



Must You Enter IRS Offshore Disclosure With Your Spouse? By Robert W. Wood, Esq....August 2012

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In early 2012, the IRS announced another offshore account disclosure program. See *New IRS Offshore Amnesty Announced: Third Time's A Charm*. Like the 2009 and 2011 versions, it offers the chance to get right with the IRS. Come forward now and pay manageable penalties or face potentially confiscatory penalties or even prosecution later.

As global transparency and financial disclosure seem to have gone into hyper-drive, the choice for many seems easy. But what if your spouse does not even know about the money? That makes coming clean even tougher.

Spousal Issues. If you've filed joint tax returns, your spouse *is* involved, even if he or she did not know of the money. Signing joint tax returns makes you *both* liable. See *Consider Tax Filing Status Carefully*. Plus, if you filed tax returns jointly, you normally must amend jointly too.

That means if you go into the IRS OVDP to clean up your accounts, you must do it jointly, right? I sure thought so. But in late June 2012, the IRS released an updated version of its Frequently Asked Questions on its OVDP program.

A new FAQs 24.1, asks: What should I do if my spouse also wishes to make a voluntary disclosure under OVDP? This one is a surprise, as many advisers (including me) thought joint tax returns meant joint participation in the OVDP was mandatory. However, it is evidently optional.

According to an OVDP hotline representative (whose advice is not binding), the IRS highly recommends that both spouses enter the program where joint returns were filed during the disclosure period. However, the representative said the IRS could in its discretion accept the signature of only one spouse on amended joint returns, as long as full payment of the tax, interest and penalties is made. Thus, it is conceivable that one spouse could enter the OVDP and amend joint returns without the other spouse's knowledge.

On the other hand, where spouses both want to participate in OVDP, the FAQs state clearly that they may do so jointly or separately. If they enter jointly, they should be sure to include all required information and documents for each spouse and clearly indicate their intention to disclose jointly. If they do it separately, each spouse should separately complete and submit all required information and documents. See FAQs 22 through 25.

Joint Accounts. The IRS must be seeing accounts with co-owners where one person claims they have no beneficial interest or only owns a portion of the account. Perhaps this is occurring where one person is making a voluntary disclosure and the other need not report the income or the account (such as a foreign relative). The IRS says that in the case of co-owners, each taxpayer who makes a voluntary disclosure is liable for the penalty on his percentage of the highest aggregate balance in the account.

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The burden is on the disclosing taxpayer who claims to own less than 100% to establish what portion he does own. Thus, evidentiary issues can become nettlesome. This may be especially so (as is so often the case) where family account matters are informal.

For more information, in the Tax Management Portfolios, see Toscher, Perez, Rettig and Robbins, 636 T.M., Tax Crimes, and in Tax Practice Series, see ¶ 3830, Penalties.

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