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Last Call for OVDP: Use it or Lose it

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It was nine years ago, on March 23, 2009, that the Internal Revenue Service issued internal memoranda establishing the Offshore Voluntary Disclosure Initiative.[1] While the IRS had allowed taxpayers to make voluntary disclosures for decades, the combination of the erosion of Swiss bank secrecy paired with the announcement of this settlement initiative sparked a massive and unprecedented wave of interest in voluntary disclosures. Almost a decade and 56,000 disclosures later, the IRS's flagship disclosure program is ending, and with it, the IRS announced a last call to taxpayers to come forward in the next six months or lose the current benefits of the Offshore Voluntary Disclosure Program (OVDP) forever.[2] While some issues will invariably remain unresolved until after the September 28th end date, we can look to the history of the OVDP and the current offshore enforcement environment in an attempt to surmise the direction of the IRS's disclosure practice after the program expires.

HISTORY OF OVDP

A cascading sequence of events led the IRS to create the first iteration of the current offshore disclosure program. The first domino to fall came in December 2007 when Igor Olenicoff pleaded guilty to a single criminal count of filing a false 2002 tax return that omitted income from an offshore account.[3] The Olenicoff guilty plea was followed by the arrest of Bradley Birkenfeld, Olenicoff's private banker at UBS in Geneva, Switzerland. Armed with the information received from Olenicoff and Birkenfeld, the Department of Justice was able to build a criminal case against UBS AG. While the criminal investigation was ongoing, the IRS obtained the approval of the U.S. District Court for the Southern District of Florida to serve a ''John Doe'' summons on UBS, seeking information identifying U.S. taxpayers with undisclosed accounts maintained at UBS in Switzerland.[4] Also around this same time, press reports were noting that a whistleblower had breached bank secrecy as to LGT Bank in Liechtenstein and was providing information to tax authorities around the world.[5]

The pressure from the investigation led UBS to enter into a Deferred Prosecution Agreement (DPA) with the Department of Justice in February 2009, pursuant to which the bank paid sizable monetary penalties and provided the Department of Justice with the names of 285 of its U.S. clients.[6] In August of 2009, the United States and Switzerland entered into a settlement agreement in connection with the ''John Doe'' summons, which resulted in UBS providing the IRS with the list of additional 4,450 names of its U.S. clients.[7]

As the UBS investigation ramped up in 2008, practitioners had anticipated a greater interest among cli-

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[1] Memorandum, from Deputy Commissioner for Services and Enforcement to Commissioner, Large and Mid-Size Business (LMSB) Division and Commissioner, Small Business/Self-Employed (SB/SE) Division, Authorization to Apply Penalty Framework to Voluntary Disclosure Requests Regarding Offshore Accounts and Entities (Mar. 23, 2009); Memorandum, from Deputy Commissioner, to SB/SE Examination Area Directors and LMSB Industry Directors, Emphasis on and Proper Development of Offshore Examination Cases, Managerial Review, and Revocation of Last Chance Compliance Initiative (Mar. 23, 2009).

[2] IRS News Release IR-2018-52 (Mar. 13, 2018).

[3] *United States v. Olenicoff*, No. 07-cr-00227 (C.D. Cal. 2007).

[4] *In re John Does*, No. 08-21864-MC-LENARD/GARBER (S.D. Fla. June 30, 2008).

[5] Lynnley Browning, *Banking Scandal Unfolds Like a Thriller*, New York Times (Aug. 14, 2008).

[6] *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla. 2008).

[7] Agreement Between the United States of American and the Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the

