OVERSEAS ACCOUNTS AND TRUSTS: WHAT TO DO IF MY CLIENT HAS OFFSHORE ASSETS?

By: Evan H. Kaploe

I. BITCOIN (CONVERTIBLE VIRTUAL CURRENCY "CVC")

A. The Big Picture on CVC

1. CVC is considered "property" for tax purposes, unlike cash, so the general principals of property transactions apply.

2. Two potential transactions involved in using CVC

   a. Spending the dollar-equivalent amount

   b. Disposing of the CVC

3. Individuals compensated for services with CVC are treated as receiving income.

4. Business transactions in CVC are subject to all the normal rules for sales, use, withholding and information reporting.

5. CVC does not have legal tender status in any jurisdiction.

B. Useful Rules and Definitions for CVC

1. "Virtual currency" is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store value.

2. Virtual currency that has an equivalent value in real currency, or that acts as a substitute for real currency, is referred to as CVC.

   a. Bitcoin is one example of a CVC.

b. Bitcoin can be digitally traded between users and can be purchased for, or exchanged into, U.S. dollars, Euros, and other real or virtual currencies.

i. As of November 8, 2017, the exchange rate was 1.00XBT = 7,481.62XBT

3. Taxpayers are required to determine the fair market value of virtual currency in U.S. dollars as of the date of payment or receipt.

4. If a CVC is listed on an exchange and the exchange rate is established by market supply and demand, the fair market value of the CVC is determined by converting the CVC into U.S. dollars at the exchange rate that is consistently applied.

C. CVC as Property and the tax Implications

1. Rule of Thumb: Every CVC transaction is taxable!

a. Users will have to calculate their gain or loss every time they purchase goods or services with CVC.

b. The recipient of the CVC also has either gain/loss or compensation (if for services)

2. Tax on Dispositions of Property

a. Income is realized for any gains on the property

b. Gain is measured by the change in the dollar value between the cost basis (purchase price) and the gross proceeds received from the disposition or amount realized (selling price).

c. Determine the character of the gain or loss using normal holding period rules.

D. Reporting CVC Transactions to the IRS and Recordkeeping

1. A disposition of CVC is reported on the tax return using Form 1040, Schedule D and Form 8949 or Form 4797

2. Gain from a disposition is also subject to the 3.8% NIIT

3. Recordkeeping software exists to track basis, exchange rates and gains.

E. Tax Tips for Merchants and Businesses

1. Identify an exchange rate to use consistently for valuing the CVC.

2. Charge sales tax when a customer purchases anything using CVC, if that is required in their line of business.

3. When paying an independent contractor more than $600 during the year, request a Form W-9 and issue Form 1099-MISC, even if you pay them in CVC.

4. Track the amount paid to contractors throughout the year to measure the threshold and determine if backup- withholding applies.

5. If paying employees in CVC, first withhold all applicable payroll taxes in U.S. dollars, and net pay can be in CVC, as appropriate.

    a. Taxes are paid in dollars, not CVC.

6. Consider converting CVC to dollars on a regular schedule so you have enough dollars to remit any income, withholding, or sales tax.

7. Include CVC transactions when determine estimated tax payments.

8. Expenses are also recorded in dollars.

9. Gain or loss on holding CVC is recorded as trading gains (Form 4797 or Schedule D, as appropriate).

II. FILING AND REPORTING REQUIREMENTS UNDER BSA AND FACTA

A. Statutory and Regulatory Compliance and Definitions.

1. A U.S. person that has a financial interest or signature authority over a foreign financial account or trust may be subject to additional reporting to the Department of Treasury (IRS and FinCen).

   a. 31 USC § 5316 – Bank Secrecy Act of 1970 ("BSA" or otherwise known as Currency and Foreign Transactions Reporting Act).

   b. 26 USC § 6038D – Foreign Account Tax Compliance Act ("FATCA")

2. If the U.S. person's interest in the foreign account exceeds $10,000 at any time during the calendar year, she must file a Report of Foreign Bank and Financial Accounts ("FBAR") with FinCen.

