IRS Announces Newest Version of Its Comprehensive Voluntary Disclosure Program: Analyzing the Evolution Over Five Years

*By Hale E. Sheppard**

I. Introduction

The Internal Revenue Service ("IRS") is carrying out a long list of other enforcement campaigns and employing the additional funds recently granted by Congress. These activities have triggered several results, one of which is an increased interest by taxpayers in pro-actively approaching the IRS to resolve matters on the most favorable terms possible. The IRS offers multiple programs designed to allow taxpayers to rectify *specific* types of non-compliance, but it has just one *general* program covering all types of violations, even those involving willful or potentially criminal wrongdoing. This program, called the updated voluntary disclosure practice ("UVDP") in this article, was introduced by the IRS in 2018 and subsequently modified in 2020 and 2022. This article explains the worldwide tax and information-reporting duties of U.S. persons, summarizes the current disclosure programs available with the IRS, and analyzes the five-year evolution of the UVDP.[1]

II. Worldwide Duties and Downfalls

Generally, U.S. persons must pay federal income tax on *all* income derived, regardless of where the income originates.[2] In other words, U.S. persons face a system of worldwide taxation, requiring them to declare to the IRS on Form 1040 (*U.S. Individual Income Tax Return*) or the appropriate tax return all income, whether it was earned, obtained, received, or accrued in the United States or a foreign country. This expansive duty creates potential issues for U.S. persons

HALE E. SHEPPARD, Esq., B.S., M.A., J.D., LL.M., LL.M.T., is a Shareholder in the Tax Controversy Section and Chair of the International Tax Section at Chamberlain Hrdlicka.

who have lived, worked, operated, and/or invested abroad at any point.

A. Overview of Tax and Information-Reporting

Individual taxpayers with foreign involvement ordinarily are required to do several things with the IRS, including, but not limited to, the following:

- They must declare on Form 1040 income from all sources around the globe;
- They must disclose on Schedule B (*Interest and Ordinary Dividends*) to Form 1040 the existence and location of foreign accounts;
- They must electronically file a FinCEN Form 114 ("*FBAR*") to provide more details about foreign accounts;
- They must report foreign financial assets, as this term is broadly defined, on Form 8938 (*Statement of Specified Foreign Financial Assets*);
- In situations where taxpayers own or have certain other links to foreign entities, they must report them on Forms 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*), Forms 8865 (*Return of U.S. Persons with Respect to Certain Foreign Partnerships*), Forms 8858 (*Information Return of U.S. Persons with Respect to Foreign Disregarded Entities and Foreign Branches*), Forms 8621 (*Information Return by Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*), or Forms 3520 (*Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*), depending on the classification of the entities; and
- They must file a Form 8833 (*Treaty-Based Return Position Disclosure*) if they are claiming that the application of a treaty between the United States and another country overrules or modifies normal treatment.[3]

B. Sanctions for Violations

Failure to maintain compliance with the duties described above can trigger significant penalties. Some common punishments imposed by the IRS are recapped below.

First, taxpayers omitting foreign income often confront U.S. tax liabilities, as well as sizable penalties related directly to the taxes. Examples include negligence penalties equal to 20 percent of the tax debt, penalties rising to 40 percent of the tax debt in situations involving undisclosed foreign financial assets, and penalties reaching 75 percent of the tax debt if the IRS can prove civil fraud.[4]

Second, large sanctions for unfiled, late, inaccurate, or incomplete FBARs can overwhelm taxpayers. Congress was concerned about widespread FBAR non-compliance for many years; therefore, it enacted stringent penalties in 2004.[5] In the case of non-willful violations, the maximum penalty is $10,000 per violation.[6] Higher penalties apply where willfulness exists. Specifically, when a taxpayer willfully fails to file an FBAR, the IRS may assert a penalty equal to $100,000 or 50 percent of the balance in the undisclosed account at the time of the violation, whichever amount is larger.[7]

Third, if a taxpayer fails to file a proper Form 8938, then the IRS generally will assert a penalty of $10,000 per violation.[8] The penalty increases to a maximum of $50,000 if the taxpayer does not rectify the problem quickly after contact by the IRS.[9]

Fourth, a variety of penalties come into play when taxpayers do not disclose their relationships with foreign entities. For instance, U.S. persons who are officers, directors, and/or shareholders of certain foreign corporations must file a Form 5471 with the IRS.[10] If they neglect to do so, then the IRS may assert a penalty of $10,000 per violation, per year.[11]

The penalties described above can be significant, even when considered separately. They can become untenable, though, when the IRS decides to "stack" penalties, asserting several in connection with the same foreign item. As recently as 2019, a District Court held the "stacking" of certain penalties by the IRS is not prohibited by law nor by the Constitution.[12]

III. Current IRS Disclosure Programs

The IRS has introduced several programs to address different types of taxpayer non-compliance, both domestic and international. A comprehensive review of *all* disclosure programs far surpasses the scope of this article. This article limits itself to providing a glance at certain programs in existence in early 2022 for purposes of putting the UVDP into context.

A. International Programs

Taxpayers who inadvertently fall into non-compliance often start to explore ways of resolving issues with the IRS with the least amount of pain. Among the current options are participating in the Streamline Foreign

Offshore Procedure ("SFOP"), Streamline Domestic Offshore Procedure ("SDOP"), Delinquent International Information Return Submission Procedures ("DIIRSP"), or Delinquent FBAR Submission Procedure ("DFSP"). These four programs, all introduced in 2014, share certain characteristics, but they differ in important ways.[13]

1. SFOP

To be eligible for the SFOP, a taxpayer (who is a U.S. citizen or Green Card holder) must meet the following criteria: (i) he was physically outside the United States for at least 330 days in one or more of the past three years; (ii) he did not have an "abode" in the United States during the relevant years; (iii) he either did not file Forms 1040 with the IRS or he filed them and omitted some income; (iv) he might have also failed to file proper international information returns; (v) the violations were due to "non-willful" conduct; (vi) neither the IRS nor the Department of Justice ("DOJ") has initiated a civil examination or criminal investigation of the taxpayer or a related party; and (vii) the taxpayer is an individual (or the estate of an individual), because the SFOP is not open to entities. Under the SFOP, taxpayers generally are required to file Forms 1040 or Forms 1040X for the past three years, international information returns for the past three years, and FBARs for the past six years. The taxpayer must pay all corresponding tax liabilities and interest charges, but the IRS does not impose any penalties on taxpayers who successfully resolve matters through the SFOP.

2. SDOP

The SDOP is similar to the SFOP, with three critical distinctions. First, participants in the SDOP do not satisfy the foreign-residency requirement. Second, they must have filed timely Forms 1040 with the IRS each year, but neglected to report all worldwide income and/or enclose all required international information returns. Finally, if taxpayers are accepted into the SDOP, the IRS does not waive all penalties, imposing instead a so-called "offshore" penalty equal to five percent of the highest total value of all non-compliant assets during the relevant six-year period.

3. DIIRSP

The DIIRSP provides that taxpayers who/which have not filed one or more international information returns can file them, on a penalty-free basis, if the taxpayers (i) previously filed annual U.S. tax returns reporting all income, (ii) have "reasonable cause" for not timely filing information returns, (iii) are not under a civil examination or a criminal investigation by the IRS or DOJ, and (iv) have not already been contacted by the IRS about the missing information returns.

4. DFSP

The DFSP is geared toward taxpayers who/which previously filed timely U.S. tax returns each year reporting all worldwide income (including income generated by foreign accounts), yet neglected to file annual FBARs. The DFSP allows such taxpayers to rectify FBAR issues without incurring penalties. The IRS's rationale here is that taxpayers willfully hiding foreign accounts normally do not report income from such accounts on their annual U.S. tax returns and pay the resulting taxes.

B. General Programs

The four programs described above pertain to situations where a taxpayer has non-compliance related to *foreign* income or assets. However, two programs exist that permit taxpayers to rectify foreign and/or domestic matters.