ents for potential foreign bank account voluntary disclosures and began to receive an increasing number of inquiries.[8] Practitioners approached the IRS with concerns about taxpayers' reluctance to utilize the traditional voluntary disclosure procedures under the Internal Revenue Manual for fear of being subject to uncapped penalties, including potential Report of Foreign Bank and Financial Accounts (FBAR) exposure as high as 300% of the accounts' value. In response, the IRS seized on the opportunity to leverage the piercing of Swiss bank secrecy and concomitant increased interest in disclosure into a compliance initiative. Shortly after UBS entered into the DPA and while the ''John Doe'' summons dispute was pending, the IRS announced the first iteration of the Offshore Voluntary Disclosure Program (2009 OVDP). The March 23, 2009, release of IRS Memoranda on this subject offered taxpayers with undisclosed offshore assets the opportunity ''to resolve those cases in an organized, coordinated manner and to make exposure to penalties more predictable.''[9] The core component of the program was the marriage of the general protection against criminal prosecution afforded by the IRS's longstanding traditional voluntary disclosure policy with a civil penalty settlement regime. Among other provisions, the 2009 OVDP eliminated the imposition of all information return penalties in favor of an omnibus ''offshore penalty,'' calculated at 20% of the value of all undisclosed foreign assets in the year of their highest aggregate value.[10] As this penalty almost always lowered the taxpayer's potential penalty exposure, due to the elimination of the threat of the draconian 50% penalty for willful failure to file an FBAR, the 2009 OVDP was seen as a desirable alternative for many delinquent taxpayers. Over 11,000 taxpayers participated in the 2009 OVDP.[11]

As 2009 OVDP progressed, technical and procedural questions began to surface, requiring the IRS to issue additional guidance. In response to practitioners' requests for such guidance, the IRS issued ''FAQs'' addressing some of the questions. The ''FAQs'' was a unique body of rules applicable only to these offshore disclosures, which ultimately included a special settlement regime for holders of Passive Foreign Investment Companies,[12] an agreement by the IRS that in certain circumstances program participants could avoid filing various information returns,[13] detailed rules on the calculation of the offshore penalty,[14] a somewhat tortured back and forth on whether participants could seek relief from the offshore penalty,[15] and the like. These FAQs have been updated as the programs have evolved, and have been the principal source of guidance to practitioners as to the terms and requirements of the program.

With Switzerland's agreement to turn over account holders' names as part of its settlement of the ''John Doe'' summons in August 2009, taxpayers' interest in coming forward to make a voluntary disclosure only grew. Switzerland's concession, viewed by some as the end of the Swiss bank secrecy laws, left many delinquent taxpayers concerned about the severity of statutory penalties and in fear of criminal prosecution. As a result, even after the 2009 OVDP ended on October 15, 2009, delinquent taxpayers with undisclosed offshore assets continued to voluntarily come forward to the IRS in hopes of reaching a structured settlement similar to what had been offered in the program. Without any formal guidance from the IRS during this period, practitioners generally continued to follow the process established in the 2009 OVDP, hoping that the IRS would reward voluntary compliance and offer a structured resolution similar to the one afforded to the 2009 OVDP participants. However, the uncertainty associated with these disclosures made it challenging to advise the taxpayers seeking to voluntarily come forward and to predict how the IRS would react.

After witnessing the success of the 2009 OVDP, and with interest in making voluntary disclosures still high, on February 4, 2011, the IRS announced the 2011 Offshore Voluntary Disclosure Initiative (2011 OVDI). While the principals of the program remained the same, the look-back period for the delinquent returns was expanded from six to eight years (2003-2010) and the ''offshore penalty'' was increased to 25%.[16] The expanded look-back period and the increased offshore penalty ensured that the taxpayers who missed the deadline for the 2009 OVDP were subject to harsher penalties than those who had come forward during the original iteration of the program. All disclosures initiated after October 15, 2009, but before the announcement of 2011 OVDI, were re-

Swiss Confederation (Aug. 19, 2009).

[8] *See* Scott D. Michel, *Voluntary Disclosure Becomes a Necessity*, International Tax Review (May 1, 2008).

[9] 2009 OVDP FAQ 1, at https://www.irs.gov/newsroom/voluntary-disclosure-questions-and-answers.

[10] 2009 OVDP FAQ 12.

[11] TIGTA, *The 2009 Offshore Voluntary Disclosure Initiative Increased Taxpayer Compliance, but Some Improvements Are Needed*, 2011-30-118, p. 6, n. 14.

[12] 2011 OVDP FAQ 10, at https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers.

[13] 2011 OVDP FAQ 29.

[14] 2011 OVDP FAQ 31-41.

[15] 2011 OVDP FAQ 51.

[16] 2011 OVDI FAQ 7.

