Update on FBARs FATCA OVDI and Emerging Trends in CROSS-BORDER TAX ENFORCEMENT

Although IRS is holding out a velvet glove by encouraging noncompliant taxpayers to come into compliance, it is showing no mercy in going after other taxpayers still seeking to hide wealth offshore.

PAUL MARCOTTE, JR. The U.S. federal government continues to view offshore tax evasion as a major contributor to the tax gap. As a consequence, the government has been intensifying international enforcement efforts, specifically targeting U.S. persons with undisclosed foreign accounts or holdings in an effort to encourage more compliance. After breaching the formerly impenetrable wall of bank secrecy in Switzerland, the government is now relentlessly pursuing U.S. holders of undisclosed accounts not only in Europe, but also in Asia where offshore private banking is increasingly migrating. Given these ongoing enforcement activities, U.S. taxpayers are finding it increasingly difficult, as well as perilous, to hide wealth offshore.

As a result of taxpayers that have come forward to date and voluntarily disclosed their offshore holdings (over 39,000 as of December 2012),[1] the government is engaged in extensive data mining, sifting through leads and other information gleaned through these disclosures as well as informants and other sources to widen the net. Armed with this information, the government is increasing the stakes by pursuing criminal charges against private client advisors at foreign banks that have facilitated or assisted U.S. persons in hiding wealth offshore. Most recently, the government successfully prosecuted a centuries-old Swiss bank for conspiring to help U.S. taxpayers hide accounts offshore notwithstanding that that the bank had no affiliate or physical presence in the

As a result of taxpayers voluntarily disclosing their OFFSHORE HOLDINGS, the government is engaged in extensive data mining, sifting through leads and other information gleaned through these disclosures as well as informants and other sources to widen the net

U.S. As a practical result, the bank has been essentially shut down.

The Department of Justice (DOJ) recently announced a program to allow Swiss banks not already under investigation to turn over detailed information on their U.S. account holders in return for non-prosecution agreements. The DOJ is currently investigating at least a dozen Swiss banks that would not be eligible to participate in the program. This new program would require participating banks to pay substantial penalties ranging from 20%-50% of the amounts held by their U.S. customers and also to provide information on other institutions where funds were transferred if the original account was closed in an effort to continue its concealment. Eligible banks have until December 31, 2013, to notify DOJ of their intent to participate.

A further significant development is that the tools available to the government to detect and combat offshore tax evasion have been greatly expanded with the 2010 enactment of the Foreign Account Tax Compliance Act (FATCA) (IRC Sections 1471-1474),[2] which is just now beginning to be implemented in phases. As described later in this article, a principal objective of FATCA is to gradually erode bank secrecy and make it much more difficult for U.S. taxpayers to have secret or undisclosed accounts with foreign financial institutions (FFIs) in most countries. Although FATCA was not well received initially in other countries due largely to a significant compliance burden and major concerns as to conflicts with national privacy laws, these countries are now viewing FATCA more favorably. This is likely due to the growing realization around the globe that offshore tax evasion is not just a concern for the U.S. but also for many other countries that are experiencing fiscal pressures.

As part of an emerging trend, some major U.S. trading partners recently agreed to a broader exchange of tax information with the U.S. and each other as well as increased cooperation in a concerted approach to fight global tax evasion. It is quite conceivable that FATCA is just a prelude to a larger effort to put in place a multilateral platform for automatic tax information sharing among countries to combat cross-border tax evasion and increased levels of cooperation by tax agencies around the globe.

FBAR and Other Offshore Reporting Requirements

A detailed discussion of the extensive and ever-increasing reporting requirements for U.S. persons with foreign accounts or activities and severe penalties for noncompliance is beyond the scope of this article. For a brief primer on the special tax regimes and information reporting requirements for U.S. beneficiaries of foreign trusts or persons with ownership (both direct and indirect) in offshore holding company structures, see this author's article in the July 2010 issue of the *Journal*.[3]

As a result of much recent media attention and extensive public outreach efforts by the IRS, many laypersons have become all too familiar with the requirement to file Treasury Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts, commonly known as "FBAR").[4] This annual report, separate from an income tax return, is required when a taxpayer has a financial interest in, or signature authority over, one or more foreign accounts and the aggregate highest balance of all the accounts at any time during the year exceeds $10,000.[5]

Since the 2010 article, the definition of "financial account" subject to FBAR reporting has been expanded to include financial-type assets not typically viewed as traditional bank accounts including (1) a life insurance policy with cash value (e.g., a whole life policy) when the insurer is foreign; and (2) foreign mutual funds when shares are available to the general public and there is a daily net asset value available.[6] These types of assets have been made subject to FBAR reporting as the government found that they have a high likelihood of facilitating money-laundering activity.

