

# SMITH CARMICHAEL ASSOCIÉS

Re: Offshore Voluntary Disclosure Program Reopens in 2012

The IRS has reopened the offshore voluntary disclosure program (OVDP) to help people hiding offshore accounts get current with their taxes and announced the collection of more than \$4.4 billion so far from the two previous international programs. The newest program is similar to the 2011 program in many ways, but with a few key differences. Unlike the 2011 program, there is no set deadline for people to apply. However, the terms of the program could change at any time going forward. For example, the IRS may increase penalties in the program for all or some taxpayers or defined classes of taxpayers or decide to end the program entirely at any point.

Under the 2011 Offshore Voluntary Disclosure Initiative (OVDI), the penalty framework required individuals to pay 25-percent of the amount in the foreign bank account in the year with the highest aggregate account balance covering the 2003 to 2010 period. The IRS also created a new penalty category of 12.5-percent for "small offshore accounts." Taxpayers whose offshore accounts or assets were less than \$75,000 in any calendar year covered by the OVDI qualified for this lower rate. In addition, some taxpayers qualified for a 5-percent penalty, including taxpayers who did not open the foreign account, or cause the account to be opened, if additional requirements were met; and foreign residents who were unaware that they were U.S. citizens.

The overall penalty structure for the new program is the same as that for the 2011 program, except for taxpayers in the highest penalty category. For OVDP, the penalty framework requires individuals to pay a penalty of 27.5 percent of the highest aggregate balance in foreign bank accounts/entities or value of foreign assets during the eight full tax years prior to the disclosure. Some taxpayers will be eligible for 5-percent or 12.5-percent penalties; these remain the same in the new program as in 2011. Participants must file all original and amended tax returns and include payment for back-taxes and interest for up to eight years, as well as pay accuracy-related and/or delinquency penalties. Taxpayers who have come forward to make voluntary disclosures since the 2011 program closed will be treated under the provisions of the new OVDP.

The OVDP can be a significant benefit to affected taxpayers. Penalties outside the program can be onerous and can include, among others: penalties for failing to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR); civil penalties; penalties for failing to file a return; and accuracy related penalties. In addition, criminal prosecution may be a risk.

The IRS recognizes that its success in offshore enforcement and in the disclosure programs has raised awareness related to tax filing obligations, including dual citizens and others who may be delinquent in filing, but owe no U.S. tax. The IRS is currently developing procedures by which these taxpayers may come into compliance with U.S. tax law. The IRS is also committed to educating all taxpayers so that they understand their U.S. tax responsibilities.

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