3. Important BSA Definitions to Remember for FBAR Filing

   a. Foreign financial account – a financial account located outside the United States, which includes an account held with a U.S. bank in a foreign branch (but not a foreign bank's branch physically located in the U.S.)

   b. U.S. person means –

      i. A U.S. citizen (including a child)

      ii. An individual who is a resident alien pursuant to IRC § 7701(b) of the U.S., D.C., the "Indian lands", and Territories and Possessions of the U.S.

iii. An entity, including a corporation, partnership, trust or limited liability company organized or formed under the laws of those identified in (ii), above, or the laws of any State.

c. Financial interest – 31 CFR § 1010.350(b)

i. The U.S. person is the owner of record or holder of legal title, regardless of whether the account is maintained for the benefit of the U.S. person or for another;

ii. The owner of record or holder of legal title is one of certain listed entities, which include:

(a) An agent, nominee, attorney, or person acting in some other capacity on behalf of the U.S. person with respect to the account, or

(b) Any of certain entities controlled by the U.S. person – 26 USC § 6030D(f); 26 USC § 7701(a)(30)(E); Treas. Reg. § 1.6030D-1(a)(1)

(i) Domestic trusts - formed or availed of for purposes of holding, directly or indirectly, specified foreign financial assets if and only if the trust has one or more specified persons as a current beneficiary. A current beneficiary for the tax year is any person who at any time during that tax year is entitled to, or at the discretion of any person may receive, a distribution from the principal

or income of the trust (determined without regard to any power of appointment to the extent that the power remains unexercised at the end of the tax year). A current beneficiary also includes any holder of a general power of appointment, whether or not exercised, that was exercisable at any time during the tax year, but does not include any holder of a general power of appointment that is exercisable only on the death of the holder.

(ii) Domestic corporations and partnerships – Treas. Reg. § 1.6038D-6(b)(1): if and only if the corporation or partnership is closely held, and at least 50% of the corporation's or partnership's gross income for the tax year is passive income or at least 50% of the assets held by the corporation or partnership for the tax year are assets that produce or are held for the production of passive income.

d. Signature authority – 31 CFR 1010.350(f)(1)

i. the authority of an individual to control the disposition of money, funds or other assets held in a financial account by direct communication to the person with whom the financial account is maintained.

e. Reportable account – 31 CFR 1010.350(c)

i. Bank accounts

ii. Securities accounts

iii. An account with a person in the business of accepting deposits as a financial agency

iv. An account that is an insurance or annuity policy with a cash value

v. An account with a broker or dealer for futures or options transactions in a commodity on, or subject to rules of, a commodity exchange or association

vi. An account with a mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions

4. Reporting Under FACTA and 26 USC § 6038D

a. The reporting rules under 26 USC § 6038D were enacted as part of FATCA. In some cases, the FATCA reporting can require the reporting of more information than is required on FBAR or taxpayers who don't have to file FBAR may have to report their foreign financial assets under 26 USC § 6038D. However, most taxpayers who are subject to FATCA reporting also will need to file FBAR.

b. The Treasury Department's FBAR requirements, which are imposed under the Bank Secrecy Act, should not be confused with the FACTA reporting requirements, which are imposed under the Internal Revenue Code. The two

reporting regimes are separate and there are many differences, but they overlap and some taxpayers have to report under both regimes. The FATCA requirements cover a broader class of foreign assets than the accounts covered by the FBAR requirements.

c. Any individual who, during the tax year, holds any interest in a "specified foreign financial asset" must attach to his income tax return for that tax year the information for each specified foreign financial asset if the aggregate value of all the individual's specified foreign financial assets exceeds the statutory dollar thresholds.

i. If the taxpayer meets the applicable reporting threshold, she must report all of her specified foreign financial assets, including the specified foreign financial assets that have a *de minimis* maximum value during the tax year.

