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# Offshore Bank Accounts and the IRS; What's Next?

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October 9, 2011 was the last day to enroll in the Second Supplemental Offshore Voluntary Disclosure Initiative (OVDI) offered by the IRS. The IRS allowed taxpayers who enrolled by filing a voluntary disclosure letter by October 9, 2011 to have up to December 9 to complete the submission of required documents. Between the 2009 Offshore Voluntary Disclosure Compliance Program (OVDP) and the 2011 OVDI more than 33,000 taxpayers made submissions to the IRS. But what happens next? What is the process for the those taxpayers who have not enrolled in either program? This is a question that the IRS needs to answer soon.

Informal advice from various sources in the IRS and IRS Criminal Investigation are suggesting that taxpayers with unreported foreign bank accounts, and unfiled FBAR's go through the IRS Criminal Investigation "preclearance" process and then file the voluntary disclosure letter without knowing what the rest process will be. This suggestion leaves a lot of uncertainty and guesswork for taxpayers and advisors. It also does not address what taxpayers with unfiled information returns are to do. Example: Form 3520, Report of Foreign Gift or From 5471, Controlled Foreign Corporation Return. Are these taxpayers to act as if there was a new program in place or are all the taxpayers to just submit voluntary disclosure letters and expect that the penalty regimes already in place will be applied? What would that mean? Well it could mean that the IRS will consider the filing of a voluntary disclosure may be a basis to treat the failure to file FBAR's and other information returns as "non-willful" for purposes of penalty assessment. Could the filing of a voluntary disclosure letter support a "reasonable cause" argument, it is unclear. What this ambiguity may mean is that for some taxpayers there is no difference between the current situation and the decision to "opt out" of the OVDI program.

The IRS in its Frequently Asked Questions (51.1) describes a process that some taxpayers may choose which is to "opt-out" of the OVDI on the basis that a non-willful penalty under the FBAR rules is less (in some cases substantially less) than the miscellaneous civil penalty of 25% of the highest aggregate account balance and that they have a "reasonable cause" argument to mitigate the failure to timely file information returns, like Forms 3520 or 5471. If the IRS does not clarify the advantages of submitting a voluntary disclosure post OVDI the choice is to submit and perhaps minimize the risk of prosecution or not file a voluntary disclosure letter, and file the late FBAR's and information returns and then deal with the audit process. The absence of a program like the OVDI means that it is up to taxpayers and their advisors to sort out the options and weight the risk benefits analysis. Some taxpayers will play the audit lottery and do nothing, some witll come forward with "quiet disclosures" and some will submit voluntary disclosure. A clarifying position statement from the IRS would be helpful to professionals and taxpayers alike. As difficult as it may seem to believe there are many more taxpayer, particularly dual residents, and dual nationals who are only now discovering their past filing obligations. Professionals should be able to provide well founded advice to these and other taxpayers and the IRS should be helpful in this regard.

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