# MSP #7 OFFSHORE VOLUNTARY DISCLOSURE (OVD): The OVD Programs Initially Undermined the Law and Still Violates Taxpayer Rights

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## DEFINITION OF PROBLEM

Between 2009 and 2014, the IRS generally required "benign actors"—people who inadvertently failed to report offshore income and file one or more related information returns (*e.g.*, the *Report of Foreign Bank and Financial Accounts* (FBAR))—to enter into a punitive offshore voluntary disclosure (OVD) program and either pay an "offshore penalty" designed for "bad actors" or "opt out" and be examined.[1] Inside the 2011 OVD programs, taxpayers with small accounts paid over eight times the unreported tax—over ten times the 75 percent penalty for civil tax fraud—and those who were unrepresented generally paid even more.[2]

Because violations by taxpayers who have small accounts or who do not obtain representation are more likely to have been inadvertent, the OVD programs undermined the statutory scheme, which applies a higher penalty to "willful" violations than to those that are not willful or are due to "reasonable cause."[3] Some benign actors did not opt out because the cost of representation in a post-opt-out examination could exceed the "offshore penalty." Others did not opt out because the IRS's broad discretion in applying penalties outside the OVD programs was too frightening.

In addition, the IRS's seemingly arbitrary and one-sided interpretations of the OVD frequently asked questions (FAQs)—interpretations that the IRS would not explain and that were not published or subject to appeal—eroded confidence that the IRS would be reasonable in a post-opt-out examination. Thus, the IRS's OVD programs turned the statutory scheme on its head while eroding trust for the IRS and eroding

1 IRS, *Voluntary Disclosure: Questions and Answers*, http://www.irs.gov/uac/Voluntary-Disclosure:-Questions-and-Answers (posted May 6, 2009) [*hereinafter* "2009 OVDP FAQ"]; IRS, *2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers*, http://www.irs.gov/Businesses/International-Businesses/2011-Offshore-Voluntary-Disclosure-Initiative-Frequently-Asked-Questions-and-Answers (posted Feb. 8, 2011) [*hereinafter* "2011 OVDI FAQ"]; *IRS, Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers*, http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers (posted June 26, 2012) [hereinafter "2012 OVDP FAQ," or collectively the "OVD programs"]. For several years, the National Taxpayer Advocate and other stakeholders have expressed concerns about the OVD programs. *See, e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress 228-238; National Taxpayer Advocate 2012 Annual Report to Congress 134-153; National Taxpayer Advocate 2011 Annual Report to Congress 191-205; *Id.* at 206-72; National Taxpayer Advocate 2013 Objectives Report to Congress 7-8; *Id.* at 21-29 [collectively, *OVD Reports*].

2 AIMS Closed Case Database and the Individual Master File Transaction History (Aug. 29, 2014) (TAS analysis of closed case data where an offshore penalty was assessed inside the 2011 OVD program); IRC § 6663 (civil fraud penalty). This is more than the nearly 600 percent they paid under the 2009 OVD program. National Taxpayer Advocate 2013 Annual Report to Congress 228-238. Thus, the 2011 program appears to have exacerbated the disproportionality of the offshore penalty.

3 *See* 31 U.S.C. § 5321(a)(5).

taxpayer rights, such as the rights *to pay no more than the correct amount of tax, challenge the IRS's position and be heard, appeal an IRS decision in an independent forum*, and *to a fair and just tax system*.[4]

Recent changes to the OVD programs address some of these concerns. However, unlike the last time the IRS made taxpayer-favorable changes to an OVD program, the IRS will not allow those who already agreed to pay disproportionate offshore penalties to benefit from them. Moreover, the IRS has not formally asked for comments or explained why it adopted some suggestions and not others. Nor does it disclose internal guidance (*e.g.*, its counter-intuitive interpretations of FAQs) to the public, eroding the taxpayer *right to be informed*.[5]

The National Taxpayer Advocate is analyzing the OVD programs closely in the context of taxpayer rights because the IRS is likely to use settlement initiatives in the future. Any program that applies an opaque one-size-fits-all approach, as the IRS chose to do with the OVD programs, is likely to produce unfairness and injustice, particularly when taxpayers have diverse facts and circumstances. Thus, this analysis is meant to help improve tax administration efforts going forward.

## ANALYSIS OF PROBLEM

### The penalty for failure to file an FBAR was aimed at criminals and other bad actors.

Under the Bank Secrecy Act (BSA) a U.S. person who owns (or has signature authority over) one or more foreign accounts exceeding $10,000, during the prior calendar year, can be subject to civil and criminal penalties unless he or she reports the account(s) on an FBAR by June 30.[6] Congress enacted this requirement in 1970 after hearing testimony that criminals were using secret foreign bank accounts for illegal purposes (*e.g.*, tax evasion, securities manipulation, insider trading, evasion of Federal Reserve margin limitations, storing and laundering funds from illegal activities, and acquiring control of U.S. industries without detection by the U.S. Securities and Exchange Commission), and that U.S. law enforcement agencies faced difficulty in obtaining information about these accounts from foreign authorities.[7]

4 See IRS Pub. 1, *Your Rights as a Taxpayer* (2014). For a detailed discussion of taxpayer rights, see National Taxpayer Advocate 2013 Annual Report to Congress 5-19 (Most Serious Problem: *The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration*).

5 See IRS Pub. 1, *Your Rights as a Taxpayer* (2014). The IRS has issued some clarifications informally. *See, e.g.*, Kristen A. Parillo, *ABA Meeting: More Guidance Coming on Modified OVDP and Streamlined Filing*, 2014 TNT 184-7 (Sept. 23, 2014) (explaining, for example, that even people who do not need to file an amended return could come into the 2014 streamlined program; that although the streamlined program references the instructions to Form 8938, which exclude assets reported on Form 5471, assets reported on delinquent Forms 5471 would nonetheless be included in the penalty base; and that IRS employees had received training regarding willfulness determinations and were using a 'job aid' neither of which would be disclosed to the public). These clarifications were later published as updates to FAQs. *See* IRS, *Streamlined Filing Compliance Procedures for U.S. Taxpayers Residing in the United States Frequently Asked Questions and Answers* (Oct. 8, 2014) [*hereinafter*, the 2014 streamlined program], http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures-for-U-S-Taxpayers-Residing-in-the-United-States-Frequently-Asked-Questions-and-Answers.

