My OVDI Odyssey

I am an OVDI participant who opted out and received full relief from all FBAR penalties as well as all tax penalties. I hope that with the publication of my OVDI Odyssey, I will provide hope as well as some information to US Persons abroad who may be in OVDP or OVDI. Perhaps a reader, whether resident abroad or an immigrant to the USA, will see something in my account that is similar to their situation and be able to use it to help them with their decision on what action to take.

You will see that I was naïve, but as I educated myself, thanks primarily to Jack's blog and comments from Just Me, Moby, Anon 123, ij and Sally, as well as reading the IRM, I lost my fear and was able to successfully present my case to the IRS.

I also benefitted from the efforts of the Taxpayer Advocate Service (TAS). While I handled all document filings and discussions with my Revenue Agent myself, I was able to turn to the TAS at critical moments when the situation became most overwhelming. I will describe how my case came to be accepted by the TAS as well as their interventions.

My profile is that of a minnow, although there are some things in my profile that on immediate glance would not look that way. In spite of these things, my Opt Out was successful and I am now of the belief that most minnows can obtain better results by opting out. While my narrative will not provide certainty for any OVDI/P participant, I hope that it can provide some examples that can help others with their decision.

I have provided copies of what I consider the most important documents related to my Opt Out:

- Calculation of Mitigated FBAR Penalties by Revenue Agent
- My Opt Out Letter
- My Reasonable Cause Arguments
- Letter of Acceptance into the Streamlined Program
- Letter 3800

Entry into Voluntary Disclosure System – Second half 2010

- Resident abroad 25 years. Was fully tax compliant outside of the US and was a self filer of US taxes during the entire period.
- Read on the Internet in the latter half of 2010 about FBAR penalties. I had no previous knowledge of the FBAR form. The threatening language and amounts of penalties terrified me and I panicked.
- Had no contacts with Americans in my country of residence, so contacted a distant friend in America who referred me to his accountant.
- The accountant told me it was good that I had been filing, but asked if I had any mutual funds outside of the US. When I said yes, the conversation went cold. The accountant refused to speak with me further and told me I needed legal counsel and referred me to a lawyer. I became quite scared and confused at his reaction.
- I contacted the lawyer and in a 15 minute conversation, the lawyer told me that I did not need to tell him my facts as there was no negotiation with the IRS if I had not filed an FBAR form. The only way to correct and explain errors was to join a Voluntary

Disclosure program. I could do a go-forward strategy if I felt really lucky and thought I would not get audited.

- My immediate reaction was that "If I owed past taxes I wanted to pay them".
- So without knowing if I owed taxes, nor anything about the recently ended 2009 OVDP, nor about the traditional Voluntary Disclosure program, I told the lawyer that I wanted to follow the proper procedure for correcting and explaining any omission and entered the traditional CI Voluntary Disclosure Program of the IRS. The lawyer never explained to me that CI stood for Criminal Investigation.

General Facts

- Had about two dozen accounts spread across several foreign countries.
- Some of these accounts were legacy accounts from permanent residence in Switzerland for more than a decade. I had since moved to the country where I currently reside.
- My employer sends its employees to other countries to work and during the OVDI period of 8 years, I had worked in multiple countries in which I had tax liabilities. My employer was responsible for the payment of taxes in the countries I was working in, which meant either my employer, or I, filed my tax returns in these countries.
- Sometimes, including the US return, I was filing 4 different tax returns per year.
- I had no clue of the complexity of coordinating the returns for US tax purposes, nor did my employer as most of its employees come from countries with residence based taxation.
- My accounts were savings/checking accounts or retirement mutual funds (PFICs).
- I made a lot of transfers between countries and accounts.

Rollover into OVDI

- Initially submitted documents as required by the Voluntary Disclosure Program
- Several months later, in February 2011, the OVDI Program started.
- In April 2011, my lawyers were told by the CI Agent I had to submit my documents via the OVDI Program.
- I refused. I understood the terms and conditions of the OVDI program as stating that I could not argue reasonable cause.
- My lawyers told me I had to cooperate and did not know what to do if I did not cooperate as all of their other clients had entered OVDI.
- I entered OVDI and began the process of submitting much of the documentation over again, which substantially increased my legal costs.

My Submission

- I submitted my OVDI documents in August 2011.
- In my submission, I included:
    - A letter detailing which documents I was submitting as part of the submission as required in FAQ 25.
    - A supplementary letter detailing my foreign residence and tax history. This showed how I qualified for the 5% penalty for foreign residents. It also gave the details of my tax compliance outside the US.