ii. a specified person (including a specified individual, and a specified domestic entity defined under Treas. Reg § 1.6038D-6) that has any interest in a specified foreign financial asset (as defined in Treas. Reg. § 1.6038D-3) during the tax year must attach Form 8938, Statement of Specified Foreign Financial Assets, if the aggregate value of all the assets exceeds the following (Treas. Reg. § 1.6038D-2(a)(1)(i) and (ii)):

(a) $50,000 ($100,000 if married) on the last day of the tax year; or

(b) $75,000 ($150,000 if married) at any time during the tax year.

d. If the individual resides outside of the United States, the IRS allows a higher dollar amount before reporting is necessary:

I $200,000 ($400,000 if married) on the last day of the tax year; or

ii. $300,000 ($600,000 if married) at any time during the tax year.

e. FACTA reporting for domestic entities – Treas. Reg. 1.6038D-6(b)

i. a specified person is not treated as having an interest in any specified foreign financial assets held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of that entity.

(a) Two exceptions – Treas. Reg. § 1.6038D-2(b)(4)

(i) Owners of a grantor trust; and

(ii) Owners of a disregarded entity

5. Non-FACTA reporting for foreign trusts – 26 USC § 6048 and Notice 97-34.

a. Form 3520: Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts

b. Form 3520-A: Annual Information Return of Foreign Trust With a U.S. Owner

B. Civil Penalties for Failure to Comply

1. Statute of Limitations – 31 USC § 5321(b)

a. The IRS may assess a civil penalty at any time before the end of the 6-year period beginning on the date of the transaction with respect to which the proposed penalty is being assessed.

2. Penalties under BSA for failure to file FBAR (FinCen Report 114)

a. Non-willful failures

i. 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.

(a) A reasonable cause exception exists for non-willful violations. Under 31 USC § 5314, no penalty shall be imposed" if "such violation was due to reasonable cause"

(b) There is no reason to think that Congress intended the meaning of "reasonable cause" in the BSA to differ from the meaning ascribed to it in tax statutes. As with the tax statutes, Congress entrusted enforcement of the BSA to the Treasury Department. If it intended Treasury to interpret "reasonable cause" differently in the newer statute, it left no clues to which any party has pointed. A person has

"reasonable cause" for an FBAR violation when he committed that violation despite an exercise of ordinary business care and prudence. Moore v. United States, 115 AFTR 2d 2015-1375 (W.D. Wash., April 1, 2015).

ii. $10,000 per violation adjusted for inflation ($12,459 currently).

iii. Multiple years

(a) Examiners will recommend one penalty for each open year, regardless of the number of unreported foreign accounts

(b) Penalty will be determined based on the aggregate balance of all unreported foreign financial accounts but subject to the limitation

b. Willful failures

i. Landmark case applied to BSA – United States v. Ratzlaf, 510 US 135 (1994)

ii. Case law has defined willfulness as an intentional violation of a known legal duty to report or where an person exhibits a reckless disregard of a statutory duty. United States v. Pomerantz, 119 AFTR 2d 2017-2113, Case No. 16-0689 (W.D. Wash., June 8, 2017); United States v. Bussell, 117 AFTR 2d 2016-439, (C.D. Calif., December 8, 2015).

iii. greater of 50% of the amount in the account at the time of the violation or $100,000, adjusted for inflation ($124,588 currently)

iv. Multiple years

(a) Examiners will recommend a penalty for each year for which the FBAR violation was willful.

(b) Usually the penalty will be limited to 50% of the highest aggregate balance of all unreported foreign financial accounts during the years under examination

(c) The penalty is determined by allocating the total penalty amount to all years for which the FBAR violations were willful based upon the ratio of the highest aggregate balance for each year to the total of the highest aggregate balances for all years combined, subject to the maximum penalty.