1. Quiet Disclosure Process

The IRS has warned taxpayers since it began introducing its recent wave of voluntary disclosure programs back in 2009 *not* to circumvent such programs by making a so-called "quiet disclosure." This essentially means taxpayers attempting to resolve issues with the IRS by filing amended tax returns and/or information returns, without officially participating in a recognized disclosure program, with hopes that the IRS will process the returns in the regular course, not start an audit, and not impose penalties. The IRS repeatedly announced that it planned to identify and harshly sanction attempted "quiet disclosures."[14]

With the introduction of the UVDP, though, the IRS completely changed course. The IRS told taxpayers that it is acceptable to make a "quiet disclosure," as long as there is no risk of criminality.[15] More specifically, the IRS stated when announcing the UVDP in 2018 that taxpayers "who did not commit any tax or tax related crimes and do not need the [UVDP] to seek protection from potential criminal prosecution can continue to correct past mistakes using the procedures mentioned above or by filing an amended or past due tax return."[16]

Tax professionals were suspicious about this drastic reversal by the IRS, so they asked pointed questions to a high-ranking IRS official during a tax conference. The official confirmed that the IRS changed its earlier position, thereby condoning what many call the quiet disclosure process ("QDP").[17]

2. UVDP

The focus of this article, the UVDP, was introduced by the IRS in 2018, and later clarified in 2020 and 2022. Details of the UVDP are analyzed below.

IV. Round One—UVDP Guidance in 2018

The information in this section of the article derives solely from IRS guidance issued in November 2018. The IRS initially released limited guidance about the UVDP, in the form of a single "memorandum." Some has endured and some has changed as the UVDP has evolved over the past few years. This article chronicles the evolution.

A. Broad Scope

The UVDP applies to all types of taxes, including income, gift, estate, employment, excise, *etc.* It also covers both international and purely domestic matters. According to the IRS, the objective of the UVDP is "to provide taxpayers concerned that their conduct is willful or fraudulent, and that may rise to the level of tax and tax-related criminal acts, with a means to come into compliance with the law and potentially avoid criminal prosecution."[18]

B. Disclosure Period

Cases addressed through the UVDP normally will cover the most recent six closed tax years. There are several exceptions to this general rule. For instance, if the IRS and taxpayer cannot resolve a case by mutual agreement, then the Revenue Agent "has discretion to expand the scope to include the full duration of the non-compliance and may assert maximum penalties under the law with the approval of management."[19] Moreover, in situations where the non-compliance lasted less than six years, the scope can be limited to just those years with issues.

Going the other way, with the IRS's consent, taxpayers might be allowed to expand the UVDP disclosure period to more than six years. Why would taxpayers want this? Well, they might desire a longer period in order to correct tax issues with foreign governments that mandate more years, to rectify tax matters occurring before the acquisition or sale of an entity, to disclose taxable and/or reportable gifts in earlier years, *etc.*[20]

C. Civil Fraud Penalties

Generally, the IRS will assert a civil fraud penalty, equal to 75 percent of the tax liability, to the one year during the disclosure period with the highest tax liability. For taxpayers filing amended returns, the fraud penalty derives from Code Sec. 6663, while for non-filers it originates in Code Sec. 6651(f).[21] In "limited circumstances," Revenue Agents may apply the civil fraud penalty to more than one year, up to all six years, "based on the facts and circumstances of the case."[22] The example provided by the IRS is a situation where a taxpayer and Revenue Agent cannot agree on the tax liability as part of the UVDP process. Additionally, Revenue Agents can impose civil fraud penalties "beyond six years" if taxpayers fail to cooperate and resolve the audit by agreement.[23]

D. Penalties Unrelated to Income Taxes

The IRS cryptically explained that penalties related to non-income-tax matters (*e.g.*, estate, gift, or employment taxes) would be resolved "based on the facts and circumstances with [Revenue Agents] coordinating with appropriate subject matter experts."[24]

E. FBAR Penalties

The IRS announced that FBAR penalties, possibly including those for "willful" violations, will be asserted pursuant to the existing guidelines in the Internal Revenue Manual.[25]

F. Ability to Request Reduced Penalties

The IRS initially indicated that taxpayers are "not precluded" from (i) seeking an accuracy-related penalty under Code Sec. 6662 equal to 20 percent of the tax liability, instead of a civil fraud penalty at 75 percent, or (ii) requesting non-willful FBAR penalties, in place of willful ones. However, given the purpose of the UVDP, the acceptance of lesser penalties by the IRS will be "exceptional," and taxpayers must present "convincing evidence" to justify a reduction.[26]

G. Perhaps No Information Return Penalties

Contrary to the harsh stance by the IRS regarding the disclosure period, civil fraud penalties, and FBAR penalties, taxpayers might escape sanctions for unfiled information returns. The IRS will not automatically assess these under the UVDP. Moreover, Revenue Agents can consider the application of other penalties, such as civil fraud penalties and FBAR penalties, in resolving information return infractions.[27]

H. Challenging the IRS Within the UVDP

The IRS stated that taxpayers retain the right to request reconsideration of the issues by the Appeals Office. This was positive news for taxpayers, although difficult to reconcile with warnings from the IRS that taxpayers could face grave consequences if they fail to "promptly and fully cooperate" in the UVDP process, disagree with the Revenue Agent on the appropriate tax liability, and/or refuse to execute a written agreement with the IRS to conclude matters.[28]

I. Revoking Participation

The IRS indicated that it will develop procedures for Revenue Agents to "revoke" a taxpayer from the UVDP under certain circumstances.[29] A high-ranking IRS official later provided some relief in this regard, explaining at a major tax conference that Revenue Agents will give ample warning of lack of cooperation before taking steps to "revoke" a "preliminary acceptance" letter previously issued to a taxpayer.[30]

J. Payment of Liabilities

The UVDP procedures also imply that taxpayers can participate only if they can pay the full freight: "In general, the [IRS] expects that voluntary disclosures will be resolved by agreement with full payment of all taxes, penalties, and interest for the disclosure period."[31] This posture by the IRS under the UVDP is inconsistent with the historic manner in which the IRS has addressed the payment issue. For example, under earlier disclosure programs, the IRS expressly allowed taxpayers to become fully compliant, notwithstanding the fact that they lacked the financial wherewithal to make the IRS whole.[32]

V. Round Two—UVDP Guidance in 2020

After nearly one-and-a-half years of silence, the IRS provided new guidance about the UVDP, when it released Form 14457 (*Voluntary Disclosure Practice Preclearance Request and Application*) and corresponding Instructions in April 2020.[33] Commentators quickly underscored the importance of this new data, indicating that "[t]he IRS quietly released its new voluntary disclosure practice form and instructions to little fanfare, but practitioners will want to pay close attention to a significant amount of new details."[34] This portion of the article analyzes *only* the second round of guidance by the IRS.

A. Procedural Details

The IRS explained the step-by-step process of the UVDP, as follows.

The first step is for taxpayers to complete and send, to the "Voluntary Disclosure Coordinator," *via* fax or mail, *only* Part I of Form 14457. This is called making a "Preclearance Request." Taxpayers are not required to sign Part I, and they should not enclose relevant tax returns, information returns, payments, or other documents. The IRS emphasizes that filing Part I is "mandatory" for all taxpayers desiring to participate in the UVDP.

The second step is for the Criminal Investigation Division ("CI") of the IRS to review Part I. If all is acceptable, then CI notifies taxpayers of "Preclearance" and assigns a "Case Control Number" to the disclosure.

The third step consists of taxpayers completing and sending, again to the "Voluntary Disclosure Coordinator," Part II of Form 14457. This is often called seeking "Preliminary Acceptance." Taxpayers generally must file Part II within 45 days of receiving "Preclearance" from CI, though the IRS contemplates the possibility of granting one 45-day extension to taxpayers upon written request. Taxpayers should not enclose relevant tax returns, information returns, payments, or other documents with Part II. Unlike Part I, the Instructions obligate taxpayers to execute Part II, because "[a] representative by means of a power-of-attorney cannot sign the voluntary disclosure on behalf of the taxpayers."[35]

The fourth step is receiving "Preliminary Acceptance" from CI, which occurs if all remains copacetic after CI reviews the data provided by the taxpayer in Part II. CI then routes the case to the appropriate office of the Examination Division. Thereafter, a Revenue Agent contacts the taxpayers and begins his review adhering to "standard examination procedures."[36]

B. Part I of Form 14457

Much of the basic information demanded by the IRS on Part I is mundane, but taxpayers might not have anticipated several items.

