

Draft Date: 10/30/2008

CASE MIS No.: [RP-XXXXXX-YY]

Part III

Administrative, Procedural, and Miscellaneous

[26 CFR 1.XXX-X]: [Title of the primary regulation section]
(Also: [XX, XXX, XXXX])

Rev. Proc. [XXXX-XX]

SECTION 1. PURPOSE

This Revenue Procedure describes the Internal Revenue Service's Foreign Asset Disclosure Initiative (FADI) for United States taxpayers who have undisclosed interests in foreign accounts, foreign entities (including, but not limited to, corporations, partnerships, trusts and foundations), or both and may have used these accounts or entities in a manner that facilitated the nonreporting or underreporting of their United States tax liabilities. This Initiative provides taxpayers an opportunity to resolve their outstanding liabilities for prior tax years by filing correct tax and information returns, properly reporting their interest in all foreign accounts and entities and avoiding possible criminal prosecution or [significant civil penalties under the provisions of Titles 26 and 31 of the United States Code](#) that would otherwise apply. Accordingly, any taxpayer who uses foreign accounts or entities to understate their United States tax liabilities or who fails to report foreign accounts as required by the Bank Secrecy Act and who fails to participate in this Initiative will be subject to full enforcement of the tax laws by the Service. The Service is using all available enforcement tools to identify U.S. taxpayers using foreign accounts and entities to conceal financial activity and to evade tax and information reporting requirements. Taxpayers who choose not to participate in this Initiative run an increasing risk of discovery and, once discovered, face not only

payment of back taxes and interest but an array of significant penalties, including criminal prosecution. Depending on the nature of the offshore structure employed by a particular taxpayer, the financial penalties can be as high as several times the amount of the tax evaded and can even exceed the amount of the offshore assets.

SECTION 2. BACKGROUND

.01 United States citizens and residents are required to pay tax on all of their world-wide income. Except for participants in the Qualified Intermediary program, foreign financial institutions and other businesses are not required to report or withhold with respect to payments made to U.S. taxpayers. As a consequence, the Internal Revenue Service has no independent information about the income of many U.S. taxpayers with foreign assets and **income** and is completely dependent on those taxpayers to properly self-report. To provide a greater incentive for those taxpayers to properly report their foreign income, several laws require special information reporting about foreign accounts, entities and transactions and impose very heavy penalties on those who fail to do so. For example, taxpayers with foreign bank accounts are required to check a box on Schedule B of their Forms 1040 to advise the IRS of the existence of foreign accounts, and are required under the Bank Secrecy Act to file a Foreign Bank Account Report (FBAR) reporting details of that account with the Treasury Department. In addition, taxpayers with foreign trusts and corporations are required to file special information returns on behalf of those entities and incur very substantial penalties if they fail to do so. In addition to those penalties, failing to file the information returns has the added consequence of keeping the statute of limitations open indefinitely on the taxpayer's individual 1040, permitting IRS to go back many years to assess unpaid taxes on foreign income once the existence of that income is discovered.

.02 Experience has shown, however, that in spite of the heavy consequences of getting caught with unreported foreign accounts and income, many wealthy taxpayers have failed to fulfill their tax obligations with respect to foreign accounts and **income**, relying on the secrecy practices of foreign financial institutions and service providers to keep them safe from detection. Several recent Senate investigations have publicly documented devices taxpayers use to secretly move funds and assets offshore, and control and enjoy those funds and assets through accounts nominally owned by shell corporations, trusts, foundations, and other similar entities. In some cases the assets are located in the United States but the taxpayers avoid paying tax on the income they produce by holding the assets through the foreign shell entities.

.03 As a result of increased public attention drawn to this problem by the Service's enforcement efforts, the Senate hearings, and reports of information being supplied by whistleblowers, the number of taxpayers with unreported offshore **income** making voluntary disclosures has been steadily increasing. The Initiative announced in this Revenue Procedure is prompted in part by the need to ensure consistent treatment of

taxpayers making voluntary disclosures and in part by the desire to encourage additional taxpayers to come forward, become compliant with the law, and provide information to enable the Service to broaden its enforcement efforts against the promoters and facilitators who profit from assisting United States taxpayers to evade their United States tax liabilities.

SECTION 3. SCOPE

.01 This Revenue Procedure applies to tax years ending after December 31, 2001.

.02 For cases resolved under this Initiative, the Service will not pursue tax, interest or penalties relating to the undisclosed use of foreign accounts or assets for tax years ending prior to January 1, 2002.