3. Criminal penalties – 31 USC § 5322

a. the criminal penalty for willful violations (or filing a false FBAR) is a fine of not more than $250,000, or imprisonment for not more than five years, or both.

b. Willfully violating the FBAR reporting requirements while violating another US law or as a part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, is penalized with a fine limited to $500,000, imprisonment of not more than 10-years, or both. 31 USC 5322(b)

i. The IRS may impose both civil and criminal penalties.

c. Criminal willfulness

i. Cheek v. United States, 498 US 192, 200 (1991) – the test for statutory willfulness, in a criminal tax context, is a "voluntary, intentional violation of a known legal duty" and willfulness "may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information.

ii. United States v. Sturman, 951 F.2d 1446 (6th Cir. 1991).

(a) Defendant took multiple steps to conceal overseas assets from the Government aside from the failure to file his FBAR.

(b) Concealed signature authority, his interest in various transactions, and his interest in various corporations that were transferring money to the foreign accounts.

(c) Admitted to knowledge of failure to answer question on Schedule B, Question 7(a).

(d) Court upheld willful blindness theory – conscious efforts to avoid learning about reporting requirements.

4. Penalties under FACTA for failure to file Form 8398

a. The civil penalty for the first failure to report is up to $10,000

b. If any failure continues for more than 90 days after the day on which the Secretary mails notice of such failure to the

individual, such individual shall pay a penalty (in addition to the first failure penalty) of $10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period. The penalty imposed under this paragraph with respect to any failure shall not exceed $50,000.

III. OFFSHORE VOLUNTARY DISCLOSURE PROGRAM

A. Delinquent FBAR Submission Procedures

1. Taxpayers who do not need to use either the OVDP or Streamlined procedures to file delinquent or amended tax returns to report and pay additional tax due but:

    a. Have not filed a required FBAR;

    b. Are not under civil examination or criminal investigation by the IRS; and

    c. Have not already been contacted by the IRS about the delinquent FBARs

2. These taxpayers should file the delinquent FBARs according to the FBAR instructions and include a statement explaining why the FBARs are filed late.

3. The IRS will not impose a penalty if the taxpayer properly reported on his US tax returns, and paid all tax on, the income from the financial accounts reported on the delinquent FBARs, and has not been contacted regarding an examination or a request for delinquent returns for the FBAR years.

B. 2014 Offshore Voluntary Disclosure Program (OVDP)

1. In 2014, the IRS continued the 2012 OVDP, but modified it to provide new options to help both taxpayers residing overseas and those residing in the U.S. to come into compliance with their U.S. tax obligations. The 2014 OVDP is open for an indefinite period until otherwise announced.

    a. Unlike the 2009 OVDP and the 2011 OVDI, the 2014 OVDP has no set deadline for taxpayers to apply.

2. Why participate in the OVDP

    a. Taxpayers holding undisclosed foreign accounts and assets, including those held through undisclosed foreign entities, should make a voluntary disclosure because it enables them to become compliant, avoid substantial civil penalties, and generally eliminate the risk of criminal prosecution for all issues relating to tax noncompliance and failing to file FBARs;

    b. provides the opportunity to calculate, with a reasonable degree of certainty, the total cost of resolving all offshore tax issues;

    c. taxpayers simply filing amended returns or filing through the streamlined filing compliance procedures <u>do not</u> eliminate the risk of criminal prosecution; and

    d. taxpayers who do not submit a voluntary disclosure run the risk of detection by IRS and the imposition of substantial penalties, including the fraud penalty and foreign information return penalties, and an increased risk of criminal prosecution.