At the same time, some of the reporting requirements for indirect owners of financial accounts have been relaxed or clarified. For example, the final regulations on reports of financial accounts provide a filing exception for

PAUL MARCOTTE, JR., is a partner in the Bethesda, Maryland, law firm of Paley Rothman and Chairs the firm's Tax Department. He is also the incoming Chair of the Maryland State Bar Association Section of Taxation. Mr. Marcotte has written previously for the JOURNAL. This article is reproduced with the permission of the Maryland Bar Journal, published by the Maryland State Bar Association, which included an earlier version.

participants and beneficiaries in tax qualified retirement plans and individual retirement accounts or IRAs (including ROTH IRAs).[7] The reporting requirement for beneficiaries of trusts has been clarified to apply only to beneficiaries with a *present* beneficial interest in more than 50% of the trust income or assets, or when the trust is a grantor trust and a U.S. person is the grantor.[8] In the Preamble, FinCen indicated that it revised this portion of the regulations to clarify that it does not intend for a pure discretionary beneficiary of a trust to have a financial interest solely by reason of such status, and does not intend that a contingent remainder beneficiary fall under the reporting requirements.[9]

In addition to the information returns required of beneficiaries of a foreign trust (IRS Form 3520 (Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts)) or holders of interests in foreign corporations (IRS Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations)), reporting may be required of interests held in foreign entities treated as partnerships for U.S. tax purposes (IRS Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships)) as well as simply holding an interest in a single-member foreign LLC that elects to be treated as a disregarded entity for U.S. tax purposes (IRS Form 8858 (Information Return of U.S. Persons With Respect to Foreign Disregarded Entities)).

As a result of another relatively recent change in the law, the IRS, by Regulation, is now permitted to require annual reporting for interests in passive foreign investment companies (PFICs) (IRS Form 8621).[10] This is a significant change from prior law under which no such reporting for a particular tax year was required absent taxable distributions or a disposition that would trigger gain recognition, or the qualified electing fund (QEF) election was to be made. Given the multitude of reporting requirements for U.S. persons with interests (direct and indirect) or holdings in foreign entities, honest, well-intentioned taxpayers and their advisors can trip up and be exposed to potentially sizeable penalties.

Coming Into Compliance; Seeking Forgiveness/ Leniency under OVDI

The IRS has traditionally had in place an internal voluntary disclosure practice that encourages taxpayers to come forward and disclose previously unreported income, unfiled returns, and other noncompliance. As long as taxpayers make a truthful, timely, and complete disclosure before they are discovered by the government, the IRS generally will not recommend criminal prosecution, although this is not an absolute grant of immunity.[11]

Beginning in 2009, the IRS made available a variant of this program, intended to apply to taxpayers with undisclosed foreign accounts or holdings, with more formal procedures and ground rules known as the offshore voluntary disclosure initiative (OVDI). The initial OVDI program was available for just a short time (a little over six months) and was offered again in 2011, also for a relatively short time.[12]

The OVDI is a formal program (what tax practitioners refer to as a "noisy" disclosure) whereby taxpayers come in the front door and announce that they have been noncompliant in an attempt to come clean with the government. The

It is quite conceivable that FATCA is just a prelude to a larger effort to put in place a multilateral platform for automatic tax information sharing among countries to combat

CROSS-BORDER TAX EVASION

and increased levels of cooperation by tax agencies around the globe

major reason to come in under this program is to avoid potential criminal prosecution and achieve more certainty as to financial exposure since the penalties for not timely filing the FBAR and other international information returns can be quite steep. Unlike the traditional voluntary disclosure practice, the IRS has stated that coming in under this program is the only way to make a valid voluntary disclosure when offshore holdings are involved, as opposed to "quiet disclosures" discussed below. This program is available not just to taxpayers that failed to file FBARs, but also for nonfilers of various international information tax returns including Forms 3520 and 5471.

The IRS announced a reopening of the OVDI in January 2012 with no set deadline, although the Service reserves the right to modify or terminate this latest version at any time.[13] The current version is similar to the 2011 version but with some less attractive features. The new program has a higher top-level penalty compared with prior versions, as discussed below. Taxpayers are required to file amended returns and FBARs for the past eight years (an earlier version required just six prior-year returns) and to pay any back taxes and all related penalties that apply when delinquent taxes are owed, plus statutory interest. IRS will not consider claims of reasonable cause in an attempt to avoid imposition of penalties such as the accuracy penalty. Much of the guidance from earlier versions of the OVDI still applies and can be found in a series of frequently asked questions and answers (FAQs), which IRS publishes and updates periodically on its website.[14]

Under the basic penalty structure, in lieu of all other civil penalties for late filed FBARs and other information returns, such as when offshore holdings include a foreign trust or holding company, a single penalty equal to 27.5% of generally all foreign accounts based on the highest account balances in the past eight years applies.[15] If assets other than financial accounts, e.g., foreign real estate, involve tax noncompliance—for example, when the property was acquired with income not reported to the IRS—these assets are also included in the penalty base.[16] This penalty was less under prior versions of the program (20% in the 2009 version, increased to 25% in 2011 version).