SECTION 4. TERMS

.01 At the time the taxpayer enters into a specific matters closing agreement (as provided in Section 9), the taxpayer must fully pay the tax liabilities, interest and penalties, as computed under this Section, or make other financial arrangements acceptable to the Service for all years covered by FADI. In addition, the taxpayer must fully pay all other unpaid, previously assessed liabilities, or make other financial arrangements acceptable to the Service.

.02 Except as provided in subsection .03 of this Section, in lieu of all applicable civil penalties that the Service may assert with respect to the items being resolved under FADI (i.e., those items arising from the use of foreign accounts and entities) for the tax years for which the taxpayer seeks relief under FADI, the taxpayer will be liable for a 30 percent penalty on the highest yearly aggregate account balance of all undisclosed foreign accounts, or asset balance of all undisclosed foreign entities, owned or controlled by the taxpayer during the years for which the taxpayer participates in FADI.

.03 The taxpayer will be liable for a 10 percent penalty on any foreign account or entity that meets each of the following criteria:

(1) The taxpayer did not have ownership of, or control over, the foreign account or entity at the time it was opened or created, and the taxpayer received ownership of, or control over, the account or entity through gift, inheritance or the operation of law;

(2) There has been no activity conducted by the taxpayer regarding the foreign account or entity, such as the withdrawal or deposit of funds or transfer of beneficial interest or ownership shares (other than periodic accrual of interest, capital gains or dividends), as part of or subsequent to the taxpayer attaining ownership or control of the account or entity and the steps associated with perfecting that interest; and

(3) The account or entity is funded with assets upon which all applicable United States taxes, including income, gift, estate and generation-skipping taxes, which have become due and owing while the taxpayer has had ownership or control of the account or entity and for which the taxpayer is liable, have been paid.

.04 Taxpayers who participate in this Initiative are not relieved of any tax, penalty or interest attributable to any adjustments that the Service may determine that are unrelated to the taxpayer's use and failure to disclose foreign accounts or entities. The relief described in subsections .02 and .03 of this Section is only applicable with respect to the adjustments relating to the taxpayer's use and failure to disclose foreign accounts or entities, which will be the subject of a closing agreement described in Section 9.

SECTION 5. ELIGIBLE TAXPAYERS

.01 A taxpayer who has an undisclosed interest in a foreign account or entity and either an unreported or underreported United States tax liability arising from, or facilitated by, the use of foreign accounts or entities may elect to participate in this Initiative if the taxpayer meets the following conditions:

(1) The taxpayer's written request to participate in FADI is received before:

(a) (i)(A) the Service has initiated a civil examination of the taxpayer, or
(i)(B) has notified the taxpayer of an examination, and

(ii) the examination relates to the undisclosed foreign accounts or foreign entities;

(b) (i)(A) the Service or the United States Department of Justice has initiated a criminal investigation of the taxpayer, or

(i)(B) has notified the taxpayer that it intends to commence a criminal investigation;

(c) (i) the Service has initiated a civil examination or criminal investigation of another person or entity such as a partnership or corporation,

(ii) the examination or investigation is directly related to matters affecting the federal tax liability of the taxpayer (i.e., the Service is investigating an entity, organization, etc. in which the taxpayer was involved (directly or indirectly) and from which the taxpayer's United States tax liability arises), and

(iii) the examination or investigation relates to undisclosed foreign accounts or foreign entities;

(d) the Service has received information from a third party (i.e., informant, other governmental agency, or the media) alerting the Service to the specific taxpayer's noncompliance with the United States tax laws arising from the use of foreign accounts

or entities, except if the taxpayer is otherwise determined to be eligible by Criminal Investigation, in their sole discretion;

(e) the Service has acquired information directly related to the taxpayer's liability from a criminal enforcement action (i.e., search warrant or grand jury subpoena) regardless of whether the enforcement action was related to a tax compliance investigation;

(2) The taxpayer has not organized, managed, promoted, solicited or in any way encouraged or facilitated the involvement of others (other than members of the taxpayer's immediate family, or of individuals from whom the taxpayer did not receive compensation of more than a nominal amount with respect to foreign accounts or entities) in arrangements that involved the use of foreign accounts or foreign entities to facilitate the nonreporting or underreporting of federal tax liabilities; and

(3) During the years for which the taxpayer seeks to participate in the FADI, the taxpayer has not derived income from illegal sources and the taxpayer has not used the foreign accounts or entities to support or in any way facilitate illegal activities unrelated to taxes.