3. In order to participate in the 2014 OVDP, the taxpayer must:

   a. Provide all the required documents;

   b. Cooperate in the voluntary disclosure process, including providing information on foreign accounts and assets, institutions and facilitators, and signing agreements to extend the period of time for assessing Title 26 liabilities and FBAR penalties

   c. Pay 20% accuracy-related penalties under 26 USC § 6662 on the full amount of offshore-related underpayments of tax for all years;

   d. Pay failure to file penalties under 26 USC § 6651(a)(1), if applicable (failure to file);

   e. Pay failure to pay penalties under 26 USC § 6651(a)(2), if applicable (failure to pay);

   f. Pay a miscellaneous Title 26 offshore penalty equal to 27.5% (or 50% in certain circumstances) of the highest aggregate value of OVDP assets during the period covered by the voluntary disclosure;

   g. Submit full payment of any Title 26 tax liabilities for years included in the offshore disclosure period, applicable interest, an offshore penalty, accuracy-related penalties for offshore-related underpayments, and, if applicable, the failure to file and failure to pay penalties or, if the taxpayer is unable to make full payment, make good faith arrangements with IRS to pay in full. (Note: the suspension of interest provisions of 26 USC § 6404(g) do not apply to interest due in this program);

h. Execute a Closing Agreement on Final Determination Covering Specific Matters, Form 906; and

i. Agree to cooperate with IRS and Department of Justice offshore enforcement efforts, if requested, by providing information about financial institutions and other facilitators who helped the taxpayer establish or maintain an offshore arrangement

4. Pre-submission period and preclearance

a. For purposes of the 2014 OVDP, a taxpayer's representative may talk to IRS without revealing the taxpayer's identity

b. For the 2014 OVDP, to obtain preclearance a taxpayers or representative must send a fax to IRS – Criminal Investigation Lead Development Center (LDC) containing the following information:

i. Applicant identifying information including complete names, dates of birth (if applicable), tax identification numbers, addresses, and telephone numbers;

ii. Identifying information of all financial institutions at which undisclosed OVDP assets were held. Identifying information for financial institutions includes complete names (including all DBAs and pseudonyms), addresses, and telephone numbers;

iii. Identifying information of all foreign and domestic entities (e.g., corporations, partnerships, limited liability companies, trusts, foundations) through which the undisclosed OVDP assets were held by the taxpayer seeking to participate in the OVDP; this does

not include any entities traded on a public stock exchange. Information must be provided for both current and dissolved entities. Identifying information for entities includes complete names (including all d/b/a names and pseudonyms), employer identification numbers (if applicable), addresses, and the jurisdiction in which the entities were organized; and

iv. Executed power of attorney forms (if represented).

5. Submission process

a. Taxpayers or their representatives should mail their Offshore Voluntary Disclosure Letter and attachments. Criminal Investigation will review the Offshore Voluntary Disclosure Letter and notify taxpayers or representatives by mail or facsimile whether their offshore voluntary disclosures have been preliminarily accepted as timely or declined. Criminal Investigation intends to complete its work within 45 days of receipt of a complete Offshore Voluntary Disclosure Letter

b. Internal Revenue Service Voluntary Disclosure Coordinator, 1-D04-100, 2970 Market Street, Philadelphia, PA 19104

c. Once a taxpayer's disclosure has been preliminarily accepted by CI as timely, the taxpayer must complete the submission and cooperate with the civil examiner in the resolution of the civil liability before the disclosure is considered complete

d. The letter from CI will instruct the taxpayer or his representative to submit the full voluntary disclosure submission to the Austin Campus within 90 days of the date

of the timeliness determination. The voluntary disclosure submission must be sent in two separate parts:

i. Payment to the Department of Treasury. Payment includes the amount of tax, interest, offshore penalty, accuracy-related penalty, and, if applicable, the failure-to-file and failure-to-pay penalties, for the voluntary disclosure period. Send payment with information identifying the taxpayer name, taxpayer identification number, and years to which the payments relate. To ensure payments are properly posted to the taxpayer's account, separate checks should be made for each tax year which would include all applicable tax, interest, accuracy-related penalties, and failure to file and failure to pay penalties. The offshore penalty should be paid by a separate check. These payments are advance payments; consequently, any credit or refund of the payments is subject to the limitations (Internal Revenue Service, 3651 S. I H 35, Stop 1919 AUSC, Austin, TX 78741, ATTN: Offshore Voluntary Disclosure Program);

ii All other required documents (Internal Revenue Service, 3651 S. I H 35, Stop 4301 AUSC Austin, TX 78741, ATTN: Offshore Voluntary Disclosure Program):