A lower 5% penalty applies (1) if the taxpayer did not open or cause the account to be opened and had minimal contact and withdrawals (e.g., inherited accounts); (2) if the account is held by an "accidental citizen" (e.g., a taxpayer who was born in the U.S. but has since

1 See "GAO Concludes IRS Should Comb Data for 'Quiet' Disclosures of Offshore Assets," BNA Daily Tax Report April 29, 2013, page G-2.

2 FATCA was enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act, P.L. 111-147, March 18, 2010.

3 Marcotte, Jr., "Planning for U.S. Persons Inheriting Offshore Trust Structures," 21 JOIT 7 (July 2010).

4 See Michaels, "New 'Shadow FBAR' Regs.," 23 JOIT 60 (March 2012).

5 The reporting requirement arises under a nontax statute, 31 U.S.C. section 5314. The relevant implementing regulations are at 31 C.F.R. section 1010.350 and 31 C.F.R. section 1010.306(c). In October 2010, the FBAR Regulations were reorganized and moved from former 31 C.F.R. section 103 to new 31 C.F.R. section 1010. In addition to FBAR filing obligations, see also 31 C.F.R. section 1010.420 on required recordkeeping for foreign accounts.

6 See revised 31 C.F.R. section 1010.350(c)(3) expanded definition of "other financial accounts" in final regulation adopted by Treasury's Financial Crimes Enforcement Network (FinCen), generally effective for FBAR filings for calendar year 2010 and later years. See also Chromow, "Dealing With FBARs," 23 JOIT 54 (August 2012).

7 31 C.F.R. section 1010.350(g)(4).

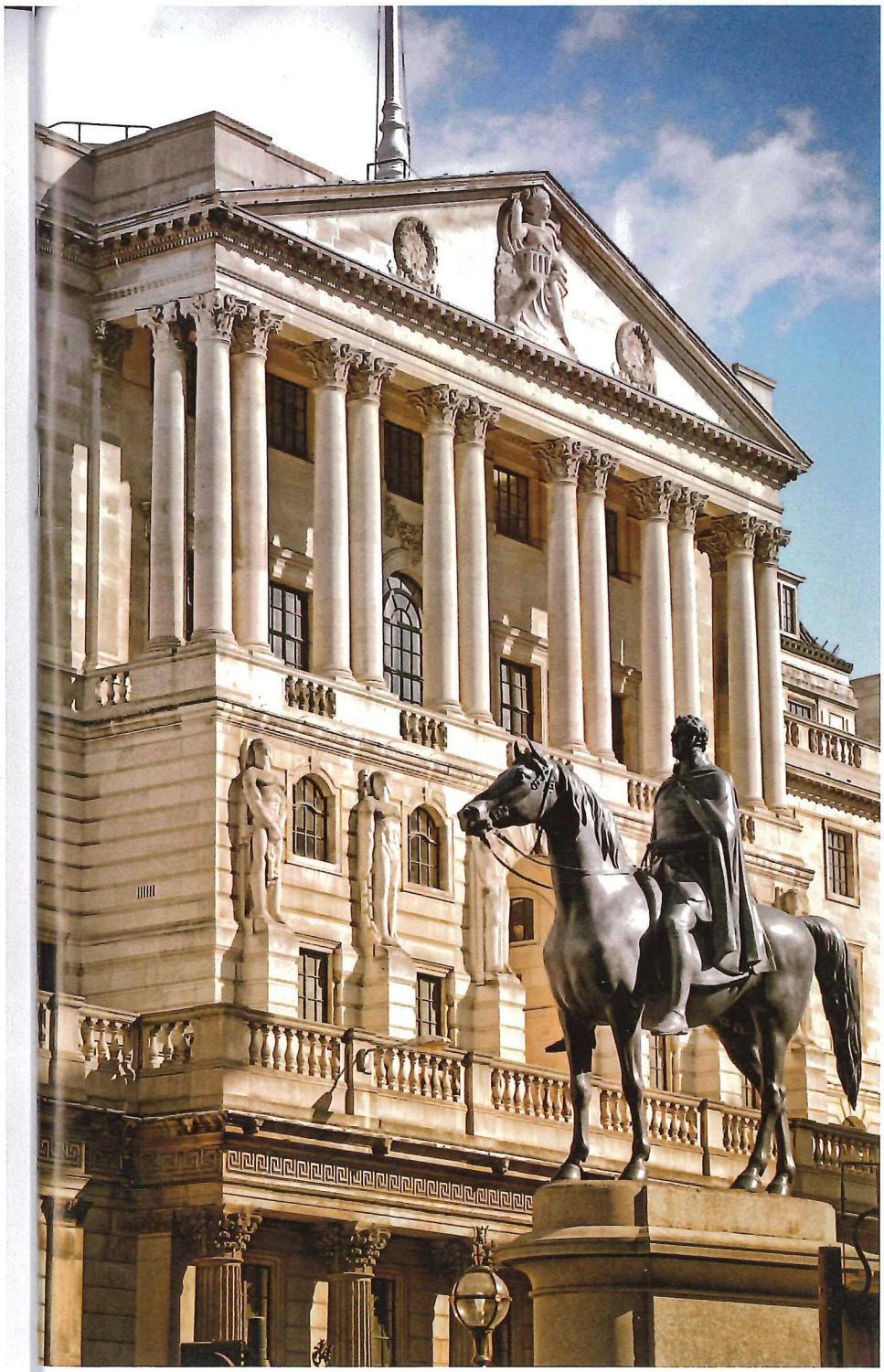
8 31 C.F.R. sections 1010.350(e)(2)(iii) and (iv) and (g)(5).

