

**WEALTH PRESERVATION AND TAX PLANNING ALERT**

www.bergersingerman.com

November 2011

**What to Do Now That The  
2011 Offshore Voluntary Disclosure Initiative Has Ended**

**The IRS Voluntary Disclosure Program**

The Voluntary Disclosure Program which existed prior to the implementation of the 2011 OVDI remains an option for U.S. taxpayers to become compliant with U.S. tax and reporting requirements. This program is a creation of IRS administrative policy that has and will continue to evolve as the IRS continues to refine its offshore enforcement and administration.

The IRS has not indicated how voluntary disclosures submitted after September 9, 2011, will be treated, but it is anticipated that the administrative procedures that were in effect with the 2011 OVDI will continue to apply, with the exception of the penalty framework. Under the 2011 OVDI, participating U.S. taxpayers were generally required to disclose all foreign income, foreign financial accounts, and ownership interest in foreign entities to the IRS for the 2003 to 2010 time period by submitting a complete package of financial information and documentation (including tax returns and informational returns) by August 31, 2011, (which the IRS later extended to September 9, 2011, due to Hurricane Irene), and were required to pay:

1. All applicable taxes, interest, accuracy-related penalties, late filing and late payment penalties (if applicable) for the 2003 – 2010 time period.
2. A 25% penalty (or as low as 5% for certain qualifying U.S. taxpayers) applicable to the highest total balance in previously unreported foreign financial accounts or the value of previously unreported foreign assets from 2003 to 2010.

The IRS has already offered two amnesty programs since 2009 (the 2009 Offshore Voluntary Disclosure Program and the 2011 OVDI). Based on this fact, it is likely that penalties imposed on voluntary disclosures submitted presently will be less favorable than what was offered by the 2011 OVDI.

**Eligibility to Participate in the Voluntary Disclosure Program**

Participation in the IRS Voluntary Disclosure Program is not automatic. Generally speaking, U.S. taxpayers with

undisclosed foreign financial accounts or foreign assets are eligible to participate in the Voluntary Disclosure Program as long as the U.S. taxpayer:

1. Makes a timely, truthful, and complete disclosure to the IRS;
2. Cooperates with the IRS to determine the tax liability associated with the undisclosed foreign income and assets;
3. Makes good faith arrangements with the IRS to pay in full, the taxes, interest, and penalties determined by the IRS to be applicable; and
4. No illegal source income from illegal activities or conduct is involved (other than for non-payment of taxes).

A U.S. taxpayer must make a **timely** application to the Voluntary Disclosure Program. An application to participate in the Voluntary Disclosure Program will be timely as long as the U.S. taxpayer is not already under examination, regardless of whether it relates to undisclosed foreign financial accounts or assets, and the IRS has not already received information from a third party (e.g., informant, other governmental agency, or the media) alerting the IRS to the U.S. taxpayer's noncompliance.

**Determining Who Is A U.S. Taxpayer**

U.S. taxpayers are required to annually disclose their worldwide income on timely filed U.S. income tax returns and to disclose their involvement with foreign entities and financial accounts on certain informational forms. U.S. taxpayers include U.S. citizens and permanent residents (green card holders). Additionally, certain foreign citizens who are not permanent residents of the U.S. may qualify as U.S. taxpayers if they are "substantially present" in the U.S. (determined by counting days of physical presence in the U.S. during a 3-year period based on a weighted average).

Individuals who are U.S. permanent residents or are substantially present in the U.S. may be eligible for various exceptions to the foregoing residency rule or may be able to rely on an income tax treaty with the U.S. to retain foreign status.

*(continued on page 2)*

**WEALTH PRESERVATION AND TAX PLANNING ALERT**

www.bergersingerman.com

November 2011

(continued from page 1)

U.S. taxpayers also include legal entities, such as corporations, partnerships and trusts which were created or organized in the United States or otherwise considered domestic entities under U.S. tax principles.

**Treasury Department and IRS Informational Forms Relating to Cross-Border Activities**

The following are the informational forms that must be filed with the Department of the Treasury or the IRS to report interests in foreign financial accounts, foreign entities, and to disclose certain foreign activities. These forms do not require the payment of taxes, but the penalties for not timely filing any of these forms when required (or filing incomplete forms) can be severe and are not limited to monetary penalties. For example, the failure to file certain IRS forms listed below can suspend the statute of limitations of the U.S. taxpayer's individual income tax return until at least 3 years after such required IRS informational form is filed. In certain cases, criminal penalties may apply when the forms listed below are not timely (or accurately) filed.

Included below are the monetary civil penalties that may apply when the informational forms listed below are not timely filed. Unless otherwise specified, the due date for filing the informational forms below is the due date of the U.S. taxpayer's federal income tax return.

