

Deadline for Taxpayers with Foreign Accounts

The OVDI follows the first 2009 Offshore Voluntary Disclosure Program, which closed with approximately 15,000 voluntary disclosures on October 15, 2009. Since that date, more than 3,000 taxpayers have initiated disclosures to the IRS with respect to foreign bank accounts. These taxpayers will be eligible to participate in the new 2011 OVDI. Noncompliant taxpayers who fail to come forward and complete a voluntary disclosure before the August 31 deadline will face “more dire” consequences including higher civil penalties and the possibility of criminal prosecution. In announcing the 2011 OVDI, IRS Commissioner Douglas Shulman called the program the “last, best chance for people to get back into the system.”

The 2011 OVDI includes several changes from the 2009 program. Penalties under the 2011 OVDI are generally higher, which means that taxpayers who did not participate in the 2009 voluntary disclosure program will not be rewarded for waiting. In particular, under the 2011 initiative, the new penalty framework requires individuals to pay a penalty of 25 percent of the amount in the foreign bank accounts in the year with the highest aggregate account balance covering the 2003 to 2010 time period – this is up from 20 percent under the 2009 program. On the other hand, certain taxpayers will be eligible for reduced penalties of 12.5 (for unreported accounts under \$75,000) or 5 percent (for those taxpayers who withdrew less than \$1000 in any year and did not open or cause the account to be opened or certain taxpayers who reside abroad and who were unaware of their US citizenship). All participants must also pay back taxes and interest for up to eight years (vs. six years under the prior program) as well as paying accuracy-related penalties, delinquency penalties, or both.

Taxpayers participating in the 2011 OVDI must file all original and amended tax returns and include payment for taxes, interest and accuracy-related penalties by the August 31, 2011 deadline.

The 2011 OVDI offers clear benefits that should encourage taxpayers to come forward now rather than risk IRS detection. Taxpayers with undisclosed foreign accounts who do not come forward will face substantially higher penalties as well as the possibility of criminal prosecution. For certain taxpayers, absent this program the potential non-reporting penalties may substantially exceed the value of the offshore accounts.

The IRS has indicated that they are aware that some taxpayers have made “quiet” disclosures by simply filing amended returns and paying additional taxes and interest rather than formally participating in the 2009 voluntary disclosure program. The IRS had further indicated that they are currently reviewing amended returns that show an increase in income and selecting returns for audit. Taxpayers selected for audit will not be eligible to participate in the OVDI. However, taxpayers who have filed quietly and have not yet been notified that they have been selected for audit may make an application to participate in the OVDI.

The 15,000-plus disclosures resulting from the 2009 voluntary disclosure program provided the IRS

and the Justice Department with an abundance of information on banks and other financial institutions that have traditionally been repositories of undisclosed funds. However, in contrast to the 2009 program, the IRS has not publicly identified any particular foreign financial institution targets. Hence, taxpayers with undisclosed accounts should not assume that they are not at risk simply because their bank or financial institution has not been publicly identified as a target. Moreover, given the potential exposure to criminal penalties, individuals considering making a voluntary disclosure should strongly consider retaining counsel.

Our experience with the 2009 program strongly indicates that the August 31, 2011 filing requirement for the 2011 OVDI is an extremely aggressive deadline that will be difficult to meet even for those promptly expressing the desire to make a voluntary disclosure. Hence, individuals wishing to take advantage of the 2011 OVDI must act quickly. The IRS must receive all amended income tax returns, amended informational filings, a full payment of the amount due as well as various other documents by the August 31, 2011 deadline. A complete application is required for admission into the OVDI.

1. Gideon Rothschild is a partner and co-chair of the Trust and Estates and Asset Protection Groups at Moses & Singer LLP. He is a past chair of the NY Branch of STEP, a Fellow of ACTEC and Academician of the International Academy of Trust & Estate Lawyers. Robert O. Heroux is an associate at the firm.

For more information on the OVDI please contact **Gideon Rothschild** at 212.554.7806/grothschild@mosessinger.com or **Robert O. Heroux** at 212.554.7844/rheroux@mosessinger.com.

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The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
Tel: 212.554.7800 Fax: 212.554.7700

2200 Fletcher Avenue
Fort Lee, NJ 07024
Tel: 201.363.1210 Fax: 201.363.9210
Abraham Y. Skoff, Esq.
Managing Attorney for New Jersey



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