In terms of what type of taxpayers can participate, Part I asks taxpayers to check the box indicating individual, partnership, corporation, trust, or executor of estate.[37] The Instructions expand on this notion, stating that the UVDP "is available to individuals (U.S. Citizens, Green Card Holders, Non-Resident Aliens, Expatriates, *etc.*) and business entities (Corporations, Partnerships, LLCs, Trusts, Estates)."[38]

Part I confirms that the UVDP broadly covers all types of matters, breaking them down into the following categories: domestic, offshore, estate and gift taxes, employment taxes, virtual currency, and the catch-all, "other issues."[39]

The IRS is interested in questions of nationality and travel, too. Part I instructs individuals to provide "all passport numbers and countries."[40] The Instructions go into more detail, demanding (i) number and country of issuance for all current passports, (ii) information about all passports that have expired within the past decade, and (iii) if the individual holds multiple passports, a statement of whether he ever entered the United States using a foreign passport.[41]

Another focus of the IRS is entities, foreign and domestic. Part I requires taxpayers to reveal all entities that were "in any way related" to the non-compliance during the disclosure period, along with all entities that the taxpayers owned, controlled, or benefitted from, directly or indirectly, including nominee entities used to conceal the ownership of non-compliant assets.[42]

The IRS also wants lots of information about problematic financial accounts. Part I demands data about all non-compliant domestic and/or foreign financial accounts that taxpayers owned, controlled, or benefitted from, directly or indirectly through entities, at any time during the entire disclosure period.[43] For purposes of the UVDP, an account is considered "non-compliant" if it generated income that was not reported on U.S. tax returns, received previously untaxed funds, and/or was not properly declared on an FBAR or Form 8938.[44]

C. Part II of Form 14457

Part II features a few noteworthy items. First, Part II warns that taxpayers will be ineligible for the UVDP if their participation is not truly voluntarily. It obligates taxpayers to disclose whether (i) anyone (including a foreign government or foreign financial institution) indicated that their records were susceptible to being remitted to the U.S. government upon request, (ii) they, directly or through an agent, submitted a pleading or other document to a foreign court or authority opposing disclosure of financial records, and (iii) if so, they provided copies to the U.S. Attorney General, as required by law.[45]

The Instructions clarify that, for purposes of the UVDP, a timely application is one made before the IRS has started a civil examination or criminal investigation of a taxpayer, before the IRS has received data from a third party (*e.g.*, an informant, John Doe summons, foreign government, *etc.*) about the taxpayer's non-compliance, and before the IRS has acquired data about the non-compliance from a criminal enforcement action, such as a search warrant or grand jury subpoena.[46]

Finally, Part II requires taxpayers to provide a "narrative," which might unnerve them and their tax/legal advisors. The narrative is divided into three parts, with one focused on the "personal and professional background" of the taxpayers, another centered on professional advisors and all other individuals who aided in the non-compliance, and the final part broadly demanding "a thorough discussion of all ... willful failures to report income, pay tax, and submit all required information returns and reports."[47]

D. Marijuana Money Ineligible

As explained above, the UVDP is open to nearly all types of taxpayers with all sorts of non-compliance. The IRS has drawn the line, though, indicating that taxpayers with pot-related problems need not apply. The IRS guidance is somewhat obtuse on this point, but taxpayers will get the message. The Instructions first state that taxpayers should not use the UVDP "if the source of the unreported income is from any illegal source."[48] Then, they go on to clarify that "[i]ncome from activities determined to be legal under state law but illegal under federal laws is considered illegal source income for purposes of the [UVDP]."[49]

E. Civil Penalties

The information about civil penalties in Form 14457 and the related Instructions issued in 2020 is very similar to the initial IRS guidance in 2018.

With respect to penalties triggered by unreported income, the Instructions indicate that (i) the IRS will assert a fraud penalty for at least one year, (ii) the one-year limit is contingent upon taxpayers fully cooperating with the UVDP process, (iii) the IRS applies the civil fraud penalty in place of accuracy-related penalties under Code Sec. 6662 and delinquency penalties under Code Sec. 6651, and (iv) the IRS can also apply estimated tax penalties under Code Sec. 6654, because they are computational in nature and a substitute for interest charges.[50]

The Instructions confirm that the IRS will not automatically assert information return penalties and that this issue will be resolved, in the discretion of the Revenue Agent, taking into account other penalties assessed against the taxpayer as part of the UVDP and whether the taxpayer agrees to settle the UVDP with the Revenue Agent.[51]

Likewise, the Instructions state that potential penalties related to excise taxes and estate and gift taxes "will be handled based on the facts and circumstances of the case."[52] The IRS remains undecided with respect to employment tax penalties, though, explaining that penalties likely will be similar to income tax penalties, but "[f]urther guidance is pending."[53]

Finally, when it comes to unreported foreign accounts, the Instructions exhibit some circular reasoning, stating that "[w]illful FBAR penalties will apply to all cases involving FBAR non-compliance where facts and law support the assertion of a willful FBAR penalty."[54]

F. Take Non-Willful Violations Elsewhere

Form 14457 and the Instructions contain language throughout alerting taxpayers that the IRS designed the UVDP exclusively for "willful" violations. Samples follow:

- "Objective. The [UVDP] provides taxpayers whose conduct involved *willful* tax or tax-related non-compliance with a means to come into compliance with the tax law and avoid potential criminal prosecution."[55]
- "Taxpayers will be required to provide a narrative statement of facts detailing their *willful* conduct in Part II of Form 14457."[56]
- "You should consider applying for the [UVDP] if you engaged in *willful* non-compliance that exposes you to criminal liability for tax and tax-related crimes, you meet the eligibility requirements (discussed next), and you wish to come into tax compliance and avoid potential criminal prosecution."[57]
- "Form 14457 should be filed when you have determined you have *willful* conduct that you believe may rise to the level of tax and tax-related crimes and wish to come into compliance to try and avoid potential criminal tax prosecution."[58]
- "Non-compliance. Includes all tax and tax-related *willful* failures to report income, pay tax, and submit all required information returns and reports (including FBARs)."[59]

G. Participation Without Full Payment

The IRS acknowledges in the Instructions that it has "historically required" taxpayers participating in disclosure programs to make full payment of all taxes, penalties, and interest.[60] However, the IRS has changed its mind since 2018 when it comes to the UVDP, now allowing taxpayers to participate even if they lack the cash, on the condition that they make a complete financial disclosure and convince the IRS that full payment is unfeasible.[61] Form 14457 confirms that taxpayers can participate in the UVDP, despite the fact that they lack the money necessary to pay the resulting taxes, penalties, and/or interest. In this regard, Part II offers the following box for taxpayers to check: "Inability to pay in full."[62] The Instructions expand on this idea, stating the following:

> The burden is on the taxpayer to establish inability to pay, to the satisfaction of the IRS, based on full disclosure of all assets and income, domestic and foreign, under the taxpayer's control. If the IRS determines that the inability to fully pay is genuine, the taxpayer must work out other financial arrangements, acceptable to the IRS, to resolve all outstanding liabilities.[63]

H. Advance Payments to the IRS

The IRS is clear about one thing, taxpayers should *not* enclose payments when they are filing Part I or Part II of Form 14457 with the IRS. The first opportunity to make an "advance payment" comes after CI has granted "preliminary acceptance," and taxpayers are waiting for a Revenue Agent to be assigned to the case. The Instructions tell taxpayers to send payments, at the correct time, only to a particular IRS office in Austin, Texas, clearly labeling them for the "Voluntary Disclosure Practice."[64] The Instructions emphasize that, while the IRS understands the desire to make advance payments to stop accrual of interest charges, it does not share that sentiment when it comes to tax and information returns. The Instructions warn taxpayers only to send checks, on a year-by-year basis, to the designated IRS office, but not returns or other documents.[65]

I. Participation by Estates

The Instructions to Form 14457 explain that it "does not encourage" use of the UVDP for decedents, even if they engaged in willful non-compliance when they were alive, because criminal liability generally ends upon the death of an individual.[66] Nonetheless, the IRS recognizes that sometimes "extraordinary circumstances" warrant participation of a decedent in the UVDP, such as when other taxpayers related to the decedent are doing so.[67] In such cases, the executor or personal representative of the estate will be required to supply a detailed narrative explaining the decedent's non-compliance.[68] Moreover, the Instructions warn that, if the executor or personal representative were personally willful in administering the estate, then he must explain his own conduct and intent, as well as who controls the underlying records of the decedent and the estate.[69]

J. Promotion of Alternatives

As explained above, Form 14457 and the corresponding Instructions expressly state numerous times that the UVDP is aimed at taxpayers with "willful" violations. They also tell taxpayers whose bad conduct does not rise to the level of tax crimes that they should pursue other avenues, as follows: "You can correct less serious non-compliance by filing amended or past due tax returns."[70] The Instructions feature a list of "Other Compliance Options," which consist of the SFOP, SDOP, DIIRSP, DFSP, and QDP.[71]

