

**Florida Bar Tax Section
Tax Procedure Certification Exam Review¹
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**Brian Harris, Akerman LLP
Micah Fogarty, Barnett Bolt Kirkwood Long & Koche**

I. Examination

A. Selection for examination

- i. Returns flagged by “Discriminate Function”, a computer process that analyzes and scores returns for audit selection.
- ii. Information return/matching: information returns (e.g. 1099s, W-2s) compared to those numbers reported on the return.
- iii. Economics: higher gross incomes increase likelihood of audit
- iv. Specific return items: the IRS may choose to flag certain items that are frequently abused by taxpayers (e.g. home office expenses, Earned Income Tax Credit), tax protestor items
- v. Return related to entity under audit or is a related return (e.g. estate tax return and the estate’s income tax return)
- vi. Large deficiencies found in prior audits
- vii. Whistle-blower/informant
- viii. High visibility taxpayer with suspect activities, news stories, public announcements

B. Types of Audits

- i. Correspondence: usually concerns only a few simple items on a return, which can be resolved through mailing documentation and explanations
- ii. Office: more complex issues, more issues raised, examiners seek interviews
- iii. Field: with complex returns, often in taxpayer’s office, multiple meetings
- iv. Trust Fund: IRS seeks to establish who is a “responsible officer” for purposes of holding multiple individuals liable for a company’s employment taxes.

C. Investigative Authority

- i. IRS has broad authority to gather information relative to the exam.
- ii. Information requests
 1. Generally, the taxpayer bears the burden of proof with respect to items on his return, so documents are given voluntarily.
 2. The IRS initially makes informal requests for documents, but these are often memorialized in a Form 4564 Information Document Request.
 3. For biggest audits, the IRS may issue summonses.
- iii. Summonses
 1. IRC 7602 – grants IRS the authority to issue a summons for any of the following purposes: (a) to ascertain correctness of any return; (b) to make a return where

¹ Thank you to Karen Lapekas, Lapekas Law, who wrote significant portions of this outline.

none has been filed; (c) to determine the liability of any person for any internal revenue tax; (d) to determine the liability at law or in equity of any transferee or fiduciary; and (e) to collect any tax liability.

2. Issuing the summons
 3. Enforcement of summons. Options –
 - a. Do nothing
 - b. Contempt order from district court (IRC 7604(b))
 - c. Criminal prosecution (IRC 7210)
 - d. Request district court enforcement (7604)
 4. Summons enforcement requirements (*Powell*)
 - a. Legitimate purpose
 - b. Information relevant to that purpose
 - c. IRS does not already have the information
 - d. IRS followed administrative requirements (e.g. service)
 5. Taxpayer contesting a summons
- D. Conclusion of audit
- i. No change
 - ii. Agreed Case
 - iii. Unagreed Case - IRS 30-day letter with proposed changes
 1. Taxpayer responds by filing protest letter and request for Appeals consideration
 2. If no taxpayer response, IRS issues statutory notice of deficiency.
- E. Alternative Dispute Resolution
- i. Accelerated issue resolution - apply resolution of same issues to other tax periods.
 - ii. Early referral to Appeals – transfer developed but unagreed issue to Appeals in an attempt to expedite resolution of entire case.
 - iii. Fast track settlement – Appeals Officer serves as mediator between taxpayer and IRS after issues fully developed.
- F. TEFRA Partnerships
- i. Unified proceedings to determine tax treatment of partnership items at partnership level with results applied to each partner.
 - ii. At close of exam, IRS may issue a Final Partnership Administrative Adjustment (FPAA) and the partnership has 90 days to seek judicial review.
 - iii. Repeal of TEFRA partnership audit rules – tax collected at partnership level.

II. Appeals

- A. Purpose – independent review of IRS and taxpayer positions with settlement authority. Appeals weighs hazards of litigations in attempting to obtain resolution.
- B. Taxpayer right to Appeals perfected by filing timely protest letter in response to IRS's 30-day letter.

C. Appeals conference

- i. May be in person or telephonic
- ii. Discuss relevant case law and authority that suggests litigation hazards to IRS.
- iii. Consider settlement proposal.

D. Conclusion of Appeal

- i. Decide in favor of taxpayer
- ii. Settlement
 1. Forms 870 and 870-D – settlement agreement form waiving restrictions on assessment and right to challenge in Tax Court.
 2. Closing Agreement – final agreement binding on both IRS and taxpayer.
- iii. Unagreed - Appeals issue a statutory notice of deficiency.

