



The IRS Continues to Focus on Stopping Offshore Tax Evasion and Ensuring Tax Compliance

International Tax Compliance Alert

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The IRS continues to make strong progress in its international compliance efforts, according to IRS Commissioner Douglas Shulman. The 2009 Offshore Voluntary Disclosure Program (which closed on October 15, 2009), the 2011 Offshore Voluntary Disclosure Initiative (which closed on September 9, 2011), and the current 2012 Offshore Voluntary Disclosure Program (the 2012 OVDP), which was announced on January 9, 2012 (and which is open until further notice), are part of a wider effort by the IRS to stop offshore tax evasion and to ensure compliance. Last week, the IRS issued news releases (IR-2012-64 and IR-2012-65) to announce that offshore voluntary disclosure programs collections have exceeded the US\$5 billion mark, the release of new details relating to the latest voluntary disclosure program (the 2012 OVDP), and that new compliance filing procedures would be available to low compliance risk non-resident taxpayers effective September 1, 2012.

The programs and procedures address prior lack of compliance with regard to tax filing, tax payment and tax disclosures (including the filing of Reports of Foreign Bank and Financial Accounts, known as FBARs). Both the 2012 OVDP and the new compliance filing procedures provide specific instructions with regard to Canadian retirement accounts. Such accounts have presented particular challenges to taxpayers, taxpayer representatives and the IRS.

The 2012 OVDP is open-ended; with less certainty, time is of the essence

The IRS reopened the Offshore Voluntary Disclosure Program on January 9, 2012 to allow taxpayers with undisclosed foreign accounts or entities to become compliant, avoid substantial civil penalties, and generally eliminate the risk of criminal prosecution.

On June 26, 2012, the IRS issued revised Frequently Asked Questions and Answers, which provide guidance to taxpayers who have come forward since the 2011 OVDI ended and those considering coming forward. Unlike the earlier programs, each of which had specific end dates and specific associated miscellaneous penalties, the 2012 OVDP may terminate or change at any time and the amount of the associated miscellaneous penalty (for most participants, currently 27.5 percent of the highest aggregate value of offshore accounts and assets associated with tax non-compliance) may also increase at any time.

Of particular note, the FAQs indicate that the IRS may deem groups of taxpayers ineligible to participate in the 2012 OVDP going forward. With regard to eligibility, the FAQs provide that, “the IRS may announce that certain taxpayer

groups that have or had accounts at specific financial institutions will be ineligible due to US government actions in connection with the specific financial institution." The IRS would make an "announcement" providing notice of the prospective date upon which eligibility for the specific taxpayer group ends and then post the "announcement" on www.irs.gov. Although the IRS has not yet made such an "announcement," recent indictments and press reports indicate that the US government is continuing its investigations of financial institutions in Asia, Europe, the Middle East and elsewhere. Taxpayers with accounts at financial institutions that are under investigation should be particularly mindful that the IRS could deem them ineligible at any time. Taxpayers should also be aware that any taxpayer who has appealed a foreign tax administrator's decision authorizing the providing of account information to the IRS and failed to serve the notice as required under 18 U.S.C. 3506 will also be ineligible to participate in the 2012 OVDP.

Among the concerns raised with regard to the IRS offshore voluntary disclosure programs have been that taxpayers living outside the United States may be unfamiliar with US tax filing, payment and disclosure obligations. Prior efforts have been made to address this concern and some participants in the 2012 OVDP who have been living outside the United States may be eligible for a reduced miscellaneous penalty. As discussed further below, the IRS is also introducing new compliance filing procedures to further address those concerns.

The IRS announces new compliance filing procedures, effective September 1, 2012

Last week, the IRS announced new Compliance Filing Procedures designed to help US taxpayers residing overseas become compliant with tax filing obligations without participating in the 2012 OVDP. However, taxpayers who are ineligible to participate in the 2012 OVDP, discussed above, will also be ineligible to participate in the Compliance Filing Procedures.

The new Compliance Filing Procedures will be available to non-resident US taxpayers who have failed to file US federal income tax returns or to file FBARs, who recently became aware of their filing obligations and who are seeking to become compliant. Taxpayers participating in the Compliance Filing Procedures will file three years of delinquent income tax returns, with the appropriate related information returns and six years of delinquent FBARs. Absent high risk factors, if the filed returns (and an application which will likely be required to accompany the filings) report less than US\$1,500 in tax due in each of the years, the taxpayers will be treated as low compliance risk and penalties will likely not apply. However, civil penalties may be imposed if determined by the IRS to be applicable. Moreover, taxpayers utilizing the Compliance Filing Procedures will not receive protection from criminal prosecution if the IRS or the Department of Justice determines that prosecution is warranted. More information on the New Filing Compliance Procedures can be found on the IRS website. Additional details regarding the Compliance Filing Procedures are expected to be provided prior to the September 1, 2012 effective date.

Relief announced for taxpayers with Canadian or other qualifying retirement or education savings plans

Both the 2012 OVDP FAQ 54 and the Compliance Filing Procedures set forth special instructions for individuals seeking retroactive relief for failure to timely elect income deferral on certain retirement and educational savings plans, specifically the Canadian registered retirement savings plan (RRSP) and the Canadian registered retirement income fund (RRIF). Taxpayers participating either in the 2012 OVDP or the Compliance Filing Procedure must (1) provide a statement requesting an extension of time to make an election to defer income tax; (2) file Forms 8891 for the applicable years; and (3) provide a statement describing the events that led to the failure to make the election, events that led to the discovery of the failure and whether or not the taxpayer relied on a professional advisor. Taxpayers who are participating in the 2011 OVDI or who participated in the 2009 OVDP may also take advantage of this retroactive relief.

Importance of consulting a lawyer

Voluntary disclosure pursuant to the 2012 OVDP and/or the new Compliance Filing Procedures may or may not be appropriate for every non-compliant taxpayer with financial interests outside of the United States. Taxpayers should seek the advice of counsel and should share all information with such counsel in order to receive the maximum benefit of such a consultation.

Whether a taxpayer qualifies for the 2012 OVDP or the Compliance Filing Procedures depends on the individual facts and circumstances involved in each case. However, even if a taxpayer is not eligible to participate in the 2012 OVDP or the

Compliance Filing Procedures, there may still be a benefit to contacting either the IRS or the Department of Justice before being contacted by one of their representatives. Taxpayers with unreported income from sources outside of the US should also discuss the state and local tax and other ramifications of any disclosure to the IRS with their tax counsel.

Taxpayers may also wish to consult a tax lawyer in order to ensure continuing compliance with tax payment, filing and reporting obligations.

For more information, please contact the authors.

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