certify their non-willfulness and satisfy other requirements.

1. Tax returns.

First, you must file tax returns for the three most recent years, based on the most recent *past* filing deadline.[12] There has been some confusion about the relevant measure. Prior guidance from the OVDP hotline (the main source of technical advice when the various IRS websites do not address a question) suggested that the filing deadline itself is what matters.

More recent comments from the OVDP hotline suggest that the filing date will control, matching up with the statute of limitations. Here is a quick example of the difference. Imagine U.S. resident Winston files for an extension of his 2016 tax return. He then files his 2016 tax return on June 18, 2017. On June 19 he files a domestic streamlined submission.

Which returns does Winston include in the submission? If the filing *deadline* controls, Winston should file amended returns for 2013, 2014, and 2015 for his streamlined submission.[13] This is because the filing *deadline* for his 2016 return has not yet passed — it has been extended until October 15, 2017.

By contrast, if the filing *date* controls, as recent guidance suggests, his amended streamlined returns would be 2014, 2015, and 2016. Of course,

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[7] IRS, "U.S. Taxpayers Residing Outside the United States" ("Individual U.S. citizens or lawful permanent residents, or estates of U.S. citizens or lawful permanent residents, 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 U.S. abode and the individual was physically outside the United States for at least 330 full days.").

[8] IRS, *supra* note 5, at Question No. 1.

[9] The 2012 OVDP streamlined option had stricter requirements, including a provision that required taxpayers to have $1,500 or less in tax liability to use the option.

[10] *See* IRS, "Foreign Financial Institutions," *supra* note 3.

[11] *See* section 6501(a) (default three-year statute of limitations from the date of filing a tax return); 31 U.S.C. section 5321(b)(1) (six-year statute of limitation for imposition of civil penalties for filings which include FBARs).

[12] IRS, *supra* note 7.

[13] Recall that Winston must file amended returns because he resides in the United States, meaning he is in the domestic streamlined program. Original returns are permitted only for the three streamlined tax returns in the foreign streamlined program.

the actual filing date is still what will control for most statute of limitations purposes.[14] If possible, it may be best to ensure that taxpayers do not file extensions before the streamlined submission. The most recent return will have to be amended in the streamlined program in any event.[15]

2. FBARs.

One must file six years of FBARs. Oral guidance from the OVDP hotline on the deadline question seems inconsistent, and online guidance refers to the deadline without clarification.[16] Before 2017 the FBAR filing deadline was always June 30. Beginning in 2017, Congress moved it to match the individual tax return filing deadline.[17]

To avoid confusion, for 2016 FBARs (due April 18, 2017), the Treasury Financial Crimes Enforcement Network (which oversees FBAR compliance) provided an automatic six-month extension to file FBARs until October 15.[18] No request is necessary for the 2016 FBAR extension, but FinCEN has not indicated whether it will keep the extension available or automatic for future years.

Returning to Winston, if he files his streamlined submission on June 19, what is his FBAR period? Based on recent OVDP hotline guidance indicating that the filing date controls, the most recently filed FBAR will be the last year for streamlined purposes. This would be consistent with the attempt to match the FBAR and tax return periods.[19] Thus, Winston's most likely FBAR period will be 2011 through 2016.

3. Certification — Form 14654 and Form 14653.

The domestic streamlined program requires Form 14654 and the foreign streamlined program requires Form 14653, both of which must be signed under penalties of perjury. Each form has three sections. The first section for each is a summary of the taxes and interest due for the three filed tax returns.

The second section of each form differs. On the foreign streamlined Form 14653, the second section consists of a checkbox for each of the three tax return years. It asks taxpayers to certify that they meet the nonresidency requirement in at least one of the years. This section is also covered by penalties of perjury, so be prepared to document the number of days spent in the United States, if any.

For the domestic streamlined Form 14654, the second section is used to compute the 5 percent penalty.[20] The Form 14654 requires the account name, type, location, account number, opening date, and balance of the account as of December 31 for the relevant year. The same information is required for each of the six FBAR years.

