

## SAN DIEGO CHAPTER OF THE CALIFORNIA SOCIETY OF CPAs, TAXATION COMMITTEE

JUNE 2011  
MARRIOTT MISSION VALLEY

### THE 2011 OFFSHORE VOLUNTARY DISCLOSURE INITIATIVE: HOW IT WORKS AND WHO MAY BENEFIT

#### I. Overview

- A. Announced February 8, 2011 and runs through August 31, 2011
- B. Follow up to 2009 OVDI, which ran from March 23, 2009 to October 15, 2009, in which approximately 14,700 taxpayers came forward
- C. Tax Years Covered: 2003 – 2010
- D. Objective  
“A special voluntary disclosure initiative designed to bring offshore money back into the U.S. tax system and help people with undisclosed income from hidden offshore accounts get current with their taxes.” IR-2011-14 (2/8/11)
- E. Eligible participants include U.S. persons (individuals, corporations, trusts, estates, etc.) with unreported offshore accounts or unreported offshore entities that produced unreported offshore income, who are not currently subject to a civil examination or criminal investigation

#### II. Submission Requirements to Participate

- A. As a condition to being accepted into the OVDI, applicants must provide the IRS the following information, and take the following steps, for the tax years covered (generally 2003 through 2010, inclusive), on or before August 31, 2011:
  - Copies of previously filed original (and, if applicable, previously filed amended) federal income tax returns for tax years covered by the voluntary disclosure;
  - Complete and accurate amended federal income tax returns for all tax years covered by the voluntary disclosure, with applicable schedules detailing the amount and type of previously unreported income from the account or entity;
  - Complete and accurate original or amended offshore-related information returns (including, but not limited to, Forms 3520, 3520-A, 5471, 5472, 926 and 8865) and FBAR forms as applicable for calendar years 2003 through 2010;
  - Cooperate in the voluntary disclosure process, including providing information on offshore financial accounts, institutions and facilitators, and signing agreements to extend the period of time for assessing tax and penalties;
  - Pay 20% accuracy-related penalties under IRC § 6662(a) on the full amount of the underpayments of tax for all years;
  - Pay failure to file penalties under IRC § 6651(a)(1), if applicable;
  - Pay failure to pay penalties under IRC § 6651(a)(2), if applicable;

- Pay, in lieu of all other penalties that may apply, including FBAR and offshore-related information return penalties, a miscellaneous Title 26 offshore penalty, equal to 25% (or in limited cases 12.5% (see FAQ 53) or 5% (see FAQ 52)) of the highest aggregate balance in foreign bank accounts and value of foreign entities and assets during the period covered by the voluntary disclosure;
- Submit full payment of all tax, interest, accuracy-related penalty, and, if applicable, the failure to file and failure to pay penalties with the required submissions set forth in FAQ 25 or make good faith arrangements with the IRS to pay in full, the tax, interest, and these penalties (see FAQ 20 for more information regarding a taxpayer's ability to fully pay) (the suspension of interest provisions of IRC § 6404(g) do not apply to interest due in this initiative); and
- Execute a Closing Agreement on Final Determination Covering Specific Matters, Form 906.

#### B. Additional Submission Requirements, as Applicable

- All applicants: Completed and signed *Offshore Voluntary Disclosures Letter* disclosing taxpayer and foreign account and asset information (attached as [Exhibit A](#) hereto)
- All applicants: Completed *Foreign Account or Asset Statement* containing detailed description of account and/or asset, and fair market value (attached as [Exhibit B](#) hereto).
- All applicants: Completed *Penalty Computation Worksheet* showing the applicant's determination of the aggregate highest account balance of his/her undisclosed offshore accounts, fair market value of foreign assets, and penalty computation signed by the applicant and the applicant's representative (attached as [Exhibit C](#) hereto).
- All applicants disclosing offshore financial accounts: For those applicants disclosing offshore financial accounts with an aggregate highest account balance in any year of \$1 million or more, completed *Foreign Financial Institution Statements* as appropriate (information the IRS will use to investigate promoters) (attached as [Exhibit D](#) hereto).
- All applicants: Properly completed and signed agreements to extend the period of time to assess tax (including tax penalties) and to assess FBAR penalties.
- All applicants disclosing offshore financial accounts: For those applicants disclosing offshore financial accounts with an aggregate highest account balance in any year of \$500,000 or more, copies of offshore financial account statements reflecting all account activity for each of the tax years covered.
- All applicants disclosing offshore entities: A statement identifying all offshore entities for the tax years covered by the voluntary disclosure, whether held directly or indirectly, and the applicant's ownership or control share of such entities.
- Estates and certain executors or advisors: If the applicant is a decedent's estate, or is an individual who participated in the failure to report the foreign account, foreign asset, or foreign entity in a required gift or estate tax return, either as executor or advisor, provide complete and accurate amended estate or gift tax returns (original estate or gift tax returns, if not previously filed) for tax years covered by the voluntary disclosure necessary to correct the underreporting of assets held in or transferred through undisclosed foreign accounts or foreign entities.