.02 The Service will treat the request to participate in FADI as a request to make a voluntary disclosure pursuant to its Voluntary Disclosure Practice as described in IR-2002-135, Dec. 11, 2002.

SECTION 6. APPLICATION

.01 Taxpayers who wish to participate in FADI must, on or before **[INSERT DATE that is 60 days from the release of FADI]**, send a written request, on Form XXXX, to participate in FADI via the United States Postal Service or by private courier to **[INSERT]**. The taxpayer's completed Form XXXX must include the following:

- (1) A statement that the taxpayer requests to participate in FADI;
- (2) A statement that the taxpayer is eligible to participate in this Initiative, as described in Section 5 of this Revenue Procedure;
- (3) The taxpayer's name, taxpayer identification number, passport number, date of birth, current address and daytime telephone number;
- (4) The name and office location of the Service official, if any, whom the taxpayer previously contacted about making a voluntary disclosure;

(5) The name, firm, address and telephone number of any representative and include copies of any powers of attorney (Forms 2848) granted by the taxpayer with respect to tax years for which the taxpayer requests to participate in FADI;

(6) The names, firm or financial affiliations, addresses and telephone numbers of any party who organized, managed, promoted, solicited or facilitated the taxpayer's involvement in the foreign accounts or entities;

(7) The names, addresses and telephone numbers of any professionals who advised the taxpayer with respect to his or her involvement in the foreign accounts or entities (including the names of the advisor's firm, bank, institution, etc.);

(8) List any foreign accounts that were owned by, or held for the benefit of, the taxpayer. The taxpayer must include the name and address of the bank or other financial institution in which each account was held;

(9) List all foreign entities in which the taxpayer has or had any ownership or beneficial interest in or that are or were controlled by the taxpayer (e.g., the taxpayer has or had the practical ability to direct or influence the financial transactions or affairs of an account or entity, or the use or disposition of an asset, whether this ability was exercised directly or indirectly through a nominee, agent, power of attorney, letter of directions, letter of wishes, or any other device whatsoever) at any time after December 31, 2001; and

(10) Identify the source of funds or assets kept in any foreign accounts or held by a foreign entity owned or controlled by the taxpayer at any time after December 31, 2001, including the identity and employer identification number of all domestic entities that were the source of those funds or assets and the relationship of those domestic entities to the taxpayer.

SECTION 7. ACKNOWLEDGEMENT OF TAXPAYER'S REQUEST TO PARTICIPATE IN FADI

.01 The Service will acknowledge receipt of the taxpayer's written request to participate in FADI within 30 calendar days of receipt of the request. In its acknowledgement, the Service will advise the taxpayer whether the taxpayer has been preliminarily determined to be eligible or ineligible to participate in FADI. The acknowledgement will not include a determination of the applicable penalty rate. Also, a preliminary determination of eligibility will not prevent the Service from later determining that the taxpayer is not eligible to participate in FADI.

SECTION 8. ADDITIONAL TAXPAYER REQUIREMENTS

.01 Within 150 calendar days of the date of the letter informing the taxpayer that the Service has preliminarily determined the taxpayer's eligibility to participate in FADI, the taxpayer must send the following material via the United States Postal Service or by private courier to **INSERT**:

- (1) Copies of original and amended federal income tax returns for tax periods ending after December 31, 2001, that the taxpayer previously filed;
- (2) Complete and accurate amended federal income tax returns (or original returns, if not previously filed) of the taxpayer for all tax years ending after December 31, 2001, and an explanation of previously unreported or underreported income or incorrectly claimed deductions or credits, including the reason(s) for the error or omission;
- (3) If the taxpayer is a decedent's estate, or is an individual who participated in the failure to report the foreign account or entity in a required gift or estate tax return, either as executor or advisor, complete and accurate amended estate or gift tax returns (original returns if not previously filed) necessary to correct the underreporting of assets held in or transferred through undisclosed foreign accounts or foreign entities during the period after December 31, 2001.
- (4) Complete and accurate amended information returns required to be filed by taxpayer, including, but not limited to, Forms 3520, 3520A and 5471, (or originals, if not previously filed) for all tax years ending after December 31, 2001, for which the taxpayer requests relief;
- (5) Complete and accurate Form TD F 90.22-1, *Report of Foreign Bank and Financial Accounts*, for foreign accounts maintained during calendar years ending after December 31, 2001;
- (6) Materials regarding the taxpayer's introduction to foreign accounts or entities, including originals and translations (if applicable) of all promotional materials, transactional materials and other related correspondence and documentation that the taxpayer, at any time, received regarding the establishment of foreign accounts or entities; and
- (7) Originals and translations (if applicable) of all documentation regarding foreign accounts or entities (including, but not limited to, account statements and any other account records, receipts, income statements, cash flow analysis and any other statements or correspondence regarding transactions conducted through the foreign accounts or entities [and documentation reflecting the identity and value of all assets held through the foreign entities](#)) for all tax years ending after December 31, 2001.