There is limited space on the Form 14654 for the accounts. Some practitioners provide a continuation sheet with the actual account information, and simply list the totals on the form itself. In those cases, it is important that the taxpayer sign the continuation sheet under penalty of perjury, or the IRS may need to follow up.

[14] *See* section 6501 ("Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was *filed*" (emphasis added).).

[15] Of course, any filed return should be as complete and accurate as possible, and intentionally leaving items off the return could be construed as willfulness.

[16] IRS, *supra* note 7.

[17] Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, P.L. 114-41, section 2006(b)(11), 129 Stat. 443 (2015).

[18] Treasury, "New Due Date for FBARs" (Dec. 26. 2016).

[19] Form 14654 includes a space for a seventh year of account information if the streamlined filing occurs between the tax return and FBAR deadlines, where the seventh year is the current-year FBAR. *See* IRS Form 14654 ("Note: Use this seventh year only if your 3-year covered tax return period does not completely overlap with your 6-year covered FBAR period (for example, if your 3-year covered tax return period is 2011 through 2013 because the due date for your 2013 tax return is passed, but your covered FBAR period is 2007 through 2012 because the due date for the 2013 FBAR has not passed).").

[20] The OVDP calculates its penalty based on the high balance during the year rather than the December 31 balance, and the OVDP penalty base follows slightly different rules than the streamlined penalty. *Compare* IRS, *supra* note 5, at Question No. 1, *with* IRS, "Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014," Questions Nos. 35-41.

The third and final section is common to both Form 14654 and Form 14653. You provide a certification statement, which is a narrative explanation of the taxpayer's facts and circumstances, along with a certification that the taxpayer's errors were not willful. This certification statement is the heart of a streamlined submission and the first battleground in a streamlined audit.

II. The Streamlined Audit

Streamlined audits start like any other: with a notice of examination. When a streamlined submission is selected for review, remember what the IRS has. The taxpayers have made a comprehensive submission disclosing their failure to report foreign income and assets. They have paid all taxes and interest due and often a significant penalty. The IRS has cashed the check, reviewed the returns, and read the penalties of perjury statements. But they still have questions. This is an eggshell audit: Tread carefully.

A criminal referral is possible either during the exam or at its conclusion. Representatives should discuss this with clients early, especially if the facts are bad. Keep the willfulness standard and burden in mind when preparing any streamlined submission and throughout any audit.

However, remember that the taxpayer was not *caught*. He voluntarily came in from the cold, paid a penalty, and it is hoped will cooperate fully during the exam. That cooperation is terribly important and should help work against a criminal referral. But if it does not, it may be helpful in negotiating lesser criminal penalties down the road.

The IRS will review the returns for correctness and verify the numbers, but willfulness will likely be their focus, as it should be for the taxpayer. Noncriminal willful penalties can be 50 percent of the account balance per year, and up to 100 percent of the account balance.[21] Criminal penalties include even higher fines and jail time.[22] The definition of willfulness, along with the relative burdens of proof, should be guiding principles.

A. Willfulness and Non-Willfulness

Willfulness is an "intentional violation of a known legal duty,"[23] commonly referred to as the *Cheek* standard. It is subjective, so the taxpayers' personal knowledge and understanding of their obligations are relevant. Even irrational but sincerely held beliefs could conceivably be relevant. Good-faith misunderstandings of legal duties are typically viewed as non-willful.[24]

The streamlined programs provide their own loose definition of non-willful conduct. The IRS informs taxpayers that 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."[25] Even behavior rising to the level of gross negligence is technically acceptable, as long as it remained non-willful.[26]

[21] 31 U.S.C. section 5321(a)(5)(C); IRM Exhibit 4.26.16-1 ("in no event can the aggregate willful penalties exceed 100 percent of the highest aggregate balance of all accounts to which the violations relate during the years at issue").

[22] 31 U.S.C. section 5322.