9 The Proposed Regulations also would have required reporting for a trust when a trust protector was serving. This provision was not in the final Regulations.

10 Section 1298(f). Pursuant to Notice 2011-55, 2011-29 IRB 53, IRS had originally suspended Section 1298(f) reporting requirements for tax years after March 18, 2010, while it was in the process of developing new filing guidance and new Form 8621. The revised version of Form 8621 (December 2012) still limits reporting to when a taxable event has occurred or QEF election is made so it does not appear yet that IRS has fully exercised the statutory authority to expand PFIC reporting requirements.

11 See generally Internal Revenue Manual section 9.5.11.9.

12 See Baker & McKenzie Voluntary Disclosure Steering Committee, "IRS Preliminary Guidance for Post-September 9, 2011, Voluntary Disclosures: OVDI 2011+?," 23 JOIT 59 (March 2012); Read, "Updates to 2011 OVDI—FAQs," 22 JOIT 59 (August 2011); Baker & McKenzie Voluntary Disclosure Steering Committee, "New 2011 Offshore Voluntary Disclosure Initiative," 22 JOIT 20 (May 2011); Baker & McKenzie Voluntary Disclosure Steering Committee, "Undeclared Money Held Offshore: U.S. Voluntary Compliance Programs" (Parts 1 and 2), 21 JOIT 30 (October 2010) and 21 JOIT 36 (November 2010); "IRS Issues FAQs on Voluntary Disclosure of Offshore Activities," JOIT Vol. 21 (July 2009) (Checkpoint only); "IRS Announces Voluntary Compliance Initiative for Taxpayers With Unreported Offshore Income," JOIT Vol. 21 (June 2009) (Checkpoint only).



been living abroad unaware of his U.S. citizenship and reporting obligation); or (3) for U.S. citizens residing abroad whose U.S.-source income is $10,000 or less in each year.[17] When this lower 5% penalty applies, assets such as directly owned foreign real estate are generally not included in the penalty base, only foreign accounts. A 12.5% penalty rate generally applies when the highest aggregate balance for all accounts does not exceed $75,000.[18]

When foreign holdings during this eight-year period include PFIC interests, the IRS provides an alternative or short-cut method for determining income tax liability for the PFIC holdings since taxpayers may lack complete records to make the tax computations mandated by the PFIC statutory regime. The alternative PFIC tax calculation applies mark-to-market principles to each holding with an assumed 20% flat tax rate applied to annual gain and an interest charge of 7% of the tax computed for PFIC holdings marked to market in the first year of the the eight-year OVDI lookback period, which interest is in lieu of interest otherwise charged under Sections 1291(c) and 1296(j).[19]

Options Under Latest OVDI, Less Costly Alternatives to Formal OVDI Submission

A continuing problem even as IRS has refined the program in this recent version is that many of the procedures and penalty structure adopt a "one size fits all"-type approach, apparently out of concern that one or more less-than-honest taxpayers may escape harsher treatment. Although IRS has provided some exceptions and circumstances where lower levels of penalties apply, many taxpayers find that they do not meet strict requirements to be eligible for the lower level and essentially stand to forfeit a substantial portion of their offshore wealth. As a result, a taxpayer can still make a submission under the formal OVDI program and avoid more serious consequences such as threat of prosecution, but "opt out" of the standard penalty framework described above and go through the normal audit process. This is typically for taxpayers who can establish reasonable cause for noncompliance.

If a taxpayer cannot establish reasonable cause, although still a good voluntary disclosure that can help avoid the potential for government prosecution, the taxpayer does not have the benefit of the penalty framework discussed above. Instead, the IRS will generally conduct a full-scope audit and apply penalties that are appropriate given the facts and circumstances.[20] In that case, the IRS may look at more than the prior eight years and if it finds that the taxpayer's noncompliance was willful, the potential penalty exposure could be greater than if the taxpayer did not opt out in the first place. Further, the alternative or short-cut method for determining income tax liability for PFIC holdings is no longer available. For this reason, opting out has its own risk.