- Spreadsheets for each year detailing transfers between accounts and showing how I calculated the true balance in the account after transfers (my Revenue Agent said that this was very much appreciated)
- I adapted the OVDI Penalty Calculation Sheets to show two columns for each account – one for the highest balance before transfers and one based on highest balance after transfers.
- I only showed the calculation of the 5% penalty as the final penalty on the worksheet.

Waiting and Wanting to Opt Out (the 6 months after OVDI submission)

- I educated myself on OVDI by reading everything I could find on the program.
- Jack's blog was immensely helpful and when stories from people like Moby and Sally appeared, I realized that I had some of the same facts as they did and that opt out could be successful.
- I read Just Me's story on the Isaac Brock Society website and read the documents produced for his case by the Taxpayer Advocate Service (TAS). He also made it clear that the TAS was there for Taxpayers who had problems. This was the first I heard of the TAS. See http://isaacbrocksociety.ca/2012/02/04/letters-to-shulman-or-a-case-study-of-ovdp-communication-attempts-with-the-irs/
- I read the IRM Section 14.26.16.4 on the FBAR Penalties and Section 20.1.1 on reasonable cause many, many times.
- I began corresponding with my Congresswoman. Her Legislative Aide for Tax took an interest in my case, but initially did not believe that Americans residing abroad who had filing omissions were being treated too harshly for their facts. I had her contact Rep. Carolyn Maloney's office (the current contact there is Elizabeth Darnell: elizabeth.darnell@mail.house.gov), who sponsors the bi-partisan Americans Abroad Caucus. After that contact, my Congresswoman's Legislative Aide was very supportive and made calls to the IRS on my behalf. She referred me to the Taxpayer Advocate.
- I wrote up my Opt Out arguments in terms of the IRM and asked for a legal opinion from my lawyers. What I got back was, "Favorable facts. As you have a good chance of receiving the 5% penalty, we recommend that you accept payment of that penalty as it is lower than what our cost to represent you in an opt out would be." My 5% penalty was a mid five figure one.

The Best Decision I made during my OVDI Case

- My legal costs had soared to $40,000, plus accountant's costs of over $12,000.
- I applied to the TAS and my case was accepted.
- I revoked my lawyer's POA the next day, i.e., I fired him.

Notes on being accepted by TAS

- My case was accepted by the TAS on my fourth try.
- When I contacted the TAS on my fourth try, I was prepared with a letter of referral from my Congresswoman, spreadsheets showing how my high legal costs had caused financial difficulty for me and proof that I had been transferred from VD into OVDI and could no longer argue reasonable cause. I also had documents ready to show lengthy waiting with no response. At this point I had already been waiting for a response in Voluntary

Disclosure programs for almost 18 months and had not heard anything since my initial acceptance into OVDI.

- Ultimately, none of the documentation was reviewed.
- On the day I called the international TAS office in Puerto Rico, either there was a holiday, or there was an overload on the phone lines and I was referred to an IRS office on the US mainland. The intake worker there asked me lots of questions, even bringing her supervisor on the line while I answered the questions again. I mentioned the documents I had and specifically asked for help from the TAS.
- My TAS Case Advocate later told me that the Reason Code for my referral to the TAS was that I requested help from the TAS and apparently this was sufficient for the IRS to refer me.

Things to be aware of if your case is accepted by TAS

- TAS is not a substitute for a lawyer. I realized that I would have to do all document submission on my own and represent myself to the IRS.
- TAS can help move the process along and they did that 5 times in my case as I will explain.
- When you are accepted by the TAS, the TAS will ask you who your representative is and expect to communicate with him or her. I knew that if I wanted to opt out, I could not pay the costs to keep my attorney involved so at the moment TAS asked me about my representative, I made the decision to revoke my attorney's POA. (I have absolutely no regrets about that decision.)
- Your case is not accepted by the TAS until you have a case number. This was assigned by the IRS intake worker.
- The TAS Case Advocate who is assigned to your case will call you within one week of the case number being assigned. Case Advocates are not lawyers, but experienced Revenue Agents. Mine was a Collections expert, which helped me, but he had an OVDI learning curve and did very well in coming to understand some of the issues. He described my OVDI case as a much more complex than a typical case the TAS takes on.

Initial TAS Work

As my Case Advocate in the TAS did not understand anything about OVDI, he referred my case to a TAS RATA (Revenue Agent Tax Analyst – equivalent to an IRS Technical Advisor) for a technical analysis to try to understand the situation. I provided my Case Advocate with my tax returns and reasonable cause arguments so that he could understand my case.