K. Cooperation with the Process

A hallmark in essentially every voluntary disclosure program is mandatory full cooperation by participating taxpayers, and the UVDP is no different. What is unique, though, is the manner in which the IRS defines the concept of "cooperation" here. Taxpayers are expected to assist in determining their tax liability and filing obligations, submit all required tax and information returns, and fully pay or make acceptable payment arrangements.[72] This is standard stuff. However, the Instructions also mandate that taxpayers "[c]ooperate with the IRS in investigating *any professional enablers who aided in the non-compliance*."[73] The Instructions further indicate that cooperation, in the context of the UVDP, entails taxpayers promptly and fully responding to all Information Document Requests, submitting to IRS interviews, providing access to relevant third-party witnesses, granting bank secrecy waivers, and settling all issues with the Revenue Agent by agreement.[74]

L. Joint Return Issues

Many couples file joint Forms 1040, and sometimes only one of the spouses is involved with non-compliance. The IRS understands this, which is why it developed special procedures in such cases. The Instructions indicate that "[c]riminal liability depends on individual conduct and intent," such that the actions or inactions of one spouse are not necessarily attributable to the other.[75]

Options exist where only one spouse was a wrongdoer. Both spouses can apply for the UVDP together, make a full disclosure of all assets and activities, and clarify on Part II of Form 14457 which spouse was responsible for the non-compliance. The IRS explains that "making a joint voluntary disclosure will ease the administrative burden of the subsequent civil examination."[76] Another possibility is for the compliant spouse to refuse to participate in the UVDP altogether. The Instructions discourage this, putting potential "innocent spouses" on notice that "[t]he IRS may examine the spouse that does not make a voluntary disclosure."[77]

M. Disclosure Periods

The Instructions offer significant guidance regarding the scope of the normal UVDP case, along with potential expansion in certain circumstances. The Instructions confirm that the ordinary disclosure period will consist of the prior six years for which the taxpayer has filed a timely tax return or the filing deadline (including extensions) has passed.[78] They also clarify that the date on which to determine the disclosure period is when the taxpayer files Part II, *not* Part I, of Form 14457.[79]

The Instructions contain three exceptions to the standard six-year disclosure period, as follows. First, if a taxpayer fails to cooperate fully with the UVDP process, as broadly defined above, then the Revenue Agent can use his own discretion to expand the disclosure period to cover "the full duration of the non-compliance" and, with management approval, "may assert maximum penalties under the law."[80] The Revenue Agent also can ask CI to "revoke" a taxpayer's preliminary acceptance in the UVDP, such that he can conduct an audit, applying all normal procedures, assessment periods, *etc.*[81] Second, if the non-compliance did not occur during each of the prior six years, then the UVDP can address only the relevant years.[82] Third, at the request of cooperative taxpayers, the IRS might allow them to enlarge the disclosure period, to cover more than six years, for reasons that would benefit the taxpayers in another context.[83] The Instructions offer the following examples to clarify disclosure period issues:[84]

> The taxpayer makes a voluntary disclosure relating to willful non-compliance spanning the last 20 years. The taxpayer fully cooperates and provides amended returns correcting all matters for the most recent six years. If the taxpayer comes forward in January 2018, the disclosure period will include 2011 through 2016. However, if the taxpayer comes forward in December 2018, the disclosure period will include 2012 through 2017.
>
> Assume the taxpayer described above filed for an extension to file the 2017 tax return until October 15, 2018. If the taxpayer comes forward in June 2018 before filing the 2017 return, the disclosure period will include 2011 through 2016. On the other hand, if the taxpayer filed the 2017 return in May 2018 before making a disclosure in June 2018, the disclosure period will include 2012 through 2017.
>
> The taxpayer makes a voluntary disclosure relating to willful non-compliance spanning the last 20 years. The taxpayer does not cooperate during the civil examination. The IRS is not limited to a six-year disclosure period and may examine all of the years with non-compliance. With management approval, the examiner will potentially assert maximum penalties for all tax years.
>
> The taxpayer makes a voluntary disclosure in January 2018 relating to willful non-compliance that occurred only during the most recent four years. The taxpayer fully cooperates. Thus, the disclosure period includes 2013 through 2016, the four years where there was non-compliance.
>
> The taxpayer makes a voluntary disclosure in January 2018 relating to willful non-compliance in 2008 through 2015. The taxpayer fully cooperates and clearly establishes full compliance with all tax and information requirements for the most recent year that was filed, 2016. The disclosure period will be limited to 2011 through 2015, the first five years of the disclosure period.

N. Pursuing Advisors

The IRS is not subtle about its intention of using data collected through the UVDP to pursue what it considers bad actors. As indicated earlier, the Instructions require taxpayers to "[c]ooperate with the IRS in investigating *any professional enablers who aided in the non-compliance*."[85] On that same score, the Instructions clarify that taxpayers must provide the IRS with lots of data about advisors in the "narrative" portion of Part II. Specifically, the IRS demands the following: (i) identity of all "professional advisors and facilitators" (including attorneys, accountants, financial planners, private bankers, consultants, and the like) that provided any services to the taxpayer during the disclosure period, "regardless of their connection to or knowledge of your non-compliance"; (ii) full contact information of all such individuals; (iii) explanation about the type of advice and/or services that the individuals provided; (iv) statement as to "whether you fully disclosed your non-compliance and/or if they helped facilitate it"; (v) description of all interactions among the individuals related to the non-compliance; and (vi) list of all individuals who maintained records for the taxpayer.[86] The Instructions indicate that, in supplying the preceding information, taxpayers do not need to waive the attorney–client privilege with its current counsel: "You are not required to summarize legal advice concerning your voluntary disclosure from attorneys currently representing you" in connection with the UVDP.[87]

O. Seeking "Preclearance" Only

As mentioned above, the IRS indicates that taxpayers whose actions were non-willful and do not rise to the level of a tax crime should pursue disclosure alternatives *other than* the UVDP, such as the SFOP, SDOP, DIIRSP, DFSP, and QDP.[88] On a related note, the Instructions obliquely convey that taxpayers have the ability to (i) first file Part I under the UVDP to determine whether the IRS is already aware of their non-compliance, (ii) get "preclearance" from the IRS, and (iii) then rectify issues with the IRS under a program other than the UVDP. The Instructions state the following in this regard: "Submitting a preclearance request will *not* prohibit you from subsequently seeking other compliance options [but] the IRS may seek information concerning compliance for a taxpayer that makes a preclearance request and then uses another compliance option."[89] However, the Instructions clarify that taxpayers cannot back out once they have filed Part II of Form 14457. They state that after a taxpayer files Part II "there is no option to retrieve it" and CI will reject it or preliminary accept it, period.[90]

P. Participation Without Identification Number

Taxpayers generally are required to input their "identification number" on Part I of Form 14457. However, the Instructions grant a reprieve, stating that "[i]f you do not have a taxpayer identification number, please explain."[91] This implies that the IRS contemplates certain taxpayers without a Social Security Number ("SSN") or Individual Taxpayer Identification Number ("ITIN") participating in the UVDP.

