

## **Frequently Asked Questions**

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Hypothetical situations present a potential for misunderstanding that exists when there is no assurance that the hypothetical contains all relevant facts. In addition, tax practitioners should be aware that posing a situation as a hypothetical does not satisfy the requirements of making a voluntary disclosure. If the IRS receives information relating specifically to the taxpayer's undisclosed foreign accounts or undisclosed foreign entities while the hypothetical question is pending, the taxpayer may become ineligible to make a voluntary disclosure.

If practitioners have questions about the terms of the voluntary disclosure program, they should contact the IRS Voluntary Disclosure Hotline at (215) 516-4777, visit [www.irs.gov](http://www.irs.gov), or contact their nearest CI office with questions. For a list of CI offices, visit:  
<http://www.irs.gov/compliance/enforcement/article/0,,id=205909,00.html>

### **Additional Frequently Asked Questions – Posted June 24, 2009**

**31. How can the IRS propose adjustments to tax for a six-year period without either an agreement from the taxpayer or a statutory exception to the normal three-year statute of limitations for making those adjustments?**

Going back six years is part of the resolution offered by the IRS for resolving offshore voluntary disclosures. The taxpayer must agree to assessment of the liabilities for those years in order to get the benefit of the reduced penalty framework. If the taxpayer does not agree to the tax, interest and penalty proposed by the voluntary disclosure examiner, the case will be referred to the field for a complete examination. In that examination, normal statute of limitations rules will apply. If no exception to the normal three-year statute applies, the IRS will only be able to assess tax, penalty and interest for three years. However, if the period of limitations was open because, for example, the IRS can prove a substantial omission of gross income, six years of liability may be assessed. Similarly, if there was a failure to file certain information returns, such as Form 3520 or Form 5471, the statute of limitations will not have begun to run. If the IRS can prove fraud, there is no statute of limitations for assessing tax.

**32. If a taxpayer's violation includes unreported individual foreign accounts and business accounts (for an active business), does the 20 percent offshore penalty include the business accounts?**

Yes. Assuming that there is unreported income with respect to all the accounts, they all will be included in the penalty base. No distinction is to be drawn based on whether the account is a business account or a savings or investment account.

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- 33. If the lookback period is 2003-2008, what does the taxpayer do if the taxpayer held foreign real estate, sold it in 2002, and did not report the gain on his 2002 return? Does the taxpayer compute the 20 percent on the highest aggregate balance in 2003-2008? What, if anything, does IRS expect the taxpayer to do with respect to 2002?**

Gain realized on a foreign transaction occurring before 2003 does not need to be included as part of the voluntary disclosure. If the proceeds of the transaction were repatriated and were not offshore after January 1, 2003, they will not be included in the base for the 20 percent offshore penalty. On the other hand, if the proceeds remained offshore after January 1, 2003, and the income in the account was not reported, they will be included in the base for the penalty.

- 34. If, after making a voluntary disclosure, a taxpayer disagrees with the 20 percent offshore penalty, what can the taxpayer do?**

If any part of the penalty structure is unacceptable to a taxpayer, that case will follow the standard audit process. All relevant years and issues will be subject to a complete examination. At the conclusion of the examination, all applicable penalties (including information return and FBAR penalties) will be imposed. Those penalties could be substantially greater than the 20 percent penalty. If the case is unagreed, the taxpayer will have recourse to Appeals.

- 35. Will examiners have any discretion to settle cases? For example, if a penalty for failing to file a Form 5471 for 6 years is \$10,000 per year, will that be compared to 20 percent of the corporation's asset value? Would the lesser amount apply?**

Voluntary disclosure examiners do not have discretion to settle cases for amounts less than what is properly due and owing. These examiners will compare the 20 percent offshore penalty to the total penalties that would otherwise apply to a particular taxpayer. Under no circumstances will a taxpayer be required to pay a penalty greater than what he would otherwise be liable for under existing statutes. If the taxpayer disagrees with the IRS's determination, as set forth in the closing agreement, the taxpayer may request that the case be referred for a standard examination of all relevant years and issues. At the conclusion of this examination, all applicable penalties, including information return penalties and FBAR penalties, will be imposed. If, after the standard examination is concluded the case is closed unagreed, the taxpayer will have recourse to Appeals. See FAQ 34.