A simple analysis came back. The TAS could not take any position as to what I should do, but it was stated in the analysis that due to "substantial similarity" to Example 4 of Fact Sheet FS-2011-13 on irs.gov (which was initially published in Dec 2011), this suggested that I should be found non-willful and that no FBAR penalty should apply. Specifically it was stated:

"The taxpayer's facts and circumstances appear substantially similar to the above fact pattern (Example 4 of FS-2011-13) and, therefore, lead to the belief that the taxpayer would obtain a penalty reduction - or complete non-assertion - due to reasonable cause. However, the taxpayer cannot obtain reasonable cause consideration within the 2011 OVDI because the 2011 OVDI

does NOT allow for any reasonable cause arguments. Furthermore, the taxpayer is correct in that the IRS publicly stated it would roll over VD participants into the 2011 OVDI. Therefore, the ONLY option the taxpayer has - which the TAS refrains from expressing any opinion as to whether the taxpayer should exercise that option or not - is to opt out of the 2011 OVDI."

So now I had a Revenue Agent in the IRS (albeit the TAS) stating that I appeared to be non-willful. This reassured me that the decision I had taken to opt out was going to be worth the risk. While I had no guarantees that the Revenue Agent who would be assigned to my case would see it in the same way the TAS RATA has seen it, in my mind, I was now committed to opt out.

The RATA's analysis also helped me to recognize that one does not need to fit a fact pattern exactly when one argues reasonable cause outside of OVDI. The examples in the IRM and the Fact Sheets can be used as a guide.

I entered a waiting period in which nothing happened while I waited for contact from a revenue agent from the IRS. The TAS maintained set monthly NCDs (Next Contact Date) with me to check if I had any contacts with the IRS during the month and how they went. They always called on the day they said they would. Several months went by and then a number of things happened that motivated the TAS to take specific action with respect to my case.

Three things happen that lead to greater TAS involvement

1. Collections Start

In a guest post on Jack Townsend's "Federal Tax Crimes" blog, Asher Rubinstein explained how the IRS was posting all OVDI payments to 2007 and since the amounts on returns submitted under OVDI were recorded in the system, but the return had not been accepted by the IRS, this lead to the generation of collections letters for years in which money was owed. This happened to me.

The year for which collections were started for me was one in which I had filed both the FBAR forms and the returns timely. I had overpaid the tax owed by almost 5 figures as I had not received my final determination from the tax authority in my country of residence when my OVDI submission was due. I had submitted an amended return to OVDI once I had the final determination from my country of residence in 2011. This return showed I owed next to nothing to the IRS for that year. As my returns had not yet been accepted by the IRS, the amended return just sat there and it appeared I owed a large amount of tax. Collections were started by the IRS on the 5 figures, when my true tax liability shown in the amended return was in the 3 figure range.

Thanks to the guest post on Jack's blog I did not panic. Neither did I turn to the TAS. I thought writing a simple letter to explain the situation to both OVDI and the Service Center would end this issue. I could not have been more wrong.

As collection letters are computer generated, it turned into a big farce of communication where I would write the IRS an explanation as soon as I received a letter from the IRS. Because I lived abroad, the letter would arrive after the date I was required to respond to it and as a result, new penalties would be assessed and I would get another letter stating these new penalties the following month. It was a vicious circle. My communications had no effect. The penalties went

up and up and up, until they were almost equal to the five figures that the IRS believed I owed. This continued for about 4 months.

In the fourth month, I contacted the OVDI Hotline and they said they could stop the collections for 9 weeks, but only for two periods of 9 weeks as it was assumed that an agent would take my case after 18 weeks. Boy, were they wrong.

2. First IRS Revenue Agent Contact

Toward the end of the period in which the OVDI Hotline had put the collections on hold, I received a telephone call from a Revenue Agent in Austin. I was happy as I thought this meant my case would finally move forward. Again, I was wrong.

When the agent called (which I have learned is surprising since I live abroad and IRS agents are not allowed to call internationally), I was busy and asked if he could call back later, but I asked him if there was anything special he wanted. He asked me if I would sign Statute of Limitation (SoL) extensions.

I had already decided to sign Statute of Limitation extensions because

1) I wanted to cooperate and
2) I had the belief that if I had reasonable cause, then signing them did not make any difference,

I said, "Sure, no problem." The agent was noticeably happy. I asked when he would call back and he gave a time. He did not call back and I never heard from him again. I tried to call him at the caller id number associated with his call and found out that he had called me using a phone card. I looked up his name in the IRS and called his office phone, but an outdated message (by two months) on his answering machine gave the name of someone else to contact. When I called that person, this person said, "Not my job" and was noticeably annoyed. When I requested email contact, I was told that IRS agents are not allowed to send emails.

