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New Options for U.S. Individuals with Undisclosed Offshore Accounts

The Internal Revenue Service (“IRS”) recently released guidance outlining expanded options for individuals who have failed to disclose offshore accounts, assets and income. These changes will be of interest to any U.S. citizen or resident who has failed in past years to fully disclose offshore assets or to include all foreign-source income on their U.S. federal income tax returns. These changes may also affect persons who are currently participating or contemplating participating in the Offshore Voluntary Disclosure Program (“OVDP”). Individuals seeking to fix past year noncompliance should be aware of several near-term application deadlines.

Expansion of the IRS “Streamlined” Compliance Program

The most significant of these changes is the expansion of the IRS Streamlined Compliance Program (the “Streamlined” program). Previously, the Streamlined program was available only to a small subset of U.S. individuals who were resident outside of the United States and who met stringent eligibility requirements. The primary benefit of the Streamlined program is that only three years of tax returns are submitted and penalties are generally reduced.

As a result of the recent changes, the Streamlined program is now available to both residents and nonresidents and the eligibility requirements have been significantly relaxed. Many individuals may now qualify for the reduced penalties that are part of this program.

Specific provisions of the Streamlined program include:

- All applicants must certify under penalties of perjury that past failures to report income, pay tax and submit required information returns (including the Report of Foreign Bank and Financial Accounts (“FBAR”)) was due to non-willful conduct.
- Persons applying to the Streamlined program must not be the subject of any current civil examination or criminal tax investigation.
- To qualify as a nonresident under the Streamlined program, the individual must satisfy a non-residency test for at least one of last three tax years for which the income tax return filing deadline has already passed.

- Persons who do not qualify as nonresidents may participate in the Streamlined “domestic” program if they filed a tax return for each of the three most recent tax years.
- All individuals participating in the Streamlined program must file original or amended U.S. income tax returns for the past three years, file FBARs for the past six years, and pay all tax and applicable interest. No penalties will apply for (i) failures to file a tax return; (ii) failures to pay tax; (iii) accuracy; or (iv) information return failures (including the FBAR failure to file penalty) unless the conduct was fraudulent or the failure to file an FBAR was willful.
- No other penalties will apply to nonresident participants. Resident participants will be subject to a 5% penalty on the individual’s highest aggregate balance/value of the person’s foreign financial assets.
- Persons who are currently participating in the OVDP or who apply to the OVDP before July 1, 2014 may transition to the Streamlined program if they otherwise qualify. Special transition rules apply.

Changes to the Offshore Voluntary Disclosure Program

The OVDP has been changed to reflect the expanded availability of the Streamlined program. Accordingly, reduced penalties previously available under the 2012 OVDP are no longer available, and participants who remain in OVDP generally are subject to a 27.5% penalty on the highest aggregate balance/value of the person’s foreign financial assets during the past eight years. As described above, persons currently participating in OVDP (or who apply before July 1, 2014) may take advantage of reduced penalties by transitioning to the Streamlined program. Persons who apply to OVDP after July 1, 2014 may still opt out of the OVDP penalty structure, but they are precluded from transitioning to the Streamlined program. As with previous versions of the OVDP, the IRS has stated that criminal penalties will generally not be assessed for individuals who participate in the OVDP.

Beginning on August 4, 2014, a person with an undisclosed foreign financial account will be subject to a 50% OVDP penalty on all of his undisclosed foreign financial assets if, at the time he submits a preclearance letter to IRS, any foreign financial institution in which he maintained an account has been publicly identified as being under investigation or as cooperating with a U.S. government investigation. For example, the 50% penalty will apply if the participant maintained an account at a foreign financial institution that is the subject of a “John Doe Summons” (meaning a summons issued for the purpose of compelling the financial institution to

identify its U.S. account holders). Taxpayers seeking to avoid the 50% OVDP penalty should submit their preclearance letter prior to August 4, 2014.

The IRS has published a list of financial institutions that have been publicly identified at the following URL: <http://www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators>

Contact Ivins, Phillips & Barker

Please contact J. Brian Davis, Douglas Andre or Kasey Place if you have any questions about the options available to U.S. persons with undisclosed foreign financial accounts. We can be reached by phone or email as indicated below.

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