Q. Possibility of Criminal Charges

Although unnerving and discouraging for taxpayers, the Instructions state that neither applying for the UVDP nor fully participating in it guarantees taxpayers immunity from criminal charges. Indeed, the Instructions explain that a "voluntary disclosure will not automatically guarantee immunity from prosecution" and it "will be considered along with all other facts and circumstances in determining whether criminal prosecution will be recommended for tax and tax related crimes covering the disclosure period."[92]

R. Expectation of Post-UVDP Compliance

The UVDP, like most disclosure programs, creates an expectation of future compliance by participating taxpayers. This makes sense because, after a taxpayer fully comprehends his tax-related duties, he essentially lacks excuses for any future violations. The Instructions solidify this notion, warning that "[t]axpayers will be expected to comply with U.S. law for all tax years after the disclosure period and file returns according to standard filing procedures."[93]

S. Demand for Details

The Instructions leave no doubt that the IRS is seeking details and trying to prevent taxpayers from cherry-picking the facts that they reveal. For instance, the Instructions indicate the following when it comes to the required narrative in Part II of Form 14457:

> Include the whole story with all favorable and unfavorable facts, including the entire history of non-compliance from inception to the present. You **must** provide specific facts explaining your willful compliance failures. You **must** address the source of all unreported income. You **must** address the use of nominees, alter egos, and any other methods used to conceal your willful non-compliance.[94]

The Instructions further require taxpayers to supply lots of data about each entity involved in any way with the non-compliance, including the name, identity of all owners and their ownership percentages, an organizational chart diagramming all ownership, and a "complete story" about their role in the non-compliance.[95]

Taxpayers must provide a similar level of detail when they are embroiled in offshore issues. The Instructions demand disclosure of the source of all foreign funds, an explanation of all control over and/or transactions with foreign accounts or entities (*e.g.*, withdrawals, deposits, loans, and investment or management decisions), and a "complete story" about all non-compliant foreign assets.[96]

T. Big Endeavor

Many taxpayers likely will not realize just how much analysis and background work goes into participating in the UVDP, fully and accurately completing Part I and Part II of Form 14457, and then defending positions before a Revenue Agent during an audit. The IRS seems to get it, though. The Instructions estimate that, while amounts will vary depending on the circumstances of each taxpayer, gathering the necessary data, learning about the applicable law, and filling out Form 14457 will take approximately 59 hours.[97]

VI. Round Three—UVDP Guidance in 2022

The IRS took action yet again when it released the newest version of Form 14457 and Instructions in February 2022.[98] This segment of the article analyzes *only* the latest information.

A. Public Comments

The IRS sought public comments on its voluntary disclosure practice in general, and the UVDP in particular, in July 2021.[99] The American Bar Association ("ABA") took the IRS up on its offer, providing extensive remarks focused on the earlier guidance offered by the IRS in 2018 and 2020.[100] Some of these remarks are reviewed below.

With respect to administration of the UVDP, the criticisms centered on "significant delays" by the IRS in many ways. The ABA told stories of taxpayers waiting up to two years for the IRS to process Part I of Form 14457 (*i.e.*, the "preclearance request"), being obligated to make multiple submissions because of silence from the IRS, and having their follow-up inquiries go unanswered. This, suggests the ABA, discourages taxpayers from applying for the UVDP. To remedy the problem, the ABA suggested prioritizing review of UVDP materials, providing taxpayers with written confirmation of receipt of such materials, allocating additional human resources to the task, and moving some of the more detailed disclosures about foreign assets from Part I to Part II of Form 14457.[101]

The ABA also asked that the IRS get realistic about the time it really takes to participate in the UVDP. The version of Form 14457 released in 2020 estimated that taxpayers spend about 59 hours to keep the necessary records, understand the law, complete Form 14457, and file it with the IRS.[102] The ABA considered that calculation seriously off base, urging the IRS to increase it to 100 hours.[103]

The ABA then turned to uncertainty regarding the disclosure period and penalties that would apply under the UVDP. In other words, the ABA sought specificity about how many previous years taxpayers must rectify and at what cost. The ABA first underscored the fact that Revenue Agents have authority to expand the normal six-year period in situations where, in their judgment, taxpayers fail to "cooperate" adequately in the UVDP process and/or where civil fraud exists. Moreover, Revenue Agents enjoy similar latitude when it comes to applying penalties related to international information returns. The ABA acknowledged that the IRS needs the ability to appropriately deal with uncooperative and fraudulent taxpayers, but maintained that the current "broad discretion" granted to Revenue Agents is "excessive and risks significantly undermining the certainty taxpayers expect to receive when making a voluntary disclosure."[104] The ABA raised the following proposals to fix the perceived problems: eliminate Revenue Agent discretion, such that the disclosure period could never exceed six years; limit the use of such discretion to situations in which the taxpayer "clearly failed to cooperate;" or subject any proposal to expand the disclosure period to approval by a committee of senior IRS personnel.[105]

Next on the ABA's list were various items about which the IRS needed to issue more or better guidance. First, the ABA pointed out the disparities in the definition of "financial account" for various purposes, including the FBAR and Form 8938. The ABA urged the IRS to either adopt the FBAR meaning or clarify the definition with respect to cryptocurrency, gambling accounts, and accounts held by nominees, alter egos, and transferees because these "have been perplexing to practitioners handling voluntary disclosures in these areas."[106] Second, the ABA explained that the UVDP indicates that it will impose lower penalties (*i.e.*, accuracy-related penalties instead of those for civil fraud, and non-willful FBAR penalties in place of willful ones) in "rare and extraordinary cases." It then asked the IRS to do the logical thing, namely, provide more detail about the specific circumstances under which the IRS would entertain reduced penalties and give examples. This, according to the ABA, would limit the number of penalty abatement requests filed by taxpayers, and the subsequent analysis required by the IRS.[107]

The ABA also offered some thoughts about employment taxes and the UVDP. The Instructions to Form 14457 released in 2020 contained little information about employment taxes, stating only that "employment tax voluntary disclosures will be subject to penalties with a structure similar to income taxes [and] further guidance is pending."[108] The ABA recommended that the IRS create a penalty structure for employment taxes that "mirrors" that for income taxes. The ABA dedicated more attention to the disclosure period, though. It explained that the general six-year disclosure period for the UVDP translates into 24 separate periods for employment tax purposes because the duties generally are quarterly. It further explained that, unlike in the income tax context, retroactive correction of employment tax matters likely affects many persons other than the taxpayer, including all workers. The ABA floated the idea of reducing the disclosure period from six to four years, "to further reduce complexities and incentivize voluntary disclosures."[109] The ABA also suggested implementing a system whereby the employer could essentially file all returns and pay all employment-related amounts, such that the IRS would not need to approach individual workers directly.[110]

The ABA had some thoughts about the sworn declarations that taxpayers must make if they want to participate in the UVDP, too. As explained above, the Form 14457, its Instructions, and various IRS announcements make it clear that the UVDP is not for everybody. The IRS designed it for taxpayers whose conduct might be criminal and/or willful. Based on this reality, the ABA is leery of the need for taxpayers to provide the IRS with detailed, comprehensive information about all their wrongdoings in Part II of Form 14457, execute it under penalties of perjury, submit it to the IRS, and not have any guarantee against criminal prosecution.[111] To put it more bluntly, the ABA believed that the sworn statement requirement in Part II "potentially raises Fifth Amendment concerns regarding self-incrimination."[112] The ABA identified two possible solutions. The IRS could assure "preliminary acceptance" to taxpayers who submit executed Parts II, completed in good faith to the best of their ability. Alternatively, the IRS could give taxpayers assurances about the specific manners in which the government would be allowed to use the data provided in Part II, if the IRS were to reject taxpayers from the UVDP for some reason.[113]

B. Newest Form 14457 and Instructions

The most recent IRS guidance, introduced after a reprieve of nearly two years, is the result of both IRS experience and feedback from the ABA and other practitioners. In this regard, the IRS news release announcing the newest Form 14457 and Instructions in February 2022 stated that they "reflect input from practitioners and stakeholders, and take into account trends in the type of financial assets that taxpayers hold."[114] Much of Form 14457 remains the same, but the IRS introduced important changes that are easy to overlook. Below is a review of *only* what is new.

1. Direct Communications with Taxpayers

In the past, practitioners generally completed and filed Part I of Form 14457 for their clients, and the IRS responded *only* to the practitioners. The Instructions to new Form 14457 describe the longstanding scenario as follows: "Only communicating with the representative initiating the voluntary disclosure and not copying taxpayers ... has been standard operating procedure" for the IRS.[115] That has changed. The new Form 14457 features a box offering the chance for practitioners *and* the taxpayers to receive communications directly from the IRS.[116]

2. Facilitating Initial Communications

Historically, taxpayers had to place an *original* signature on Part II and send it to the IRS by *mail*. This could be quite challenging, of course, when taxpayers applying for the UVDP were divorced, residing in a city different from their representatives, or living abroad. The IRS has seen the light, so to speak, deciding to simplify the application procedure. The Instructions to the newest Form 14457 state that the IRS now "accepts and encourages" submissions of both Parts I and Parts II by fax.[117] They further indicate that the IRS accepts photocopies, faxes, and scans of taxpayer signatures, provided that taxpayers or their representatives retain the original versions in their files for six years, just in case the IRS gets a hankering to see them.[118]

3. Data About Past, Future, or Current IRS Battles

In determining whether it will grant "preclearance" to a taxpayer, the IRS is seeking additional information about tax disputes. In particular, Line 9 of the new Part I requires taxpayers to disclose whether they, their spouses, or any related entities have received a Notice of Deficiency for any year covered by the UVDP. If so, taxpayers must acknowledge this and enclose a copy of the Notice of Deficiency.[119]