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solved under the terms of the 2011 OVDI[17] and applications were accepted through September 9, 2011.

Over 18,000 taxpayers participated in the 2011 OVDI and the interest was so overwhelming that the IRS announced yet a third program, the 2012 Offshore Voluntary Disclosure Program (2012 OVDP) in January, 2012.[18] While the program was largely a continuation of the 2011 OVDI, it had no formal end date and the offshore penalty was increased to 27.5% of the highest value of the undisclosed offshore assets.[19] The 2012 Program became a major success for the IRS in part because of the Department of Justice's adoption of the Swiss Bank Program, which resulted in 80 Swiss banks coming forward to cooperate with U.S. tax enforcement authorities and their prodding of their customer base to initiate voluntary disclosures, with a corresponding reduction in the penalties paid by the banks to the DOJ.

The IRS made significant modifications to the program on June 18, 2014, effective for taxpayers initiating participation in the program after June 30, 2014. The main feature of what has become known as the 2014 OVDP, was an increased offshore penalty of 50% for taxpayers with undisclosed assets at listed foreign financial institutions that the DOJ has publicized to be either under investigation, cooperating with the DOJ, or as to which a ''John Doe'' summons was issued by the IRS.[20]

Contemporaneously with the announcement of the 2014 OVDP, the IRS also announced the expansion of the Streamlined Filing Compliance Procedures (SFCP).[21] An earlier version of the SFCP was designed for non-U.S. resident, non-filers, with limited tax liability and was the IRS's effort to entice the U.S. taxpayers living permanently abroad to come back into compliance with an offer of full penalty relief.[22] The SFCP expansion was offered to provide a streamlined resolution and penalty relief to both international and domestic U.S. taxpayers whose noncompliance was due to non-willful conduct. Instead of submitting to the ever increasing penalty regime imposed by OVDP, eligible taxpayers can opt to pay a reduced 5% or 0% offshore penalty (depending on residency status) and only need to file three years of tax returns and six years of FBARs.

These structured disclosure programs have been an overwhelming success for the IRS. The IRS has estimated that, since the launch of OVDP in 2009, more than 56,000 taxpayers have used a version of the program and paid a total of $11.1 billion in back taxes, interest, and penalties. The SFCP have been even more popular, bringing an additional 65,000 taxpayers into compliance. Nevertheless, the IRS has announced that it is closing OVDP for good on September 28, 2018.[23]

WHY IS OVDP ENDING NOW?

Acting IRS Commissioner David Kautter stated that the IRS was closing OVDP because taxpayers have had ample time to come into compliance and take advantage of the program.[24] The IRS has been concerned about affording (what they view as) a sweetheart deal to taxpayers who have not come in to make a disclosure after nine years of publicity. As discussed above, in the past the IRS had ''punished'' the latecomers by increasing the offshore penalty with each iteration of the program. But the number of taxpayers coming forward had also steadily dwindled. While submissions into OVDP peaked in 2011 with 18,000 taxpayers entering the program, the numbers have fallen off a cliff since then, with only 600 disclosures having been made in 2017.[25]

There are several reasons why participation in the program may have gone down so precipitously. First, the decline in participation could be a testament to the success of the program. The IRS may be right that, for the most part, those who wanted to participate in OVDP have already done so, and it does not make sense to leave the program open, and dedicate the resources thereto, for the recalcitrant few. Second, it is also almost certainly true that these numbers have been impacted, to some extent, by the creation of other, less onerous, offshore disclosure options, such as SFCP. With an increase of the offshore penalty to 50%, SFCP, the delinquent FBAR submission procedures, and the delinquent international information return submission procedures became much more attractive options, especially for taxpayers who had no potential criminal exposure.

