Streamlined Disclosure in *U.S. v. Brian Nelson Booker*

A Former CPA Sets a Dubious Precedent

By Sharon L. McCarthy

Brian Nelson Booker has the dubious distinction of being the first person criminally charged by the Department of Justice (DOJ) with allegedly making false statements in connection with the IRS's Streamlined Domestic Offshore Program (SDOP). The former CPA is now a fugitive, living since 2016 in a country that has no extradition treaty with the United States. The allegations in the *Booker* indictment [*U.S. v. Brian Nelson Booker,* 19 Cr. 60152 (S.D. Fla.)] should alarm anyone who has participated in the submission of a false streamlined disclosure, and it is an unfortunate reminder of the need for tax advisors to be vigilant when making assertions of nonwillfulness before the IRS.

Obligation to Report Foreign Bank Accounts

The *Booker* indictment sets forth certain truisms of foreign account reporting that have been in place since the Bank Secrecy Act was passed into law in 1970, and that by now should be well-known to all return preparers:

- All U.S. citizens are obligated to report all income earned, regardless of where they earned it, on a U.S. Individual Income Tax Return each year, and they are required to pay the taxes due on that income.
- U.S. citizens are also obligated to report to the IRS each year whether they had an interest in, or signature authority over, a financial account in a foreign country for that year by checking "Yes" or "No" in the appropriate box on Schedule B of IRS Form 1040, and identifying the country where the account was maintained.
- Each year, U.S. citizens who had an interest in, or signature authority over, one or more financial accounts in a foreign country with an aggregate value of more than $10,000 at any time during

the prior year are required to file with the Commissioner of Internal Revenue a Report of Foreign Bank and Financial Accounts (FBAR). An FBAR identifies, among other things, the name of the financial institution at which the account was held, the account number, and the maximum value of the account during the calendar year.

Willful failure to comply with these foreign account reporting requirements can result in civil penalties of the greater of $100,000 or 50% of the amount in the account for each violation; each year of noncompliance also constitutes a separate violation. Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the willful FBAR penalties were increased to the greater of $129,210 or 50% of the amount in the account for penalties assessed after January 15, 2017. Potential criminal penalties for willful failure to comply include up to five years in prison and a fine of up to $250,000 [18 USC 5322(a)].

Voluntary Disclosure and Streamlined Domestic Disclosure

In 2007, after a whistleblower revealed that UBS in Switzerland was assisting U.S. taxpayers in evading U.S. taxes through undisclosed foreign bank accounts, the IRS and DOJ undertook a major effort to scrutinize the foreign account reporting of U.S. taxpayers. In 2009, the IRS began to use a carrot-and-stick approach to foreign account reporting by announcing the first of a series of formal Offshore Voluntary Disclosure Programs (OVDP), which gave taxpayers the ability to disclose their interests in foreign bank accounts without the risk of criminal prosecution. In announcing these OVDPs, the IRS stated clearly that those who did not come forward promptly to disclose faced the very real possibility of criminal prosecution.

In June 2012, the IRS announced the SDOP, which opened the door to significantly lower potential penalties for taxpayers who were able to truthfully certify that their failure to report foreign accounts or income was due to nonwillful conduct. The certification of nonwillful conduct had to include a narrative—signed under penalty of perjury—explaining the origin and background of the foreign account, including favorable and unfavorable facts, the source of the funds, and the taxpayer's contact with the account at issue. The certification must also set forth the taxpayer's basis for asserting that the failure to report was nonwillful—that is, it was due to negligence, inadvertence, mistake, or conduct that was the result of a good-faith misunderstanding of the requirements of the law.

In exchange for filing three years of amended returns reporting foreign income and six years of FBARs, a taxpayer is required to pay a significantly reduced civil penalty equal to 5% of the highest year-end balance of accounts and assets that should have been reported on either the FBAR or IRS Form 8938, Specified Foreign Financial Assets. This 5% penalty for those who qualify under the SDOP is significantly less than that offered in every permutation of the OVDP, which began at 20% in 2009 and is now set at the default "willful FBAR penalty," which is the greater of $129,210 or 50% of the amount in the account. [See IRS Interim Guidance Memo, Updated Voluntary Disclosure Practice (November 20, 2018).] As a result, the SDOP is very attractive to taxpayers who waited to come forward to disclose their foreign accounts. As will be explained below, only a narrow range of taxpayers meets the nonwillful requirements of the SDOP, but many willful taxpayers try to make the case for eligibility. That is why both taxpayers and tax advisors face particular scrutiny in the context of the SDOP.