E. Alternative Dispute Resolution

- i. Post Appeals Mediation – different Appeals officer serves as mediator if taxpayer and assigned Appeals officer cannot reach resolution.

III. Tax Litigation

A. Tax Court – deficiency litigation and prior payment not required.

B. District Court/Court of Federal Claims – refund action and full payment of amount at issue (unless divisible tax).

IV. Statute of Limitations on Assessment

A. General Rule – with certain exceptions, the IRS has 3 years from the date the return is filed to assess additional tax (“deficiency”). This 3-year rule also applies to penalties and interest. § 6501.

B. Start of Assessment Period

- i. Filing of a “return”
 1. Substantial compliance/*Beard* test – only valid return starts 3-year period.
 2. Substitute return – IRS prepared substitute return does not start 3-year period.
- ii. Early return – 3-year period begins on filing due date.
- iii. Late return – 3-year period begins when delinquent return filed.
- iv. Amended return – should not affect assessment period.

C. Exceptions to 3-Year Statute of Limitations on Assessment

- i. False or fraudulent return - no SOL applies.
- ii. No return – no SOL applies.
- iii. Agreement to extend – IRS and taxpayer may agree to extend the SOL, often during the course of an examination or during Appeals.
- iv. Termination of private foundation status – no SOL applies
- v. Request for prompt assessment
- vi. Substantial (more than 25%) omission of income – 6-year SOL

- D. Statute of limitations on refunds – taxpayer file refund claim within later of (i) 3 years after return is filed or (ii) 2 years from the date the tax is paid.

V. Statute of Limitations on Collection

- A. General Rule - § 6502 sets forth a 10-year SOL on collection.
- B. Start Date of SOL on Collection - 10-year SOL begins on the date of assessment
- C. Extension – may be extended by agreement.
- D. Tolling of both 3-year and 10-year SOL periods:
 - i. Notice of deficiency – 90 days after mailing (or 150 days if taxpayer outside of the US) plus 60 days thereafter. If taxpayer files petition, SOL suspended until Tax Court decision becomes final plus 60 days.
 - ii. Bankruptcy – during bankruptcy case plus 60 days for assessment (and 6 months for collection).
- E. Tolling of 10-year collection period only
 - i. Installment agreement – suspended while installment agreement is pending, for 30 days immediately after rejection of proposed installment agreement, and for 30 days immediately following the termination of an installment agreement (and during any consideration by Appeals).
 - ii. Offer in compromise - suspended while OIC is pending, for 30 days immediately after rejection of proposed OIC, and during any consideration by Appeals.
 - iii. Collection due process hearing – until Appeals determination becomes final.

VI. Civil Penalties

- A. Delinquency penalties
 - i. § 6651(a)(1) failure to timely file return – 5% per month up to maximum of 25% on deficiency amount. If fraudulent failure to file, 15% per month up to maximum of 75%.
 - ii. § 6651(a)(2) failure to timely pay tax - .5% per month of delinquency up to maximum of 25% (or 50 months).
 - iii. Delinquency penalties assessed, collected, and paid in same manner as taxes.
 - iv. Subject to reasonable cause defense.
 - v. Overlapping penalties - failure to file and failure to pay penalties integrated so that combined penalty cannot exceed 5% per month but 25% limit applies separately to each penalty.
 - vi. Reasonable cause defense
 - 1. Avoid penalty by establishing failure due to reasonable cause and not willful neglect.
 - 2. The determination of whether the taxpayer acted with reasonable cause and in

good faith is made on a case-by-case basis, taking into account all the relevant facts and circumstances.