### III. Penalty Framework

- A. 20% accuracy-related penalties under IRC § 6662(a)
- B. Failure to file penalties under IRC § 6651(a)(1), if applicable (5%, plus 5% each month, up to 25%)

- C. Failure to pay penalties under IRC § 6651(a)(2), if applicable (0.5%, plus 0.5% each month, up to 25%)
- D. In lieu of all other penalties that may apply (including FBAR and foreign information return penalties), a miscellaneous Title 26 offshore penalty, equal to 25% of the highest value of the offshore account or value of the offshore entity or asset during the covered years
  - (i) 5% penalty if applicant (a) did not open account, (b) exercised minimal and infrequent contact with account, (c) have not withdrawn more than \$1,000 from the account in any one year, and (d) can establish that all applicable U.S. tax has been paid on funds deposited to account (i.e., only account earnings have been unreported)
  - (ii) 5% penalty if applicant is foreign resident who was unaware he/she was a U.S. citizen
  - (iii) 12.5% penalty for applicants whose highest aggregate account balance (including fair market value of assets in undisclosed offshore entities and fair market value of any foreign assets that were either acquired with improperly untaxed funds or produced improperly untaxed income) in each of the years covered is less than \$75,000

#### IV. Potential Benefits to Participating

- A. Eliminate exposure to other potentially applicable penalties (e.g., 75% fraud)
- B. “Generally” eliminate the risk of criminal prosecution
- C. Come current with tax and information reporting obligations with a relative degree of certainty regarding penalty exposure
- D. 2009 OVDI participants may potentially participate in 2011 OVDI if they qualify for the reduced 5% or 12.5% penalty under the 2011 OVDI

#### V. Strategic Considerations of Whether to Participate

- A. If no unreported income, generally best not to participate in OVDI; IRS FAQs 17 and 18 provide that penalties will not be imposed for filing of delinquent information forms (question about authority of administrative guidance issued as FAQs without formal comment and hearing process?)
- B. Penalties under the OVDI versus regular civil penalties that may apply
  - (i) 25% penalty based on highest value of offshore account (and no reasonable cause defense) versus potential \$10,000 penalty (and reasonable cause defense); case-by-case analysis
  - (ii) Real estate that produces nominal rental income; no reporting requirement, but potentially large penalty if disclosed pursuant to OVDI
- C. Statute of limitations issues – 3 year, 6 year, open?
- D. No guarantee the IRS will not initiate criminal investigation

#### VI. California Voluntary Compliance Initiative (SB 86) – Aug. 1, 2011 to Oct. 31, 2011

Federal tax regulations require us to notify you that any tax advice in this message was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties.

*Jon P. Schimmer* is a partner at Procopio and focuses his practice on all areas of international, federal, state and local tax and business matters, with an emphasis on tax and business planning for corporations, limited liability companies and partnerships, particularly with respect to formations, acquisitions, mergers and reorganizations, and liquidations. Mr. Schimmer also advises individuals with respect to income, estate, and gift tax issues, and represents businesses and individuals in connection with audit and controversy matters before the Internal Revenue Service, Franchise Tax Board, State Board of Equalization and County Assessor Offices. Mr. Schimmer received his Juris Doctor degree from the University of San Diego School of Law in 2001, where he graduated cum laude. He is admitted to practice in California, the U.S. District Court, Southern District of California and before the United States Tax Court, and he is an adjunct Professor of Law in the Graduate Tax Program at the University of San Diego School of Law. Mr. Schimmer is also licensed by The California Board of Accountancy as a Certified Public Accountant. Reach him at 619.525.3805 or [jon.schimmer@procopio.com](mailto:jon.schimmer@procopio.com).