(a) copies of previously filed original (and, if applicable, previously filed amended) federal income tax returns for tax years covered by the voluntary disclosure;

(b) complete and accurate amended federal income tax returns (if delinquent) for all tax years covered by the voluntary disclosure, with applicable schedules, copies of previously filed returns for any compliant years in the offshore disclosure period (if submitting a copy of a previously filed return, “COPY” must be written on the top of the first page of the return);

(c) copy of the completed and signed Offshore Voluntary Disclosure Letter (including enclosures and attachments) submitted to Criminal Investigation;

(d) a completed Foreign Account or Asset Statement for each previously undisclosed OVDP asset during the voluntary disclosure period;

(e) a completed and signed Taxpayer Account Summary With Penalty Calculation;

(f) properly completed and signed agreements to extend the period of time to assess tax (including tax penalties) and to assess FBAR penalties (failure to extend the period of time to assess tax and assess FBAR penalties according to the instructions will render the OVDP submission incomplete);

(g) copies of statements for all financial accounts reflecting all account activity for each of the tax years covered by their voluntary disclosure.

6. Post-submission process

    a. After a taxpayer sends in his full and complete submission, his case will be assigned to a civil examiner to complete the certification of his tax returns for accuracy, and completeness

    b. Normally, no examination will be conducted with respect to an offshore voluntary disclosure made under the OVDP, although IRS reserves the right to conduct an examination

    c. the examiner has the right to ask any relevant questions, request any relevant documents, and even make third party contacts, if necessary, to certify the accuracy of the amended returns, without converting the certification to an examination

7. Applicable penalty rates

    a. The otherwise applicable OVDP penalty rate of 27.5% may be increased to 50% under certain circumstances

    b. Beginning on Aug. 4, 2014, any taxpayer who has an undisclosed foreign financial account will be subject to a 50% miscellaneous offshore penalty if, at the time of submitting the preclearance letter to IRS Criminal Investigation an event has already occurred that constitutes a public disclosure that either:

        i. The foreign financial institution where the account is held, or another facilitator who assisted in establishing or maintaining the taxpayer's offshore arrangement, is or has been under investigation by IRS or the

Department of Justice in connection with accounts that are beneficially owned by a U.S. person;

ii. The foreign financial institution or other facilitator is cooperating with IRS or the Department of Justice in connection with accounts that are beneficially owned by a U.S. person; or

iii. The foreign financial institution or other facilitator has been identified in a court-approved issuance of a summons seeking information about U.S. taxpayers who may hold financial accounts (a “John Doe summons”) at the foreign financial institution or have accounts established or maintained by the facilitator

C. Streamlined Offshore Procedures

1. The streamlined filing compliance procedures 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

a. The streamlined procedures are designed to provide to taxpayers in these situations (1) a streamlined procedure for filing amended or delinquent returns and (2) terms for resolving their tax and penalty obligations

b. These procedures will be available for an indefinite period until otherwise announced

2. Domestic offshore procedures for US taxpayers residing in US

a. Eligibility for the streamlined program

i. Fail to meet the applicable non-residency requirement (for joint return filers, one or both of the spouses must fail to meet the applicable non-residency requirement);

ii. 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;

iii. 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

iv. these failures resulted from non-willful conduct.

b. Procedure for filing under streamlined program

i. 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, file amended tax returns, together with all required information returns (e.g., Forms 3520, 3520-A, 5471, 5472, 8938, 926, and 8621);

ii. for each of the most recent 6 years for which the FBAR due date has passed period, file any delinquent FBARs (FinCEN Form 114), and

iii. pay a Title 26 miscellaneous offshore penalty

(a) 5% of the highest aggregate balance or value of the taxpayer's foreign financial assets that are subject to the miscellaneous penalty during the years in the covered return period.