3. Generally, the most important factor in determining reasonable cause is the taxpayer's effort to report the proper tax liability. Other factors to consider are the taxpayer's experience, knowledge, education, and the taxpayer's reliance on the advice of a tax advisor.
- vii. First time abatement program
1. Requirements – (a) No penalties for prior 3 years, (b) filed all currently required returns or filed an extension, and (c) have paid or arranged to pay any tax due.
- B. Accuracy-related penalty
- i. § 6662 - 20% penalty on portion of underpayment attributable to:
 1. Negligence or disregard of rules and regulations;
 2. Substantial understatement of income tax;
 - a. Substantial understatement if exceeds greater of (i) 10% of tax or (ii) \$5,000.
 - b. Reduction in penalty if substantial authority exists or certain disclosure requirements are met.
 - i. Substantial authority – falls between reasonable basis and more likely than not.
 - ii. Disclosure – attach statement to return (Form 8275 if position is contrary to a regulation).
 3. Substantial valuation overstatement;
 - a. Substantial valuation overstatement when value is 150% or more of correct amount (or adjusted basis).
 - b. Increase to 40% if gross valuation misstatement. Gross misstatement if value claimed on return is 200% or more of correct amount.
 4. Substantial overstatement of pension liabilities;
 - a. Substantial overstatement is 200% or more of correct amount of liabilities.
 - b. Increase to 40% if gross valuation misstatement (400% or more of correct amount).
 5. Substantial estate or gift tax valuation understatement;
 - a. Substantial understatement is claimed value of 65% or less of the correct value.
 - b. Increase to 40% if gross valuation misstatement if claimed value is 40% or less of the correct value.
 6. Any disallowance of claimed tax benefit by reason of transaction lacking economic substance;
 - a. Strict liability – no reasonable cause defense.
 - b. Increase to 40% if transaction not properly disclosed.
 7. Any undisclosed foreign financial asset understatement - 40% penalty rate.
 - ii. Reasonable cause defense
 1. Accuracy-related penalty not imposed if taxpayer establishes reasonable cause and acted in good faith.
 - iii. § 6662A – 20% penalty on portion of underpayment attributable to listed or reportable transaction.

1. Increase to 30% if taxpayer does not comply with reportable transaction requirements.
2. Reasonable cause defense (§ 6664(d)) – taxpayer must show: (i) adequate disclosure of relevant facts affecting tax treatment of item, (ii) there is or was substantial authority for tax treatment, and (iii) taxpayer reasonably believed such tax treatment was more likely than not the proper treatment.

C. Civil fraud penalty

- i. § 6663 – 75% penalty on understatement if conduct amounts to fraud.
- ii. Evidence of fraud
- iii. Reasonable cause defense – same meaning as with delinquency penalties.

D. Failure to deposit penalties

- i. Failure to make estimated tax payments – underpayment rate plus 3%.
 1. No reasonable cause defense
 2. Waived if (a) tax shown is less than \$1,000, (b) no liability for prior year, or (c) taxpayer retires upon reaching 62 years of age or becomes disabled.
- ii. § 6656 – penalty amount depends on when taxpayer corrects. Penalty is 2% if failure not more than 5 days, 5% if more than 5 but not more than 15 days, and 10% if failure is more than 15 days.

E. Information return penalties

- i. § 6721 failure to file correct information returns with IRS - For returns due after January 1, 2016, penalty is \$260 per return up to maximum of \$3,178,500
- ii. § 6722 failure to issue correct information return to payee - For returns due after January 1, 2016, penalty is \$250 per return up to maximum of \$3,00,000
- iii. Subject to reasonable cause defense

VII. **Collections**

- A. Assessment: required for the IRS to legally collect tax (record liability)
 - i. Notice and demand should be made as soon as practicable and within 50 days after assessment. (But not required)
 - ii. Notice only has to be sent to last known address
- B. Additional assessment (to extent differs from filed/non-filed return) require notice of deficiency where taxes are for income, gift, estate, some excise taxes.
- C. Taxes/items not requiring notice to assess
 - i. Employment
 - ii. Most excise taxes
 - iii. Amounts shown on any return
 - iv. Math/clerk errors
 - v. Jeopardy assessments (expedited assessment process)
 - vi. Penalties (where not associated with a deficiency)
 - vii. Interest
- D. Liens
 - i. IRC 6321. Automatic and relates back to date of assessment

- ii. Attaches to all property and rights to property (not just real property)
- iii. Alter-ego liens/nominee liens. Lien may be filed against a 3rd party based on lien filed against the taxpayer.
- iv. “Secret lien”: IRS not required to provide notice/public filing.
- v. Lien publicly filed only for purposes of notice to third parties and establishing priority.
- vi. IRC 6323(a) - The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.
- vii. IRC 6323(b): provides for “super-priority liens”. Gives priority to specified persons even where notice of tax lien is filed. (Example: retail purchase if purchaser does not make the purchase for the purpose of evading collection of tax).