Third, it is also possible that OVDP has simply become too punitive for most taxpayers. We have personally encountered taxpayers who wanted to rectify their noncompliance, and may not qualify for other disclosure options, but balked when confronted with the 50% penalty imposed for having an account at a ''bad actor'' bank. For the taxpayers willing to forgo protection from criminal prosecution, it has become more appealing to risk a civil audit and take advan-

[17] 2011 OVDI FAQ 19.
[18] IRS News Release IR-2012-5 (June 26, 2012).
[19] 2012 OVDP FAQs 1, 3, 7, 8.
[20] 2014 OVDP FAQ 7.2.
[21] IRS News Release IR-2014-73 (June 18, 2014).
[22] IRS News Release IR-2012-65 (June 26, 2012).
[23] IR-2018-52.
[24] *Id.*
[25] *Id.*

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tage of the FBAR mitigation guidelines that will likely cap the FBAR penalty, rather than willingly submit to a 50% penalty imposed on all offshore noncompliant assets. Finally, the IRS's requirement that taxpayers' pre-clearance request include information identifying the foreign banks and entities that held taxpayers' foreign assets may have scared some taxpayers away. The pre-clearance system was originally designed so that taxpayers could receive assurances that they were eligible for the program before having to disclose potentially incriminating information. But as the IRS has begun to ask for more information in the pre-clearance request, the process itself has become a veritable confession, which vitiated its intended purpose, and nervous clients grew wary.

Whatever actually caused the decline in participation, the IRS seems to have determined that continuing OVDP with only a few hundred submissions per year is not a valuable allocation of resources, especially given the IRS's decision, early on, to review each and every disclosure in what became, for many participants, an extended civil audit. The announcement that taxpayers have six months to ''use it or lose it'' is likely the final push for delinquent taxpayers to come forward through the special settlement program.

OFFSHORE ENFORCEMENT IS STILL A PRIORITY

Taxpayers should not view the elimination of OVDP to signal a decrease in offshore enforcement by the IRS. The IRS was explicit that eradicating offshore noncompliance and evasion will remain the agency's top priority. The IRS noted that the implementation of the Foreign Account Tax Compliance Act (FATCA) in conjunction with data gathered from other reporting and enforcement initiatives has created a data rich environment for it to continue identifying noncompliance.[26] This announcement comes just seven months after IRS Criminal Investigation division (IRS-CI) announced the creation a Nationally Coordinated Investigations Unit that contains a dedicated International Tax Enforcement Group. For the first time, IRS-CI has consolidated leading subject matter expert agents into one field office group. IRS-CI announced that this group would draw on data from a wide range of sources including information from whistleblowers, the Panama Papers, and FATCA reporting.[27] The release of the Paradise Papers, in November 2017, also increased the amount of data available to be mined by the IRS. Finally, various non-U.S. banks, either under investigation or as part of compliance with the DOJ Swiss Bank Program, and private whistleblowers continue to provide the Department of Justice and the IRS information concerning U.S.-accountholders, which will inevitably lead to an increase in civil audits and criminal investigations. In sum, all indications are that offshore enforcement is as robust as it has ever been.

DISCLOSURE OF OFFSHORE ASSETS AFTER SEPTEMBER 28

So what happens if, after OVDP sunsets, a taxpayer still wants to voluntarily come into compliance? According to the IRS, after September 28, the taxpayers with undisclosed offshore assets will have four compliance options:

- Streamlined Filing Compliance Program;
- Delinquent FBAR submission procedures;
- Delinquent international information returns submission procedures;
- IRS-CI traditional voluntary disclosure program under IRM 9.5.11.9 (12-02-2009) (IRS-CI VDP).[28]

Streamlined Filing Compliance Program

While SFCP will continue to be offered as a viable compliance option, it is only available to eligible taxpayers who can certify under penalties of perjury that their failure to report worldwide income, pay tax thereon, and file FBARs was due to non-willful conduct. Waiver of penalties for U.S. taxpayers residing abroad and a 5% penalty for domestic taxpayers make SFCP an attractive option for many delinquent taxpayers. However, taxpayers who have continued to be noncompliant for the last several years (i.e., failing to report worldwide income on their U.S. returns and file FBARs) should carefully consider whether their recent delinquency can be sufficiently explained as nonwillful conduct. Given the IRS's efforts to increase awareness of taxpayers' reporting obligations in connection with the offshore assets, publicity surrounding IRS's offshore enforcement initiatives, and greater attention paid to international filing requirements among U.S. and foreign practitioners, we anticipate that at least domestic SFCP submissions made after the September 28 deadline may receive additional scrutiny by the IRS. Because SFCP does not offer any protection from criminal prosecution and because IRS audits of previously made SFCP submissions have

[26] *Id.*

[27] Kat Lucero, *IRS to Consolidate National, International Criminal Case Work*, 148 Daily Tax Rep. G-5 (Aug. 3, 2017).