I was quite upset at this first contact and decided to write both my Congresswoman and Nina Olson (the National Taxpayer Advocate) about this unsatisfactory first contact. The Legislative Aide for my Congresswoman contacted the office of this agent and received a reply back that became extremely useful for future action. It said that I, as the taxpayer, had to understand that agents were in the field and were very busy and that I, as a taxpayer, should have some understanding of the poor agent's situation. There was no recognition of the fact that my phone calls were not being returned and the promised contact had not been made.

3. Letter to Nina Olson and Nina responds

I commented about my situation on Jack Townsend's Federal Tax Crimes blog and Just Me suggested that I write Nina Olson directly as her email is public. I followed the suggestion. I told Nina that I was in OVDI and my case was with her agency and I had good contact with TAS Agents, but my first contact with the IRS had been disappointing. I focused on the fact that TAS agents could send emails and this had facilitated a positive relationship and good information sharing between my TAS Case Advocate and myself. I noted that it is possible to send emails to the Tax Authority in my country and they must have the same security concerns as the IRS does.

I recommended to Nina that she advocate for a policy allowing, at the very least, an exchange of non-confidential information by email.

Nina wrote me back within 3 days of when I sent the email. She stated that she has been pushing for the use of email within the IRS for non-confidential communications. She also told me that her two Attorney Advisors were following OVDI cases and she copied my email to them so that they would be aware of another OVDI case in the TAS.

This was a pivotal action that changed everything for my case.

Critical information from TAS on penalty amounts – IRM 4.26.16.4.7 (4)

Almost immediately, Nina's Senior Attorney Advisor contacted me. He wanted to know the details of my case and how long I had been in the OVD system. This began a period of collaboration in which we spent several hours on the phone going over my facts and my reasonable cause arguments. I had expected this kind of collaboration with my original attorney, but for the $40,000 I spent on that attorney, I never received this kind of analysis. From the TAS, I learned of the potential strengths and weaknesses of my reasonable cause arguments.

> (Note: Interestingly, the TAS Senior Attorney also told me that mine was the best taxpayer submission of reasonable cause he had ever seen. When at the end of my case, I asked my Revenue Agent if my reasonable cause arguments had been read, the Revenue Agent affirmed this and said it was like reading a "term paper." Their response makes me wonder what many taxpayer prepared reasonable cause arguments are like. My reasonable cause arguments were based on my reading of the IRM applied to my facts. Just Me's TAS documents which are published on the Isaac Brock Society website provided good guidance on how to formulate my arguments. I refer you again to: See http://isaacbrocksociety.ca/2012/02/04/letters-to-shulman-or-a-case-study-of-ovdp-communication-attempts-with-the-irs/ See Exhibit S. I also directly used some of the same general arguments of Moby have been published on Jack's Federal Tax Crimes site. See http://federaltaxcrimes.blogspot.se/2012/03/opting-out-2-3212.html)

The TAS Senior Attorney also pointed out IRM 4.26.16.4.7(4) which basically states that if someone has not been "egregious", they should not receive more than one FBAR penalty per year. This indicated that if I was considered non-willful, I should not receive more than 1 maximum FBAR penalty per year. I used $10,000 a year as a penalty and realized that if I opted out, in the worst case, this would be only slightly more than my OVDI penalty and I would have the chance to argue reasonable cause.

I considered this a very valuable piece of information in confirming my decision to opt out.

The specific text of IRM 4.26.16.7.(4) is: "Given the magnitude of the maximum penalties permitted for each violation, the assertion of multiple penalties and the assertion of separate penalties for multiple violations with respect to a single FBAR form, should be considered only in the most egregious cases."

The TAS Senior Attorney also pointed out that for years that were not filed, no accuracy penalty on any taxes owed should be assessed as no return was ever filed. If nothing was ever filed, how

can the return be inaccurate? The FTF (Failure to File/Failure to Pay) penalties provided for in Sections 6651 (a) and (b) are what are to be applied to non-filed returns.

Recommendation for any OVDI participant accepted by the TAS

For anyone in OVDI or OVDP whose case is accepted by the TAS, make sure your Case Advocate contacts one of Nina Olson's Attorney Advisors, Eric Lopresti or Rosty Schiller. Most Case Advocates have no experience with OVDI. As the Voluntary Disclosure Programs are one of the Most Serious Problems (MSPs) identified by the IRS, the TAS Attorney Advisors are monitoring them and can intervene in your process, if necessary.