[23] *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Bishop*, 412 U.S. 346, 360 (1973) ("the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty"); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) ("willfulness in this context simply means a voluntary, intentional violation of a known legal duty"); IRM section 4.26.16.6.5.1(1).

[24] *See Cheek*, 498 U.S. 192, 202 ("In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.").

[25] IRS, *supra* note 7.

[26] William Hoke, "Practitioners Question Use of OVDP Over Streamlined Program," *Tax Notes*, Oct. 31, 2016, p. 632 ("'Anything that doesn't rise to the level of tax fraud or the willfulness standard for [the foreign bank account report] is fair game for streamlining,' said John McDougal, special trial attorney and division counsel, IRS Small Business/Self-Employed Division. 'As long as you weren't fraudulent or willful in the FBAR sense, even gross negligence is an appropriate basis for filing streamlined.'").

The IRS bears the burden of proving willfulness.[27] Streamlined audits might begin with the IRS *thinking* that the taxpayer was willful, but the Service must still adequately document it from the evidence.

B. Pre-Audit Considerations

The certification statement is the most important form of audit preparation for a streamlined audit. The certification statement provides the IRS with a first and guiding impression of the taxpayer's story. Consider the facts, types of questions the IRS may ask, risks that answers may pose, and how those answers affect a potential willfulness finding.

The certification statement is where one explains what happened and perhaps preemptively addresses IRS concerns. In streamlined filings one does not provide bank statements with the submission, but they will almost certainly be the first request by the auditor. Any landmines in the bank statements are best dealt with at the beginning, when you can control the first impression.

Do the account statements show active trading or wire transfers? Are the funds pre- or post-tax? Were the accounts related to any U.S. activities? Why were they opened in the first place, and why at specific institutions? Was a non-U.S. passport used to open the account?

Did the foreign institution tell the taxpayer about U.S. obligations? Were there any problematic instructions, such as "hold mail" orders, and if so, why? Was there income, was it reported, and was foreign or U.S. tax paid? Why did the taxpayer's Schedules B show no foreign accounts? Were these accounts ever discussed with a return preparer?

More uncommon situations, such as controlled foreign corporations, require the same level of consideration. Why was the entity originally formed? When, and who did so? What does the entity do? Did it earn income? Was it reported and were taxes paid, and if not, why not? Was it tax compliant in the local jurisdiction? Did the taxpayer consult any tax advisers on U.S. compliance?

Were there business partners, and did they report the entity on their tax returns? Did the return preparer know about the entity, and did he mention any U.S. tax requirements to the taxpayer? How active was the taxpayer in the business, especially compared with domestic U.S. employment? Why was the Form 5471 not on the original return, and why was the entity not otherwise disclosed?

Not every question must be addressed under penalties of perjury, but it is certainly a good idea to consider them beforehand. The more you can accurately shape an impression in the certification statement, the more likely you are to avoid an audit by making the initial reviewers at ease with any problems in the amended tax returns. A comprehensive certification statement will also be the roadmap for the first parts of an audit and the baseline against which later details will be assessed.

C. Audit Commencement — Initial Interview

At some point after the taxpayer receives a notice of examination, the auditor will want an interview with the taxpayer to review the submission. The manager may attend, and perhaps even a streamlined technical coordinator, and they may remain involved throughout the exam. The IRS personnel might be reasonably acquainted with the file, and even with your client's public social media presence. Be familiar with your client's background, at least regarding any foreign accounts and income at any time.

Lawyer and client should be conversant with the certification statement. Many of the auditor's questions will concern the statement, but the taxpayer is also being assessed on the document's truthfulness. An intentional misstatement in the certification statement, even by a non-willful taxpayer, can be an independent basis for penalties and possibly even criminal prosecution.