[28] IR-2018-52.

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shown to be invasive and onerous, careful thought should be given as to whether this is an appropriate compliance avenue based on the individual taxpayer's facts and circumstances. Moreover, SFCP is not available to non-filers who are ineligible for foreign SFCP for failure to meet the austere non-residency requirements during the years at issue.[29]

Delinquent FBAR and International Information Return Submission Procedures

The other two compliance options offered by the IRS — delinquent filings for FBARs and international information returns — also do not provide taxpayers with any protection from criminal prosecution. Delinquent FBAR submissions require filing of at most six years of delinquent FBARs and waive penalties only for taxpayers whose delinquency is limited to FBAR noncompliance (i.e. no income tax issues). Taxpayers using this program are required to include an explanation for delinquent filings.

Delinquent filing of international information returns is even more problematic. First, the program does not provide any guidance on the look-back period for the delinquent returns. Second, the filings require an inclusion of a reasonable cause statement signed under penalties of perjury explaining the reasons for the delinquency. Finally, though taxpayers with unreported income are permitted to utilize this option, there is no safe harbor penalty protection for those who do not have an income tax issue.

While these two options may be considered desirable compliance alternatives as they do not involve prepayment of any penalties, they are also imbued with a lot of uncertainties without any penalty caps.

IRS-CI Voluntary Disclosure Program

The final, announced, option is the traditional IRS-CI VDP under IRM 9.5.11.9. This program has been available to taxpayers for many years and was used as the basis for OVDP. Taxpayers have continued using this program to resolve their domestic, non-offshore related delinquencies.

The main benefit of IRS-CI VDP is that it offers taxpayers some assurances that their case will not be referred for criminal investigation. However, beyond that, there are no set procedures and there is no structured settlement resolution.[30] Accordingly, if the case with offshore delinquencies follows the same path as the domestic voluntary disclosures, taxpayers participating in this program could be subject to onerous and invasive offshore audits, culminating with draconian FBAR penalties and multiple penalties for failure to file international information returns.

It is practitioners' belief and understanding that, under the IRS-CI VDP, even for participants with domestic issues, there are no uniform guidelines or settlement initiatives. Assuming that some preliminary acceptance procedure is adopted, after the taxpayers get conditionally accepted to the IRS-CI VDP by the IRS-CI, the cases are likely to be assigned for examination (rather than a certification as in OVDP) to various IRS groups all over the country. Each group handles the submissions differently, and with no uniform guidance, similar to ''FAQs'' adopted in the offshore programs, taxpayers are likely to face separate processes and inconsistent outcomes.

The main question is whether the post-September 28 IRS-CI VDP will follow the process and procedures currently utilized in the domestic disclosures. However, even if it does, there are a lot of practical differences between OVDP and IRS-CI VDP that, unless clarified, would make it difficult to advise taxpayers with offshore tax issues on what to expect if they make a disclosure under this program. We see the following outstanding questions as particularly pressing:

- The pre-clearance request (a request made to the IRS-CI to see if the taxpayer is eligible to participate in the program) that is presently used to resolve domestic tax issues as part of the IRS-CI VDP process only requires taxpayers to include their name, address, social security number, and date of birth.[31] However, the OVDP pre-clearance request currently requires taxpayers to divulge potentially incriminating bank and entity information prior to receiving assurances of criminal pro-

[29] Non-filers are only eligible to participate in the foreign SFCP. To meet the non-residency requirements of the foreign SFCP, during any one (or more) of the last three years, the taxpayer must not have had a U.S. abode and must have been outside of the United States for at least 330 days. Either ownership of the U.S. abode, or presence in the U.S. in excess of 35 days during all three years would disqualify the taxpayer from foreign SFCP. https://www.irs.gov/individuals/international-taxpayers/u-s-taxpayers-residing-outside-the-united-states. The non-residency requirements of foreign SFCP and ineligibility of the non-filers for domestic SFCP had left a sizable group of taxpayers without a simple resolution of prior noncompliance.