There are a number of OVD cases in the TAS system and it is my view that the Nina's TAS Attorney Advisors wish to be aware of as many as possible. Contacts with the Attorney Advisors of the TAS helped my Case Advocate to understand more about OVDI and become more effective. Note that he commented to me that OVDI cases are really hard and complicated in comparison with most of the cases that the TAS deals with. This is why you must make sure your Case Advocate contacts the Attorney Advisors in Nina's office.

TAO issued

Almost immediately after getting in contact with the TAS Senior Attorney Advisor, collections were started again by the IRS and my Case Advocate told me that he could only stop them for another 14 weeks and did so (TAS Intervention #1). At the same time, I passed the IRS response to my Congresswoman's queries about the unresponsive Revenue Agent to Nina's Attorney Advisors.

The combination of these two events motivated the TAS to take concrete action.

The TAS investigated and determined the Revenue Agent who had contacted me, and who was unreachable, was not my final agent. His only purpose was to check to see if all my documents were complete and update the Statute of Limitation extensions if the time was about to run out on them. Once he had done so, my box was put into a holding area for assignment and shipping out to an agent who would work on the details of my case.

As I had already been about 24 months in the OVD system at this time, the TAS requested a date that my case would be assigned (TAS Intervention #2) and a response came back that I had a one year wait. This meant that I would likely be in the system 3 years before my case would be assigned. (This was in the second half of 2012).

With this news, the TAS sprang into action. Since:

1) There were other cases submitted after my case that had already been processed
2) The IRS had stated I would not be responded to before late 2013
3) The IRS had failed to meet the commitment made to respond to me in the contact that I had
4) Collections were continuing on a refund that I was actually owed,

the TAS decided to issue a TAO (Taxpayer Assistance Order). (TAS Intervention #3)

The TAO was very simple. It said, "Please assign anon5percent's case". The amount of effort spent on this TAO was incredible. I had to supply documentation of all my contacts with the IRS. I had certified each mailing so this was no issue. My Case Advocate, his supervisor, the Local Taxpayer Advocate (the local Taxpayer Advocate office head), the District Taxpayer Advocate and the Senior Attorney Advisor were involved for at least a week making sure that this TAO met the high standards required for a TAO and that it was error free.

The IRS accepted my TAO. On page 612 of the 2012 Taxpayer Advocate Annual Report to Congress (ARC), in the table, it shows that during 2012 only 434 TAOs were issued by the Taxpayer Advocate and 337 were accepted and complied with "as is" by the IRS. Mine was one of those.

The issuance and acceptance of the TAO changed my case and my life for the better. I was told the case was going to be assigned, but that it might take some time as the IRS was looking for an experienced agent in a time zone convenient for me who could work my case.

Contacts with Revenue Agent who worked my case
The agent I was assigned used as much discretion as in possible in OVDI to bring my case to a close. The agent was a true professional every step of the way.

The Revenue Agent was unaware that TAS was involved in my case. Apparently, there had been no TAS code entered into my file. The agent only became aware of the TAS at the end of my case.

The reason I mention this is because I consider the agent I worked with to be an ideal model for how agents should work within OVDI. I do not believe the agent gave me special treatment because of TAS involvement.

My experience convinces me that:

1) Experienced agents recognize OVDI minnows when they see one
2) On an individual level, there is much professional understanding for the situations of minnows led into OVDI
3) That some managers in the IRS are allowing limited amounts of discretion to be used by Revenue Agents
4) That there is recognition within the IRS that Americans residing abroad should not be in OVDI and subject to the extreme penalty levels and
5) There is recognition within the IRS that one size does not fit all.

First contact with Revenue Agent who worked my case
Approximately six weeks after I was told that my TAO had been accepted by the IRS, I received a request for Statute of Limitation extensions from a new agent. I signed them and returned them and called the agent to advise the agent that I had done this and ask if anything else was needed.

When I called, I identified myself and told the agent that I had signed the Statute of Limitations extensions and had sent them back. Like the first agent, this Revenue Agent seemed really happy about this. I asked if I would be continuing with this agent and I was told that the agent would be with me until the end of my case.

I then asked if there was anything the agent needed from me. I mentioned that the balance transfer calculations had been complicated. The agent told me the calculations were useful and thanked me for doing them.

Almost immediately thereafter, the agent stated, that my case had been reviewed and "there is absolutely no way anyone would ever consider you willful." I did not know how to respond to this.