6 *See, e.g.*, 31 U.S.C. §§ 5314, 5321; 31 C.F.R. §§ 1010.350, 1010.306(c); FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), http://www.fincen.gov/forms/bsa_forms/.

7 *See, e.g.*, Pub. L. No. 91-507, § 241, 242 (1970); S. Rep. No. 91-1139 at 2-4, 8-9 (1970); H. Rep. No. 91-975 at 12 (1970). *Accord* H.R. Rep. No. 241-3, at 27, 50 (1970) (statement of Robert M. Morgenthau, U.S. Att'y S.D.N.Y.) ("in addition to the usual difficulties attending to the detection of criminal conduct in financial transactions, we have here the added obstacle of the use of secret foreign accounts to avoid discovery… where criminals have made such extraordinary efforts to cover their tracks, we must respond with equal vigor to uncover them."); *Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the S. Subcomm. on Financial Institutions, Comm. on Banking and Currency*, 91st Cong. 2nd Sess. at 170 (1970) (statement of Eugene T. Rossides, Assistant Secretary of the Treas. for Enforcement and Operations) ("Our overall aim is to build a system to combat organized crime and white collar crime and to deter and prevent the use of secret foreign bank accounts for tax fraud and their use to screen from view a wide variety of criminally related financial activities, and to conceal and cleanse criminal wealth.").

Under the 2011 OVD program, the median offshore penalty for those with the smallest accounts rose to eight times the unreported tax, up from about six times the unreported tax under the 2009 program.

Although a criminal penalty already applied to those who willfully failed to report the existence of a foreign account on Schedule B of a Form 1040, *U.S. Individual Income Tax Return*, Treasury Department officials testified that a less-severe civil penalty would be easier to assert and less likely to violate the U.S. Constitution.[8]

Later, in 2002, the IRS reported to Congress that the FBAR compliance rate was less than 20 percent because about one million U.S. taxpayers may have been required to file FBARs, but the IRS had received fewer than 200,000 filings.[9] Its estimate of required FBAR filings was based in part on the number of credit and debit cards held by U.S. citizens and residents to access funds in offshore accounts. The IRS also cited the difficulty of proving willfulness as one of the reasons why it imposed so few FBAR civil penalties, even against those who intentionally failed to file an FBAR to conceal tax evasion or other crimes.[10]

### Following reports of people intentionally "attempting to conceal income from the IRS," Congress enacted a non-willful FBAR penalty.

In 2004, Congress dramatically increased the maximum penalty for willful violations and imposed—for the first time—a penalty for non-willful violations.[11] The maximum civil penalty for willful FBAR violations is now 50 percent of the maximum balance in each overseas account for each year of non-reporting (or, if greater, $100,000 per violation).[12] By contrast, the maximum penalty for non-willful violations is $10,000.[13] It may be waived if the taxpayer has "reasonable cause" and pays the tax on the income from the account.[14] Legislative history suggests the IRS's estimate that hundreds of thousands of taxpayers were "attempting to conceal income from the IRS" was a reason for this change.[15] It did not reference a

8 *See, e.g., Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the S. Subcomm. on Financial Institutions, Comm. on Banking and Currency*, 91st Cong. 2nd Sess. at 152 (1970) (statement of Robert Cole, Special Assistant for Int'l Affairs, Treas. Dept.) ("Civil penalties can be imposed administratively and there are cases where it might be appropriate to impose a civil penalty where imposition of a criminal penalty [under IRC § 7203 or IRC § 7206(1)] would seem unduly harsh or could raise evidentiary or constitutional problems.").

9 U.S. Department of the Treasury, *A Report to Congress in Accordance with § 361(B) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, 6 (Apr. 26, 2002); IRS Sets New Audit Priorities, FS-2002-12 (Sept. 2002).

10 U.S. Department of the Treasury, *A Report to Congress in Accordance with § 361(B) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, 10 (Apr. 26, 2002) ("taxpayers generally assert to the IRS that they were not aware that they were required to file an FBAR. Often, the administrative record lacks evidence to the contrary, such as an advice letter from an accountant or financial planner or any witness to testify that the taxpayer knew of the filing requirement. In such cases the litigation risk in assessing a penalty is substantial, particularly where, after notice from the IRS or FinCEN, the person has voluntarily backfiled the missing forms. Rather than go forward with penalty assessments based on a less than substantial record, FinCEN's limited resources have been allocated to other compliance and enforcement efforts…"). In January 2003, the IRS offered to settle with persons using offshore payment cards to avoid paying taxes. 2003 IR-2003-5 (Jan 14, 2003); Rev. Proc. 2003-11, 2003-1 C.B. 311.

11 The American Jobs Creation Act of 2004, Pub. L. No. 108-357, Title VIII, § 821(a), 118 Stat. 1586 (Oct. 22, 2004) (amending 31 U.S.C. § 5321(a)(5)).

12 31 U.S.C. § 5321(a)(5). Criminal penalties may also apply to willful violations. 31 U.S.C. § 5322.

13 31 U.S.C. § 5321(a)(5).

14 *Id*.

15 Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 108th Cong., JCS-5-05, 377-378 (2005) ("For one scheme alone, the IRS estimates that there may be hundreds of thousands of taxpayers with offshore bank accounts attempting to conceal income from the IRS."). *See also* S. Rep. No. 108-11, at 101 (2003) ("attempting to conceal"); S. Rep. No. 108-257, at 32 (2003) (same).

concern about taxpayers inadvertently failing to file the form. Thus, even the non-willful FBAR penalty appears to have been aimed at willful violations.

Another penalty of $10,000 or more may apply if the person does not report the same account on Form 8938, *Statement of Specified Foreign Financial Assets*.[16] Similar information reporting requirements apply to those who own interests in foreign entities.[17] Yet many benign actors who are not criminals (*e.g.*, immigrants, U.S. citizens living abroad, and those who relied on uninformed preparers) have *inadvertently* failed to file these forms.