[30] For example, the IRM allows for the submission of amended returns under a ''cover letter'' from a professional, but there are no clear instructions as to where and how such a submission should be made. I.R.M. 9.5.11.9.6(a) (12-02-2009). Practitioners will note that the IRS has been very hostile to so-called ''quiet disclosures,'' which are, for the most part, just that type of filing. See, e.g., Sunset OVDP FAQ 8, at https://www.irs.gov/individuals/international-taxpayers/closing-the-2014-offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers. Absent IRS guidance on procedures, practitioners will still face great uncertainties.

[31] *See* https://www.irs.gov/compliance/criminal-investigation/how-to-make-a-domestic-voluntary-disclosure.

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tection. It is uncertain at this time which form of pre-clearance request taxpayers should use to disclose offshore assets through IRS-CI VDP, or if the pre-clearance process would even continue to be available at all.

- Currently, the intake form for domestic disclosures through the IRS-CI VDP requests a six-year look-back that tracks the statute of limitations for criminal prosecution, but the current OVDP look-back period is eight years. In light of IRS's repeated emphasis on ensuring that the taxpayers who waited to come forward do not receive a better outcome than those that came before them, we believe it is possible that the IRS will attempt to either expand the look-back period or impose a punitive structured settlement as part of the civil exam resolution.
- In addition, it is uncertain how non-filers will be handled under IRS-CI VDP. The IRS-CI VDP process generally applies to both filers and non-filers but there is no statute of limitations on assessment with regard to a tax return that is never filed. As part of the IRS-CI VDP, will the IRS make the look-back period for non-filers coterminous with all other taxpayers?
- Will the IRS offer some sort of uniform settlement of penalties or a cap on penalties? The absence of a civil penalty regime may doom any future effort to encourage offshore disclosures. Many non-compliant taxpayers could face penalties for the failure to file FBARs and to file various information returns that, if applied, would exceed their potential tax liability, and in many cases, the gross amount of their offshore assets, by many multiples. In our experience, few taxpayers (especially those living overseas) will elect to enter a voluntary disclosure program with essentially unlimited penalty exposure. This concern, after all, was one of the main drivers in the creation of 2009 OVDP.
- OVDP participants were permitted to utilize modified mark-to-market rules to report income from Passive Foreign Investment Companies (PFICs). This option was created as a matter of practicality due to difficulties in obtaining detailed historic bank account information from foreign banks. Requiring taxpayers to obtain these statements to report PFIC income pursuant to §1291[32] default rules would be highly punitive, and likely nearly impossible. While it would seemingly be in the IRS's interest to continue allowing taxpayers to utilize this modified PFIC regime, it is notable that the IRS has not allowed the use of modified mark-to-market rules in SFCP submissions, or if taxpayers had decided to ''opt out'' of the OVDP penalty regime, despite repeated requests from practitioners. We would not be surprised if this benefit sunsets with OVDP.
- As part of OVDP, the IRS allowed taxpayers to abandon so-called ''sham'' entities instead of filing retroactive information returns. In many cases this rule substantially simplified the taxpayer's disclosure. It will be interesting to see whether the taxpayers' would be allowed to do so in IRS-CI VDP. However, it is unlikely that the IRS would be willing to forgo penalties for failure to file informational returns and continuation penalties for failure to provide these returns upon demand under §6038(b) and §6677(a)-§6677(b), unless it is substituted by a sizeable offshore penalty.

Despite all the uncertainty, and even in the absence of clear procedural guidance, the IRS remains clear and explicit that it does not consider the so-called ''quiet disclosure,'' which involves simply filing delinquent returns and FBARs, to be an acceptable means of rectifying prior noncompliance.[33] The IRS stated its intent to review each one of these submissions and subject them to criminal or civil sanctions under the current law.[34]

Another OVDP Program?