**EXHIBIT A**

Offshore Voluntary Disclosures Letter

***Offshore Voluntary Disclosures***

*If taxpayer has domestic issues only, please have them contact their local Criminal Investigation office for a traditional voluntary disclosure.*

**<DATE>**

**Internal Revenue Service  
Criminal Investigation  
ATTN: Voluntary Disclosure Coordinator  
Philadelphia Lead Development Center  
600 Arch Street, Room 6406  
Philadelphia, PA 19106**

**Re: Taxpayer Name  
Tax Identification Number  
Taxpayer Date of Birth  
Taxpayer Address**

**Dear Voluntary Disclosure Coordinator:**

To assist in a timely determination of my acceptance into the Voluntary Disclosure Program, (*for Voluntary Disclosures involving offshore accounts or assets*), I have addressed *all* of the following items:

- Please include:
  - Complete name:
  - Social Security Number:
  - DOB:
  - Address:
  - Passport Number (and Country):
  - Current Occupation
  
- Taxpayer Representative and his/her contact information.
  
- Explain the source of the funds.

- Disclose if you or any related entities are currently under audit or criminal investigation by the Internal Revenue Service or any other law enforcement authority.
  - Has the IRS notified you that it intends to commence an examination or investigation? **Yes No**
  - Are you under criminal investigation by any law enforcement authority? **Yes No**
  - If yes, please explain.
  
- Do you believe that the IRS has obtained information concerning your tax liability? **Yes No**
  - If yes, please specify.
  
- Please check the box to estimate the annual range of the highest aggregate *value* of your offshore accounts/assets.

**Highest Aggregate**

<b>Account/Asset Value</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
\$0 to \$100,000								
\$100,000 to \$1,000,000								
\$1,000,000 to \$2,500,000								
\$2,500,000 to \$10,000,000								
\$10,000,000 to \$100,000,000								
Greater than \$100,000,000								

- Please check the box to estimate the potential total unreported *income* from the offshore account(s) during each disclosure period. If known, please enter exact amounts/assets.

**Estimated Total**

<b>Unreported Income</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
\$0 to \$100,000								
\$100,000 to \$1,000,000								
\$1,000,000 to \$2,500,000								
\$2,500,000 to \$10,000,000								
Greater than \$10,000,000								

- For accounts or assets where you have control or are a beneficial owner of the account or asset, list any and all financial institutions and the country where the institution is located. For accounts, please also list the dates the accounts were opened and/or closed. Provide your point of contact at each financial institution.
- Explain the purpose for establishing the offshore account or assets. For example: Holocaust Compensation or Restitution; inherited account; account established prior to World War II, etc.; if tax non-compliance – please explain.
- List each person or entity affiliated with the account, their formal structure (i.e., if a corporation, foundation, or trust), and the nature of their relationship to the account (i.e. owner, power of attorney, parent entity of corporate account holder, etc.).
- Explain all face to face meetings, and any other communications you had regarding the accounts or assets with the financial institution(s). Also include face to face meetings or communications regarding the accounts or assets with independent advisors/investment managers not from the financial institution(s) where the funds are held. Provide the names, locations and dates of these meetings and/or communications.

**To be included with all letters:**

By signing this document, I certify that I am willing to continue to cooperate with the Internal Revenue Service, including in assessing my income tax liabilities and making good faith arrangements to pay all taxes, interest, and penalties associated with this voluntary disclosure.

Under penalties of perjury, I declare that I have examined this document and accompanying statements, and to the best of my knowledge and belief, they are true, correct, and complete.

\_\_\_\_\_  
Signature of Taxpayer

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Date

**IRS reserves the right to make further contacts with the taxpayer to clarify his/her submission.**

**EXHIBIT B**  
Foreign Account or Asset Statement

Foreign Account or Asset Statement  
Statement \_\_\_ of \_\_\_

Name: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

Submit a separate Statement for each foreign account or asset included in your voluntary disclosure. At least one Statement must be submitted. Respond to each applicable question in the space provided –attachments are appropriate should additional space be necessary.