The IRS's seemingly arbitrary and one-sided approach to interpreting the OVD FAQs—interpretations that the IRS did not publish, explain, or subject to an appeal—eroded confidence that the IRS would be reasonable in post-opt-out examinations, prompting some benign actors to agree to pay disproportionate offshore penalties.

### The IRS's effort to apply willful penalties to bad actors has eroded the distinction between willful and non-willful violations.

The IRS may only apply the penalty for willful violations when it can prove willfulness.[18] According to the Supreme Court (and the Internal Revenue Manual or IRM) the IRS may meet its burden to prove willfulness if it shows a violation is a "voluntary, intentional violation of a known legal duty."[19]

However, the government has eroded the distinction between willful and non-willful violations. Because Schedule B of Form 1040 (*U.S. Individual Income Tax Return*) asks if the taxpayer has a foreign account and references the FBAR filing requirement, the government has been somewhat successful in arguing—in court cases involving bad actors—that in some cases the filing of a Schedule B can turn a subsequent failure to file an FBAR into a willful violation (called "willful blindness").[20]

The IRS acknowledges that the existence of the checkbox on Schedule B does not turn every FBAR violation into a willful one.[21] However, it suggests that it may do so when the taxpayer has also tried to conceal the account and/or has

16 *See* IRC § 6038D.

17 *See, e.g.*, Form 5471, *Information Return of U.S. Persons With Respect to Certain Foreign Corporations*, Form 5472, *Information Return of a Foreign Owned Corporation*, Form 926, *Return by a U.S. Transferor of Property to a Foreign Corporation*, Form 8921, *Return by a Shareholder of a Passive Foreign Investment Co. or Qualified Electing Fund*, Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*, Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, Form 3520-A, *Annual Return of Foreign Trust With a U.S. Owner*, Form 8938, *Statement of Foreign Financial Assets*. The penalty for failure to file these information returns is generally $10,000 per violation or a percentage of the funds transferred. *See generally* IRC §§ 6038, 6038B, 6038D, 6039F, 6048. *Accord* 2012 OVDP FAQ #5. The failure to file these information returns generally means that the statute of limitations for the related income tax return does not begin to run. *See* IRC § 6501(c)(8). In addition, a 40 percent penalty may apply to the portion of any understatement attributable to a transaction involving an undisclosed foreign financial asset. IRC § 6662(j). Thus, taxpayers who failed to file could be liable for tax underpayments, delinquency penalties, and elevated accuracy-related penalties for many years—liabilities generally avoided under OVD settlement programs. Thus, these rules can increase the risk of severe penalties for those who opt out.

18 31 U.S.C. § 5321(a)(5).

19 *Ratzlaf v. U.S.*, 510 U.S. 135, 142 (1994) (*citing Cheek v. U.S.*, 498 U.S. 192, 201 (1991)); IRM 4.26.16.4.5.3 (July 1, 2008).

20 *See, e.g.*, *Williams v. Comm'r*, 489 Fed. Appx. 655 (4th Cir. 2012) (unpublished) (holding that the filing of Schedule B put the taxpayer on inquiry notice concerning the FBAR filing requirement, turning his continuing ignorance into "willful blindness," and triggering the willful FBAR penalty); *U.S. v. Sturman*, 951 F.2d 1466, 1477 (6th Cir. 1991) (same); *U.S. v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012) (same).

21 IRM 4.26.16.4.5.3(6) (July 1, 2008) ("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.").

a large account.[22] The IRS does not identify other relevant factors or provide assurance that it will only pursue a willful penalty against those also engaged in tax shelters, tax evasion, or criminal conduct. As a result, most taxpayers do not know how the IRS will apply this guidance to them. Even a taxpayer who inadvertently overlooked the FBAR filing requirement cannot be sure the violation will be treated as non-willful or due to reasonable cause. Thus, the government's position has likely discouraged benign actors from opting out of the OVD programs and seeking judicial review.

### It is inconsistent with the statutory scheme for benign actors to pay the same penalty as bad actors.

The IRM acknowledges that the maximum statutory penalties for "willful" failures to file an FBAR may "greatly exceed an amount that would be appropriate in view of the violation."[23] Because the statute only specifies the "maximum" FBAR penalty that the IRS "may" impose, it would be inconsistent with the statute for the IRS to assert the maximum penalty in every case.[24]

Moreover, legislative history (cited above) may suggest the IRS should only impose a penalty against those "attempting to conceal income from the IRS," rather than inadvertent violators.[25] Some commentators have gone so far as to suggest that FBAR penalties can be so disproportionate as to violate the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution.[26] Thus, it is inconsistent with the statutory scheme for benign actors to pay the same penalty as bad actors.

### Until recently, the IRS generally required benign actors to enter its OVD settlement programs and pay the same offshore penalty as bad actors or risk "opting out."

Between May 6, 2009 and July 1, 2014, the IRS generally required anyone who failed to report offshore income and file an FBAR or other information return to enter into an offshore voluntary disclosure (or OVD) settlement program.[27] Under the 2009 program, these taxpayers were required to pay:

- All unpaid taxes;
- A 20 percent accuracy-related penalty; and
- An "offshore penalty" of 20 percent of their highest offshore account balance (plus foreign assets) during a six-year period (2003-2008).[28]

22 IRM 4.26.16.4.5.3(6) (July 1, 2008) ([after filing a Schedule B,] "the failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved may lead to a conclusion that the violation was due to willful blindness.").

23 IRM 4.26.16.4(5) (July 1, 2008).

24 31 U.S.C. § 5321(a)(5).

25 Indeed, the IRM (quoted above) suggests that the failure to report an account on Schedule B combined with, "efforts taken to conceal the existence of the accounts" may constitute willful blindness. IRM 4.26.16.4.5.3(6) (July 1, 2008). However, it is unclear if the efforts to conceal the accounts must be made with the intent to evade taxes or conceal crimes, rather than reasonable concerns about privacy or unwarranted persecution by a government or others. At a recent American Bar Association (ABA) conference, one IRS employee reportedly expressed the view that a person would not be deemed willful if he was concealing the account to evade foreign taxes. *See* Kristen A. Parillo, *ABA Meeting: More Guidance Coming on Modified OVDP and Streamlined Filing*, 2014 TNT 184-7 (Sept. 23, 2014) (quoting John McDougal as saying "the willfulness we're trying to determine is with respect to U.S. obligations, not foreign obligations… [if] I'm convinced he had no clue he had to file in the United States, then that seems to me to be the answer to the question").