- 36. Re: FAQ 12 Does interest run on any of the penalties? If so, which ones and from what date does interest accrue?**

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With regard to the accuracy-related and delinquency penalties, interest runs from the due date of the return in question. With regard to all other penalties, interest runs from the date of assessment of the penalty.

- 37. Re: FAQ 20 A taxpayer owns valuable land and artwork located in a foreign jurisdiction. This property produces no income and there were no reporting requirements regarding this property. Must the taxpayer report the land and artwork and pay a 20 percent penalty?**

FAQ 20 relates to income producing property for which no income was reported. Under those circumstances, no distinction is made between assets held directly and assets held through an entity in computing the 20 percent offshore penalty. However, if the taxpayer owns nonincome producing property in the taxpayer's own name, there has been no U.S. taxable event and no reporting obligation to disclose. The taxpayer will be required to report any current income from the property or gain from its sale or other disposition at such time in the future as the income is realized. Because there has as yet been no tax noncompliance, the 20 percent offshore penalty would not apply to those assets. If the foreign assets were held in the name of an entity such as a trust or corporation, there would have been an information return filing obligation that may need to be disclosed. See FAQ 42.

- 38. If a taxpayer transferred funds from one unreported foreign account to another between 2003 and 2008, will he have to pay a 20 percent offshore penalty on both accounts?**

No. If the taxpayer can establish that funds were transferred from one account to another, any duplication will be removed before calculating the 20 percent penalty. However, the burden will be on the taxpayer to establish the extent of the duplication.

- 39. How is the 20 percent offshore penalty computed if the taxpayer has multiple accounts or entities where the highest value of some accounts is not in the same year? Are separate penalties determined at the rate of 20 percent for each account or entity value?**

The values of accounts and other assets are aggregated for each year and the penalty is calculated at 20 percent of the highest year's aggregate value.

- 40. A taxpayer has two offshore accounts. No FBARs were filed. The taxpayer reported all income from one account but not the other. Mechanically, how does the taxpayer report this? Does the taxpayer report both accounts as a voluntary disclosure or bifurcate it into a delinquent FBAR filing for the reported account and a voluntary disclosure for the unreported account?**

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Because the annual FBAR requirement is to file a single report reporting all foreign accounts meeting the reporting requirement, it is not possible to bifurcate the corrected filing. The taxpayer should make a voluntary disclosure for the omitted income and include the delinquent FBARs with respect to both accounts. The account with no income tax issue is unrelated to the taxpayer's tax noncompliance, so no penalty will be imposed with respect to that account. See FAQ 9.

- 41. If, in addition to other noncompliance, a taxpayer has failed to file an FBAR to report an account over which the taxpayer has signature authority but no beneficial interest (e.g., an account owned by his employer), will that foreign account be included in the base for calculating the taxpayer's 20 percent offshore penalty?**

No. The account on which the taxpayer has mere signature authority will be treated as unrelated to the tax noncompliance the taxpayer is voluntarily disclosing. The taxpayer may cure the FBAR delinquency for the account the taxpayer does not own by filing the FBAR with an explanatory statement by September 23, 2009. See FAQ 9. The answer might be different (1) if the account over which the taxpayer has signature authority is held in the name of a related person, such as a family member or a corporation controlled by the taxpayer; (2) if the account is held in the name of a foreign corporation or trust for which the taxpayer had a Title 26 reporting obligation; or (3) if the account was related in some other way to the taxpayer's tax noncompliance. In these cases, the taxpayer will be liable for the 20 percent offshore penalty if there is unreported income on the account. On the other hand, if there is no unreported income with respect to the account, no penalty will be imposed under the rationale of FAQ 40.