I was quiet and then asked if the agent had any questions about my qualifications for the 5% penalty for overseas residents. The agent told me that I had already been approved for this penalty, but there was something else that we needed to discuss.

Tax Credits not allowed on OVDI MTM calculations

My agent then told me that we needed to discuss the MTM calculations. As I had been declaring my passive earnings and paying tax on them in my country of residence, my accountant took tax credits against the PFIC MTM tax. This PFIC tax within OVDI is a weird item. It is not in the normal passive basket on Form 1116, it is a line item by itself.

The Revenue Agent told me that tax credits on the MTM tax in the OVDI program were not allowed and if I "remained in the program," I would owe another $19,000 in tax. Inside OVDI, I had already paid $11,000 in tax over all my non-compliant years.

I remained quiet as I had already decided to opt out. I also really did not know what to say. I decided to say nothing because I knew I was going to opt out and the terms and conditions for PFICs would be different outside of the program.

Note: My accountant is convinced that this MTM tax credit has been allowed by some agents. As it was irrelevant for me, I never pursued it.

Opt Out mentioned several times

At this point, the agent repeated that I would owe an additional $19,000 in taxes within the OVDI Program, but if I chose to opt out, tax credits would be allowed. I did not respond to this.

The agent then said, "Let me explain a little bit about the program to you." The agent went on to explain that originally when the program had started all taxpayers with FBAR omissions had been directed into the program, which was a "one size fits all" program, but the Service soon learned that one size did not fit all. An Opt Out option had been developed for those who did not fit into the Program.

I still did not respond. The agent continued and said that the terms and conditions under opt out might be more favorable than those in the OVDI program as OVDI offered a good deal for willful tax evaders, but not to non-willful taxpayers.

The agent also mentioned that under opt out, for those who had previously filed and did not have major revenue discrepancies, tax years could be closed and that would also impact the final tax determination.

Around this point I decided to ask, "What is this opt out you are talking about?"

Boom! It was like floodgates opened. These were the magic words. The agent told me that under opt out penalties were calculated differently and the agent had prepared tables that showed what my penalties would be in an Opt Out scenario and that the agent was going to send me these so I could have a look at them.

Critical information that increased my resolve to opt out
The agent then told me that the penalties in the tables would be shown on a yearly basis and not to freak out (the agent's words) when I saw a total penalty amount of around $200,000 for all years.

The agent then clearly stated, at least 3 times, that in more than a decade of the agent's experience in international individual tax, the agent **"had never seen anyone receive more than one year of FBAR penalties".** I repeat, the agent told me this at least 3 times.

The agent told me to take a look at the table that would be sent to me before making any decisions.

Tables: Non-Willful II Penalties – Important to understand penalties at one's level of willfulness – Also SoL had run out on 2003 and 2004
Given this information of a possibility of only receiving one year of FBAR penalties and the wording in IRM 4.26.16.4.7 (4), that indicated that for non-egregious cases it was possible to receive only one FBAR penalty in a year, I now thought (rightly or wrongly) I might be looking at a total $10,000 FBAR penalty within OVDI. The tables sent to me made me think that it could be as low as $5000. Both were lower than my OVDI 5% penalty.

When I entered OVDI, I thought I would receive an automatic $10,000 penalty per account if I was not in the OVDI program. The tables made it clear that this was totally wrong. There are different levels of FBAR penalties and the tables showed that I was being considered as Non-Willful II and that these penalties are far less than USD 10,000 per account. This information is to be found in IRM Exhibit 4.26.16-2 (07-01-2008) on irs.gov.

What is most interesting to note is that under NWII, the penalty is 10% of the balance in EACH account, with a maximum of $5000 per account on accounts up to $250,000. I think many minnows assume that if the total balance on all accounts is over $250,000, then the penalty is $10,000 per account. I did.

I have provided a redacted copy of one of the penalty sheets sent to me to help illustrate how FBAR penalty calculations actually work outside of OVDI.

After reviewing the sheets and considering what the agent had told me, I realized that by opting out, my potential FBAR penalties, in the worst case, would likely be less than my 5% OVDI penalty, plus I could argue reasonable cause.

I decided not to wait until the agent had examined my accounts and issued a 906. I decided that I would inform the agent immediately that I was going to opt out. I had not read about any cases where an Opt Out had been done before a 906 was issued, but I did not see the point of wasting any more time in OVDI.