In that same vein, Line 10 of the new Part I also mandates that taxpayers disclose if they, their spouses, or any related parties have litigated or are litigating any federal tax matters for any year covered by the UVDP in Tax Court, District Court, or the Court of Federal Claims. If this is true, taxpayers need to reveal to the IRS the case caption, docket number, and other information.[120]

The Instructions to Form 14457 provide additional backstory. With respect to Line 9, the IRS explains that its computer systems conduct automatic information-matching exercises in an effort to identify taxpayer non-compliance. If a taxpayer receives a Notice of Deficiency from a Substitute-for-Return Unit of the IRS, this will render the taxpayer ineligible for the UVDP because unfiled returns "would go to the very essence of a voluntary disclosure for a non-filer."[121] On the other hand, the IRS recognizes that sometimes it issues a Notice of Deficiency automatically because of specific data related to the taxpayer supplied by a third party. This type of Notice of Deficiency, clarifies the Instructions, would *not* necessarily make a taxpayer ineligible for the UVDP. The IRS will "analyze and compare" the tax issues raised in the Notice of Deficiency with those voluntarily described by the taxpayer in Form 14457. If they are different, then the taxpayer may proceed with the UVDP.[122]

4. Non-Tax Problems

Part I of Form 14457 probes for data to determine whether a taxpayer will be eligible for the UVDP. Among other things, it requires a taxpayer to reveal whether he, his spouse, or any related entities are currently the focus of a civil audit or criminal investigation by the IRS or any other law enforcement authority.[123] The newest Instructions clarify and expand on this mandate. They first explain that relevant enforcement actions encompass those by the IRS, state agencies, and foreign governments.[124] However, they limit this by stating that taxpayers are not obligated to reveal criminal investigations with "zero nexus" to financial matters, such as when a taxpayer is the target of a state criminal investigation for assault charges related to a "bar room brawl."[125]

5. Definition of "Financial Account"

All previous incarnations of Form 14457 have demanded data from the taxpayers about all non-compliant "financial accounts," but only the most recent version defines this key term. The Instructions indicate that, for purposes of the UVDP, financial accounts encompass (i) securities, brokerage, savings, demand, checking, deposit, time deposit, and any other accounts maintained with a financial institution or a person functioning as one, and (ii) futures accounts, options accounts, insurance or annuity policies with cash surrender values, and shares in a mutual fund or similar pooled fund.[126] The Instructions underscore that the concept of financial account pertains to accounts held directly by taxpayers or through nominees, alter egos, or transferees.[127] Finally, the Instructions emphasize that taxpayers should "interpret broadly" the concept of financial account to cover any type of relationship with a third party that was established to provide or engage in deposit-type services or other financial services, including virtual currency and gambling accounts, regardless of who provides such arrangements.[128]

6. Accounts Held by Entities

Taxpayers must provide the IRS with an estimate of the highest aggregate value of the non-complaint foreign assets for each year during the six-year disclosure period.[129] The Instructions to the new Form 14457 clarify that a taxpayer can omit from this calculation values of accounts held by entities in which he had no financial interest, such as accounts over which he solely had signature authority.[130] However, warn the Instructions, if a taxpayer owns all or part of a foreign entity that holds a non-compliant account, then the taxpayer is deemed to have an interest in the account for purposes of figuring the highest value.[131] The Instructions offer the following two examples:[132]

> **Example 1.** The taxpayer owns 50 percent of the shares in a foreign corporation, and family members own the remaining 50 percent. The corporation has an operating account in foreign bank. The taxpayer failed to file annual Forms 5471, to report his interest in the corporation, and failed to file annual FBARs, to report his indirect interest in the account. For purposes of determining the highest value of non-compliant assets for the UVDP, the taxpayer must include his shares in the corporation and his "effective control" over the account.

> **Example 2.** The taxpayer is a salaried employee of a foreign corporation, who has signature authority over a foreign account held by the corporation, but has no ownership interest in the corporation. The taxpayer can exclude the value of the account when calculating the value of non-compliant foreign assets, but he will still need to remedy his violations for not filing FBARs to report his signature authority over the account.

7. Virtual Currency

The previous rendering of Form 14457 was devoid of specific inquiries about virtual currency. This has completely shifted, with the newest version demanding significant data about this complex asset. New Line 13 of Part I obligates taxpayers to list all non-compliant virtual currency, whether domestic or foreign.[133] Expanding on this disclosure duty, new Line 13 says that the list must cover the entire UVDP disclosure period, including virtual currency acquired or disposed of during such period, as well as virtual currency held through entities that the taxpayer directly or indirectly controlled, owned, or beneficially owned.[134] Moreover, taxpayers who used a "mixer" or "tumbler" in connection with virtual currency transactions must explain the reason for doing so.[135] The Instructions leave no doubt that the IRS is prodding taxpayers for all possible data about their cutting-edge assets. They acknowledge that virtual currency is a "dynamic area" and that the IRS is seeking, for purposes of the UVDP, information about items that might exceed what many define as "virtual currency."[136]

8. Interviews Under Oath

The Instructions to the new Form 14457 put taxpayers on notice that seeking relief under the UVDP likely will require more than just submitting paperwork. In particular, they explain that a Revenue Agent "may require that you submit to an interview under oath to explain the facts provided in your voluntary disclosure, answer questions about return positions, provide information about promoters, and answer any other questions the [Revenue Agent] determines are relevant."[137]

The Instructions caution of similar inquiries on the other end, when taxpayers accepted into the UVDP are discussing payment abilities with the IRS. The Instructions indicate that a Revenue Officer "may require you to submit to an interview under oath to determine the viability of any proposed payment arrangements, verify the accuracy of statements made regarding assets and income, and answer any other questions the [Revenue Officer] determines are relevant."[138]

9. Expanded Descriptions of Non-Compliance

The IRS has never wavered in its quest to gather details about wrongdoing by taxpayers. As explained above, the Instructions to the earlier version of Form 14457 obligated taxpayers to provide "the whole story with all favorable and unfavorable facts," reveal "the entire history of non-compliance from inception to the present," admit to specific acts of "willful compliance failures," and explain "nominees, alter egos, and any other methods used to conceal" violations.[139] The IRS still wants all that data, of course, and it has expanded its demands to accommodate the evolution of the UVDP to cover all types of taxes.

The Instructions to the current Form 14457 set the tone, ordering taxpayers to describe the non-compliance "in complete and thorough detail."[140] With respect to estate, gift, and generation-skipping transfer taxes, the Instructions broadly ask for all details, including estimates of tax liabilities.[141] In situations involving employment tax problems, the Instructions require a schedule of unreported wages by quarter, an explanation of any issues with tax withholding, and a list of affected employees.[142] The Instructions are the most expansive when it comes to virtual currency issues. They direct taxpayers to explain how they acquired the assets (*e.g.*, kiosk, centralized online, peer-to-peer platform, operator, exchange payment processor, custodial banker, *etc.*), how they held the assets (*e.g.*, exchange, hosted wallet, private wallet, *etc.*), the names of the virtual currencies, and an estimate of virtual currency transactions conducted.[143]

10. Penalties Galore

The Instructions add a significant amount of information about various types of penalties, as broken down below.

a) Fraud penalties

When a voluntary disclosure involves fraud by a taxable entity, such as a Subchapter C corporation, and by an individual related to such entity, the Instructions clarify that the IRS will assert a civil fraud penalty or a fraudulent failure to file penalty, as appropriate, against both the entity and the individual for at least one year.[144] The Instructions contain the following example:

> Individual taxpayer was the sole shareholder of a corporation, and the corporation fraudulently understated income by paying personal expenses of the individual taxpayer and deducting them as business expenses. Individual taxpayer submits Forms 1040X for the past six years, while the corporation files Forms 1120-S for six years. The IRS will assert one fraud penalty to the year with the highest tax liability at the individual level and at the corporate level, and the IRS will not impose accuracy-related penalties for the remaining five years.[145]

b) Estate tax penalties

The Instructions indicate that the IRS will assert a civil fraud penalty or a fraudulent failure to file penalty, as appropriate, in all estate tax cases filed under the UVDP. However, the penalty will equal 50 percent of the tax underpayment, as opposed to the normal 75 percent.[146] The Instructions offer various examples of how this fraud penalty will work, using situations involving assets omitted from, or undervalued on, Form 706 (*U.S. Estate and Generation-Skipping Transfer Tax Return*), deductions and credits overstated on Form 706, and an unfiled Form 706.[147]

c) Gift tax and generation-skipping transfer tax penalties

As with estate taxes, the Instructions confirm that the IRS intends to asses a civil fraud penalty or a fraudulent failure to file penalty, as is fitting, in all UVDP cases involving gift tax and generation-skipping transfer tax.[148] In situations involving fraudulent activity in just one year, the Instructions state that the penalty rate will be 50 percent, not 75 percent.[149] However, in cases where the malevolent activity touches *multiple* years, the six-year disclosure period does not apply, the taxpayer must submit original or amended Forms 709 (*U.S. Gift and Generation-Skipping Transfer Tax Return*) for all relevant years, the IRS will impose the normal fraud penalty at a rate of 75 percent on the return with the highest tax liability, and the IRS will waive penalties on all other returns.[150]

d) Employment tax penalties

Punishments involving employment tax violations are the most complex. On a positive note, the Instructions explain that the IRS will assert a fraud penalty to *only one* tax quarter/period, the one reflecting the highest employment tax liability, and the IRS will not impose accuracy-related penalties or delinquency penalties to any tax periods.[151] On the negative side, the Instructions indicate that (i) the IRS will inflict failure-to-deposit penalties under Code Sec. 6656, (ii) employment tax liabilities will be calculated without applying the special reduced rates in Code Sec. 3509 and without the special interest-waiver rules in Code Sec. 6205, (iii) taxpayers cannot benefit from so-called Code Sec. 530 relief, (iv) the higher supplemental income tax-withholding rate will apply where taxpayers did not withhold and remit to the IRS proper amounts from the wages of workers, and (v) taxpayers must file all necessary Forms W-2 (*Wage and Tax Statement*) or Forms W-2C (*Corrected Wage and Tax Statement*), if necessary.[152] The Instructions contain several examples showing how employment tax matters will be handled under the UVDP. Two examples, the most complex and the simplest, are set forth below.[153]

Example 1. The taxpayer failed to treat workers as employees and failed to withhold and remit employment taxes to the IRS. Under the UVDP, the IRS will assert one fraud penalty on the tax period with the highest tax liability, will waive accuracy-related penalties for all periods, will assert failure-to-deposit penalties for all periods, and will figure the tax liabilities by applying the higher supplemental income tax rates and without allowing reductions normally available under Code Sec. 3509 and/or Code Sec. 6205.

Example 2. The taxpayer files late employment tax returns with the IRS. Under the UVDP, the IRS will assert one fraud penalty on the tax period with the highest tax liability, will waive accuracy-related penalties for all periods, and will assert failure-to-deposit penalties for all periods.

VII. Conclusion

In this era of sound bites, blogs, and mass messaging *via* social media, *serious* analysis of tax issues is lacking. Incomplete information, particularly when it comes to complex tax issues, can be fatal. Indeed, misunderstanding eligibility criteria, applying for the wrong disclosure program, disobeying precise procedures, failing to assert all available defenses, and other errors can be costly to taxpayers, in terms of both their money and liberty. Unlike other articles out there on this topic, this one strives to provide taxpayers and their advisors with *comprehensive* information and analysis about the UVDP, from inception to the present. Such data should gain importance as the IRS utilizes additional funding from Congress in 2022 to intensify its attacks on virtual currency, so-called tax shelters, unreported offshore activities, and more.

ENDNOTES

* Hale defends businesses and individuals in tax audits, tax appeals, and tax litigation, involving domestic and international issues. You can reach Hale by phone at (404) 658-5441 or by email at *hale.sheppard@chamberlainlaw.com*.

1 This article represents the third in a series following the UVDP. For earlier coverage, *see* Hale E. Sheppard, *IRS Issues New Form 14457 and Instructions regarding Its Comprehensive Domestic and International Voluntary Disclosure Program: Analyzing Key Aspects*, 46, 4 Int'l Tax J. 41 (2020); Hale E. Sheppard, *IRS Amnesty Covers More than Foreign Accounts: Analyzing the Updated Voluntary Disclosure Practice, New International Tax Withholding Procedure, and Guidelines for Late Returns by Foreign Corporations*, 97, 6 Taxes 19 (2019), republished in 45, 3 Int'l Tax J. (2019).

2 Code Sec. 7701(a)(30)(A); Reg. §7701(b)-1; Code Sec. 61(a) and Reg. §1.61-1(a) both provide that "gross income" generally means "all income from whatever source derived."

3 For a detailed discussion of common international filing requirements, *see* Hale E. Sheppard, *Extended Assessment Periods and International Tax Enforcement: Rafizadeh v. Commissioner, Unreported Foreign Assets, and Use of FATCA Weapons*, 44, 5 J. Int'l Taxation 25 (2018); Hale E. Sheppard, *Lessons from an International Tax Dispute: Three Interrelated Cases, in Three Different Proceedings, Generating Three Separate Liabilities*, 46, 5 Int'l Tax J. 43 (2020).

4 Code Secs. 6662 and 6663.

5 Pub. L. No. 108-357 (October 22, 2004).

6 31 USC §5321(a)(5)(B)(i). This penalty is inapplicable if the taxpayer was "non-willful" and there was "reasonable cause" for the violation. *See* 31 USC §5321(a)(5)(B)(ii).

7 31 USC §5321(a)(5)(C)(i).

8 Code Sec. 6038D(d)(1); Reg. §1.6038D-8(a).

9 Code Sec. 6038D(d)(2); Reg. §1.6038D-8(c).

10 Code Sec. 6038; Reg. §1.6038-2; Code Sec. 6046; Reg. §1.6046-1; Code Sec. 6679; Reg. §301.6679-1; Instructions to Form 5471.

11 Code Sec. 6038(b)(1); Reg. §1.6038-2(k)(1)(i); Code Sec. 6046(f); Reg. §1.6046-1(k).

12 Hale E. Sheppard, *What Garrity Teaches about FBARs, Foreign Trusts, "Stacking" of International Penalties, and Simultaneously Fighting the U.S. Government on Multiple Fronts*, 20, 6 J. Tax Practice & Procedure 27 (2019).

13 *See* Hale E. Sheppard, *Alarming U.S. Tax Rules and Information-Reporting Duties for Foreign Retirement Plans and Accounts: Analyzing Problems and Solutions*, 129, 4 J. Taxation 14 (2018) (explaining the four remaining international disclosure programs, as well as the now defunct Offshore Voluntary Disclosure Program).

14 *See, e.g.*, Robert B. Stack and Douglas M. Andres, "Expedited Opt-Out Needed for OVDI Participants Who Owe No Tax," 2012 Tax Notes Today 21-12 (Jan. 30, 2012) (stating that the taxpayer is "is worried that requesting retroactive treaty relief through the letter ruling process could be deemed a quiet filing, [the taxpayer] decides to enter the OVDI."); Robert Goulder, "Quiet Disclosures Get No Love from IRS," 2010 Tax Notes Today 90-1 (May 11, 2010); Marie Sapirie, "Charges Against HSBC Bank Bermuda Client Raise Quiet Disclosure Questions," 201 Tax Notes Today 98-1 (May 20, 2011); U.S. Government Accountability Office. "IRS Has Collected Billions of Dollars, but May Be Missing Continued Evasion," GAO-13-318

(2013) (explaining that IRS intends to identify and penalize "quiet disclosures").

[15] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[16] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[17] Andrew Velarde, "Noncooperation in Voluntary Disclosure Won't Blindside Taxpayer," Tax Analysts Document 2019-9094 (March 12, 2019) (comments by John Cardone, Director of Withholding and International Individual Compliance, LB&I Division); *See also* Nathan J. Richman, "Revisions to IRS Voluntary Disclosure Program Underway," 173 Tax Notes Federal 714 (November 1, 2021) (Daniel N. Price of the IRS Office of Chief Counsel stated at the UCLA Tax Controversy Institute that taxpayers "should use another avenue to return to compliance" unless they are concerned about criminal charges, civil fraud penalties, or willful FBAR penalties.)

[18] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[19] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[20] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[21] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[22] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[23] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[24] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[25] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[26] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[27] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[28] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[29] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[30] Andrew Velarde, "Noncooperation in Voluntary Disclosure Won't Blindside Taxpayer," Tax Analysts Document 2019-9094 (March 12, 2019) (comments by John Cardone, Director of Withholding and International Individual Compliance, LB&I Division).