26 *See* Steven Toscher and Barbara Lubin, *When Penalties Are Excessive — The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty*, J. Tax Practice & Procedure 69-74 (Jan. 2010).

27 *See, e.g.*, 2012 OVDP FAQs 15 and 16 (threatening those who make quiet disclosures with examinations and criminal prosecution, and pointedly providing no assurance that these threats do not apply to benign actors); 2009 OVDP FAQs 10 and 49 (same).

28 2009 OVDP FAQs #'s 12, 13, 32, and 33.

The offshore penalty rose to 25 percent of the highest account balance during an eight-year period under the 2011 program, to 27.5 percent under the 2012 program, and up to 50 percent (still over an eight-year period) under the 2014 program.[29] With few exceptions, the OVD programs applied the same offshore penalty to benign and bad actors. The exceptions included:

- A five percent penalty for those holding inactive offshore accounts funded with previously-taxed proceeds and for certain foreign residents;[30]
- A 12.5 percent penalty for those with accounts never exceeding $75,000;[31] and
- A streamlined program that allowed certain "low risk" foreign residents with a *de minimis* amount of unreported income to avoid the OVD program. However, they could still be deemed "high risk" by the IRS and audited.[32]

Statistics suggest that all or nearly all of the taxpayers who applied to the streamlined programs were benign actors. Between Sept. 1, 2012 and April 24, 2014, the streamlined program attracted 8,851 taxpayers, and only eight percent (or 697 taxpayers) were classified as high risk and examined, as shown by the figure below.

**FIGURE 1.7.1, OVD streamlined program submissions by risk level[33]**

| Submissions | Taxpayers | Percent of Total |
|---|---|---|
| *Classified Low Risk* | 1,334 | 15% |
| *Classified High Risk and Examined* | 697 | 8% |
| Subtotal Classified High or Low Risk | 2,031 | 23% |
| Not Classified by Exam | 6,820 | 77% |
| **Total Submissions** | **8,851** | **100%** |

Even among the "high risk" group, most returns (51 percent) were not changed by the IRS, as shown on the figure below.

29 2014 OVDP FAQ #9; 2012 OVDP FAQ #8; 2011 OVDI FAQ #8.

30 2011 OVDI FAQ #52; 2012 OVDP FAQ #52 (eliminated under the 2014 program).

31 2011 OVDI FAQ #53; 2012 OVDP FAQ #53 (eliminated under the 2014 program).

32 *See* Form 14438, *Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer* (Aug. 2013); IRS, *Streamlined Filing Compliance Procedures* (Oct. 9, 2014), http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures (describing changes to the streamlined program first announced in 2012).

33 IRS response to TAS information request (July 30, 2014) (reflecting submissions received between Sept. 1, 2012 and April 24, 2014). The IRS stopped classifying returns as either high or low risk on June 18, 2014 when it announced the updated streamlined and OVDP programs. IRS response to TAS information request (Dec. 2, 2014). All the tables, charts, and figures in this discussion use numbers that may not add to 100 percent due to rounding.

### FIGURE 1.7.2, Examination results for "high risk" taxpayers on cases closed as of July 15, 2014[34]

| Examination Results | Returns | Percent of Total |
|---|---|---|
| No Change | 182 | 51% |
| Adjustment Agreed | 159 | 45% |
| Adjustment Unagreed/Other | 15 | 4% |
| **Total Closed** | **356** | **100%** |

Even among those whose returns were adjusted, the average adjustment was only $810 per return.[35] However, the IRS discouraged many taxpayers (including benign actors) from applying to the streamlined program, for example, if they had an understatement of more than $1,500 or other "risk factors."[36]

In addition, the IRS narrowly construed the exceptions under which taxpayers could receive lower rates within the OVD programs. Fewer than two percent of the offshore penalties assessed against OVD applicants were assessed at these reduced offshore penalty rates, as shown on the figure below.

### FIGURE 1.7.3, Total OVD offshore penalty assessments by rate[37]

| Offshore Penalty Rate | Total (millions) | Percent |
|---|---|---|
| Regular Rate (20%, 25%, or 27.5%) | $4,143 | 98.4% |
| Reduced Rate (5% or 12.5%) | $58 | 1.4% |
| Other | $7 | 0.2% |
| **Total** | **$4,208** | **100.0%** |

The only other option for benign actors was to opt out of the OVD programs and be examined. However, because those opting out faced prolonged uncertainty, the expense and stress of an examination, potential appeals, and the risk of even more severe penalties, some agreed to pay the (offshore) penalty designed for bad actors, as described in prior reports.[38]

### IRS data indicate that benign actors paid a proportionately greater offshore penalty than bad actors.

People who are unrepresented or who have small accounts are perhaps more likely to make inadvertent reporting violations than those who are represented or have large accounts. Those with small accounts generally had less to gain from failing to disclose them and fewer resources to investigate the reporting requirements. Similarly, those without representation were probably less likely to know about the requirement.

34 IRS response to TAS information request (July 30, 2014).

35 IRS response to TAS information request (Dec. 2, 2014).

36 See Form 14438, *Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer* (Aug. 2013).

37 IRS response to TAS information request (July 30, 2014) (analysis of data from OVD closed case reports for the 2009, 2011, and 2012 programs).

38 See, *e.g.*, OVD Reports.

Under the 2009 OVD program, however, the median offshore penalty paid by those with the smallest accounts was nearly six times the median unreported tax, as compared to about three times the unreported tax for those with the largest accounts, as shown on the figure below. Moreover, unrepresented taxpayers paid proportionately more regardless of the size of their accounts, as shown below.

