

Voluntary Disclosure, Going Forward (US version)

13 January 12

The 2012 Offshore Voluntary Disclosure Program

On January 9, 2012, the IRS announced a new Offshore Voluntary Disclosure Program (the 'OVDP') that gives taxpayers with unreported foreign accounts a chance to come clean while mitigating the risk of criminal prosecution, noting that 'the risk for people who do not come in continues to increase.'

The OVDP borrows heavily from the terms offered in the 2009 and 2011 voluntary disclosure programs, with some significant changes. Unlike the previous programs, there is no deadline by which applications must be submitted and the OVDP will remain open until further notice. The IRS has cautioned, however, that the terms of the program may change (including by increasing the penalties) and the IRS may end the program entirely at any time.

As in the 2011 voluntary disclosure program, taxpayers wishing to participate must file original and/or amended tax returns and pay back taxes for the eight tax years prior to the year of disclosure (tax years 2004 through 2011 for individuals making a disclosure in 2012), including accuracy-related and/or delinquency penalties. The generally applicable penalty rate has been increased from 25% to 27.5% of the total aggregate value of unreported foreign bank accounts, foreign companies, and other offshore assets.

Non-US residents may qualify for a reduced 5% penalty if (i) the taxpayer was tax compliant in the jurisdiction of residence, or (ii) the taxpayer was an 'accidental American' who had been unaware of his or her US citizenship. Further, the IRS has noted that it is developing procedures for delinquent dual citizens and others who are not compliant with their US tax and filing obligations but who owe no US tax, and such guidance may result in no OVDP penalty.

As in the 2011 voluntary disclosure program, taxpayers with offshore accounts that did not surpass \$75,000 in the aggregate in any year may be eligible for reduced 12.5% penalty rate.

Individuals who are considering participating in the OVDP should seek advice from a qualified US attorney so that such advice is subject to the attorney client privilege. The failure to file an income tax return, filing a false income tax return, wilfully failing to file an FBAR or filing a false FBAR can be crimes punishable by imprisonment and substantial fines. Legal counsel can help determine if an individual is eligible for the OVDP, evaluate the risks of criminal prosecution, and recommend a course of action to come into compliance.

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