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Offshore Voluntary Disclosure

IRS extends the 2011 program

By Eric L. Morgenthal



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It's official. The once "limited time" Offshore Voluntary Disclosure program, a/k/a The 2011 OVDI is now open-ended. On January 9, the IRS announced it would be extending the 2011 initiative indefinitely until further notice. The parameters of the program remain nearly identical except for the raising of the standard penalty rate from 25 percent to 27.5 percent on the highest collective offshore balance during the eight-year disclosure period. What has yet to be announced is whether the disclosure procedure will also be the mechanism for addressing deficient Foreign Account Tax Compliance Act (FATCA) reporting obligations first being instituted this spring.

Clearly, the Internal Revenue Service (IRS) has the power to enforce federal tax laws set forth in Title 26 of the U.S. Code, the Internal Revenue Code (IRC).¹ And it also has the authority to issue regulations (either legislative or interpretive) to support those tax laws. Through Revenue Notices, Rulings, Private Letter Rulings and the Internal Revenue Manual, the IRS can promulgate guidelines for the assessment and collection of federal tax. But through these offshore disclosure programs, a new standard for the interpretation and administration of tax law has emerged... the Frequently Asked Question (FAQ).

Generally speaking, the practitioner community received the announcement of the indefinite OVDI extension with applause. However, it has also raised the ire of many frustrated tax advisors who have to begin to wonder...are IRS web-based FAQ's becoming the new (and parallel) IRC?

When the 2009 Offshore Disclosure program was introduced, information was disseminated through a listing of FAQ's to establish the guideposts for navigating through the process. The program was new and as time passed, the listing expanded to address questions raised by the practitioner community. But a limiting factor to the application of all FAQ's was a basic and

resounding principal...that the IRS, through this (or any other program) was not authorized to ever collect any more in tax than they would otherwise have been entitled to under the statute (IRC) as passed by Congress. To many, this does not appear to have been the case. A recent scathing report released by the Taxpayer Advocate accuses the IRS of "bait and switch." Particularly when the IRS weighs the OVDI penalties for civil wrongs against the statutory assessments for "willful" tax crimes to substantiate draconian assessments. Granted, taxpayers now have the right to withdraw from the Voluntary Disclosure program. But once they have stepped forward, they are already on radar and withdrawal would force them to face the uncertain potential of even greater penalties outside the program at their own peril.

For income tax returns, the statute of limitations on assessment typically doesn't commence until the return is filed. But for the FBAR filing deadline, the six-year assessment statute instead typically begins from the time of the omission (the due date of the tax return), even if never filed. The applicable criminal statute carries a five-year period of exposure. Therefore, the IRS is prescribing a voluntary disclosure period through the

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OVDI program which may be longer than the length of the taxpayer's statutory exposure. This can impose the obligation to voluntarily and potentially self-assess a higher tax/penalty cost than the IRS could otherwise enforce and collect.

U.S. citizen taxpayers are subject to tax on their worldwide income. Even children born of U.S. citizens, residing abroad, who have never set foot on American soil, are also subject to the U.S. filing and Foreign Bank Reporting provisions. They too had been required to surrender a percentage of their assets to re-emerge from the shadows of non-compliance under the OVDI regime. In response to the public outcry, the IRS has attempted to carve out an exception for those taxpayers whom are (in their view) the least culpable of wrongful conduct. Namely, expatriate citizens ensnared in the Foreign Reporting tax trap.

This past December, the IRS issued a Fact Sheet setting forth parameters of potential relief for US and dual citizens residing abroad.²

Upon first glance at the IRS FAQ web page for offshore voluntary disclosures, one would notice that on the top are the dates of additions to the questions but the list does not reflect all IRS shifts in interpretation. Due to the oftentimes lack of appeal rights afforded to amnesty applications, the potential for due process violations are raised - particularly when taxpayers set forth their submission based upon FAQ guidance that can be adjusted, not statutorily, or even through evolution of case law, but rather, with the click of a mouse in an IRS office. Absent withdrawal from the disclosure process, an entire body of tax law grounded in precedent, statute

and/or regulations can be trumped by a nebulously drafted and transiently posted web-based FAQ. This can create the appearance that taxpayers have failed to comply with OVDI corrective measures simply because the original web page delineating them is no longer visible now.

In these difficult economic times, people are calling for action. They want government to run fast but they don't want it to run amok. Even for voluntary disclosures, the IRS should respect due process procedures to insure the preservation of taxpayer rights. After all, OVDI enforcement units must abide by the same IRS motto: "to provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."

Note: Eric L. Morgenthal, Esq., CPA, M.S. (Taxation) maintains his Tax Law practice in Melville, NY specializing solely in International, Federal and New York State Tax Controversy Matters. He currently serves as Co-Chair of the Suffolk County Bar Association Taxation Law Committee, is a member of the Nassau County Bar Association Tax Law Committee, New York State Bar Association Tax Section, the American Institute of Certified Public Accountants and the American Institute of Attorney-CPA's IRS Liaison Committee. Comments can be directed to his firm at info@litaxlaw.com.

1. Pursuant to IRC Sections 7803 and 7805(a), Congress has bestowed the power to the Treasury or their delegate (the IRS) to administer the tax laws.

2. IRS Fact Sheet 2011-13