**FIGURE 1.7.4, Comparison of median offshore penalties to unpaid tax by median account size and representation for the 2009 OVD program[39]**

| | Bottom 10% | Middle 80% | Top 10% |
|---|---|---|---|
| Offshore account(s) balance | $44,855 | $607,875 | $7,259,580 |
| 2009 OVD penalty | $8,540 | $117,803 | $1,410,517 |
| Additional tax, tax years 2002–2011 | $1,472 | $30,894 | $452,966 |
| Offshore penalty as a percent of tax assessed | 580% | 381% | 311% |
| Unrepresented percent | 31% | 11% | 4% |
| Offshore penalty as a percent of tax assessed (unrepresented taxpayers only) | 772% | 474% | 398% |

Under the 2011 OVD program, the median offshore penalty for those with the smallest accounts rose to eight times the unreported tax, up from about six times the unreported tax under the 2009 program, as shown above and below. Unrepresented taxpayers continued to pay proportionately more except for those with the smallest accounts, as shown on the figure below. Moreover, for the middle 80 percent of taxpayers, the offshore penalty percentage increased by about 85 percent between the 2009 and 2011 programs (from 381 to 706 percent) while the median account balance declined by about 70 percent (from $607,875 to $183,993). Thus, the offshore penalty became increasingly more disproportionate for those with small accounts who were most likely to have been benign actors.

39 National Taxpayer Advocate 2013 Annual Report to Congress 228-238. All figures are medians rather than averages because the data contains extreme outliers. The 2009 OVD program data was not updated because it has not changed significantly since last year's report. For the purposes of this analysis (and the analysis in the table below), we consider unrepresented taxpayers to be those without a Transaction Code 960 present on the Compliance Data Warehouse Individual Master File Transaction History table as of October 3, 2013. If the IRS Master File database indicated that a taxpayer had a representative on any tax module for any of tax years 2003-2012, then the taxpayer was considered represented, even though he or she may have been unrepresented in connection with the OVD program.

**FIGURE 1.7.5, Comparison of median offshore penalties to unpaid tax by median account size and representation for the 2011 OVD program[40]**

| | Bottom 10% | Middle 80% | Top 10% |
|---|---|---|---|
| Offshore account(s) balance | $17,368 | $183,993 | $3,833,152 |
| 2011 OVD penalty | $2,202 | $41,238 | $888,943 |
| Additional tax, tax years 2003–2012 | $268 | $5,845 | $190,579 |
| Offshore penalty as a percent of tax assessed | 821% | 706% | 466% |
| Unrepresented percent | 53% | 30% | 10% |
| Offshore penalty as a percent of tax assessed (unrepresented taxpayers only) | 788% | 736% | 705% |

Disproportionality may have increased between the 2009 and 2011 programs because those settling under the 2011 program generally had proportionately less unreported tax, but were still mostly subject to the "one-size–fits-all" offshore penalty, which rose from 20 percent in the 2009 program to 25 percent for 2011.

### Taxpayers who opted out or were removed paid much less.

Taxpayers who had the courage to opt out or who were removed from the IRS's OVD programs generally paid far smaller penalties. As shown on the following table, they were assessed less in penalties (including the FBAR penalty) than in additional taxes.

**FIGURE 1.7.6, Opt-out and removal examination results[41]**

| Program | Returns Closed | Avg. Tax Assessed | Avg. FBAR Penalty[42] | Avg. Tax Penalty | Penalty to Tax Assessment Ratio |
|---|---|---|---|---|---|
| 2009 OVD | 1,865 | $13,667 | $2,288 | $10,633 | 95% |
| 2011 OVD | 1,381 | $3,974 | $794 | $930 | 43% |
| 2012 OVD | 34 | $178 | $0 | $31 | 17% |
| Canadian opt-out and streamlined | 6,085 | $110 | $0 | $6 | 6% |

40 Audit Information Management System Closed Case Database and the Individual Master File Transaction History (Aug. 29, 2014) (TAS analysis of closed case data where an offshore penalty was assessed inside the 2011 OVD program). Like those in the table above, all figures are medians. Although TAS pulled the 2009 OVD program data (above) based on directions from technical experts at the IRS, the IRS formally objected that the 2009 data "fails to capture taxpayers closed under old FAQ 35 where there was no additional tax assessment or taxpayers with offsetting adjustments." IRS response to TAS information request (Dec. 6, 2013); IRS response to TAS information request (Dec. 2, 2014) (same). Accordingly, when TAS pulled the 2011 OVD program data it included taxpayers with no additional tax assessments or offsetting adjustments (as requested by the IRS), but the penalties were even more disproportionate, as shown above. All similar comparisons between the 2009 and 2011 program data in this report assume this difference in methodology does not materially affect the results.

41 IRS response to TAS information request (July 30, 2014). TAS received aggregate figures from the IRS and then divided them by the number of closed returns to compute averages. The penalty-to-tax assessment percentage is the sum of the average tax and FBAR penalties divided by the average tax assessment. The IRS recorded data on Canadians who opted out separately from other taxpayers. IRS response to TAS information request (July 30, 2014). It also combined streamlined examination results with the results of examinations of Canadians who opted out. *Id.*

42 By comparison, the average FBAR penalty assessed in the 4,584 examinations closed in 2011-2013 outside of the OVD programs was about $40,685, with the IRS issuing warning letters in 791 (or about 17 percent) of them. IRS response to TAS information request (July 30, 2014). It also initiated about 95 criminal investigations and obtained 35 convictions during the 2011-2013 periods. *Id.*

For example, this figure shows that when taxpayers opted out of the 2011 OVD and were examined they only paid about $5,698 on average ($3,974 in tax, plus $930 in tax penalties and $794 in FBAR penalties), with penalties comprising only about $1,724 of that amount. These results are not surprising. The IRS designed the opt-out process for those who felt the offshore penalty was too high—higher than the penalty that they would pay under the statute as enacted by Congress. The problem is that many benign actors did not opt out. Moreover, while the analysis above suggests that the penalties for benign actors have grown proportionately more severe inside the programs, they appear to have declined for those who opted out. As shown above, the penalty to tax percentage for those who opted out or were removed declined from 95 percent under the 2009 OVD program to 17 percent under the 2012 program.