FBAR SOLs:
It is important to know when FBAR SoLs run out when making an OVDI opt out decision.
I noticed that the only tables sent to me were for 2005 and later. As it had taken the IRS so long to get to my case, in spite of all the FBAR SoL extensions I had signed, the only FBAR years that were still open were those from 2005 onwards. 2003 and 2004 were out of consideration for FBAR penalties outside of OVDI.

Next Steps
I contacted the agent and said that I had received the calculations and I wanted to opt out as soon as possible. The agent told me that I would have to write an opt out letter, but as I had officially informed the IRS of my opt out by phone, I was going to receive Letter 4564 warning me of high penalties, but I should realize that these were just routine letters that had to be sent out for procedural purposes.

The agent said that an examination would be done on the years that were open outside of OVDI and the agent was going to start this immediately. I had no objections to this.

Examination
The agent informed me that if I was going to opt out my PFICs would now have to be recalculated under the 1291 method instead of the modified 1296 method used in the OVDI program. The agent wanted to maintain control of this calculation and said initial impressions were that because of my behavior patterns with my PFICs, under the 1291 method, I would likely owe the same amount of tax, or possibly less tax than with the modified PFIC calculation within OVDI. It turned out that I owed a lot less tax with the 1291 method outside of OVDI.

The negative thing the agent informed me is that as all tax years except two were closed, I would not be allowed tax credits for the closed years if I had not claimed them in my original return and my accountant would have to recalculate my tax credits.

Two IDRs (Information Document Requests – Form 4564) were subsequently sent and they were concerned with proof of tax credits, earned income and calculations of tax credits.

I self-translated several documents and these were accepted by the agent.

My Opt Out Letter – (provided along with my reasonable cause arguments)

1. **My opt out letter -** I am providing the opt out letter I sent. In it, I requested:
    - Opt out into the Streamlined Program
    - Consideration of My Reasonable Cause Arguments if I was not accepted into the Streamlined Program
    - A First Time Abate on Tax Penalties

2. **Considerations**
    - The TAS had suggested that I opt out into the Streamlined Program for US Persons resident abroad. I told the TAS that I was not eligible for it as I had:
        - Owed more in OVDI than $1500 in tax some years (I did not yet know how much I would owe outside of OVDI)
        - I had filed before 2009 and the Streamlined Program was for non-filers
        - I had PFICs and maybe this was considered complicated
    - The TAS told me that:
        - the IRS had agreed to consider taxes owed higher than $1500 a year for the Streamlined Program
        - That as I was part of OVDI, it was understood I had to file before 2009 to be compliant and it was accepted that one could possibly make amendments after the OVDI returns were filed (this was my case) and this should not prevent my opt out into the Streamlined Program
        - PFICs were not necessarily complicated. If I had created entities to hold them, the IRS might consider something like that more complex.
        - If accepted into the Streamlined Program, it would be certain that I would owe no tax or FBAR penalties.

Opt Out Procedure and Complications

Procedure

My Revenue Agent explained to me that the Opt Out Committee is mostly concerned that all procedures have been correctly followed. My agent was not aware of any opt out that had ever been rejected. I asked if my agent had to make a recommendation to the Opt Out Committee and my agent said no because if accepted for Opt Out, I would go to examination, which the agent had already started. My agent also was going to receive the case back once the opt out was approved and I would not be assigned to a new agent. The agent could give no indication of when I would know if my Opt Out would be approved.

1. Complications

After I had submitted my Opt Out Letter, the Revenue Agent informed me that as I had asked to opt out into the Streamlined Program I now had two complications:

a. I was going to be rejected from the Streamlined Program because I was not a non-filer;
b. The queue for the Streamlined Program is a long one and it is managed on a first come first service basis and I was at the back of it. So I would have to wait a long time just to get rejected. I was told there "were likely 2000 Canadians in front of me" as many Canadians have chosen to apply for the Streamlined Program since it started in late 2012.
c. I had thought that the agent could choose which Opt Out procedure, Streamlined or regular OVDI Opt Out, was better for me, but the agent is not given the authority to make that decision. Only the Opt Out Committee can decide that. As I asked for the Streamlined Program, I was going to be sent to that program's Opt Out process and Committee.

d. The agent also told me that queue for people opting out of OVDI and directly into examination (not into the Streamlined Program) was shorter and while no specific time could be given, it would have likely been less than waiting for consideration under the Streamlined Program

2. Confusion about First Time Abate

a. My Revenue Agent told me that it could only be applied to one tax period. This has just recently been clarified by the IRS.
b. My Revenue Agent saw it as a Collections penalty relief and said that it could only be applied after the tax penalty was assessed by a Collections Agent. The TAS saw it as an Examination penalty relief and thought the Revenue Agent had the right to grant it. Therefore, I should ask for it during the examination. I did, but as a tax penalty was never assessed, I never needed to clarify the discrepancy.