(b) Aggregate the year-end account balances and year-end asset values of all the financial value of all financial assets subject to the penalty for each year and selecting the highest aggregate balance/value from among those years.

(c) Foreign financial asset is also subject to the miscellaneous 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.

(d) Taxpayer enters the value and files on the Form 14654, Certification by US Person Residing in the United States for Streamlined Domestic Offshore Procedures.

iv. 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, a complete and accurate amended tax return using Form 1040X (Amended U.S. Individual Income Tax Return) together with any required information returns even if these information returns would normally not be submitted with the Form 1040 had the taxpayer filed a complete and accurate original return.

(a) At the top of the first page of each amended tax return "Streamlined Domestic Offshore" must be written in red to indicate that the returns are being submitted under these procedures. This is critical to ensure that the taxpayer's returns are processed through these special procedures.

(b) A completed and signed statement on the Certification by U.S. Person Residing in the U.S. (Form 14654) certifying (1) that the taxpayer is eligible for the Streamlined Domestic Offshore Procedures; (2) that all required FBARs have now been filed; (3) that the failure to report all income, pay all tax, and submit all required information returns, including FBARs, resulted from non-willful conduct; and (4) that the miscellaneous offshore penalty amount is accurate.

v. Payment of all tax due as reflected on the tax returns and all applicable statutory interest with respect to each of the late payment amounts. The taxpayer's taxpayer identification number must be included on his check.

vii. must be sent in paper form (electronic submissions will not be accepted) to Internal Revenue Service, 3651 South I-H 35Stop 6063 AUSC, Attn: Streamlined Domestic Offshore, Austin, TX 78741. This address may only be used for returns filed under these procedures

viii. For each of the most recent 6 years for which the FBAR due date has passed, the taxpayer must file delinquent FBARs according to the FBAR instructions and include a statement explaining that the FBARs are being filed as part of the streamlined filing compliance procedures. The taxpayer is required to file these delinquent FBARs electronically at FinCen.

d. The narrative statement of facts portion of the Form 14654 must contain the following information: specific reasons for the taxpayer's failure to report all income, pay all tax, and submit all required information returns, including FBARs:

i. The whole story should be included, including favorable and unfavorable facts

ii. Specific reasons, whether favorable or unfavorable to the taxpayer, should include his personal background, financial background, and anything else he believes is relevant to his failure to report all income, pay all tax, and submit all required information returns, including FBARs; and

iii. an explanation of the source of funds in all of his foreign financial accounts/assets should be included. For example, the taxpayer should explain whether he inherited the account/asset, whether he opened it while residing in a foreign country, or whether he had a business reason to open or use it, his contacts with the account/asset including withdrawals, deposits, and investment/management decisions. The taxpayer must provide a complete story about his foreign financial account/asset

e. Avoidance of penalty under 26 USC § 6662, information return penalties and FBAR penalties

3. Foreign offshore procedures for US taxpayers residing outside US

a. Eligibility for streamlined foreign offshore procedure

i. meet the applicable non-residency requirement described below (for joint return filers, both spouses must meet the applicable non-residency requirement,) and

(a) For Individual U.S. citizens or lawful permanent residents, or estates of U.S. citizens or lawful permanent residents, any one or more of the most recent three years for which the U.S. tax return due date (or properly applied for extended due date) has passed, the individual did not have a U.S. abode and the individual was physically outside the U.S. for at least 330 full days.

(b) Individuals who are not U.S. citizens or lawful permanent residents, or estates of individuals who were not U.S. citizens or lawful permanent residents, meet the applicable non-residency requirement if, in any one or more of the last three years for which the U.S. tax return due date (or properly applied for extended due date) has passed, the individual did not meet the substantial presence test of

ii. have failed to report the 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)with respect to a foreign financial account, and the failures resulted from non-willful conduct.

b. Everything else is the same as the streamlined program for taxpayers residing in the US, except that there is no miscellaneous penalty. Rather, the taxpayer must simply pay the tax and interest due.