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It is no secret that the DOJ has invested tremendous resources into prosecuting taxpayers who failed to take advantage of the many opportunities to come forward through one of the OVDPs. Since 2008, the DOJ has criminally charged more than 130 accountholders and 40 facilitators, including tax advisors (Testimony of Acting Assistant Attorney General David A. Hubbert of the DOJ Tax Division Before the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial & Antitrust Law, at a Hearing on Oversight of the Tax Division, June 8, 2017, http://bit.ly/37qZuBI). Beginning in 2016, the DOJ made it clear that those who participated in the SDOP should be concerned if their disclosures were not truthful:

> While we certainly encourage taxpayers to come into compliance, Tax Division prosecutors are reviewing certain streamlined filings and will investigate and prosecute taxpayers who willfully submit false statements in an effort to obstruct and impede the IRS and evade the payment of tax due. (Principal Deputy Assistant Attorney General Caroline D. Ciraolo, Keynote Address at the American Bar Association's 27th Annual Philadelphia Tax Conference, November 2, 2016, http://bit.ly/2qoSIZy).

With the filing of the *Booker* indictment, the DOJ's threats have become a reality.

What Did Booker Do?

Because Booker has absented himself from the United States and is considered a fugitive, the only facts available about the case are those alleged by the government in the indictment. According to the indictment, Booker is a U.S. citizen who was registered as a CPA with the Texas

State Board of Public Accountancy from 1976 until 1991. Most recently, until December 2016, he had been living in Florida, where he operated a Panamanian cocoa trading company from his home. The cocoa trading company also operated in Venezuela.

Booker filed FBARs in 2008, 2009, and 2010, reporting his interest in two bank accounts located in Venezuela; however, he failed to include in those FBARs his interest in bank accounts, valued in some years in excess of $9 million, located in Switzerland and Panama, as well as his interest in an "insurance wrapper" policy held in the name of a Singaporean insurance company with an account in Switzerland. The indictment explains that the insurance wrappers enabled a policyholder to maintain financial assets in a foreign bank account, but had the effect of concealing the policyholder's interest by holding that interest in the name of the insurance company, not the individual.

From 2004 until 2009, Booker had an account at Schroder & Co. Bank AG. In 2009, Schroder notified Booker in writing that he either needed to withdraw his funds from the bank or provide Schroder with an IRS Form W-9, through which his interest in the account would be reported to the IRS. In apparent response to the bank's letter, Booker instructed Schroder to transfer all assets in the accounts to an account at another Swiss bank, held in the name of the Singaporean insurance company. Booker held the interest in that account through at least February 2019.

In addition, from 1999 through 2013, Booker held a financial interest in bank accounts in Banco General, SA, headquartered in Panama City. The Banco General accounts were held in the name of the cocoa trading company operated by Booker.

Schroder participated in the DOJ's Swiss Bank Program, through which Swiss banks were given the opportunity to resolve potential criminal liabilities in the United States arising from their participation in assisting U.S. taxpayers in concealing their interests in foreign bank accounts. Through the Swiss Bank Program, Schroder provided the DOJ with information regarding Booker's relationship with the bank.

In addition to his failure to report the accounts in Switzerland and Panama on FBARs, the indictment alleges that Booker failed to report income earned from those accounts. U.S. citizens who hold life insurance or annuity contracts with foreign insurers are required to report to the IRS any premiums paid to the foreign insurers during that quarter on IRS Form 720 and pay an excise tax on those premium payments. Booker is alleged to have been aware of, but failed to comply with, his obligation to file Form 720 and pay an excise tax on premiums he paid in conjunction with his insurance wrapper policy with the Singaporean insurance company. In addition, although Booker reported gross receipts and net profits for his cocoa trading company on IRS Form Schedule C for at least two tax years, 2008 and 2009, he allegedly underreported the gross receipts and net profits for the company, as well as his total income for those tax years.

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In July 2015, Booker filed delinquent FBARs for calendar years 2008 through 2014 that disclosed his interest in, and signature authority over, 14 foreign financial accounts that he previously had not disclosed, including the Swiss and Panamanian accounts described above.

In October 2015, Booker submitted a streamlined submission, IRS Form 14654, in which he certified that he "learned about the FBAR filing requirements in 2008" and that he "mistakenly believed that only personal financial accounts had to be reported on the FBAR." He further certified that he was eligible for treatment under the streamlined procedures and that his failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to nonwillful conduct.

As a result of the conduct alleged, Booker has been charged with three counts of filing false reports of foreign bank and financial accounts, in violation of 31 USC 5314 and 5322(a), each count carrying a maximum sentence of five years in prison. He has also been charged with four counts of filing false statements with the IRS, under 26 USC 7206(1), each count carrying a maximum sentence of three years in prison. Included in those false statements are those made by Booker in the streamlined submission, specifically that his failure to report the foreign accounts was due to nonwillful conduct.

