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New Year's Resolution: Disclosing Your Foreign Bank Account?

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The IRS reported in November of 2009 that over 14,000 taxpayers entered the special voluntary disclosure program for offshore accounts. That program deadline expired on October 15, 2009. However, despite the expiration of this special program, taxpayers continue to avail themselves of the IRS's longstanding general voluntary disclosure program. The IRS's general program is described in the Internal Revenue Manual section IRM 9.5.11.9. See http://www.irs.gov/newsroom/article/0,,id=104361,00.html. We understand that the IRS received numerous disclosure filings under the general program subsequent to the expiration of the special program deadline.

There are likely a variety of reasons why taxpayers did not enter the special program and are now opting to disclose. Taxpayers may have simply not understood the deadline for the special program or may have received inaccurate information from their advisors. Other taxpayers may have become concerned that the IRS would issue summons to additional Swiss and other foreign banks – their bank. Indeed, IRS officials have publicly stated that they are using information gained through the now-closed special program to support further enforcement efforts, and we understand that one or more foreign banks are receiving particularly close scrutiny from the IRS at this time. Whatever the reasons, assuming the taxpayer is otherwise eligible to make a timely disclosure under the general voluntary disclosure program, those reasons should not be relevant to acceptance into the program. In other words, should a taxpayer resolve to come clean on their yet undisclosed accounts?

Assuming the taxpayer is eligible to participate in the disclosure program (the criteria for a

timely voluntary disclosure are set forth in IRM 9.5.11.9(4)), the most important issue for disclosing taxpayers is what civil penalties the IRS will propose to assert. Taxpayers will be required to pay the tax due plus interest for the past six years and likely also a 20% negligence penalty on the unpaid tax, but the terms of any additional penalties, such as the FBAR penalty which for willful violations can be as high as 50% of the account value for the reporting year, are not known.

Given the apparent volume of these post-October 15 filings, the IRS may consider adopting a standardized approach thereby ensuring a measure of uniform treatment of taxpayers, and, perhaps just as importantly, allowing for efficient use of limited audit resources. Criminal investigation regional offices are still processing disclosures which were timely filed by the October 15 deadline. This may result in a longer than usual response time for each "pre-check" to determine if a taxpayer is eligible for voluntary disclosure (i.e., the taxpayer has not already been identified by the IRS). It is also important to note that any taxpayer who comes forward for the general non-disclosure program will need to cooperate with the IRS and pay any tax, penalties, and interest that are determined to be due. Of course, there are three significant strategic advantages to coming forward, the first is to greatly reduce the potential for criminal prosecution; the second is that a voluntary disclosure when the IRS does not have excess capacity due to the unexpectedly large number of filings may result in a more streamlined audit process; and finally, many taxpayers have the opportunity to solve what in some cases may be a long-festering problem that will only become more significant given the IRS's continuing emphasis on cracking down on international non-compliance.