Waiting – Time for More TAS Action

I waited two months to hear something back from the Opt Out Committee and nothing came back. At this point I contacted the TAS and said told them that I was annoyed at being put at the back of the queue of the Streamlined Program after I had already had been waiting 27 months when I opted out.

I also pointed out that my agent had told me that I would be rejected from the Streamlined Program due to the fact that I had filed returns previously.

This led the TAS to take 2 actions. They had the Technical Advisor within the IRS who knew the eligibility details of the Streamlined Program call my agent and explain the new policy about opt outs into the Streamlined Program (TAS Action #4) and they also explained how long I had been waiting in OVDI to the IRS (TAS Action #5) and magically, an Opt Out decision was immediately made on my case.

Done!

29 months after I had started in the Voluntary Disclosure Program, I received:

- Letter 5062 which states that I had been accepted into the Streamlined Program
- Form 4549 showing my revised income tax calculations for my open years
- Letter 4265 stating that now an FBAR exam was going to be done – my agent included another letter explaining that this was a procedural matter

One month later, 30 months after entering the Voluntary Disclosure Program system, I received a Letter 3800 for each open FBAR year. I was confused when I saw them as each letter requests that the FBAR forms be sent again. I called the agent and was told that this was only proforma. I had already submitted the FBAR as part of OVDI and I was done!

I asked the agent at this point if my reasonable cause arguments had been read and the agent said yes and that if I had not been accepted into the Streamlined Program the tax and FBAR penalties would have been waived as the agent had decided to accept my reasonable cause arguments. The agent also told me that an interview is listed as required for the FBAR examination, but from the

Agent's discussions me with, the Agent felt that there was sufficient information about me so that an interview was not necessary.

The agent also told me that I will receive refunds of all tax overpayments and tax penalties previously paid as part of OVDI.

Final Result

- During the OVDI period, an average of $133 a year in tax was owed in total.
- No FBAR penalties were assessed
- No tax penalties were assessed

Conclusions

The process was entirely unnecessary and a waste of my time and money. After 30 months and excessive legal costs, I ended up in the same place I would have been without entering any Voluntary Disclosure Program. I filed amended returns, had an examination and was able to argue reasonable cause.

The IRS wasted lots of money and time to collect my $133 a year. The costs of the Taxpayer Advocate Service were additional public costs that were caused by inappropriate IRS policy. Furthermore, I incurred high legal costs and had to live with undue stress as I was treated in the same category as criminals who had intentionally evaded taxes.

Nina Olson runs a tight ship at the Taxpayer Advocate Service. Her staff helped me to understand and feel less stressed and they were extremely conscientious as well. Congress made a good decision when they created the TAS and they could not have a better person to lead it than Nina Olson. I am extremely grateful to Nina, her Senior Attorney Advisor and my Case Advocate. The issuance of the TAO changed my life for the better as the IRS finally started to move on my case.

The IRS policy of "one size fits all" was totally misguided. However, there are good, highly professional agents out there who are aware of this and will use the small amount of discretion they are given within the program. I think there is an unannounced policy within the IRS that one size does not fit all. Outside of OVDI, examiners have more discretion and the regulations in the IRM can work in the favor of most minnows.

The worst part of OVDI for me was dealing with tax professionals. The lawyers I dealt with made me feel like a criminal and ran up excessive fees. My experience with my IRS Revenue Agent was a lot more pleasant and while I think it is a good thing to get legal advice on your options and about the strength of your opt out arguments, ultimately, I did not see the need for extensive legal advice. Run from any lawyer who tells you that a Voluntary Disclosure Program is your only option and that there is no negotiation.

The IRS needs to develop a better way to assist US person foreign residents to come into compliance. While the Streamlined Program is a start, the rules are confusing and unclear to both those inside and outside the IRS. The Streamlined Program needs to go further and its rules need

clarification and communication. The Streamlined Program could also be extended to immigrants to the US.

I have signed documents allowing my data to be used by the Taxpayer Advocate in the next Taxpayer Advocate Annual Report to Congress (ARC). Hopefully, this data, along with that of others can motivate the IRS and/or Congress to take action to fix the problems created by the OVDI/P approach.

I am grateful that Jack took up the topic of OVDI on his blog and grateful for the comments on his blog from other OVD victims. You saved me. Thank you and it is now time to move on.