

# First Charges Announced for Bad Entry Into OVDP Alternative

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A cocoa trader turned tax fugitive faces what appear to be the first charges that include a false submission under the federal streamlined filing procedures.

“This is the first indictment I am aware of that alleges the taxpayer certification of non-willfulness in the streamlined program constitutes the criminal filing of a false document with the IRS,” Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP told *Tax Notes*.

Caroline Ciraolo of Kostelanetz & Fink LLP agreed that the indictment against Brian Nelson Booker — [announced August 27](#) by the Justice Department — is the first she has seen involving an allegedly false streamlined submission.

An August 22 [superseding indictment](#) charges Booker with three counts of filing false foreign bank account reports — for 2011 through 2013 — and four counts of filing false statements with the IRS under [section 7206\(1\)](#). Three of the false statement charges, which were from the original June 6 indictment, concern allegedly false income tax returns filed for 2010 through 2012.

The new [section 7206\(1\)](#) charge involves Booker’s October 2015 filing under the streamlined domestic offshore program, which the government alleges “falsely certified that he met all the eligibility requirements for treatment under the Streamlined procedures, and falsely claimed, among other things, that his failure to report all income, pay all tax, and submit all required information returns, including FBARS, was due to non-willful conduct.”

Both the streamlined filing procedures and the offshore voluntary disclosure program offered taxpayers with undeclared foreign accounts a way to come back into compliance. Before it closed in September 2018, the OVDP was for willful failures to fully disclose a taxpayer’s offshore assets. The program’s deals came with a closing agreement including assertions that the IRS wouldn’t refer the case for criminal prosecution and a miscellaneous penalty between 20 percent and 50 percent of the highest balance of undeclared assets, depending on when the disclosure was made. The IRS updated its [general voluntary disclosure program](#) in November 2018.

The streamlined filing procedures are meant for non-willful violations, perhaps due to negligence; they don’t come with a closing agreement, but have only a 5 percent miscellaneous penalty.

Ungerman noted that the IRS and Justice Department’s Tax Division have

been considering [criminal charges](#) for omissions or false statements in streamlined program submissions for years. “That threat is a reality now,” he said.

“The indictment is a shot across the bow to taxpayers and practitioners who automatically choose the streamlined program solely because the penalties are lower than a formal voluntary disclosure,” Ungerman said.

“Understand that the government is reviewing these submissions,” Ciralo said, echoing statements she made as Tax Division head.

## Central America

According to the superseding indictment, Booker ran a cocoa trading company operating in Venezuela, Panama, and Florida. He had two bank accounts in Caracas that he reported on his FBARs and tax returns for 2008 through 2010. The government noted that he was a CPA in Texas from 1976 to 1991.

However, Booker also allegedly had accounts at Swiss and Panamanian banks, as well as an insurance wrapper policy from a Singaporean company. An insurance wrapper is a financial product that nominally looks like insurance but is used as a vehicle to hold some other financial assets.

While participating in the U.S. Justice Department’s Swiss bank program, [one of Booker’s Swiss banks](#) told him in 2009 to either report his account to the IRS or take his money and leave. He chose the latter and had the money transferred to another Swiss bank connected to his insurance wrapper policy, becoming a [so-called leaver](#), according to the superseding indictment.

In July 2015 Booker filed delinquent FBARs for 2008 through 2014 that finally reported his Swiss and Panamanian bank accounts and his insurance wrapper policy. In October 2015 he made the allegedly false streamlined submission claiming his FBAR reporting failures were non-willful because he learned about FBARs in 2008 and had incorrectly believed that he only had to report personally held financial accounts and not those held by his business.

The superseding indictment asserts that Booker was aware of the foreign insurance excise tax requirement and failed to file Forms 720, “Quarterly Federal Excise Tax Return.”

The government’s indictment notes that after Booker found out about the criminal investigation into his dealings, he relocated on “or about December 28, 2016 . . . to a country that has no extradition treaty with the United States. He has remained outside the United States since that time.”

## Takeaways

Ciralo said taxpayers need to carefully consider their paths back to compliance and not focus on the lower penalty offered by the streamlined program.

“Taxpayers should re-examine positions taken in the streamlined program that may be considered false in light of the Booker indictment,” Ungerman said. “Since the streamlined program is merely a tax return processing program, taxpayers and tax professionals who believed there would be little or no IRS scrutiny were sadly mistaken.”

Ciraolo contrasted Booker’s indictment with the [disagreements](#) that practitioners and the government have been litigating regarding the definition of willfulness for FBAR violations.

“Mere disagreements with the characterization of accurately reported conduct can’t be charged under [section 7206](#). There must be some lie,” Ciraolo said, adding that the indictment shouldn’t be seen as a reason not to consider making a streamlined submission.

No defense attorney has so far entered an appearance in *United States v. Booker*, No. 19-cr-60152 (S.D. Fl. 2019).