[31] IRS Memorandum LB&I-09-1118-014 (November 20, 2018).

[32] Offshore Voluntary Disclosure Program, Frequently Asked Question #20; *See also* Internal Revenue Service. "Offshore Voluntary Disclosure Initiative Collection Procedure," Tax Analyst Doc. 2015-22100.

[33] Form 14457 (*Voluntary Disclosure Practice Preclearance Request and Application*) (April 2020).

[34] Andrew Velarde. "IRS Gives New Answers about Eligibility for Voluntary Disclosure," Tax Analysts Doc. No. 2020-18821 (May 13, 2020); *See also* Andrew Velarde. "IRS Has New Answers on What Voluntary Disclosure Entails," Tax Analysts Doc. No. 2020-18450, 2020 Tax Notes Today International 94-2 (May 14, 2020).

[35] Form 14457 (April 2020), Instructions, page 14.

[36] Form 14457 (April 2020), Instructions, page 8.

[37] Form 14457 (April 2020), page 1.

[38] Form 14457 (April 2020), Instructions, page 6.

[39] Form 14457 (April 2020), page 1.

[40] Form 14457 (April 2020), page 1.

[41] Form 14457 (April 2020), Instructions, page 12.

[42] Form 14457 (April 2020), page 2; Instructions, page 12.

[43] Form 14457 (April 2020), page 3.

[44] Form 14457 (April 2020), Instructions, page 12.

[45] Form 14457 (April 2020), page 4.

[46] Form 14457 (April 2020), Instructions, page 7.

[47] Form 14457 (April 2020), pages 4 and 5.

[48] Form 14457 (April 2020), Instructions, page 7.

[49] Form 14457 (April 2020), Instructions, page 7.

[50] Form 14457 (April 2020), Instructions, page 8.

[51] Form 14457 (April 2020), Instructions, page 8.

[52] Form 14457 (April 2020), Instructions, page 8.

[53] Form 14457 (April 2020), Instructions, page 8.

[54] Form 14457 (April 2020), Instructions, page 8.

[55] Form 14457 (April 2020), Instructions, page 6 (emphasis added).

[56] Form 14457 (April 2020), Instructions, page 6 (emphasis added).

[57] Form 14457 (April 2020), Instructions, page 6 (emphasis added).

[58] Form 14457 (April 2020), Instructions, page 7 (emphasis added).

[59] Form 14457 (April 2020), Instructions, page 13 (emphasis added).

[60] Form 14457 (April 2020), Instructions, page 10.

[61] Form 14457 (April 2020), Instructions, page 10.

[62] Form 14457 (April 2020), page 3.

[63] Form 14457 (April 2020), Instructions, page 10.

[64] Form 14457 (April 2020), Instructions, page 10.

[65] Form 14457 (April 2020), Instructions, page 10.

[66] Form 14457 (April 2020), Instructions, page 9.

[67] Form 14457 (April 2020), Instructions, page 9.

[68] Form 14457 (April 2020), Instructions, page 9.

[69] Form 14457 (April 2020), Instructions, page 13.

[70] Form 14457 (April 2020), Instructions, page 7.

[71] Form 14457 (April 2020), Instructions, page 8.

[72] Form 14457 (April 2020), Instructions, page 7.

[73] Form 14457 (April 2020), Instructions, page 7 (emphasis added).

[74] Form 14457 (April 2020), Instructions, pages 8-9.

[75] Form 14457 (April 2020), Instructions, page 10.

[76] Form 14457 (April 2020), Instructions, page 10.

[77] Form 14457 (April 2020), Instructions, page 10.

[78] Form 14457 (April 2020), Instructions, page 9.

[79] Form 14457 (April 2020), Instructions, page 9.

[80] Form 14457 (April 2020), Instructions, page 9.

[81] Form 14457 (April 2020), Instructions, page 11.

[82] Form 14457 (April 2020), Instructions, page 9.

[83] Form 14457 (April 2020), Instructions, page 9.

[84] Form 14457 (April 2020), Instructions, page 9. The author modified the examples for clarity's sake.

[85] Form 14457 (April 2020), Instructions, page 7 (emphasis added).

[86] Form 14457 (April 2020), Instructions, page 12.

[87] Form 14457 (April 2020), Instructions, page 12.

[88] Form 14457 (April 2020), Instructions, page 8.

[89] Form 14457 (April 2020), Instructions, page 11.

[90] Form 14457 (April 2020), Instructions, page 11.

[91] Form 14457 (April 2020), Instructions, page 12.

[92] Form 14457 (April 2020), Instructions, page 6.

[93] Form 14457 (April 2020), Instructions, pages 8 and 10.

[94] Form 14457 (April 2020), Instructions, page 14 (emphasis in original).

[95] Form 14457 (April 2020), Instructions, page 14.

[96] Form 14457 (April 2020), Instructions, page 14.

[97] Form 14457 (April 2020), Instructions, page 14.

[98] Internal Revenue Service, IR-2022-33, February 15, 2022; Form 14457 (February 2022).

[99] 86 FR 35868 (July 7, 2021), as corrected by 86 FR 40138 (July 26, 2021).

[100] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021); Nathan J. Richman, "Revisions to IRS Voluntary Disclosure Program Underway," 173 Tax Notes Federal 714 (November 1, 2021).

[101] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[102] Form 14457 (April 2020), Instructions, page 14.

[103] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[104] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[105] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[106] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[107] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[108] Form 14457 (April 2020), Instructions, page 8.

[109] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[110] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[111] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[112] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[113] "ABA Tax Section Offers Comments on Voluntary Disclosure Practice," 2021 Tax Notes Today Federal 185-29 (September 24, 2021).

[114] Internal Revenue Service, IR-2022-33, February 15, 2022.

[115] Form 14457 (February 2022), Instructions, Page 12.

[116] Form 14457 (February 2022), Line 6i.

[117] Form 14457 (February 2022), Instructions, page 7.

[118] Form 14457 (February 2022), Instructions, page 7.

[119] Form 14457 (February 2022), Part I, Line 9.
[120] Form 14457 (February 2022), Part I, Line 10.
[121] Form 14457 (February 2022), Instructions, page 14.
[122] Form 14457 (February 2022), Instructions, page 14.
[123] Form 14457 (February 2022), Part I, Line 11.
[124] Form 14457 (February 2022), Instructions, page 14.
[125] Form 14457 (February 2022), Instructions, page 15.
[126] Form 14457 (February 2022), Instructions, page 15.
[127] Form 14457 (February 2022), Instructions, page 15.
[128] Form 14457 (February 2022), Instructions, page 15.
[129] Form 14457 (February 2022), Part II, Line 5.
[130] Form 14457 (February 2022), Instructions, page 16.
[131] Form 14457 (February 2022), Instructions, page 16.
[132] Form 14457 (February 2022), Instructions, page 16. The author modified the examples for clarity's sake.
[133] Form 14457 (February 2022), Part I, Line 13.
[134] Form 14457 (February 2022), Part I, Line 13.
[135] Form 14457 (February 2022), Instructions, page 15.
[136] Form 14457 (February 2022), Instructions, page 15; *See also* Nathan J. Richman, "New Voluntary Compliance Form Leaves Crypto Questions for Users," Tax Analysts Doc. 2022-6799 (March 3, 2022).
[137] Form 14457 (February 2022), Instructions, page 8.
[138] Form 14457 (February 2022), Instructions, page 8.
[139] Form 14457 (April 2020), Instructions, page 14.
[140] Form 14457 (February 2022), Instructions, page 16.
[141] Form 14457 (February 2022), Instructions, page 16.
[142] Form 14457 (February 2022), Instructions, page 16.
[143] Form 14457 (February 2022), Instructions, page 17.
[144] Form 14457 (February 2022), Instructions, page 9.
[145] Form 14457 (February 2022), Instructions, page 9. The author modified the example for clarity's sake.
[146] Form 14457 (February 2022), Instructions, page 9.
[147] Form 14457 (February 2022), Instructions, page 9.
[148] Form 14457 (February 2022), Instructions, page 9.
[149] Form 14457 (February 2022), Instructions, page 9.
[150] Form 14457 (February 2022), Instructions, page 9.
[151] Form 14457 (February 2022), Instructions, page 9.
[152] Form 14457 (February 2022), Instructions, page 9.
[153] Form 14457 (February 2022), Instructions, page 10. The author modified the examples for clarity's sake.