Scott Michel Discusses Offshore Voluntary Disclosure Program Shutdown with Law360

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The Internal Revenue Service on Friday, September 28 is shutting down a program that provided leniency in exchange for the voluntary disclosure of foreign accounts, leaving an uncertain path for those who willfully hid assets overseas and still wish to escape harsh penalties.

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The date for the shutdown, Sept. 28, is now upon us and some people were waiting until the last moments to enter the program, according to Scott D. Michel, a member at Caplin & Drysdale. He told Law360 the program was unusual when it launched in 2009 because it married the civil penalty structure to a protection against criminal prosecution that did not depend on the willfulness or non willfulness of the violator.

"OVDP capped penalties on the income taxes at 20 percent of the tax due; outside the program those could rise to 75 percent," he said. Michel said he thought that after the OVDP closes the IRS would be tough on anyone who has been willful in not disclosing offshore assets or income.

What was unique about the OVDP, he said, was that it was a civil penalty regime that was both specified and capped. Its elimination means people will now face a penalty as high as 75 percent if they are willful violators and choose to disclose through criminal investigations, or lower penalties at zero or 5 percent if they are nonwillful violators and qualify for the streamlined program, he said. Michel explained the OVDP's 20 percent penalty is an "accuracy related" penalty, which comes with a 27.5 percent penalty on the previously unreported offshore assets, but that amount can rise to 50 percent when certain specified individuals, banks or companies are involved.

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Outside the OVDP, Michel said the individual would pay taxes on the $50,000, plus a penalty of either 20 percent or 75 percent on that tax, plus interest. On top of that the taxpayer would face a potential penalty of 50 percent of the $1 million per year for a willful Report of Foreign Bank and Financial Accounts or FBAR violation, he said.

For people who have not disclosed any offshore assets or income and show evidence of willfulness, then absent reasonable cause, Michel said he expected the IRS to be relatively tough when they are detected. The agency is increasingly able to find them, he said, because of the Foreign Account Tax Compliance Act, or FATCA, which requires banks all over the world to exercise greater due diligence and report U.S. citizens who have accounts.

The IRS has also become more sophisticated with data analytics, which lets it analyze transactions and transfers, Michel said. This, combined with FATCA, means the service is getting much better at finding people who have failed to file, he said.

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Michel at Caplin & Drysdale did not recommend going down the quiet disclosure route because, he said, the IRS has made it clear the agency does not like that option.

"I think practitioners would be ill-advised to sort of revert to the quiet disclosure option because the IRS seems to be hostile to that method, coming forward," he told *Law360*. "There are rare circumstances where somebody may owe $200 of tax and you just file returns. But if someone has a material amount of unreported offshore assets and a material tax liability due, I think that our advice, going forward and at a minimum, would be to follow the guidance in the Internal Revenue Manual about attaching a cover letter to the material package and send it in."

The cover letter should be prepared by a tax professional and have certain representations and guarantees about the accounts, Michel said. It may be smart to send this to Austin, Texas, because that is where the IRS processes many decisions about offshore disclosure returns, he said.

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Despite the uncertainty in what comes next - whether it's guidance, a new program or nothing at all - Michel remained optimistic, because taxpayers with offshore accounts and their counsel have an unexpected ally: the IRS' new commissioner, Charles Rettig, who will start his term in early October.

Michel knows Rettig through their work together as vice chairs at the American Bar Association's Section of Taxation, but he also called the new commissioner a dear friend. He said Rettig has likely handled a few thousand voluntary disclosures during his career, so if anybody in the IRS is going to understand the mindset of taxpayers and practitioners who advise those taxpayers, it's going to be him.

"I think that whoever in the service is going to sit down and think about how these cases will be handled down the road, that those people will have a real valuable ally in the commissioner as a resource to help fashion whatever guidance and strategy the service will come up with," Michel said.

For the full article, please visit *Law360* website (subscription required).

Excerpt taken from the article "Options Few For Willful Offshore Tax Cheats As OVDP Ends by Amy Lee Rosen for Law360 Tax Authority.

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