

IRS announces reduced penalties and extension of time to file under Voluntary Disclosure programme

07 JUNE 2011

CATEGORY:
ARTICLE

The IRS has announced important and favourable changes to the 2011 Offshore Voluntary Disclosure Initiative ('2011 OVDI') which allows non-compliant US citizens, green card holders and tax residents to become compliant with their historic tax and information reporting obligations, as follows:

- (i) a reduction of the so-called 'highest account balance' or 'in lieu of' penalty from 25% to 5% is now available for certain individuals living outside of the US;
- (ii) an acknowledgment that in some cases the 'preferred approach' may be for participants to 'opt out' of the 2011 OVDI so as to achieve a lower penalty outside of the program; and
- (iii) an option for participants to request an extension of up to 90 days from the original August 31, 2011 deadline to meet their filing requirements under the programme.

Non-resident citizens and green card holders

The first major change is a new reduced 5% penalty regime applicable to certain citizens and green card holders living outside of the United States. This regime applies to individuals who, in each year covered by the 2011 OVDI (2003 through 2010), (i) lived outside of the US, (ii) timely complied with all of their tax reporting and payment obligations in the country in which they were living, and (iii) had \$10,000 or less in US source income each year.

Of equal importance, the penalty base for such individuals no longer includes non-financial assets, such as real estate, business interests or artwork, if they were purchased with funds on which the individual can show all applicable taxes were paid, either in the US or in the country of residence.

The new reduced penalty regime could prove extremely beneficial for 'accidental Americans', dual citizens and US individuals who live abroad and have always complied with the tax laws of the country in which they reside. However, further guidance may be required where amounts, such as certain investment income, are not required to be reported on foreign tax returns.

Importantly, taxpayers who participated in the 2009 voluntary disclosure programme also are eligible to apply for the new reduced 5% penalty regime if they meet the requirements, even if they have already entered into a closing agreement.

'Opting out'

The second major change is the IRS acknowledgement that 'opting out' of the 2011 OVDI may be the 'preferred approach' in some cases. This could allow individuals to obtain significantly lower penalties than would otherwise apply under the fixed terms of the programme. In some instances it may even be possible to entirely eliminate the 25% 'in lieu of' penalty through so-called 'reasonable cause' defenses. This modification to the terms of the 2011 OVDI indicates a change in IRS thinking regarding 'opt outs' and an acknowledgement that the result under the 2011 OVDI may be unduly harsh in some situations.

Ninety-day extension

The third major change is the potential availability of an extension of up to 90 days after August 31, 2011 to complete an individual's submission. Originally, an eligible individual who wanted to participate in the 2011 OVDI had to submit a complete package, including all amended tax returns, amended informational filings, full payment of the taxes, interest and certain penalties, and various other documents by August 31, 2011.

However, many taxpayers have been unable to obtain the information necessary to comply with this deadline, notwithstanding their best efforts. Under the revised terms, individuals who can show a good faith attempt to fully comply with the requirement to make a complete submission by August 31, 2011 can request an extension of up to 90 days. The request for extension must list the missing items, the reasons they are missing and the steps taken to obtain them.

Going forward

The revised terms of the 2011 OVDI provide welcome favourable changes and could be particularly important for US citizens and green card holders living outside the United States. What was viewed by many as draconian account and asset value 'in lieu of' penalties can now be substantially mitigated or even potentially eliminated in qualifying circumstances. Thus, individuals wishing to participate in the 2011 OVDI should act quickly to ensure that they can meet the August 31, 2011 deadline or qualify to request the 90-day extension.

For further information in relation to anything covered by this Stop Press, please speak to your primary contact at Withers, or to:

In Europe

Richard Cassell (London)
richard.cassell@withersworldwide.com
+44 (0)20 7597 6173

Kristin Konschnik (London)
kristin.konschnik@withersworldwide.com
+44 (0)20 7597 6436

Jay Rubinstein (Zurich)
jay.rubinstein@withersworldwide.com
+41 (0)44 488 88 01

Aaron Schumacher (Geneva)
aaron.schumacher@withersworldwide.com
+41 (0)22 593 7705

Michael Parets (Zurich)
michael.parets@withersworldwide.com
+41 (0)44 488 88 03

In Asia

Jay Krause (Hong Kong)
jay.krause@withersworldwide.com
+44 (0)20 7597 6350

Joe Field (Hong Kong)
joe.field@withersworldwide.com
+852 3711 1628

In the US

Paul Behling (New Haven)
paul.behling@withers.us.com
+1 203 974 0392

Authors

Jay Krause

PARTNER | LONDON

Private client and tax

 +44 20 7597 6350

 jay.krause@withersworldwide.com

Richard Cassell

OF COUNSEL | LONDON

Private client and tax

 +44 20 7597 6173

 richard.cassell@withersworldwide.com

Jay H. Rubinstein

PARTNER | GENEVA

Private client and tax

 +41 22 593 7716

 jay.rubinstein@withersworldwide.com

Aaron Schumacher

PARTNER | NEW HAVEN, GREENWICH

Private client and tax

 +1 203 974 0399

 aaron.schumacher@withersworldwide.com