

Client Alert.

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IRS Offshore Voluntary Disclosure Program Reopens

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On January 9, 2012, the Internal Revenue Service (the “IRS”) reopened indefinitely its offshore voluntary disclosure program (the “2012 OVDP”) to assist taxpayers in reporting undisclosed foreign accounts, assets, and income. The IRS press release (IR-2012-5) can be accessed here: <http://www.irs.gov/newsroom/article/0,,id=252162,00.html?portlet=108>.

This third offshore program is part of the IRS’s continuing efforts to curb tax evasion through the use of offshore structures and financial accounts. The prior offshore programs were opened during the 2009 (OVDP) and 2011 (OVDI) calendar years.¹ These programs garnered significant revenues, and the IRS’s hope for continued revenue along with offering an open door to increase compliance are the two main reasons for the revival of the disclosure program. Since the 2011 program closed this past September, taxpayers have continued to come forward to make voluntary disclosures. According to the press release, such taxpayers will be eligible for the terms offered in new OVDP.

Under the 2012 OVDP, taxpayers with previously undisclosed foreign accounts, assets, and income may be able to avoid criminal prosecution and limit their exposure to civil penalties if they meet certain requirements, including filing all original and amended tax returns and include payment for back-taxes and interest for up to eight years as well as paying accuracy-related and/or delinquency penalties.

The structure of the 2012 OVDP is based on the 2011 OVDI program, with a few key differences. Unlike the prior program, there is no set deadline for people to apply; the terms of the program could change at any time going forward, e.g., penalties could increase or there could be a sudden closure of the program. In addition, as compared to the 2011 program, the penalty framework for the high penalty category has been adjusted—individuals are required to pay a penalty of 27.5 percent of the highest aggregate balance in foreign bank accounts or the value of foreign assets during the eight full tax years prior to the disclosure. This is increased from 25 percent in the 2011 program. The 27.5 percent penalty may be reduced to 12.5 percent for taxpayers with aggregate offshore accounts of less than \$75,000 in any calendar year covered by the 2012 OVDP. The 2012 OVDP also retains a 5 percent reduced penalty in limited situations. The IRS will provide more details on the 2012 OVDP within the next month on www.irs.gov.

Taxpayers with undisclosed foreign accounts, assets, and income who are not otherwise insulated from penalties through circumstances of reasonable cause should consider participating in the 2012 OVDP and, if after consultation with counsel consider disclosure to be appropriate, should not delay participation since the IRS may change the terms of the 2012 OVDP at any time going forward. In addition, gathering records and preparing proper amended returns can take a significant amount of time.

¹ See our prior client alert discussing the 2011 offshore voluntary disclosure initiative at <http://www.mofo.com/files/Uploads/Images/110214-IRS-Unveils-2011-Offshore-Voluntary-Disclosure-Initiative.pdf>.

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Morrison & Foerster's Federal Tax Controversy Group regularly advises taxpayers in connection with voluntary disclosure of foreign accounts, assets, and income and has assisted clients in both prior disclosure programs. We also keep abreast of related foreign financial disclosure rules under the Foreign Account Tax Compliance Act ("FATCA") and maintain a website for all information regarding developments in this area at KNOWfatca.com. The most recent FATCA development relates to a new set of reporting requirements for specified foreign financial assets, currently residing in Internal Revenue Code Section 6038D. Enacted as part of the Treasury Department's attempt to improve tax compliance by U.S. taxpayers with offshore accounts, these reporting requirements generally require an individual to file a statement with their income tax return and report interests in specified foreign financial assets if the aggregate value of such assets exceeds certain thresholds. In the summer of 2011, the IRS issued guidance² suspending these information reporting requirements for tax years beginning after March 17, 2010, until the IRS released Form 8938, "Statement of Foreign Financial Assets." This past December, the Treasury Department and the IRS released temporary and proposed regulations, along with Form 8938,³ relating to the specified foreign financial asset reporting requirements.⁴ These reporting requirements are effective for tax years starting after March 18, 2010, which for most people will be their 2011 tax returns filed during the 2012 calendar year. The filing of Form 8938 is not a substitute for any "Report of Foreign Bank and Financial Accounts" ("FBAR") filing requirement; both forms must be filed, if required. Our next issue of MoFo Tax Talk, due out later this month, will provide greater detail on Form 8938 and the temporary and proposed regulations.

Please contact any of the attorneys listed below or your regular contact at Morrison & Foerster if you have any questions regarding the 2012 OVDP, FATCA or other foreign disclosure issues.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

² See Notice 2011-55 and [MoFo Tax Talk Volume 4, No. 2](#).

³ To review Form 8939 along with the related instructions, see KNOWFatca.com.

⁴ A draft Form 8939 was released in October 2011.