- 42. FAQ 9 states that a taxpayer who only failed to file an FBAR should not use this process. What about a taxpayer who only has delinquent Form 5471s or Form 3520s but no tax due? Does that taxpayer fall outside this voluntary disclosure process?**

A taxpayer who has failed to file tax information returns, such as Form 5471 for controlled foreign corporations (CFCs) or Form 3520 for foreign trusts but who has reported and paid tax on all their taxable income with respect to all transactions related to the CFCs or foreign trusts, should file delinquent information returns with the appropriate service center according to the instructions for the form and attach a statement explaining why the information returns are filed late. (The Form 5471 should be submitted with an amended return showing no change to income or tax liability.) Send copies of the delinquent information returns, together with copies of tax returns for all relevant years, by September 23, 2009, to the Philadelphia Offshore Identification Unit at:

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Internal Revenue Service  
11501 Roosevelt Blvd.  
South Bldg., Room 2002  
Philadelphia, PA 19154  
Attn: Charlie Judge, Offshore Unit, DP S-611

The IRS will not impose a penalty for the failure to file the information returns.

**43. Re: FAQ 9 A taxpayer recently learned that they have an FBAR filing obligation but they do not have sufficient time to gather the information necessary to properly file the FBAR by the June 30, 2009 due date. How should the taxpayer proceed?**

Taxpayers who reported and paid tax on all their 2008 taxable income but only recently learned of their FBAR filing obligation and have insufficient time to gather the necessary information to complete the FBAR, should file the delinquent FBAR report according to the instructions and attach a statement explaining why the report is filed late. Send a copy of the delinquent FBAR, together with a copy of the 2008 tax return, by September 23, 2009, to the Philadelphia Offshore Identification Unit at the address in FAQ 9.

In this situation, the IRS will not impose a penalty for the failure to file the FBAR.

Additionally, if all 2008 taxable income with respect to a foreign financial account is timely reported and a United States person only recently learned they have a 2008 FBAR obligation and there is insufficient time to gather the necessary information to complete the FBAR, the United States person may follow the procedures set forth above and no penalty will be imposed.

For 2008 tax returns due after September 23, 2009, the tax return does not need to accompany the 2008 FBAR.

**44. Re: FAQ 12 The due date for the 2008 FBAR is June 30, 2009. Should a taxpayer file a 2008 FBAR in the normal manner or should a taxpayer submit it with the voluntary disclosure request?**

Except as described in FAQ 43, the taxpayer should timely file the 2008 FBAR in the normal manner by the June 30, 2009 deadline and submit an additional copy with the taxpayer's voluntary disclosure.

**45. If a taxpayer is uncertain about whether he is required to file an FBAR with respect to a particular foreign account, how can the taxpayer get help with this question?**

Help with questions about FBAR filing requirements is available on the FBAR Hotline at 1-800-800-2877. When the call is answered, select option 2. You can

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also submit written questions about the FBAR rules by e-mail addressed to [FBARQuestions@irs.gov](mailto:FBARQuestions@irs.gov). The instructions to the FBAR form are available at [www.irs.gov](http://www.irs.gov). Do not call the Voluntary Disclosure Hotline with questions about whether you have an FBAR filing requirement. The purpose of the Voluntary Disclosure Hotline is to answer questions about how to make voluntary disclosures and what penalties apply, assuming a taxpayer was required to file.

- 46. A taxpayer moved to the U.S. in 2007 and is now a permanent resident of the U.S. The taxpayer had a requirement to file an FBAR for one year but failed to do so. Is the taxpayer subject to a penalty equal to 20 percent of the account?**

First, the taxpayer should confirm that the taxpayer had an FBAR filing requirement. Assuming that the taxpayer was required to report the interest earned on the account during the year the taxpayer was in the U.S. and failed to do so, the taxpayer is subject to a penalty based on the high account balance during the year. The penalty may be limited to five percent if the taxpayer did not avoid U.S. tax with respect to the deposits and if the account was passively held during the year the taxpayer was in the U.S. If there was no unreported taxable income related to the unreported foreign accounts that would have been reported on the FBAR, the taxpayer will not be subject to the 20 percent offshore penalty. In that case, the taxpayer should file delinquent FBARs attaching a statement explaining why the FBAR was not timely filed. For more information, see FAQ 9.

