

## Scott Michel Comments on Public Leaks Aiding in U.S. OVDP Penalty

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Public leaks, such as the Panama Papers, that are being mined for investigatory leads by the IRS and the U.S. Justice Department may not be an appropriate cutoff for applying the higher penalty under the IRS's offshore voluntary disclosure program, according to some practitioners.

Scott D. Michel of Caplin & Drysdale, Chtd. compared the possibility of using public leaks as the basis for inclusion on the list to the subjective timeliness criteria that had been used for voluntary disclosure practice before the current version of Internal Revenue Manual section 9.5.11.9 shifted to objective criteria regarding when the IRS receives information. The three triggers currently in FAQ 7.2 are "largely clear and specific benchmarks" comparable to the objective timeliness criteria in the IRM, he said.

The current criteria rely on fixed determinations by the government concerning the institutions and facilitators that get added to the list, Michel said. In a typical bank case leading to a NPA, the bank will warn account holders that it may be required to disclose information to the U.S. government and sends them letters encouraging them to make voluntary disclosures under the OVDP, including descriptions of potential civil and criminal consequences, he said. The IRS determined that at some point, an account holder has enough notice of the potential for disclosure that there should be a price for waiting and that the fixed determination — in the bank example, the publication of the completed NPA — serves as that point, he said.

The problem with using public leaks for justifying the higher penalty is that when leaks occur, neither the validity of the information nor the presence of actual noncompliance is assured, Michel said. "If you are going to say that a taxpayer is gaming the system by waiting until their names are in the Panama Papers or they are mentioned in some kind of a media leak, then you are on a slippery slope — should the taxpayer whose spouse threatens to go to the IRS suddenly be in the 50 percent group?" he said. "There could be any leak or public or private disclosure to the IRS about any account or any bank or any asset manager anywhere in the world at any time."

Michel said the publication of leaked information would be better thought of as serving the same function as the advance warning banks moving toward a NPA provide to their clients.

For the full article, please visit [Tax Notes'](#) website (subscription required).

Excerpt taken from the article "Are Public Leaks Enough for the Higher U.S. OVDP Penalty?" by Nathan J. Richman for Tax Notes.

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