E. Levies

- i. Administrative or Judicial sale
- ii. IRC 6331(a) - If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.
- iii. 6331(d) Requirement of notice before levy - Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

F. Installment Agreement

- i. Does not have to provide for full payment within CSED (partial pay agreement)
- ii. Interest/penalties continue to accrue
- iii. Must stay current on current tax obligations (filing and payment, no pyramiding)
- iv. Easily defaulted: missed payment, failure to pay/file tax liabilities during period of agreement, change in financial circumstances, failure to provide requested financial information

G. Offer-in-Compromise

- i. Doubt as to liability - Useful where taxpayer failed to respond to notice of deficiency or other opportunity to dispute underlying liability
- ii. Doubt as to collectability - Based on taxpayer’s ability to pay, accepted only if amount equals/exceeds reasonable collection potential (quick sale of personal/real property) plus present value of future income (minus necessary living expenses) over 48-60 months (48 months if offer to be paid within 90 days of offer acceptance)
- iii. Effective Tax Administration

VIII. Collection Due Process

- A. CDP hearing rights arise when notice of tax lien or levy is issued
- B. IRS must provide notice of CDP rights
- C. Hearing with Appeals Officer. A Notice of Determination then issued, providing opportunity to file Petition in Tax Court.

IX. Payroll-tax specific issues

A. IRC 6672: The Trust Fund Recovery Penalty

- i. Any person required to collect, truthfully account for, and pay over any tax...who willfully fails to collect such tax, or truthfully account for, and pay over any tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof
- ii. Called “trust fund taxes” because the amounts are held by the employer in trust for the U.S.
 1. Income tax withheld by the employer
 2. Federal Insurance Contribution Act (FICA) - Employer/employee share responsibility for this tax. ½ is withheld from the wages and the other half is due from the employer (thus, only ½ of total FICA tax is a “trust fund tax”)
- iii. Who is responsible? “Responsible persons”
 1. Look to person’s authority to direct the payment of taxes or payments to creditors
 - a. Authority to sign checks
 - b. Controls financial affairs
 - c. Officer of the corporation
 - d. Ability to hire/fire
 - e. Authority to borrow money
 - f. Authority to sign returns, actually signs the returns
- iv. Person who *willfully* failed to collect, truthfully account for, and pay over trust fund taxes (at the time the taxes were withheld)
 1. Willfulness: responsible person was aware that taxes were not paid, had authority to pay them, and failed to do so (e.g. paid other creditors)
 2. Cannot delegate authority
- v. Assessment of the TFRP discretionary: more likely to be assessed where collection against the entity would be difficult
- vi. Relief available where there was “reasonable cause” for failure to pay.
- vii. Assessment
 1. Federal Tax Deposit Alert sent to employer
 2. If no compliance/explanation, revenue officer assigned
 3. If employer does not come into full compliance, revenue officer may initiate a responsible person investigation (looks to copies of checks, signatory authority on bank accounts, corporate books/records, tax returns, interviews)
 4. No deficiency notice required. However, the IRS must hand-deliver or mail by certified mail a 60-day letter setting forth the amount of the penalty and the tax periods
 5. Taxpayer may request review by Appeals Officer (within 60 days)
 6. Alternative option is to pay amount of withholding attributable to one employee for each tax period at issue and file a claim for refund with the IRS. If claim disallowed, may file suit for refund in District Court. (“Divisible tax” option). Suit cannot be filed before the earlier of 6 months after the refund claim filed with the IRS (unless the IRS mailed a Notice of Disallowance). Suit must be filed within within 2 years from the mailing of the Notice of Disallowance. If no Notice mailed, no limit on time within which a suit may be filed.

- viii. Voluntary payments may be designated to trust fund portion of liability (no designation if payment made through an installment agreement, offer in compromise, through bankruptcy proceedings).

X. Relief from Joint and Several Liability “Innocent Spouse Relief”

- A. The IRC provides relief for an “innocent spouse” who signed a joint return and is thus jointly and severally liable for the tax shown thereon.
- B. IRC 6015 provides 3 opportunities for relief. Relieves innocent spouse (i.e. “requesting spouse” or “electing spouse”) of the liability to the extent it is attributable to the other spouse
- C. 6015(b) applies to ALL joint filers (regardless of marital status). Sets forth requirements for spouse to be relieved of liability to the extent it is attributable to an understatement attributable to the other spouse.
 - i. Joint income tax return filed
 - ii. Income Tax understatement attributable to erroneous items of one spouse
 - iii. The other spouse establishes the he did not know or have reasons to know there was an understatement
 - iv. Facts and circumstances test: it would be inequitable to hold that individual liable for the deficiency attributable to the understatement.
 - v. Timely election: spouse elects relief within 2 years after IRS begins collection activities with respect to that spouse
- D. IRC 6015(c) applies to taxpayers no longer married or that are legally separated
 - i. Joint income tax return filed
 - ii. Deficiency is allocable to other spouse
 - iii. When makes election for relief under this section he is no longer married to, or is legally separate from, the other spouse, AND hasn’t been a member of the same household for the 12 months preceding the election.
 - iv. Election made within 2 years of date IRS begins collection activities against requesting spouse
 - v. Requesting spouse only relieved of deficiency to extent that, if they had filed separate returns, the other spouse would have been liable. But still maintain benefits of joint-filed return. (i.e. no disallowed deductions for married-filing-separately).
 - vi. Exception: Not applicable if there was a transfer of assets between spouses as part of a fraudulent scheme.
- E. 6015(f). (Does not require a deficiency). Provides for equitable relief. Individual may be relieved of liability if:
 - i. Under facts and circumstances test it is inequitable to hold that individual liable for unpaid tax or deficiency; and
 - ii. Relief is not available under the 6015(b) or 6015(c)
- F. Tax Court Review