The formal OVDI program is intended for taxpayers who have not properly reported all of their income from foreign accounts or holdings. If all income from an undisclosed foreign account or holding was reported on the original return and the taxpayer just did not file FBARs or information returns such as Forms 3520 or 5471, the IRS generally will permit late FBARs or informative returns to

be filed with no penalties imposed.[21] According to the IRS, however, there is no de minimis amount for unreported income—just one dollar of unreported income means this procedure is not available.[22]

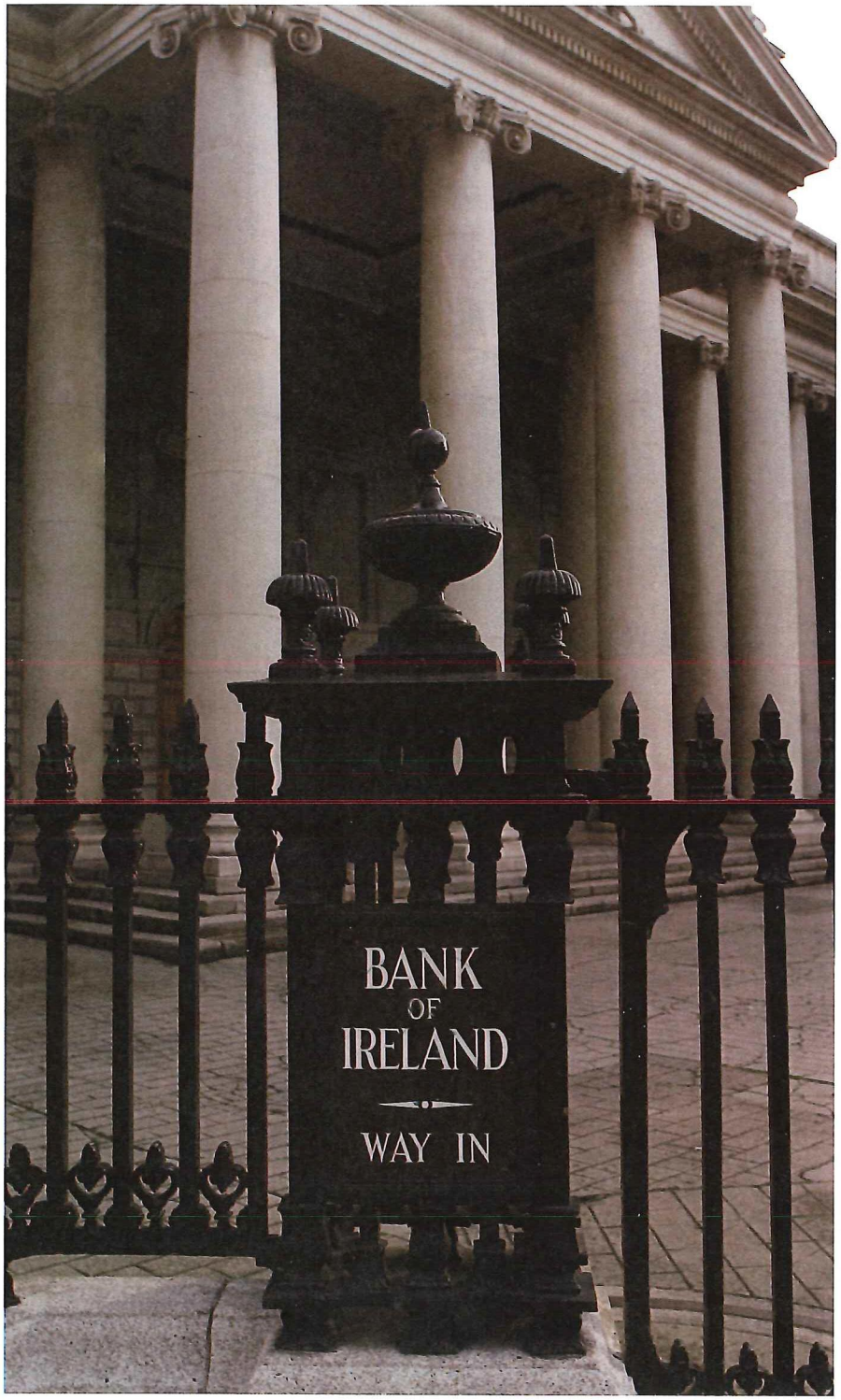
Special Procedures/ Relief for Dual Nationals and U.S. Citizens Living Abroad

A set of streamlined procedures that became effective September 1, 2012, generally apply to U.S. citizens living abroad who have simple returns and represent a low compliance risk (i.e., taxpayers who do not owe more than $1,500 tax in any year).[23] Eligible taxpayers will be required to file returns for three years and FBARs for six years. No FBAR penalties will be imposed and this procedure avoids the necessity of making a full submission under the formal OVDI program. The IRS has since issued more guidance and instructions to describe the factors that it will use to assess compliance risk and has come up with a questionnaire on its website to elicit information to determine eligibility.[24]

IRS indicates that this streamlined procedure does not apply when a taxpayer has resided in the U.S. since 2009 or has filed original U.S. tax returns since 2009. An exception applies if the only reason an amended return is necessary is to make a late election regarding deferral under Canadian retirement plans. Taxpayers who do not meet these requirements will be treated as a higher compliance risk and may be subjected to closer scrutiny or a full audit for more than three years. Also, the submission will not be treated as a qualifying voluntary disclosure that would avoid more serious consequences. IRS cautions that this procedure may not be the best option for taxpayers concerned with possible criminal sanctions.