How could the agent know? The agent may have additional sources to check. Auditors can

[27] *Cheek*, 498 U.S. at 201-202 ("Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to provide that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. . . . In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief."); IRM section 4.26.16.6.5.1(3) ("The burden of establishing willfulness is on the Service.").

conduct interviews with third parties (including the tax return preparer). Remember, the IRS would probably not have selected the taxpayer for review if it were satisfied with the submission. Any inconsistencies found with the certification statement during the interview could raise suspicions or require further explanation and document production.

Prepare for a comprehensive interview, although there could be additional interviews later. The IRS will issue document requests, and there will be discussions with the agent and possibly other IRS personnel. The IRS may develop a sense of your client's situation and potential willfulness at this early stage. Humanizing your client can pay dividends later.

You should generally follow the interview with a letter to the auditor documenting the interview itself. That letter can be helpful to begin framing the terms of the audit. You might remind the IRS of their burden of proof and willfulness standards. Put your client's narrative within that standard, and, if necessary, document any potential improprieties or aggressiveness from the IRS.

D. Document Request Phase

Before or after the interview, expect information document requests. The first request will probably be for account statements, so have them handy. This is an easy way to build goodwill with the auditor, and the statements should conform to your submission.

Expect requests concerning any questionable items on the returns. Corporate formation documents for offshore entities are common requests, as are account opening and maintenance records and correspondence with foreign banks. Older records might be unavailable.

In our experience, simply stating that old records have been lost, or were never retained in the first place, might be met with skepticism from the IRS. The IRS might expect you to have any documents that would inform an item on the return (for example, purchase orders for securities that would establish basis or be used in a passive foreign investment company excess distribution calculation or in contracts for services income). Expect the IRS to ask how you were able to prepare the return without the materials and what efforts the taxpayers made to obtain them.

The situation could be avoided if explained in the streamlined submission itself. The certification statement is signed under penalties of perjury, so it may not always be the best place to make affirmative statements about what records are and are not available. Still, those explanations can be prepared in a cover letter for the submission or in a statement on the return.

Be prepared for the audit scope to expand, at least informally. This is not like the OVDP exams, in which the IRS rarely demands information from outside the program's eight-year period. In a streamlined audit, the IRS may ask questions regarding activities *outside* the tax years at issue. If those activities conceivably bear on willfulness, there is a risk the IRS will ask about them.

For example, suppose the taxpayers have a period without income, but publicly available records indicate that they had a business. The IRS may not be able to audit those long-past years, but they might evaluate the certification statement in light of past inconsistencies. Be prepared with an understanding of the facts, and be ready to advocate to keep the audit focused.

Summonses are possible during streamlined audits. The IRS may follow repeated requests with a summons, even when the documents are unavailable. Keep a clear record of all your responses to the requests and all conversations with the agent.

Each call with the agent, especially when responding to a document request, should be accompanied by documentation. Be ready to prove you have done your best to respond to requests in a timely and cooperative manner. Doing so could allow you to question the basis for the summons, especially when the taxpayers previously responded to the best of their ability.

Consider involving the manager, too. The manager may have signed off on the summons. Even so, involving her in your response strategy may avoid relying on the agent to communicate your concerns to the manager. If necessary, try to involve IRS counsel. Continue to document every conversation. It may help during the audit, in appeals, or in court.

Summons enforcement requires the IRS to follow all appropriate procedures. Section 7602 gives the IRS authority to issue first-party summonses, but a summons is only valid if it: (1) is issued for a legitimate purpose; (2) seeks information that "may be relevant" to the exam; (3) seeks information that is not already in the IRS's possession; and (4) follows all administrative proceedings.[28] The summons rules for agents are in Internal Revenue Manual section 25.5.

The "may be relevant" prong of the test is extremely broad. It typically means that the information need only "throw light upon the correctness of the taxpayer's return."[29] But its breadth is limited, and the IRM defines "may be relevant" as follows:

> The "may be relevant" standard of section 7602 means any information that "might shed light" on the correctness of the taxpayer's return (or any other proper issue in a legitimate investigation, such as the location of collectible assets). *The word "might" in this standard means that the Service has a realistic expectation, rather than an idle hope, that something useful may be discovered.*[30] [Emphasis added.]

