



Robert W. Wood

THE TAX LAWYER

Feb. 9 2011 – 10:48 am

IRS Offshore Amnesty: Second (Last) Chance

It is not blanket amnesty, though criminal prosecution is highly unlikely. This and other points about the IRS's newest foray into foreign bank account disclosure are prompting questions. [Announced](#) February 8, 2011, the new "[2011 Offshore Voluntary Disclosure Initiative](#)" offers what IRS Commissioner Shulman called the "last, best chance" to come clean. Some observers thought the vaunted previous come hither program with its [October 15, 2009](#) deadline was the last best. Now, there's another with its own set of [rules](#).

Those who thought failing to meet the October 15, 2009 deadline meant the IRS would give no quarter may be happily surprised. After all, many taxpayers didn't know about that program until it was too late. Some couldn't quite pull the trigger to come forward given all the variables, especially the fact that the IRS wouldn't unconditionally commit to forgo prosecution.

In fact, the IRS hasn't promised not to pursue prosecution, although traditionally the IRS won't unless they already have an investigation underway before you step forward. That can militate for a "[pre-clearance](#)"—disclosing very little to the IRS until they confirm you are **not** under investigation. See [Q&A 23](#).

For months now tax lawyers have known another program was coming. This program is less generous than the first, so most coming clean under Numero Uno should feel better than those who will now.

The Who? If you have a foreign bank account holding more than \$10,000 at any time during the year, you must check the “yes” box on Schedule B to your IRS [Form 1040](#) disclosing it. You must report your worldwide income including any foreign earnings even if they are taxed abroad. Plus, you must file an FBAR annually (Treasury Form [TD F 90-22.1](#), Report of Foreign Bank and Financial Accounts). Separate from tax returns, FBARs are due each June 30 for the preceding year.

Failing to do any of these is serious even if you didn’t understand you were supposed to. You sign tax returns under penalties of perjury, so failures can be considered tax evasion or fraud with big civil and criminal exposure. The penalties for failure to file an FBAR are even worse: prison for up to ten years and criminal penalties up to \$500,000 for each FBAR.

You could hope you’re never discovered, but you can’t run out the clock. The IRS generally has three years after a return is filed to audit or six years in cases of substantial (25%) understatements of income. If a tax return or FBAR is never filed, the statute of limitations never runs. See [Even The IRS Has Time Limits](#).

The IRS could come after you 20 years later. And clearly, the IRS is getting more and more data from foreign governments and institutions to ferret out holdings by US persons.

The How Many? The IRS’s first offshore disclosure program in 2009 corralled about 15,000 taxpayers, but only about 2,000 of those cases are wrapped up. See [IRS Sets Offshore Amnesty, Part II](#). Since the October 15, 2009 deadline about 3,000 more have come in under the IRS’s old-time one-off system of voluntary disclosure. Those 3,000 can opt to come in under the new deal. See [Q&A 19](#).

These numbers may not seem too impressive, but they are when you consider the IRS only expected 1,000 or so in its 2009 deal. The IRS suggests disclosure deals with foreign banks are in the works, so this new initiative may shake more people out of the bushes. Even though the IRS

won't say conclusively that entrants won't be prosecuted, the first program proved the IRS generally would not. Besides, there are few alternatives.

The Why? Not everyone with a foreign bank account is trying to hide income or assets from the IRS. Many people have their feet in multiple countries, inherited foreign accounts or married into them. Some US citizens have hardly ever lived in the US. Whatever the circumstances or reasons, US citizens and permanent residents (Green Card holders) are at risk if they don't report foreign income and accounts.

The What? The 2011 voluntary disclosure program involves paying back taxes and interest on any income you didn't report, plus a 20% penalty on those back taxes. There is also an FBAR penalty equal to 25% of the amount in the foreign account(s), as opposed to 20% before. See [Q&A 8](#). You base that 25% on the year with the highest balance from 2003 through 2010. Some taxpayers can qualify for reduced 5% or 12.5% penalties, a positive change from the 2009 program for those who qualify. See [Q&A 52 and 53](#).

Taxpayers will be required to complete a "Foreign Account or Asset Statement" for each previously undisclosed foreign account or asset during the voluntary disclosure period. See [Q&A 25](#). Similarly, individuals disclosing offshore financial accounts with an aggregate highest account balance in any year of \$1 million or more will be required to complete a "Foreign Financial Institution Statement" for each foreign financial institution with which the taxpayer had undisclosed accounts or transactions.

Penalty Reduction? The new 12.5% penalty is for those whose offshore accounts or assets did not surpass \$75,000 in any calendar year between 2003 and 2010. See [Q&A 53](#). Taxpayers who inherited a foreign account and never withdrew money from it or foreign residents who didn't even know they were US citizens might face only a 5% FBAR penalty. The 2011 program provides additional guidance for qualifying for these lowered penalties.

Plus, if you qualify for the 5% or 12.5% penalty but came in under the 2009 voluntary disclosure program, you may get a second bite at the

apple. See [Q&A 52 and 53](#). After providing the necessary information to the IRS, you may be able to get a redetermination.

The When? The new August 31, 2011 deadline is *unlike* the October 15, 2009 date. Taxpayers must not only come forward by August 31, 2011, but also file all original and amended tax returns and include payment for taxes, interest and accuracy-related penalties by the deadline. See [Q&A 1](#). That deadline may be problematic to sweat the details, get counsel, review old tax returns and bank records, prepare all amended tax returns and file all required documents.

The paperwork can be considerable so don't wait until the last minute. Although I've seen some clients complete the entire process, many who came in under the 2009 program are still slogging through the paperwork. Everything takes time.

The IRS has already posted some helpful [guidance](#). More forms and documents appear to be forthcoming, but keep checking the [IRS website](#) for more information.

For more, see:

[IRS Offers New Amnesty For Offshore Tax Cheats](#)

[Still Have A Foreign Bank Account?](#)

[What To Do If Your Foreign Account Is A PFIC](#)

[Still More Foreign Account Worries!](#)

[Six Questions About Secret Foreign Bank Accounts](#)

[Ten Things To Know About Offshore Bank Accounts](#)

*Robert W. Wood practices law with [Wood & Porter](#), in San Francisco. The author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009, [Tax Institute](#)), he can be reached at wood@woodporter.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*