Taking a Shortcut and Bypassing OVDI—Quiet Disclosures

Here, a taxpayer comes in through the back door and merely submits delinquent FBARs and corrected tax returns (with payment of any additional tax plus interest) to an IRS Service Center like any other normal tax filings with the hope of not attracting any attention or being flagged. IRS has consistently said in cases involving undisclosed offshore holdings that this is not a valid voluntary disclosure and IRS reserves the right to audit these returns, impose penalties, and when appropriate, recommend prosecution.[25] Although IRS has given informal indications that Service Centers are on the lookout for these types of filings so that they can be flagged for extra scrutiny, the General Accounting Office recently issued a report criticizing IRS for failing to detect taxpayers who file amended returns, attempting to make quiet disclosures of unreported foreign holdings.[26] As a result, IRS can now be expected to watch these filings more closely.



FATCA

In addition to existing reporting requirements, the tools available to the government to detect and combat tax evasion associated with U.S. taxpayers holding undisclosed offshore wealth have been greatly expanded with FATCA.[27] FATCA has two key components. First, U.S. taxpayers holding a threshold level of finan-

IRS may look at more than the prior eight years and if it finds that the taxpayer's noncompliance was willful, the

POTENTIAL PENALTY EXPOSURE

could be greater than if the taxpayer did not opt out of the standard penalty framework in the first place

cial assets outside the United States must now report those assets to the IRS annually as part of their income tax return. In addition, FATCA will require FFIs to report directly to the IRS certain information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest, or be subject to mandatory tax withholding on income received from U.S. sources.

Reporting by U.S. taxpayers holding specified foreign financial assets. FATCA added new Section 6038D, which now requires certain U.S. taxpayers holding "specified foreign financial assets" with an aggregate value exceeding $50,000 (or such higher level as IRS establishes) to report information about those assets to the IRS on new Form 8938 (Statement of Specified Foreign Financial Assets)[28] and attach the form to their annual income tax returns. This reporting requirement started to apply for most taxpayers with respect to their 2011 tax return. IRS has issued Temporary and Proposed Regulations that provide much-needed guidance and higher reporting thresholds including for married persons filing joint returns and taxpayers living abroad who can be expected to have more foreign holdings than taxpayers living in the U.S.[29] Although Section 6038D is geared toward individuals, Section 6038D(f) authorizes the IRS to require, by Regulations or other guidance, reporting by any domestic entity "formed or availed of" for purposes of "holding, directly or indirectly specified foreign financial assets" to the same extent as required of individuals. To date, the IRS has issued only a Proposed Regulation as to when it will consider a domestic entity as having been formed or availed of to hold specified foreign financial assets, thus triggering a reporting obligation as to that entity.[30]

This new reporting requirement is in addition to, and not in lieu of, reporting required under FBAR. As a result, the two reporting regimes are at times duplicative,[31] but the new FATCA requirements are much broader in scope as to the types of assets that must be reported. As a consequence, these new FATCA reporting requirements are often referred to as "son of FBAR" or "super FBAR." For example, not only are traditional bank and brokerage accounts included in "specified foreign financial assets," but also interests such as stock or securities issued by foreign issuers as well as any other interests in foreign entities, e.g., foreign partnerships, LLCs, and foreign trusts.[32] For this purpose though, the Regulations provide that except for limited situations, such as when the taxpayer is treated as the owner of a grantor-type trust, a taxpayer is not considered to have an interest in a specified foreign asset held by an entity solely by reason of the taxpayer being an equity owner of the entity.[33] Also, a taxpayer is not considered to have an interest in a foreign trust or estate unless the taxpayer knows (or has reason to know based on readily available information) of the interest. However, such knowledge will be presumed if the taxpayer has received a distribution from the trust or estate.[34]

Also included is any financial instrument or contract held for investment if the issuer or contract party is a foreign person. Foreign holdings including stock or securities *(Continued on page 63)*

13 IR-2012-5. January 9, 2012. See "IRS Preliminary Guidance...," *supra* note 12.

14 www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers.

15 *Id.* FAQ 8.

16 *Id.* FAQ 35.

17 *Id.* FAQ 52.

18 *Id.* FAQ 53.

19 *Id.* FAQ 10.

20 *Id.* FAQ 51.

21 *Id.* FAQs 17 and 18.

22 *Id.* FAQ 33.

23 IR-2012-65, June 26, 2012. See also "New IRS Compliance Procedures for Delinquent U.S. Taxpayers Living Abroad," 23 JOIT 5 (September 2012).

24 www.irs.gov/uac/Instructions-for-New-Streamlined-Filing-Compliance-Procedures-for-Non-Resident-Non-Filer-US-Taxpayers.

25 Note 14, *supra*, FAQ 16.

26 See GAO Report," IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion" (GAO-13-318), issued April 26, 2013.

27 FATCA was added as Chapter 4 of the Code, with new Sections 1471-1474, and Section 6038D, in addition to several existing sections that were amended.