### IRS delays may have prompted some benign actors to accept disproportionate offshore penalties.

The potential cost of representation in a lengthy examination and potential appeal, may have prompted some benign actors to pay a disproportionate offshore penalty. As shown on the following figure, OVD cases generally remained unresolved for long periods.

### FIGURE 1.7.7, OVD program applications, dispositions, and processing times as of September 30, 2014[43]

| | 2009 OVDP | | 2011 OVDI | | 2012 OVDP | |
|---|---|---|---|---|---|---|
| | Number | Average Processing Days | Number | Average Processing Days | Number | Average Processing Days |
| Closed certifications | 10,774 | 311.2 | 9,616 | 246.0 | 1,790 | 219.9 |
| Closed opt-outs | 264 | 566.7 | 500 | 195.5 | 34 | 308.6 |
| Closed removals | 88 | 620.4 | 576 | 482.4 | 0 | 0.0 |
| **Total closed cases** | **11,126** | **318.9** | **10,692** | **240.0** | **1,824** | **221.2** |
| Open certifications | 20 | 1,011.2 | 2,263 | 384.5 | 5,072 | 212.2 |
| Open opt outs | 0 | 0.0 | 135 | 437.7 | 26 | 377.6 |
| Open removals | 0 | 0.0 | 80 | 542.6 | 3 | 271.1 |
| Open suspense | 0 | 0.0 | 19 | 580.8 | 5 | 356.5 |
| **Total open cases** | **20** | **1,011.2** | **2,497** | **396.0** | **5,106** | **214.7** |
| **TOTAL CASES** | **11,146** | **n/a** | **13,189** | **n/a** | **6,930** | **n/a** |

Not everyone who feels comfortable making an OVD submission without representation also feels confident to represent themselves in a post-opt-out examination. Thus, the expected cost of such representation—costs that increase the longer the process—likely discouraged some benign actors from opting out.

### The IRS's one-sided interpretations of OVD FAQs likely prompted other benign actors to accept disproportionate offshore penalties.

Taxpayers who inadvertently violated the rules would be more likely to risk opting out and being examined by the IRS if they believed the IRS would treat them fairly and take only reasonable positions in any post-opt-out examination. Significant uncertainty about what constitutes a "willful" FBAR violation,

43 IRS response to TAS information request (Oct. 8, 2014). These figures do not include the time that taxpayers waited for the IRS's Criminal Investigation Division to clear them to participate or for the IRS to load their cases onto its tracking system.

what is required to establish "reasonable cause," and the IRS's wide latitude to determine the FBAR penalty amount increased the importance of how the IRS used its broad discretion in applying the rules.[44]

However, the IRS's unreviewable, unpublished, and one-sided interpretations of certain OVD FAQs eroded confidence that the IRS would be reasonable in post-opt-out examinations. Stakeholders complained about the IRS's strained interpretations of FAQs and recommended that the IRS adopt more formal guidance such as a revenue procedure.[45] One well-documented example, discussed in prior reports, is the IRS's interpretation of 2009 OVDP FAQ 35.[46] In the context of the 2011 OVDI, the Taxpayer Advocate Service (TAS) continues to encounter other similarly strained interpretations on a regular basis. Although we were unable to obtain taxpayer consent to discuss even more egregious cases, the following example illustrates this ongoing problem.[47]

> *Example*: An IRS employee took the position that a taxpayer's foreign apartment must be included in the "offshore penalty" base solely because the taxpayer filed returns reporting income from the apartment between two and fifteen months late—after receipt of foreign information reporting documents relating to inherited property. The employee concluded the delay in filing returns meant that the apartment was related to tax noncompliance. Under the 2011 OVDI FAQ 35, "[t]he offshore penalty is intended to apply to all of the taxpayer's offshore holdings that are related in any way to tax noncompliance." FAQ 35 defines tax noncompliance as follows:
>
> > "Tax noncompliance includes failure to report income from the assets, as well as failure to pay U.S. tax that was due with respect to the funds used to acquire the asset."
>
> The taxpayer timely overpaid her taxes and reported the income from the apartment (albeit on late-filed returns), and the apartment was not acquired with untaxed funds. Thus, the IRS employee's unreviewable determination to include the apartment in the offshore penalty base appears to contradict FAQ 35.

44 For further discussion of these issues, see, *e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress 228-238.

45 See, *e.g.*, Letter from New York State Bar Association Tax Section to Commissioner, IRS, Chief Counsel, IRS, and Acting Assistant Secretary (Tax Policy) Department of the Treasury, *2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers*, *reprinted as*, *NYSBA Tax Section Comments on FAQ for 2011 Offshore Voluntary Disclosure Initiative*, 2011 TNT 153-13 (Aug. 9, 2011) (hereinafter "NYSBA Letter") (identifying inconsistencies and recommending "FAQs be incorporated into some type of more permanent guidance such as a Revenue Procedure and that such guidance be subject to public comments."); National Taxpayer Advocate 2013 Annual Report to Congress 228-238. Formal guidance could be interpreted by one branch of National Office of Chief Counsel attorneys whose advice could be published as Chief Counsel Advice (CCA), rather than by IRS technical advisors and SB/SE field attorneys. See, *e.g.*, IRC § 6110.

46 See, *e.g.*, OVD Reports; NYSBA Letter.

47 TAS has obtained taxpayer consent to discuss the case example described above. TAS developed its procedure for obtaining consents to publish case examples in consultation with the IRS Office of Chief Counsel. In response to a formal TAS request for the IRS to confirm whether the FAQ interpretations described in the example were correct—a request that also gave the IRS an opportunity to rectify the situation—the IRS stated:

> "The IRS cannot confirm the allegations of employee interpretations as stated by TAS. Moreover it is not appropriate to discuss individual taxpayer cases as part of the Most Serious Problem process. There are separate processes for addressing individual taxpayer cases and the IRS works with TAS as appropriate through those processes. Finally, information being requested is information protected under IRC § 6103 and is not appropriate for a publicly released report." IRS response to TAS information request (July 30, 2014).