- 47. If parents have a jointly owned foreign account on which they have made their children signatories, the children have an FBAR filing requirement but no income. Should the children just file delinquent FBARs as described by FAQ 9 and have the parents submit a voluntary disclosure? Will both parents be penalized 20 percent each? Will each have a 20 percent penalty on 50 percent of the balance?**

Only one 20 percent offshore penalty will be applied with respect to voluntary disclosures relating to the same account. In the example, the parents will be jointly required to pay a single 20 percent penalty on the account. This can be through one parent paying the total penalty or through each paying a portion, at the taxpayers' option. For those signatories with no ownership interest in the account, such as the children in these facts, they may file delinquent FBARs with no penalty as described in FAQs 9 and 41. However, any joint account owner who does not make a voluntary disclosure may be examined and subject to all appropriate penalties.

- 48. If there are multiple individuals with signature authority over a trust account, does everyone involved need to file delinquent FBARs? If so, could everyone be subject to a 20 percent offshore penalty?**

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Only one 20 percent offshore penalty will be applied with respect to voluntary disclosures relating to the same account. The penalty may be allocated among the taxpayers making the disclosures in any way they choose. The reporting requirements for filing an FBAR, however, do not change. Therefore, every individual who is required to file an FBAR must file one.

**49. Re: FAQ 10 Some taxpayers have made quiet disclosures by filing amended returns. Will the IRS audit these taxpayers? If so, will they be eligible for the 20 percent offshore penalty? Is the IRS really going to prosecute someone who filed an amended return and correctly reported all their income?**

The IRS is reviewing amended returns and could select any amended return for examination. If a return is selected for examination, the 20 percent offshore penalty would not be available. When criminal behavior is evident and the disclosure does not meet the requirements of a voluntary disclosure under IRM 9.5.11.9, the IRS may recommend criminal prosecution to the Department of Justice. Taxpayers who have already made quiet disclosures but have not yet been selected for examination may take advantage of the penalty framework applicable to voluntary disclosure requests regarding unreported offshore accounts and entities, provided they otherwise meet the criteria for voluntary disclosure set forth in IRM 9.5.11.9. Those taxpayers must send previously submitted documents, including copies of amended returns, to their local CI office by September 23, 2009. See FAQs 4 and 10 for more information.

**50. What is the distinction between filing amended returns to correct errors and filing a voluntary disclosure?**

An amended return is the proper vehicle to correct an error on a filed return, whether a taxpayer receives a refund or owes additional tax. A voluntary disclosure is a truthful, timely and complete communication to the IRS in which a taxpayer shows a willingness to cooperate (and does in fact cooperate) with the IRS in determining the taxpayer's correct tax liability and makes arrangements in good faith to fully pay that liability. Filing correct amended returns is normally a part of the process of making a voluntary disclosure under IRM 9.5.11.9.

Taxpayers and practitioners trying to decide whether to simply file an amended return with a Service Center or to make a formal voluntary disclosure under the process described in IRM 9.5.11.9 and the March 23, 2009 memoranda should consider the nature of the error they are trying to correct. Taxpayers with undisclosed foreign accounts or entities should consider making a voluntary disclosure because it enables them to become compliant, avoid substantial civil penalties and generally eliminate the risk of criminal prosecution. Making a voluntary disclosure also provides the opportunity to calculate, with a reasonable degree of certainty, the total cost of resolving all offshore tax issues. It is anticipated that the voluntary disclosure process is appropriate for most

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taxpayers who have underreported their income with respect to offshore accounts and assets. However, there will be some cases, such as where a taxpayer has reported all income but failed to file the FBAR (FAQ 9), or only failed to file information returns (FAQ 42), where it remains appropriate for the taxpayer to simply file amended returns with the applicable Service Center (with copies to the Philadelphia office listed in FAQ 9).

**51. If the Service has served a John Doe summons seeking information that may identify a taxpayer as holding an undisclosed foreign account or undisclosed foreign entity, does that make the taxpayer ineligible to make a voluntary disclosure in accordance with the March 23, 2009 guidance?**

No. The mere fact that the Service served a John Doe summons does not make every member of the John Doe class ineligible to participate. However, once the Service obtains information under a John Doe summons that provides evidence of a specific taxpayer's noncompliance with the tax laws, that particular taxpayer may become ineligible. For this reason, a taxpayer concerned that a party served with a John Doe summons will provide information about them to the Service should apply to make a voluntary disclosure as soon as possible.