28 See Kadar, "FATCA and Form 8938 Reporting," 24 JOIT 11 (August 2013).

29 Temp. Reg. 1.6038D-2T. TD 9567, December 14, 2011. See Michaels, *supra* note 4..

30 Prop. Reg. 1.6038D-6, to be effective for tax years beginning after 2011 once a final Regulation has been issued.

31 See Kadar, *supra* note 28.

32 Section 6038D(b)(2).

33 Temp. Reg. 1.6038D-2T(b)(3).

34 Temp. Reg. 1.6038D-3T(c).

35 Section 6038D(d).

Offshore Wealth

(Continued from page 47) held in an account with a U.S. custodian or institution such as a domestic bank or brokerage are not required to be separately reported.

An example of how more expansive in scope the reporting is for FATCA compared with FBARs is directly owned real estate. It appears that this is not subject to reporting on either an FBAR or Form 8938. However, a question arises when the property is subject to a triple net lease so although the real estate itself is not a specified foreign financial asset required to be reported, the lease may be reportable if it falls under the definition of a financial instrument or contract. Similarly, a beneficiary of a foreign trust who has a less-than-50% interest in trust income or principal is not subject to FBAR reporting as to that interest, but could be subject to the new FATCA reporting if the actuarial present value of the interest meets the reporting threshold.

Failure to report foreign financial assets on Form 8938 will result in a penalty of $10,000 (and up to $50,000 for continued failure after IRS notification).[35] IRS has indicated that the deficiency procedures allowing a taxpayer to contest an income tax assessment in U.S. Tax Court prior to payment do not apply to this penalty.[36] Further, underpayments of tax attributable to non-disclosed foreign financial assets will be subject to an increased accuracy penalty of 40%.[37] Failure to include this form with Form 1040 will cause the statute of limitations to be postponed for three years until this filing is made with an amended return even as to items on a return deriving from purely domestic sources subject to a reasonable-cause exemption.[38]

Reporting by FFIs. Although beyond the scope of this article, the second and perhaps more important prong of FATCA will require FFIs to enter into special agreements with the IRS whereby they commit to (1) identify accounts held by U.S. taxpayers and conduct periodic due diligence; (2) report annually to the IRS account information on its U.S. customers; and (3) withhold and pay over to the IRS 30% of any payments of U.S.-source income (including gross proceeds from sales, not just gains) otherwise due recalcitrant account holders. If the FFI fails to enter into such agreement, any payors of U.S.-source income to any accounts maintained by the FFI are subject to flat 30% withholding.

To ease concerns of major U.S. trading partners that these new requirements may cause banks and other institutions in their countries to violate data privacy and similar laws, the IRS has developed model intergovernmental agreements (IGAs).[39] Under one model IGA, an FFI can report the information directly to its own host gov-

[36] Chief Counsel Advice (CCA) 201226028.

[37] Section 6662(j).

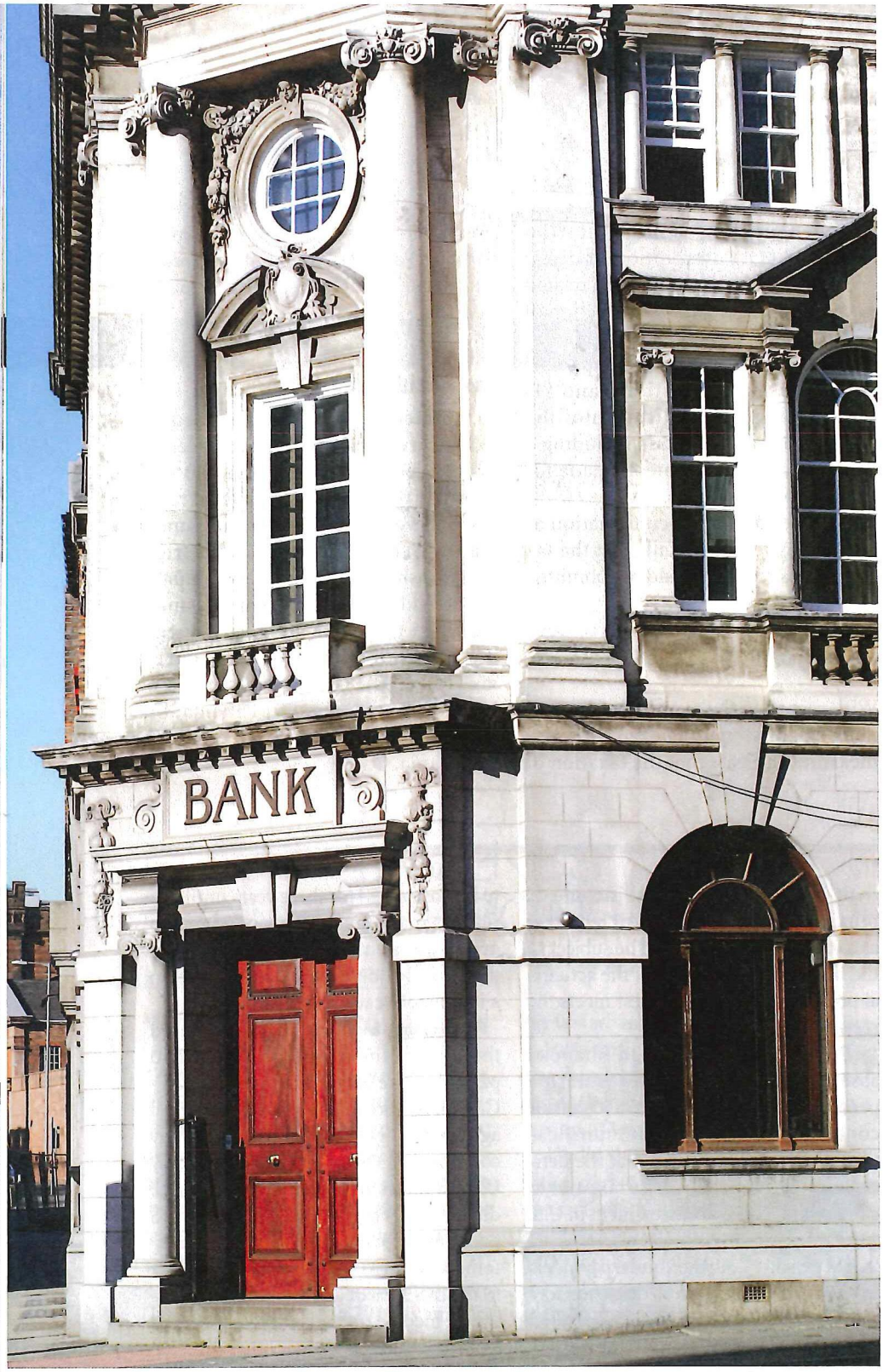
[38] Section 6501(c)(8)