The IRS Office of Chief Counsel has advised the National Taxpayer Advocate that the IRS was legally authorized to provide TAS with the requested information. Moreover, the IRS routinely provides TAS with information about individual taxpayer cases (*e.g.*, as part of a case review or study) for the purpose of compiling this report.

Although the apartment would not be included in the penalty base outside of the OVD program, the taxpayer was unwilling to opt out. She feared that opting out could somehow affect her status as a green card holder or her application for U.S. citizenship.

When a taxpayer disagrees with a revenue agent's (*i.e.*, an auditor's) interpretation of an FAQ, the agent is not required to explain the interpretation or allow the taxpayer to speak with the technical advisor or counsel attorney whose advice he or she sought. Nor can the taxpayer have the interpretation reviewed by the IRS Office of Appeals. Moreover, these interpretations are unpublished. Thus, neither taxpayers nor the IRS can be sure revenue agents, technical advisors, or IRS attorneys are applying the FAQs consistently.

The IRS may, in fact, achieve consistency through frequent informal electronic and telephonic communications among IRS revenue agents, technical advisors, and attorneys. For example, IRS officials revealed at an ABA conference that some agents had attended web-based training and were using checksheets concerning willfulness determinations. While these efforts should promote consistency, the materials were withheld from the public.[48] Without transparency as to these checklists and FAQ interpretations, neither taxpayers nor other IRS employees (including TAS employees and IRS executives) can be sure the IRS is treating taxpayers consistently.[49] Nor can they be confident IRS employees are consistently interpreting willfulness and reasonable cause *correctly*.

The IRS's seemingly arbitrary and one-sided approach to interpreting the OVD FAQs—interpretations that the IRS did not publish, explain, or subject to an appeal—eroded confidence that the IRS would be reasonable in post-opt-out examinations, prompting some benign actors to agree to pay disproportionate offshore penalties.

### Recent OVD program changes treat certain benign actors more reasonably.

On June 18, 2014 the IRS adopted some of the National Taxpayer Advocate's OVD-related recommendations. It modified the terms of the 2012 OVD program (called the 2014 OVDP) and created a new 2014 "streamlined" program that allows those who failed to file an FBAR and report offshore income to pay a reduced offshore penalty—five percent for U.S. residents and zero percent for nonresidents—if they certify that their violations were not willful.[50] At five percent of the offshore account balance, the penalty

48 Kristen A. Parillo, *ABA Meeting: More Guidance Coming On Modified OVDP and Streamlined Filing*, 2014 TNT 184-7 (Sept. 23, 2014). For a broader discussion of the IRS's difficulty with the Freedom of Information Act (FOIA), see for example, National Taxpayer Advocate 2011 Annual Report to Congress 380-403 (Most Serious Problem: *The IRS's Failure to Consistently Vet and Disclose its Procedures Harms Taxpayers, Deprives It of Valuable Comments, and Violates the Law*); National Taxpayer Advocate 2006 Annual Report to Congress 10-30 (Most Serious Problem: *Transparency of the IRS*); National Taxpayer Advocate 2008 Objectives Report to Congress xxi-xxvii (*Update on Transparency of the IRS*); and National Taxpayer Advocate 2010 Annual Report to Congress 71-84 (Most Serious Problem: *IRS Policy Implementation Through Systems Programming Lacks Transparency and Precludes Adequate Review*).

49 TAS gave IRS management an opportunity to comment on whether it believes the FAQs were applied consistently and correctly in a handful of cases TAS had worked where revenue agents either disregarded the FAQs completely or gave them strained anti-taxpayer interpretations, including the example above. As noted above, IRS management said it "cannot confirm the allegations of employee interpretations." IRS response to TAS information request (July 30, 2014). While also asserting that providing such information would not be "appropriate," the response suggests at least tacit management support for the anti-taxpayer interpretations about which we have raised concerns.

50 To qualify for the nonresident streamlined program, a person must have been a nonresident in one of the last three years for which a return was required. IRS, *U.S. Taxpayers Residing Outside the United States* (Oct. 9, 2014). However, the program defines "nonresident" very narrowly—generally excluding people if they or their spouses have visited the U.S. for vacation, to work, to visit a sick relative, or to shop on more than 35 days. IRS, *U.S. Taxpayers Residing Outside the United States* (Oct. 9, 2014); IRS, *U.S. Taxpayers Residing in the United States* (Oct. 9, 2014). TAS commented that the IRS should use a more expansive definition of nonresident.

is less harsh than the 27.5 percent (or 50 percent) penalty under the 2012 or 2014 OVDP.[51] Because taxpayers are not offered a closing agreement under the 2014 program, however, the IRS could examine them and assess higher penalties. Thus, benign actors in the streamlined program do not have the same right to finality as bad actors in the other OVD programs.[52]

During a transition period, taxpayers with open OVD program cases, who had not signed closing agreements, could also participate in the streamlined program and receive a closing agreement if the IRS agreed their violations were not willful.[53] The last time the IRS created more favorable rates for certain types of benign actors—the 5 and 12.5 percent rates (described above)—it allowed qualifying taxpayers who already had signed closing agreements to amend them so they were not disadvantaged by having come forward earlier.[54] For the 2014 program changes, however, the IRS did not offer the same terms to benign actors who already had signed (and countersigned) closing agreements. Thus, the 2014 OVD-related changes represent a major step forward in distinguishing between benign actors and bad actors, as contemplated by Congress, but they leave many benign actors with previously signed closing agreements feeling punished for having come forward early.

### The OVD program guidance-making and disclosure process remains flawed.

The IRS still has not adopted the National Taxpayer Advocate's recommendations to improve transparency or accountability in its program guidance or FAQ interpretations. Although it may receive OVD-related comments from TAS and the public, it has not formally asked for comments from internal or external stakeholders, and does not necessarily address the comments it receives to explain why it has adopted some and not others.[55] Nor does it disclose all of the guidance that employees are applying (*e.g.*, the FAQ interpretations described above). Thus, the OVD-related guidance-making process remains flawed. As a result, the IRS will continue to be viewed as ignoring reasonable concerns and some OVD

51 As of the end of FY 2014, there were approximately 3,085 applicants to the new 2014 streamlined program and 1,409 applicants to the 2014 OVDP. IRS response to TAS information request (Dec. 2, 2014). As of October 8, 2014, no results had been captured for either program. *Id*.