In its press release and the accompanied FAQs on the OVDP sunset, the IRS suggested that it may be contemplating some sort of a structured program to settle prior offshore noncompliance.[35] It is currently unclear whether the IRS is considering offering a structured penalty settlement as part of the IRS-CI VDP or rolling out a new iteration of the OVDP. Considering the history of the OVDP, the IRS may not have yet decided what to do and it is unlikely that this question will be settled and announced prior to September 28. Notably, the IRS did invite practitioners to submit comments and suggestions on the future of the IRS's voluntary disclosure practice.[36]

If the IRS's posture between 2009 OVDP and 2011 OVDI offers any guidance, what is more likely to happen is that IRS-CI VDP pre-clearance and even possibly ''intake'' applications will be accepted, but not

[32] All section references are to the Internal Revenue Code of 1986, as amended (the Code), and the regulations thereunder, unless otherwise specified.

[33] Sunset OVDP FAQ 8.

[34] *Id.*

[35] IR-2018-52; Sunset OVDP FAQ 10.

[36] Sunset OVDP FAQ 10.

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likely processed and closed out until some decisions are made. The IRS may want to wait and see the number of latecomers seeking to come forward before deciding whether and how to structure a settlement initiative. However, we should expect with reasonable certainty that whatever settlement initiative is offered, it will be more punitive and/or onerous then the settlement offered under the 2014 OVDP.

As practitioners, we have witnessed firsthand the value that a thoughtfully considered disclosure program can have in boosting tax compliance and helping taxpayers deal with, and correct, past delinquencies. We hope that the IRS uses this opportunity to develop a durable option for the still delinquent taxpayers who are willing to come into compliance.

SO WHAT DOES IT ALL MEAN?

If there is one certainty for life after September 28, it is that there is going to be a lot of uncertainty. Taxpayers who have been aware of the various compliance programs and have been indecisive, vacillating on how to proceed, are likely to be affected the most by the sunset of OVDP. These taxpayers are not likely to qualify for SFCP, especially if they continued with delinquencies after learning about the compliance requirements. Nor would this type of fact pattern fare well on examination, even if it is a part of the IRS-CI VDP. While there may be some criminal protection for these cases in IRS-CI VDP, given the increasing number of rulings from federal courts against defendants in FBAR cases, it will be difficult to avoid the imposition of the willful FBAR penalty (or, more practically, to offer any comfort to potential disclosure clients). And any settlement initiative announced after September 28, will almost certainly be less merciful than the current 2014 OVDP penalty regime.

To take advantage of the OVDP penalty regime before it sunsets, taxpayers must submit complete intake forms (Forms 14457 and 14454) prior to the September 28th deadline. In order to make a complete submission, taxpayers — post pre-clearance — will need to gather sufficient documentation, including bank statements for the last eight years, to answer narrative questions about the disclosure, calculate an approximation of the high balance of offshore bank accounts, and an estimate of unreported income. In addition, for each unreported foreign bank account, taxpayers will need to provide account information including the name and address of the institution, the account number, lists of any advisors and communications regarding the account, information on deposits and withdrawals, and other narrative information about the account including what documentation has been retained.

The IRS stated that these submissions may not be partial, incomplete, or placeholders, in order to meet the September 28th deadline. In the past taxpayers have been allowed to supplement intake forms if subsequent due diligence unearths additional information. This guidance infuses some ambiguity into whether this option would still exist. Accordingly, it is particularly important that taxpayers are comfortable that their intake forms are complete and extensive before submitting them. In light of the completeness requirements and the impeding September 28th deadline, the taxpayers wishing to participate in the OVDP will be racing against time. Because practitioners have been routinely experiencing a slowdown in the pre-clearance process, taxpayers do not want to be presented with the need to submit completed intake forms prior to receiving pre-clearance approval that their submission will be timely.

CONCLUSION

With the announcement that OVDP is closing, we have almost as many questions as we have answers about the future of voluntary disclosure practice. While this is not necessarily a now or never situation, it is most certainly now or no one knows what happens next. Now is the time for the delinquent taxpayers to pick their poison and act quickly to determine whether OVDP offers the best resolution in light of the impending uncertainty.

In the meantime, we hope the IRS recognizes that the existence of a clear, efficient, and reasonable voluntary disclosure program is essential to overall tax administration and compliance, especially in connection with offshore assets, and after September 28 it is imperative that it implements a model system that practitioners and taxpayers can easily adhere to and navigate.

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