.02 Upon the Service's request, and within the period of time allowed by the Service in

its request, the taxpayer must provide any additional information requested by the Service concerning transactions conducted through the foreign accounts or entities, and provide executed consents to extend the time to assess tax for years that the taxpayer requests to participate in FADI.

.03 Participants will be required to waive the provisions of section 6103 to permit use of the documents they submit (but not their federal income tax returns) in any investigation or proceeding (including applications for judicial approval of John Doe summonses) involving promoters, facilitators or other entities that were involved in their offshore financial affairs. A waiver paragraph will be included in the closing agreement to be executed under Section 9 of this Revenue Procedure.

.04 Any contact or communication by the Service with a taxpayer regarding the taxpayer's request to participate in FADI is not an examination of books and records for purposes of section 7605(b) or Rev. Proc. 2005-32, 2005-1 C.B. 1206. The Service may audit the returns of any taxpayer who participates in FADI, and may propose tax adjustments, including penalties, regarding items that are not resolved under FADI.

SECTION 9. FINAL DETERMINATION THAT TAXPAYER IS ELIGIBLE TO PARTICIPATE IN FADI

.01 After an eligible taxpayer meets the requirements of sections 5, 6 and 8 of this Revenue Procedure, the taxpayer must execute a specific matters closing agreement in the form appended to this Revenue Procedure as Exhibit 1. In the closing agreement, the taxpayer must waive all defenses to the assessment and collection of tax, penalties, and interest under FADI, including any defenses based on the expiration of the period of limitations on assessment or collection. The taxpayer must also agree, in the closing agreement, that the failure to disclose information that would make the taxpayer ineligible to participate in FADI, or the failure to fully and accurately provide the information required by this Revenue Procedure, constitutes misrepresentation of a material fact under section 7121. The taxpayer must return the executed closing agreement to the Service within 30 days. An extension of this period may be granted by the Service, in its sole discretion, for good cause. If the taxpayer fails to submit the executed closing agreement to the Service within the prescribed period, the taxpayer will be deemed to be ineligible to participate in FADI.

.02 Execution of the closing agreement by the Commissioner constitutes a final determination under section 7121 that the taxpayer is eligible to participate in FADI. The agreement constitutes a final determination only with respect to the items addressed by FADI.

SECTION 10. EFFECTIVE DATE

.01 This revenue procedure is effective [INSERT DATE THIS REVENUE PROCEDURE IS RELEASED TO THE PUBLIC] , the date this revenue procedure was announced by news release.

SECTION 11. PAPERWORK REDUCTON ACT

.01 The collection of information contained in this Revenue Procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number [INSERT OMB CONTROL NUMBER]. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

.02 Requests for information are contained in Section 6 (APPLICATION), Section 8 (ADDITIONAL TAXPAYER REQUIREMENTS), and Section 9 (FINAL DETERMINATION THAT TAXPAYER IS ELIGIBLE TO PARTICIPATE IN FADI) of this Revenue Procedure. This information will be used to determine whether a taxpayer is eligible for FADI and to apply the terms of the Initiative. This information will also further the Service's understanding of how the use of foreign accounts and entities to avoid United States tax liabilities are promoted and solicited. Collection of the information described in this Revenue Procedure is required to obtain the benefits of FADI. The likely respondents are individuals, corporations, partnerships, trusts, and other entities.

.03 The estimated total annual reporting burden is uncertain but estimated to be at least [INSERT HOURS] hours. The estimated annual burden per respondent varies from [INSERT HOURS], depending on individual circumstances, with an estimated average of [INSERT HOURS] hours. The number of respondents is uncertain but estimated to be [INSERT NUMBER]. The estimated frequency of responses is at least one per respondent.

.04 Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, in accordance with 26 U.S.C. § 6103.

SECTION 12: DRAFTING INFORMATION

.01 The principal authors of this Revenue Procedure are Kimberly Mattonen and Carlton King of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this revenue procedure contact [INSERT NAME OF CONTACT PERSON] at [INSERT TELEPHONE NUMBER] (not a toll free call).