1. Treasury Department Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts). A U.S. taxpayer must file Form TD F 90-22.1 if the U.S. taxpayer has a financial interest in, signature authority or other authority over one or more financial accounts located in a foreign country and the aggregate balance of these accounts exceeds US \$10,000 at any time during the tax year in question. A financial account includes any bank, securities, or other financial instruments account. Certain U.S. taxpayers are considered to have a financial interest in the financial accounts held by corporations, partnerships and trusts. The due date for filing this form is June 30th of each year following the calendar year in which its requirement for filing have been met. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties of up to US \$10,000

per account (if willful, then the greater of US \$100,000 or 50% of the total balance of the foreign account not disclosed).

2. IRS Form 8938 (Statement of Specified Foreign Financial Assets) – Filing Requirement Currently Suspended Until IRS Form 8938 Is Finalized. For tax years beginning after March 18, 2010, any individual who, during the tax year, holds any interest in one or more "specified foreign financial assets" which have an aggregate value exceeding US \$50,000 must file IRS Form 8938. The term "specified foreign financial asset" includes any financial account maintained by a foreign financial institution, as well as certain assets not held by a foreign financial institution, such as stocks, securities or financial instruments issued by a nonresident of the U.S., and interests in foreign entities. Currently, IRS Form 8938 and instructions are in draft form and being circulated by the IRS for comment. Penalties for failure to file IRS Form 8938 when required can result in a US \$10,000 penalty (an additional penalty of up to US \$50,000 may apply if failure to file continues after notified by the IRS).
3. IRS Form 926 (Return by a U.S. Transferor of Property to a Foreign Corporation). A U.S. taxpayer is required to file IRS Form 926 to report transfers of property to foreign corporations. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties equal to 10% of the value of the property transferred (US \$100,000 maximum per return with no limitation if the failure to file was intentional).
4. IRS Form 3520 (Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts). A U.S. taxpayer is required to file IRS Form 3520 if the U.S. taxpayer created a foreign trust, is deemed to be the owner of assets held by a foreign trust, directly or indirectly transferred property or received distributions from a foreign trust, or held certain loan obligations with a foreign trust. A U.S. taxpayer is also required to file IRS Form 3520 to report certain gifts received from foreign persons and entities. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties equal to the greater of US \$10,000 or 35% of the transaction required to be reported or, in the case of gifts, up to 25% of the gift amount received by the U.S.

(continued on page 3)

**WEALTH PRESERVATION AND TAX PLANNING ALERT**

www.bergersingerman.com

November 2011

(continued from page 2)

- taxpayer.
5. IRS Form 3520-A (Annual Information Return of Foreign Trust With a U.S. Owner). The IRS Form 3520-A must be filed on behalf of a foreign trust when one or more U.S. taxpayers are considered to own any portion of the foreign trust's assets. IRS Form 3520-A must be filed with the IRS by the 15th day of the 3rd month after the end of the trust's tax year, and certain required annual statements must be provided to all U.S. owners and beneficiaries of the foreign trust by this due date. Penalties equal to the greater of US \$10,000 or 5% of the gross value of the assets owned by the U.S. owner may apply when IRS Form 3520-A is not timely filed.
  6. IRS Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations). Certain U.S. taxpayers who are officers, directors or shareholders in certain foreign corporations must file IRS Form 5471. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties of US \$10,000 per return. Additional penalties apply if the failure to file is intentional.
  7. IRS Forms 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business). Certain 25% foreign-owned U.S. corporations or foreign corporations engaged in U.S. trade or business must file IRS Form 5472 to report certain transactions with a foreign- or U.S.-related party. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties of US \$10,000 per return. Additional penalties apply if the failure to file is intentional.
  8. IRS Form 8621 (Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund). A U.S. taxpayer that is a shareholder of a passive foreign investment company ("PFIC") must file IRS Form 8621 to report certain dispositions of PFIC stock, report the receipt of certain distributions from a PFIC, and make certain tax elections with respect to a PFIC. As enacted by the HIRE Act and effective after March 18, 2010, U.S. shareholders of a PFIC must also file IRS Form 8621 to disclose the ownership of one or more PFICs. This enhanced reporting requirement of disclosing the ownership of one or more PFICs is currently suspended until a new IRS Form 8621 is finalized. In the meantime, a U.S. taxpayer who is otherwise required to file IRS

- Form 8621 (i.e., to report certain dispositions of a PFIC, distributions from a PFIC, or to make certain tax elections with respect to a PFIC) must continue to do so.
9. IRS Form 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships). Certain U.S. taxpayers must disclose their ownership interests in foreign partnerships and disclose certain transfers of property to the foreign partnership, certain acquisitions and dispositions of partnership interests, and certain changes in foreign partnership interests. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties of US \$10,000 per return. Additional penalties apply if the failure to file is intentional.
  10. IRS Form 8858 (Information Return of U.S. Persons With Respect to Foreign Disregarded Entities). Certain U.S. taxpayers that own a foreign disregarded entity directly or indirectly must file IRS Form 8858. U.S. taxpayers who fail to timely file this form when required can be subject to civil penalties of US \$10,000 per return. Additional penalties apply if the failure to file is intentional.

