

## IRS Offshore Voluntary Disclosure Program to Close in September

by Nathan J. Richman

The IRS has announced that it will close its offshore voluntary disclosure program on September 28.

In general, the OVDP frees previously noncompliant taxpayers from the risk of criminal prosecution and other potential penalties, including the foreign bank account report sledgehammer. In exchange, taxpayers entering the program must cooperate and pay taxes, interest, and penalties, including accuracy-related penalties, failure-to-file penalties, and a miscellaneous penalty of 27.5 percent or 50 percent of account value.

Released on March 13, the newly updated FAQs and announcement both make clear that the streamlined filing procedures for taxpayers whose noncompliance has not been willful does not stop with the end of the OVDP. However, the announcement does warn that the streamlined program may close in the future as well.

In the announcement, the IRS notes that the number of taxpayers coming in through the OVDP has declined in recent years, with only 600 in 2017. Since 2009 the OVDP has resulted in over 56,000 disclosures that have included taxpayers paying \$11.1 billion in taxes, penalties, and interest, according to the announcement.

According to the updated FAQs, a complete voluntary disclosure must be postmarked by September 28, 2018, to qualify for the OVDP. "Partial, incomplete, or placeholder submissions" will not hold the door open, the FAQs note.

Mark E. Matthews of Caplin & Drysdale Chtd. said that the recent, precipitous decline in OVDP submissions makes the end of the program unsurprising, especially since the IRS previously warned that the OVDP would eventually end.

Barbara T. Kaplan of Greenberg Traurig LLP said, "Those with continuing criminal tax exposure should act now to come into compliance before this program is discontinued." She attributed the reduced importance of the OVDP in part to the IRS's access to data from the Foreign Account Tax Compliance Act.

Charles Bruce, legal counsel to American Citizens Abroad and an attorney with Bonnard Lawson-Lausanne, said, "There are many people who still have not come forward and, in my view, many of these cannot go the route of the streamlined filing compliance procedure because they cannot swear to being 'nonwillful.'"

Jeffrey A. Neiman of Marcus Neiman & Rashbaum LLP told Tax Analysts, "By closing OVDP, the IRS is not shutting the door on those with undeclared offshore assets. There are still other means for taxpayers to come forward."

Kaplan noted that both the streamlined program and the standard voluntary disclosure program included in the Internal Revenue Manual remain after the announcement.

The updated FAQs include an opening for practitioners and taxpayers to send feedback and suggestions for the future of voluntary disclosures to the IRS Large Business and International Division.

"I think it is encouraging and good practice for the IRS that they are seeking practitioner comments," Matthews said. "We appreciate that opportunity."

In the past couple of years, practitioners have been raising questions about the costliness of the OVDP.

Neiman, a former tax prosecutor, said he thought the OVDP was flawed. "Under OVDP, the penalty regime just became too rigid and too excessive," he said, adding that he hopes the IRS will approach future disclosures more practically.

As a result of a 2015 IRS memorandum (SBSE-04-0515-0025) that generally limits the penalty for willful failure to file FBARs to 50 percent of the high value of the account during open years, the closure will likely have limited impact on those taxpayers who failed to file or filed false FBARs, Matthews said. The primary effect of the OVDP closure may be to put the sections 6663 and 6651(f) fraud penalties and other, non-FBAR information return penalties in play, he added.

Bruce said that many of the taxpayers who still need to come into compliance are Mexican and Canadian so-called accidental Americans who may not have fully appreciated their U.S. tax filing obligations. Between the FATCA information disclosures, the possibility of

passport revocation, and the last call for OVDP submissions, those taxpayers will have to carefully consider how to move forward, he said, adding that tragically the options under consideration will include renouncing their U.S. citizenship.

*Andrew Velarde contributed to this article.* ■