[39] See "Treasury Releases FATCA Intergovernmental Agreements," 23 JOIT 5 (October 2012).

[40] See IR-2013-48, May 9, 2013.

[41] The U.K. issued "The International Tax Compliance (United States of America) Regulations 2013," 2013 No. 1962 (August 6, 2013), which came into force September 1, 2013. The Explanatory Note says: "These Regulations are made to give effect to the agreement reached between the Government of the United Kingdom and the Government of the United States of America [U.S.-U.K. IGA] to improve international tax compliance and to implement FATCA...." HMRC also issued Guidance Notes (August 14, 2013) on implementation of the Regulations.

[42] See OECD report for the G8 Summit, "A Step Change in Tax Transparency," June 18, 2013, www.oecd.org/newsroom/oecd-reports-to-g8-on-global-system-of-automatic-exchange-of-tax-information.htm.



ernment, which can then provide it to the IRS under authority of existing tax information exchange agreements (TIEAs). As a result of the uproar created by FATCA overseas, which continues to some extent, several overseas institutions that do not want to incur the sizeable costs of complying with FATCA at least in the short term are refusing to do business with U.S. persons and have closed accounts of their U.S. customers and told them to take their business elsewhere. From a longer-term perspective, once the FATCA regime for FFIs is fully phased in, it will be increasingly difficult for U.S. persons to hold undeclared bank or similar financial accounts offshore. To do so, U.S. taxpayers will need to seek such arrangements in more remote financial centers around the globe, which present their own potential risks.

Emerging trends in intergovernmental cooperation/enforcement. As discussed above, other countries including major U.S. trading partners have shared interests in combating global tax evasion when it comes to their own citizens. The United Kingdom, through Her Majesty's Revenue and Customs (HMRC), has had its own offshore amnesty type program in effect since 2009, which has been periodically extended. Canada earlier this year adopted a multi-pronged approach geared more toward enforcement including a mechanism for the Canada Revenue Agency (CRA) to pay rewards to informants with knowledge of major tax avoidance by Canadians as well as a requirement for financial institutions there to file reports of electronic funds transfers greater than $10,000. The IRS recently announced that the U.S., U.K., and Australian tax administrations have agreed to share tax information as to trusts and companies (many in classic haven jurisdictions) established by their respective citizens and residents throughout the world.[40] The EU member states are considering a proposal to adopt a FATCA-type reporting regime that would apply to financial institutions in all member countries.[41] Most recently, the OECD stated in a report released in June at the G8 Summit that progress is being made on developing a standardized global automatic tax information system aligned with FATCA.[42]

Conclusion

Although the IRS is holding out a velvet glove by encouraging noncompliant taxpayers to come into compliance, it is showing no mercy in going after other taxpayers still seeking to hide wealth offshore. With rising cooperation from other governments around the world sharing similar concerns as to their own citizens, and forced cooperation from major FFIs as a result of FATCA, it is becoming increasingly harder for U.S. taxpayers to hide wealth overseas. It is quite probable that someday under the auspices of one or more international organizations such as the OECD, there will be a concerted effort resulting in some form of standardized multilateral information reporting/sharing by the U.S. and its major trading partners patterned after FATCA, with the result that the ability to maintain secret or hidden accounts will become a relic of the past. ●