

APRIL 2009

## IRS ANNOUNCES SIX-MONTH VOLUNTARY DISCLOSURE PROGRAM FOR TAXPAYERS WITH UNDISCLOSED OFFSHORE ASSETS

On March 26, 2009, the Internal Revenue Service (the "IRS") announced that it has adopted a program to encourage taxpayers who have assets located offshore to voluntarily disclose both the assets and any income earned thereon (the "VDP"). The VDP is available for the six-month period which began on March 23, 2009.

A United States taxpayer who has assets offshore: (i) generally must report, each year, information relating to the foreign financial accounts in which the assets are held on Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"); and (ii) must pay federal income tax on income earned in such accounts. An FBAR must be filed each year in which the aggregate value of the taxpayer's foreign financial accounts exceeds \$10,000. Taxpayers who fail to file an FBAR are subject to significant penalties that may equal or even exceed the value of the accounts. For each failure to file an FBAR, there are civil and, potentially, criminal penalties. A non-willful failure to file an FBAR may give rise to a civil penalty of up to \$10,000 per year. In other situations, a taxpayer will be subject to a civil penalty equal to the greater of \$100,000 or 50 percent of the value of the accounts. Under certain circumstances, an additional criminal penalty of up to \$500,000 or 10 years in prison (or both) may be assessed.

In addition to the penalties for failure to file an FBAR, a United States taxpayer who fails to report and pay income tax on offshore income may be subject to penalties under the Internal Revenue Code. Such penalties include, among others, a delinquency penalty of up to 25 percent of the unpaid tax, and an accuracy penalty of 20 percent of the unpaid tax (which may be increased up to 75 percent for any part of the underpayment attributable to fraud).

Under the VDP, taxpayers may limit their exposure to the various penalties (as summarized below). To be eligible for the program taxpayers must, prior to September 24, 2009, (i) file an FBAR or amend any deficient FBAR for each of the last six years to report all foreign financial accounts, (ii) file a tax return or amend any deficient tax return for each of the last six tax years to report all income earned in such foreign financial accounts, and (iii) pay all taxes and interest due on income generated by assets held offshore during the last six years.

Provided that the taxpayer complies with the VDP requirements, the IRS may reduce the applicable penalties to the following:

1. A penalty equal to 20 percent of the amount in the foreign accounts in the year with the highest aggregate account value. This penalty will be assessed in lieu of all other penalties that might apply, except for the accuracy or delinquency penalty. This 20 percent penalty may be reduced to 5 percent in situations where (i) the taxpayer did not open the foreign account; (ii) no activity (e.g., deposits and withdrawals) took place while he or she controlled the account; and (3) all applicable United States taxes have been paid on the assets in the account; and
2. An accuracy penalty of 20 percent or a delinquency penalty of 25 percent for failure to file and pay the income tax will be assessed with respect to the underpayment or reporting of tax without any exception.

However, there is no assurance that the IRS will grant these reduced penalties even if the taxpayer complies with the VDP requirements. A taxpayer whose name has been provided to the IRS by outside sources (e.g., a foreign bank) apparently may still qualify under the VDP if the IRS has not opened a

APRIL 2009

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criminal investigation of such taxpayer. Taxpayers will not be eligible for the VDP if they are currently under criminal investigation. Moreover, according to the IRS, "a voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended. This practice

does not apply to taxpayers with illegal source income." See Internal Revenue Manual 9.5.11.9(2).

Taxpayers who seek to take advantage of this program should consult experienced tax advisors in regard to the requirements and implications of the voluntary disclosure program.

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