1	Name of Foreign Financial Institution			
2	Country where Institution is Located			
3	Contact Person at this Institution			
		YES	NO	
4	Is the offshore account a bank account holding cash, money market, or CD?			
5	Is the offshore account a custodial account holding securities?			
6	Is the offshore account another type of account or asset?			
7	If so, what type of account or asset?			
<b>Bank or Financial Accounts</b>				
8	Source of funds within account			
9	Name under which the account was held			
10	If held by an entity, type of entity			
11	Date account was opened			
12	Date account was closed			
13	Does the account include Passive Foreign Investment Company (PFIC) or mutual funds?	YES	NO	OTHER
<b>Other Assets (real estate, artwork, bullion, etc.)</b>				
14	Description and Location of the Asset			
15	Purchase price and date acquired			
16	Sales price and date of disposition (if sold)			
17	FMV at 12/31/10 if asset is still owned			

The highest value of this account and/or fair market value of asset over the period of the voluntary disclosure should be included on the Penalty Computation Worksheet.

**EXHIBIT C**  
Penalty Computation Worksheet

**PENALTY COMPUTATION WORKSHEET**

	2003	2004	2005	2006	2007	2008	2009	2010
<b>Acct #1 *</b>								
<b>Acct #2 *</b>								
<b>Acct #3 *</b>								
<b>Acct #4 *</b>								
(add additional accounts as needed)								
Highest Aggregate Balance	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**25% Offshore Penalty**

Highest Aggregate Balance is in year:

Highest Aggregate Balance in USD is:

Multiply the highest aggregate balance by 25%

25%

**Calculated Offshore Penalty:**

\$0

\* For each year of your voluntary disclosure, provide the highest balance in the account (or fair market value of the asset)

Under the penalties of perjury, I declare that I examined the facts stated in this Penalty Computation Worksheet, including any accompanying documents, and, to the best of my knowledge and belief, they are true, correct, and complete.

\_\_\_\_\_  
Taxpayer's Signature(s)

\_\_\_\_\_  
Date

I am submitting this Penalty Computation Worksheet and any accompanying documents. Upon information and belief, the statements herein are true and correct.

\_\_\_\_\_  
Representative's Signature

\_\_\_\_\_  
Date

**EXHIBIT D**  
Foreign Financial Institution Statements

Foreign Financial Institution Statement  
Statement \_\_\_ of \_\_\_

Name: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

For those applicants disclosing offshore financial accounts with an aggregate highest account balance in any year of \$1 million or more, submit a separate Statement for each foreign financial institution where you held the funds you are now disclosing. At least one Statement must be submitted. These Statements will be used by us to identify promoters and banks. We may request additional information from you about promoters or banks.

Name of Foreign Financial Institution			
Country where it is located			
Question		YES	NO
1	Did a representative of the foreign financial institution visit you in the United States regarding the offshore account or asset?		
2	Did a representative of the foreign financial institution suggest to you the use of offshore accounts, offshore investments, offshore entities or particular foreign countries as a way of avoiding taxes or avoiding the disclosure of your ownership of the account or asset?		
3	Did a representative of the foreign financial institution suggest to you the use of practices such as holding mail at the institution, using of prepaid phone cards, bank storage of account documentation, or conducting face to face meetings to avoid the disclosure of your ownership of the account or asset?		
4	Did a representative of the foreign financial institution or one of its U.S. subsidiaries provide services in the U.S. related to offshore accounts or assets (such as facilitating opening accounts, reviewing account activity, forwarding account statements, providing investment and/or tax advice, etc.)?		
5	Were you able to make deposits to or withdrawals from your offshore account through the use of a U.S. domestic branch office of the foreign financial institution?		
6	Were you able to access funds in your offshore account by the use of wire transfers made into the U.S.?		
7	Was an accountant, attorney, return preparer or other business person in the U.S. involved in setting up the offshore account, investment or entity or in advising their use?		
8	Was a U.S. bank, brokerage firm, or other financial services company involved in setting up the offshore account, investment or entity or in advising their use?		
9	Did a representative of the foreign financial institution attempt to discourage or prevent you from filing a voluntary disclosure with the IRS or repatriating the foreign funds into the U.S.?		
10	Did an advisor or other person attempt to influence you to move funds from one foreign financial institution to another or from one foreign country to another to avoid disclosure of the account or asset?		