



LEGAL ALERT

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## The IRS Announces a Third Offshore Voluntary Disclosure Program

by Carlene Y. Lowry and William A. Kastin

We previously reported in our [February 21, 2011 Legal Alert](#) on two offshore voluntary disclosure programs initiated by the IRS to bring persons back into compliance who failed to report an interest in, or signature authority over, one or more offshore financial accounts. These reporting requirements are generally referred to as the "FBAR" reporting requirements. The first program ran from March 23, 2009 thru October 15, 2009 (2009 OVDP), the second program ran from February 8, 2011 thru September 9, 2011, with an extension for certain supplemental information to be provided by December 9, 2011 (2011 OVDI).

The IRS just announced a third offshore voluntary disclosure program (2012 OVDP) to assist taxpayers in reporting their offshore accounts. The 2012 OVDP is similar to 2011 OVDI, but has a few major distinctions. First, there is no set

deadline for taxpayers to enter 2012 OVDP. However, taxpayers are cautioned that the IRS may change the terms of 2012 OVDP at any point, including by increasing penalties or ending the program entirely.

Second, under 2012 OVDP, the highest penalty rate is 27.5% of the highest aggregate balance in the applicable foreign bank accounts/entities or the value of the applicable foreign assets held during the period covered by the disclosure. Under 2011 OVDI the highest penalty was 25% of such amounts. Notwithstanding this change to the highest penalty rate, the 5% and 12% reduced penalty rates available in limited circumstances under 2011 OVDI are also available under 2012 OVDP. A more detailed discussion of these penalty rates appears in our [February 21, 2011 Legal Alert](#).

As under the prior offshore voluntary disclosure programs, taxpayers who feel that the offshore penalty is too onerous may “opt out” of 2012 OVDP, at which point they will be subject to IRS examination. Importantly, the decision whether to opt out of any offshore voluntary disclosure program requires a careful consideration of a number of competing factors and the “correct” answer will depend upon the particular taxpayer’s circumstances.

In order to be eligible for 2012 OVDP, a taxpayer must file all original and/or amended income tax returns and pay delinquent income taxes and related interest for up to eight years. The taxpayer must also pay accuracy-related penalties and/or the failure-to-file and failure-to-pay penalties, as applicable.

The 2011 OVDI Frequently Asked Questions, published by the IRS, confirmed that certain taxpayers who failed to comply with their offshore filing requirements, but who did not fail to report taxable income and who did not owe U.S. income tax during the eight year period at issue, were eligible for certain safe harbors and/or reduced offshore penalties. The IRS has explained that it is currently developing procedures by which taxpayers who are delinquent in their filing obligations, but who owe no U.S. income tax may come into compliance with U.S. tax law.

The impetus behind the release of 2012 OVDP appears to be based on the numbers. The IRS reports that it has collected \$3.4 billion from about 95% of the participants in 2009 OVDP and another \$1 billion in up-front payments under 2011 OVDI. That number will grow since the IRS did not require taxpayers to pay the 2011 OVDI offshore penalty up front.

The IRS reports that it has received 33,000 voluntary disclosures from 2009 OVDP and 2011 OVDI and that, since 2011 OVDI closed, hundreds of taxpayers have continued to come forward with voluntary disclosures. Taxpayers who made voluntary disclosures after 2011 OVDI closed are eligible to participate in 2012 OVDP while taxpayers who continue to choose not to come forward increase their risk of criminal prosecution.

Please note that the above summary regarding 2012 OVDP is based on the limited information available at this time. The IRS intends to provide more details in the next month. However, taxpayers can make a voluntary disclosure at any time.

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