- i. Petition in Tax Court must be filed after the earlier of: (a) The IRS mails by certified or registered mail the notice of final determination to the last known address; or (b) 6 months after the request is made (Where IRS fails to make a final determination within 6 months, do not have to wait for a final determination to petition Tax Court.)
- ii. Petition in Tax Court must be filed no later than the 90th day after the notice of final determination if mailed by certified or registered mail to the last known address.

XI. International Compliance Issues (OVDP, Streamlined, etc.)

International tax compliance has been a hot topic in the last ten years. US citizens and tax residents are taxed on their worldwide income. They may also be subject to numerous reporting obligations for foreign financial accounts and entities. Some of these include:

- Form 3520, Annual Return to Report Transactions with Foreign Trusts & Receipt of Foreign Gifts
- Form 5471, Information Return of US Persons with Respect to Certain Foreign Corporations
- Form 8938, Statement of Specific Foreign Financial Assets
- Form 8621, Information Return by a Shareholder of a PFIC

US citizens and tax residents who have a financial interest in or signature authority over a foreign financial account may also be required to file an FBAR (FinCEN Form 114). This is filed on a yearly basis and is not part of their US individual income tax return.

Many practitioners encounter taxpayers who have not paid tax on income from their foreign accounts, have not filed FBARs and/or have not filed all the required informational returns. The penalties for failure to file FBARs and informational forms can be severe, even if no tax is due. Practitioners should be aware of the various options for dealing with these sorts of compliance issues.

A. 2014 Offshore Voluntary Disclosure Program

The IRS Offshore Voluntary Disclosure Program is working with taxpayers whose penalties may be reduced. The IRS began an open-ended OVDP in January 2012 because of strong interest in the 2009 and 2011 programs. The IRS may end the 2012 program at any time in the future.

The IRS is offering taxpayers with undisclosed income from offshore accounts another opportunity to get current with their tax returns. The 2012 OVDP has a higher penalty rate than the previous programs, but offers clear benefits to encourage taxpayers to disclose foreign accounts now rather than risk detection by the IRS and possible criminal prosecution.

This is a continuation of the program's modified terms introduced in 2012. For purposes of referring to this modified program, it may be referred to as the 2014 OVDP. The modifications are effective on July 1, 2014.

In addition to the OVDP, we offer additional options available to U.S. taxpayers with undisclosed foreign financial assets.

Read the FAQ and IRS' website for much, much more information:

<https://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised>

<https://www.irs.gov/uac/2012-Offshore-Voluntary-Disclosure-Program>

B. Streamlined Filing Compliance Procedures

Purpose of the streamlined procedures

The streamlined filing compliance procedures describe below are available to taxpayers certifying that their failure to report foreign financial assets and pay all tax due in respect of those assets did not result from willful conduct on their part. The streamlined procedures are designed to provide to taxpayers in such situations with:

- a streamlined procedure for filing amended or delinquent returns, and
- terms for resolving their tax and penalty procedure for filing amended or delinquent returns, and
- terms for resolving their tax and penalty obligations.

As reflected below, the streamlined filing procedures that were first offered on September 1, 2012 have been expanded and modified to accommodate a broader group of U.S. taxpayers. Major changes to the streamlined procedures include:

- extension of eligibility to U.S. taxpayers residing in the United States
- Elimination of the \$1,500 tax threshold, and
- elimination of the risk assessment process associated with the streamlined filing compliance procedure announced in 2012.