The IRS is prohibited from issuing summonses to make arbitrary, irrelevant, unreasonable, or oppressive demands.[31] If a summons demands items that had not been sought in prior requests, that may be a reason to request a conference with IRS counsel. If the IRS accepts that some records are unavailable but issues a summons for other similar records, you may want to ask for an explanation, or at least document it.

Having a clear record of all communications and documenting responses to the IRS can be tremendously helpful. Summonses are generally disfavored for cooperative taxpayers.[32] A taxpayer who can show good-faith compliance with prior requests (such as letters to banks for records that the banks ignored) has a stronger case to make to IRS counsel when requesting withdrawal of the summons or even in a motion to quash, if ultimately necessary.

Of course, most summonses are issued according to procedure, and for valid purposes. Consequences for not responding can be grave. But even if you are forced to comply with an overly aggressive summons, it is yet another opportunity to document your objections and lay the foundation to have them heard by IRS Appeals.

E. Beyond the Audit

As the audit winds down, you may have a good sense from the agent of her conclusions. If the IRS is leaning toward a willfulness determination, your document exchanges should have provided extensive context for any irregularities. If you have a good relationship with the auditor, you can try to suggest lesser penalties.

The IRS can impose a range of willful and non-willful penalties.[33] If the finding is non-willfulness, the domestic streamlined 5 percent penalty the taxpayer already paid overrides all others.[34] But even for willful taxpayers, the IRM allows mitigating factors to lower the penalty.

Mitigation is available if a taxpayer meets four criteria: (1) the taxpayer has no history of criminal tax or Bank Secrecy Act convictions in the past 10 years and no prior FBAR penalties; (2) no funds in

[28] *United States v. Powell*, 379 U.S. 48, 58 (1964).

[29] *United States v. Ryan*, 455 F.2d 728 (9th Cir. 1971).

[30] IRM section 25.5.4.5.1.2.

[31] IRM section 25.5.4.5.2.

[32] *See* IRM section 5.14.6.1(2) ("In general, the Service should issue summonses only when the Taxpayers (or other witness) will not produce the desired records or other information voluntarily.").

[33] *See* IRM sections 4.26.16.6.4 – 4.26.16.6.8.

[34] IRS, *supra* note 7 ("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.").

the accounts were associated with illegal source income or were used to further criminal purposes; (3) the taxpayer was cooperative; and (4) the IRS has not imposed a fraud penalty that concerns the foreign income. Consider highlighting and documenting these factors throughout the streamlined audit.

Remember, a streamlined audit is just an audit. All audits allow a taxpayer to go to IRS Appeals. Any irregularities in the audit (such as improper questions, unreasonable requests, and unsupported assertions in the willfulness determination) are grounds for Appeals to question the auditor's findings. Each irregularity should be carefully documented when it occurs, and they all should resurface in the protest.

You might be able to settle for a lower penalty, even if the auditor's willfulness finding is well supported. If going to Appeals does not lead to a lower penalty, you can consider litigation. However, consider the possibility of a criminal referral, even though this possibility may become more remote the further a taxpayer gets into the administrative process.

III. Conclusion

Streamlined audits are difficult and present significant challenges for both taxpayers and representatives. But no matter how challenging, they are always possible and should be considered when deciding whether to enter the OVDP or the streamlined program. Only some features of streamlined audits have been highlighted here, and there may be significant variation. Given the audit stakes, gather any information you can.

Representatives and taxpayers have multiple ways to influence the process, beginning with the choice to enter a streamlined program. A representative should always consider how his positions would be viewed in the future. Guard against inconsistencies with the certification statement, the early interview, and every document response.

Carefully focusing on the willfulness standard and the IRS's burden can help keep you ahead of problems. Ideally, you can show the IRS that the taxpayer was not willful or that mitigating factors should be considered. ■