Akerman Practice Update

TAXATION

June 2011

Just The FAQs Please, The IRS has updated guidance on the Offshore Voluntary Disclosure Initiative

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On June 2, the IRS updated the frequently asked questions (FAQ) related to the 2011 Offshore Voluntary Disclosure Initiative (OVDI). The OVDI, which was originally announced February 8, 2011, provides an opportunity for taxpayers to disclose previously unreported offshore assets in exchange for a 25% penalty (or in some cases, a 5% or 12.5% penalty) on the highest amount of the assets between 2003 and 2010, payment of unreported taxes and interest for the tax years 2003 through 2010 and various other civil penalties.

The updated FAQ's provide(i) for a 90-day extension period for taxpayers wishing to comply that are unable to make the August 31 deadline, so long as the taxpayer makes a good faith attempt to comply and can explain which items are missing and why; (ii) compare in detailed explanations, the penalties

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that would potentially apply to taxpayers participating in the initiative versus with those penalties that would potentially apply to taxpayers that "opt-out" of the initiative; and (iii) and most importantly, provide an additional reduced penalty for US persons who are living outside the US.

90-Day Extension to Submit Documents

The 90-day extension is not a blanket extension of the deadline for the OVDI. It is in fact, a completely discretionary extension as determined by the IRS for taxpayers pre-cleared in the OVDI who need additional time.

The IRS stated that a taxpayer may request an extension of the August deadline to complete the OVDI submission if, and only if, the taxpayer can demonstrate a good faith attempt to fully comply on or before August 31, 2011. The good faith attempt to fully comply must include the properly completed and signed agreements to extend the period of time to assess tax (including tax penalties) and to assess Report of Foreign Bank and Financial Accounts (FBAR) penalties.

Written requests for up to a 90-day extension must include a statement of those items that are missing, the reasons why such items are missing, and the steps taken to secure them. In addition, the submission must include copies of filed original and amended income tax returns, various completed information forms required by the OVDI, and in some cases, copies of offshore financial account statements.

A taxpayer wishing to be a part of the OVDI after August 31, 2011 does not benefit from the 90-day extension.

New Opt Out and Removal Guide

As part of the updated guidance, the IRS also provided a new Opt Out and Removal Guide ("Guide") that includes steps that should be taken before and after opting out or being removed from the OVDI. This Guide includes sample letters, a rundown of penalties that may apply to a taxpayer, and a list of possible exceptions to the three-year statute of limitations for individuals who have opted out or have been removed from the OVDI.

Opting out of the OVDI is an irrevocable election by a taxpayer to have his or her case handled under the standard IRS audit process. Removal from the OVDI, in contrast, is a determination made by the IRS to remove a taxpayer from the OVDI. In both situations, an examination is immediately initiated.

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Under the procedures outlined in the Guide, a centralized review committee will make a determination as to whether the case merits a normal examination, should be reassigned to a Special Enforcement Program agent, or should receive some other treatment. The Guide states that the review committee will decide the appropriate level of examination, keeping in mind that the taxpayer is not to be viewed in a negative light for opting out of the OVDI. The IRS described in the Guide several scenarios in which a taxpayer might wish to opt out from the OVDI.

The Guide also states that the review committee will consider the apparent severity of the results under the OVDI and the cooperation of the taxpayer, including whether removal was under consideration at the time of opt out. The Guide further states, that all committee decisions are final.

A taxpayer should fully explore all results and options prior to opting out of the OVDI.

Foreign Resident Penalty Reduction

Additionally, the OVDI was modified to include a reduction of the 25% offshore penalty to 5% if certain requirements are met.

This relief is only available to taxpayers who meet all of the following requirements during all years of the OVDI: (i) resided in a foreign country; (ii) were in compliance with the tax laws of their resident country; (iii) had $10,000 or less of U.S. source income each tax year; and (iv) any offshore-related taxable income not reported on the individual's U.S. tax return must have been reported on the individual's income tax return filed with their resident foreign country.

If such requirements are met, the taxpayer would be eligible for a reduced 5% offshore penalty that would apply only to the value of their foreign financial accounts.

The June update to the OVDI has provided some additional tools for taxpayers with respect to the OVDI. It has provided reduced penalties in very specific situation and guidance on opting out of the OVDI. Although the update provides for an extension of time to the August 31, 2001 deadline, taxpayers should be weary of its use and benefit, considering the discretionary approval process by the IRS and a showing of a good faith attempt to comply with the deadline.

For more information, please contact a member of our Taxation practice or either of the attorneys listed below:

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