**Increased IRS Cross-Border Enforcement**

Global tax enforcement is a top priority at the IRS to combat offshore tax evasion. According to IRS Commissioner Doug Shulman, approximately 30,000 U.S. taxpayers have come forward to make voluntary disclosures under the 2009 Offshore Voluntary Disclosure Program (the "2009 VDP") and the 2011 OVDI, resulting in approximately \$2.2 billion collected so far. IRS Commissioner Doug Shulman cites "an unprecedented period for our global international tax enforcement efforts," and the IRS having "pierced international bank secrecy laws" as a couple of reasons for the number of U.S. taxpayers who participated in the 2009 VDP and 2011 OVDI.

Offshore enforcement efforts are ongoing. Presently, U.S. and Swiss officials are in negotiations on a civil settlement amid US. criminal probes of 11 financial institutions, including Credit Suisse Group AG and Julius Baer Group Ltd, suspected of aiding U.S. taxpayers in dodging U.S. tax. The identities of thousands of U.S. taxpayers may be turned over

(continued on page 4)

we deliver creative and effective business solutions and counsel

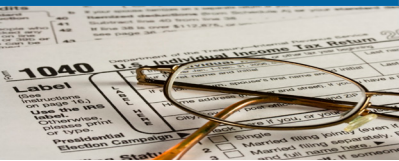
# BERGER SINGERMAN

attorneys at law

## WEALTH PRESERVATION AND TAX PLANNING ALERT

[www.bergersingerman.com](http://www.bergersingerman.com)

November 2011



(continued from page 3)

to U.S. authorities as a result.

The enactment of the Hiring Incentives to Restore Employment Act (the "HIRE Act") on March 18, 2010 will further augment offshore enforcement. More specifically, the HIRE Act included certain provisions of previously proposed legislation known as the Foreign Account Tax Compliance Act ("FATCA"). The FATCA provisions of the HIRE Act are meant to curb offshore tax evasion and are viewed by many practitioners as the most far-reaching law of its kind in recent history. Under the FATCA provisions of the HIRE Act, individual compliance has been broadened (see IRS Forms 8938 and 8621, discussed above). Additionally, pursuant to a phased implementation of reporting starting in 2013 and to be implemented over the next few years, foreign financial institutions, among other things, will be required to provide information about each of their U.S. owned or controlled accounts, disclose information to the IRS and withhold U.S. taxes on these accounts, if necessary.

### Conclusion

Increased offshore enforcement by the IRS makes it more likely that U.S. taxpayers who have concealed foreign financial accounts, income and assets will be discovered. These taxpayers should consider applying to the IRS

Voluntary Disclosure Program to become compliant with their U.S. tax and reporting requirements prior to the IRS discovering their noncompliance in order to try and minimize penalties and the possibility of criminal prosecution.

The Voluntary Disclosure Program may not be suitable for every U.S. taxpayer who is noncompliant. For example, the facts and circumstances of some U.S. taxpayers may support a reasonable cause basis to have otherwise applicable penalties reduced or abated.

The above summary is not intended to be an exhaustive summary of the IRS Voluntary Disclosure Program or the options available to U.S. taxpayers who desire to become compliant with their U.S. tax and reporting obligations. ■

---

*The information in this newsletter is of a general nature only and is not intended to be relied upon as, nor substitute for, specific professional advice. Berger Singerman is not responsible for any loss or damage occasioned to any person in connection with acting on or refraining from action as a result of any material in this publication.*

*The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.*

## WEALTH PRESERVATION AND TAX PLANNING GROUP

**Michael Harris**

(561) 893-8717

MHarris@bergersingerman.com

**Nick Jovanovich**

(954) 712-5144

NJovanovich@bergersingerman.com

**Daniel Mielnicki**

(561) 893-8705

DMielnicki@bergersingerman.com

**Marian Nease**

(561) 893-8710

MNease@bergersingerman.com

**Sheldon Polish**

(954) 712-5132

SPolish@bergersingerman.com

**William Shaheen**

(561) 893-8732

WShaheen@bergersingerman.com

**Alfredo Tamayo**

(561) 893-8733

ATamayo@bergersingerman.com