Streamlined Disclosure Applies Only to Nonwillful Conduct

When the IRS announced its first OVDP with the promise of a 20% civil penalty—versus the statutory penalty of up to 50% of the aggregate high balance of undisclosed accounts for every year of nondisclosure—some taxpayers believed the civil penalty to be unfair, particularly when they established the foreign account after suffering religious or political persecution. Under subsequent iterations of the OVDP, that penalty increased, first to 25%, then 27.5%, and now the greater of $129,210 or 50%. It is no surprise, then,

that taxpayers are attracted to the 5% penalty offered by the SDOP. Most taxpayers, upon reading about the SDOP, believe that their circumstances fit perfectly into its requirements. It therefore comes as a shock to many taxpayers when their tax advisors inform them that their conduct would be construed by the IRS as "willful," and that they are not in fact eligible for the lower penalty.

The circumstances under which the nonwillful 5% penalty would apply include, for example, the following fairly clear-cut scenarios. In each case, it is assumed that upon learning of the reporting requirement, the taxpayer sought advice from a tax professional:

- Taxpayer's grandparents established a foreign account for him when he was born 60 years ago. Taxpayer just learned of the account, never deposited money into the account, and never took money out of the account.
- Taxpayer, a U.S. citizen, was sent by her company to its London office and established a foreign bank account in her own name to receive her salary. Taxpayer was advised by her U.S. accountant—incorrectly—that she did not have to report the account to the IRS until she moved back to the United States. Taxpayer has that advice in an e-mail from the accountant.
- Taxpayer, a French citizen, came to the United States for school and ended up staying and obtaining U.S. citizenship. Taxpayer worked abroad before coming to the United States and had no idea that the foreign account that held his savings from his prior work needed to be reported to the IRS.

In all three scenarios, the taxpayers likely would be able to meet the nonwillful standard of the SDOP; that is, that the failure to report the foreign account was due to negligence, inadvertence, mistake, or conduct that was the result of a good faith misunderstanding of the requirements of the law. Each could comfortably submit a streamlined disclosure and certify under penalty of perjury that their conduct was nonwillful.

In the vast majority of situations in which foreign accounts have not been reported, however, the facts are not as favorable and suggest that the taxpayer took steps to hide the account from the IRS in an effort to avoid paying tax on the income earned in the account, or for the purpose of hiding the source of the funds in the account. Some of the most common badges of willful conduct, or fraud, seen in the foreign account context include the following:

- Using a bank secrecy jurisdiction, such as Switzerland or the British Virgin Islands
- Hiding money from a spouse or business partner
- Failing to pay tax on the corpus of funds in the account (e.g., skimming from a business)
- Failing to pay tax on the income earned in the account
- Numbered account or pseudonym used to identify account
- Entities or structures created solely for the purpose of holding the account, thereby insulating the taxpayer's identity
- Instructions to bank to hold mail related to the account and to not send any mail to the taxpayer in the United States
- Moving the account after being advised by the first bank that the account would be disclosed to the United States
- Using cash or a debit card to extract cash from the account
- Failing to tell accountant or other advisor about the account, particularly in response to a direct question on a tax organizer
- Failing to check the appropriate box on Schedule B of Form 1040.

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The allegations in the *Booker* indictment suggest that the government found Booker's certification of nonwillfulness to be unbelievable, based on the following factors:

- Booker had been a CPA and therefore had the training necessary to give him heightened awareness of the reporting requirements.
- Booker had reported some of his foreign accounts but failed to disclose accounts holding over $9 million.
- Booker's accounts were held in the bank secrecy jurisdictions of Switzerland and Panama.
- Booker's Swiss account was held in the name of a Singaporean insurance company, thereby hiding his identity as the owner of the account.

CPAs and return preparers should keep the *Booker* case in mind when advising taxpayers on their eligibility for the SDOP. As noted above, taxpayers are attracted to the 5% penalty offered by the SDOP, but they must qualify to earn that lower penalty rate.

Violators Will Be Prosecuted

The criminal charges against former CPA Brian Nelson Booker, the first ever arising from the IRS's Streamlined Domestic Disclosure Program, serve as an important reminder to all return preparers of their duties not only to report their own income honestly and correctly, but to provide sound advice to clients whose interest in a lower penalty may blind them to facts that indicate willful nonreporting. Tax advisors now have concrete proof, through the *Booker* indictment, that submission of fraudulent certifications in the SDOP could result in criminal prosecution. ❑

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