

MEMORANDUM

To: Clients & Friends of the Firm
From: Stanley C. Ruchelman & Susan R. Nevas
Re: 2011 Voluntary Disclosure Program
Date: February 14, 2011

On February 10, 2011, the I.R.S. announced a brief window for taxpayers to come forward and declare unreported foreign bank accounts. According to I.R.S. Commissioner Douglas Shulman, taxpayers with unreported foreign accounts or unreported income related to foreign assets have a “last, best chance” to come into compliance for a limited cost. For most filers, the 2011 Offshore Voluntary Disclosure Program (“OVDP”) will be less generous than the program in 2009. However, persons who resided abroad without knowing of their U.S. citizenship status may be entitled to a reduced penalty. The window to take advantage of the OVDP is extremely brief and those who do not move forward within the next 45 days may find that the window will close rather quickly. A full submission and tax payment must be made by August 31, 2011. Taxpayers who applied to the 2009 program can request application of the reduced penalty structure if applicable to their circumstances.

The Basic I.R.S. Offer

Most taxpayers who come forward under the OVDP will have to pay:

- Back taxes and interest on all unreported income with respect to foreign accounts and assets for the eight years from 2003 to 2010 – two more years than under the 2009 program, which covered 2003-2008;
- Accuracy-related penalties of 20% of the back taxes, and if applicable, up to 25% of back taxes for failure to timely file a return or pay tax shown on a filed return (a new feature);
- 25% of the highest aggregate balance of foreign accounts and/or value of covered foreign assets during the program term, compared to 20% under the 2009 program.

To be accepted into the program, taxpayers will also have to:

- File original and amended income tax returns for all covered years;
- Provide any additional information IRS requests; and
- Agree to extend the time for assessing tax.

Participants will generally avoid the risk of:

- Criminal tax charges, carrying possible jail time and fines for each covered year;
- Other civil tax penalties for each covered year;
- Civil and criminal penalties for failure to file a Report of Foreign Bank and Financial Accounts (“FBAR”) in any covered year; and
- Taxes, interest and penalties for offshore accounts and assets prior to 2003.

Better Terms for Some Taxpayers

If taxes, interest and penalties calculated under regular tax rules are less than the tax calculated under the 2011 OVDP terms, the taxpayer will owe the lesser amount. This is intended to encourage full disclosure rather than a silent disclosure if the silent disclosure results in a smaller penalty than the 25% penalty based on asset values. For smaller offshore holdings – not more than \$75,000 at any time between 2003 and 2010 – the rate on the highest aggregate amount may be 12.5% instead of 25%. The rate may be 5% for an account holder unaware he or she was a U.S. citizen. A taxpayer who came in under the 2009 OVDP and would have owed less under the new rules may apply for reconsideration.

The I.R.S. has also refined the circumstances in which it will treat real estate and tangible assets as a “financial account” subject to the 25% penalty. If the asset was acquired with the proceeds of unreported and untaxed income, the asset will be subject to the penalty. Similarly, if income from the assets was not reported, the asset is included in the penalty base. However, if the asset was not acquired with the proceeds of untaxed income and is either non-income producing or the income was fully taxed, no penalty will be imposed.

Centralized Submissions

The I.R.S. has centralized the filing process for the OVDP. For the 2011 taxpayers or their representatives should mail the OVDP application letter to the Offshore Voluntary Disclosure Coordinator, 600 Arch Street, Room 6404 Philadelphia, PA 19106. The Criminal Investigation Division (“CID”) will review the OVDP application letter and notify taxpayers or representatives by mail whether the application letter is preliminarily accepted or declined. It is intended that CID will complete its work within 30 days of receipt. The letter from CID will instruct the taxpayer or representative to submit the full voluntary disclosure package of information to the Internal Revenue Service, 3651 S. I H 35 Stop

To: Clients & Friends

-3-

February 14, 2011

4301 AUSC, Austin, TX 78741, ATTN: 2011 Offshore Voluntary Disclosure Initiative. The package must be submitted not later than August 31, 2011.

The I.R.S. Message

The I.R.S. has a two-part message for taxpayers: “Come forward, or else;” and “Do it now!”

The first part of the message is more emphatic than in 2009. This time, IRS points to new ways it expects to find noncompliant taxpayers, including investigation of foreign banks identified during the 2009 initiative and extensive pending requirements for foreign banks and other entities to reveal US account holders and investors. Clearly, the I.R.S. expects to obtain significant information from foreign financial institutions once the FACTA reporting system is fully implemented. A follow-on litany of potential civil and criminal charges, with associated costs and jail sentences, is more prominent than in the 2009 program description. I.R.S. also cautions that normal periods for tax assessment may at times be extended or eliminated.

The second, “act now” portion of the message is partly between the lines. IRS advises taxpayers to begin collecting foreign documents and preparing returns immediately. Unless the entire package is in by the end of August, the application will be rejected.

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I.R.S. regulations require the following statement. This memorandum has not been written as a formal opinion of counsel. Accordingly, any tax advice contained herein is not intended or written by us to be used, and cannot be used by the recipient of this communication, for the purpose of avoiding tax penalties.

SCR/aw