52 *See* IRS Pub. 1, *Your Rights as a Taxpayer* (2014) (announcing the IRS's intention to give taxpayers the right to finality). Only taxpayers with open OVD program cases were permitted to obtain closing agreements under the 2014 streamlined program terms. IRS, *Transition Rules: Frequently Asked Questions (FAQs)* (June 18, 2014), http://www.irs.gov/Individuals/International-Taxpayers/Transition-Rules-Frequently-Asked-Questions-FAQs.

53 Streamlined Filing Compliance Procedures (June 18, 2014), http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures. ("A taxpayer eligible for treatment under the streamlined procedures who submits, or has submitted, a voluntary disclosure letter under the OVDP (or any predecessor offshore voluntary disclosure program) prior to July 1, 2014, but who does not yet have a fully executed OVDP closing agreement, may request treatment under the applicable penalty terms available under the streamlined procedures.")

54 *See* 2011 OVDI FAQ #52 ("Taxpayers who participated in the 2009 OVDP whose cases have been resolved and closed with a Form 906 closing agreement who believe the facts of their case qualify them for the 5% reduced penalty criteria of the 2011 OVDI, but paid a higher penalty amount under the 2009 OVDP should provide a statement to this effect … Upon receipt of this information, the case will be assigned to an examiner to review and make a determination."); 2011 OVDI FAQ #53 (same).

55 Although the Large Business and International (LB&I) division does not ask for public comments before issuing OVD-related guidance, it has begun asking a member of the National Taxpayer Advocate's staff to comment on such guidance on short notice. TAS appreciates this opportunity to comment. However, LB&I has not asked for TAS or other affected IRS functions for comments using the normal Internal Management Document (IMD) process for clearing and disclosing interim guidance to staff or IRM changes. IRM 1.11.1 (Sept. 4, 2009); IRM 1.11.9 (Apr. 7, 2014). The IMD process contains procedures for dispute resolution. *Id.* Thus, LB&I has not explained why it has not adopted some of TAS's comments. Nor has LB&I asked for comments from the IRS Office of Servicewide Penalties (OSP)—the IRS office supposedly charged with "coordinating policy and procedures concerning the administration of penalty programs." IRM 20.1.6.1.1 (Sept. 17, 2010); IRM 4.24.9.1 (Oct. 26, 2012) (same); OSP response to TAS information request (July 10, 2014) (indicating that LB&I had merely asked OSP for new penalty reference numbers in connection OVD-related program changes). For a more detailed discussion of this problem see, Most Serious Problem: *PENALTY STUDIES: The IRS Does Not Ensure Penalties Promote Voluntary Compliance, as Recommended by Congress and Others, infra.*

participants will continue to believe the IRS is not applying the FAQs consistently or fairly. This state of affairs does not engender trust in IRS policies, procedures, or actions.

## CONCLUSION

OVD program data suggest that the IRS turned the statutory scheme on its head by charging benign actors the same offshore penalty as bad actors. Further, the pressure benign actors felt to accept the OVD program terms rather than opting out, eroded taxpayer rights, such as the *rights to pay no more than the correct amount of tax*, *challenge the IRS's position and be heard*, *appeal an IRS decision in an independent forum*, and *to a fair and just tax system*.[56]

Recent changes to the OVD programs address some of TAS's concerns. However, unlike the last time the IRS made taxpayer-favorable changes to an OVD program, the IRS will not allow those who already agreed to pay disproportionate offshore penalties to benefit from the most recent changes.

Moreover, the IRS still does not formally ask for internal or external comments before issuing OVD guidance, or publicly explain why it has adopted some comments and not others. Nor does it disclose its interpretations of FAQs or other internal guidance to the public. Correcting these flaws would further the taxpayer *right to be informed*.[57]

The flaws in the OVD programs, outlined in this report, do not bode well for fairness and justice in the IRS's implementation of future settlement programs where taxpayers have diverse facts and circumstances. Moreover, the IRS's unwillingness to address these flaws and fundamentally restructure its offshore initiatives undermines voluntary compliance and places taxpayers at risk of disproportionate penalties.

56 See IRS Pub. 1, *Your Rights as a Taxpayer* (2014).

57 *Id*.

## RECOMMENDATIONS

In the interests of effective tax administration, the National Taxpayer Advocate recommends the IRS:

1. Improve the transparency of the OVD and streamlined programs by:
   a. Publishing OVD-related program guidance as a revenue procedure (or similar guidance published in the Internal Revenue Bulletin) that incorporates comments from internal and external stakeholders, and assigning interpretation of the guidance to national office attorneys whose advice would be disclosed to the public just like other Chief Counsel Advice (CCA).
   b. Providing instructions to OVD program staff by incorporating them into the IRM, which incorporates comments from internal stakeholders and is disclosed to the public.
   c. Publishing interpretations of the program terms by any IRS employees authorized to interpret them (*e.g.*, by IRS attorneys and technical advisors) just like CCA.
   d. More frequently updating the guidance on the IRS website with any clarifying interpretations rendered by technical advisors or other IRS employees to the extent those interpretations are not incorporated into other public guidance.[58]
2. Allow taxpayers to elevate or appeal a revenue agent's OVD and streamlined program determinations. At a minimum, the agent and anyone who advised him or her (*e.g.*, a technical advisor or IRS attorney) with respect to a disputed assumption should be required to explain his or her reasoning to the taxpayer in writing and reconsider the advice in light of any new facts or analysis provided by the taxpayer.
3. Allow taxpayers to amend their closing agreements to benefit from recent OVD-related program changes.[59]

58 Rather than changing the FAQs each time, a list of all clarifying guidance applicable to a specific FAQ could be made visible if a user clicked on that particular FAQ.

59 The IRS previously offered to amend 2009 OVDP agreements for taxpayers who would qualify for the reduced 5 percent or 12.5 percent offshore penalty rates under the 2011 OVDI. *See* 2011 OVDI FAQ #52; 2011 OVDI FAQ #53.