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I want to make a Voluntary Disclosure, but I don't have the money to pay what I may owe

February 13, 2011

One of the conditions of the new Offshore Voluntary Disclosure Initiative is the requirement that all income tax liabilities including taxes, interest on the income tax, and penalties be paid, along with an FBAR penalty with the submission of the supporting documents. The question is what if you cannot now make the payment in full or at all.

The [IRS](#) has published guidelines in the form of Frequently Asked Questions to anticipate some of the issues that may come up. FAQ 20 and its answer state the requirement for payment and FAQ 25 and its answer describe how a payment agreement will be approached.

FAQ answer 25 states the taxpayer must submit financial statements using Forms (433A, for individuals and 433B for businesses) which are [IRS](#) forms. This is important, because there are two different statutory schemes at play, the Internal Revenue Code and the Bank Secrecy Act. The income tax, interest and penalties relating to income tax on the unreported income and possibly unfiled income returns, (including information returns, like Form 5471 and 3520) are governed by the Internal Revenue Code. The FBAR penalty (the 25% penalty) is governed under the Bank Secrecy Act. This is likely to be important in that some taxpayers who no longer have the funds, because of poor investment results, health expenses or casualty losses, may wish to file an Offer in Compromise if they otherwise meet offer criteria.

The fundamental question, not address in the FAQ's is how [IRS](#) will address administration of potential offer cases. There are the following potential outcomes. First, all liabilities could be the proper subject of an offer. Second, only the income tax liabilities could be covered by an offer. Third, neither liability is covered. The third is the least likely as income taxes, interest and penalties are properly within offer guidelines.

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If the second approach is the result because of a lack of authority to compromise Bank Secrecy Act penalties, then the question that arises is whether the taxpayer can make a “designated” payment to cover only the Bank Secrecy Act liability and make an offer on the Income Tax liability. Again, the FAQ’s are silent. The FAQ’s may need to be supplemented to answer these questions, or separate guidance issued. Until then, the best approach is for taxpayers to consult with counsel. The worst decision would be to avoid making a disclosure and run the risk of prosecution.

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