Eligibility for the Streamlined Domestic Offshore Procedures

In addition to having to meet the general eligibility criteria described above, individual U.S. taxpayers, or estates of individual U.S. taxpayers, seeking to use the Streamlined Domestic Offshore Procedures described in this section must: (1) fail to meet the applicable non-residency requirement described in section 2.A. above (for joint return filers, one or both of the spouses must fail to meet the applicable non-residency requirement described in 2.A. above); (2) have previously filed a U.S. tax return (if required) for each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed; (3) have failed to report gross income from a foreign financial asset and pay tax as required by U.S. law, and may have failed to file an FBAR (FinCEN Form 114, previously Form TD F 90-22.1) and/or one or more international information returns (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, and

8621) with respect to the foreign financial asset, and (4) such failures resulted from non-willful conduct. 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.

Description of Scope and Effect of Procedures

U.S. taxpayers (U.S. citizens, lawful permanent residents, and those meeting the substantial presence test of IRC section 7701(b)(3)) eligible to use the Streamlined Domestic Offshore Procedures must (1) for each of the most recent 3 years for which the U.S. tax return due date (or properly applied for extended due date) has passed (the “covered tax return period”), file amended tax returns, together with all required information returns (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, and 8621), (2) for each of the most recent 6 years for which the FBAR due date has passed (the “covered FBAR period”), file any delinquent FBARs (FinCEN Form 114, previously Form TD F 90-22.1), and (3) pay a Title 26 miscellaneous offshore penalty. The full amount of the tax, interest, and miscellaneous offshore penalty due in connection with these filings should be remitted with the amended tax returns.

The Title 26 miscellaneous offshore penalty is equal to 5 percent of the highest aggregate balance/value of the taxpayer’s foreign financial assets that are subject to the miscellaneous offshore penalty during the years in the covered tax return period and the covered FBAR period. For this purpose, the highest aggregate balance/value is determined by aggregating the year-end account balances and year-end asset values of all the foreign financial assets subject to the miscellaneous offshore penalty for each of the years in the covered tax return period and the covered FBAR period and selecting the highest aggregate balance/value from among those years.

A foreign financial asset is subject to the 5-percent miscellaneous offshore penalty in a given year in the covered FBAR period if the asset should have been, but was not, reported on an FBAR (FinCEN Form 114) for that year. A foreign financial asset is subject to the 5-percent miscellaneous offshore penalty in a given year in the covered tax return period if the asset should have been, but was not, reported on a Form 8938 for that year. A foreign financial asset is also subject to the 5-percent miscellaneous offshore penalty in a given year in the covered tax return period if the asset was properly reported for that year, but gross income in respect of the asset was not reported in that year.

<https://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-in-the-United-States>

C. Delinquent FBAR Submission Procedures

Taxpayers who do not need to use either the OVDP or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax, but

who:

- have not filed a required Report of Foreign Bank and Financial Accounts (FBAR) (FinCEN Form 114, previously Form TD F 90-22.1),
- are not under a civil examination or a criminal investigation by the IRS, and
- have not already been contacted by the IRS about the delinquent FBARs

should file the delinquent FBARs according to the FBAR instructions.

The IRS will not impose a penalty for the failure to file the delinquent FBARs if you properly reported on your U.S. tax returns, and paid all tax on, the income from the foreign financial accounts reported on the delinquent FBARs, and you have not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted.

FBARs will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

<https://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures>

D. Delinquent International Information Return Submission Procedures

Taxpayers who do not need to use the OVDP or the Streamlined Filing Compliance Procedures to file delinquent or amended tax returns to report and pay additional tax, but who:

- have not filed one or more required international information returns,
- have reasonable cause for not timely filing the information returns,
- are not under a civil examination or a criminal investigation by the IRS, and
- have not already been contacted by the IRS about the delinquent information returns

should file the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file.

Describe your situation in the reasonable cause statement

As part of the reasonable cause statement, taxpayers must also certify that any entity for which the information returns are being filed was not engaged in tax evasion. If a reasonable cause statement is not attached to each delinquent information return filed, penalties may be assessed in accordance with existing procedures.

- All delinquent international information returns other than Forms 3520 and 3520-A should be attached to an amended return and filed according to the applicable instructions for the amended return.
- All delinquent Forms 3520 and 3520-A should be filed according to the applicable instructions for those forms.

- A reasonable cause statement must be attached to each delinquent information return filed for which reasonable cause is being requested.

Information returns filed with amended returns will not be automatically subject to audit but may be selected for audit through the existing audit selection processes that are in place for any tax or information returns.

<https://www.irs.gov/Individuals/International-Taxpayers/Delinquent-International-Information-Return-Submission-Procedures>