

Private Banking Newsletter



July 2009

Announcements

Rebranding of our Private Banking Group

“We have rebranded! The name of our Private Banking Practice Group has now been changed to the Wealth Management Practice Group - something we have done with a view to more accurately describing what it is that we do. We are also formalizing a broader Wealth Management Industry Practice Group, which includes our colleagues from a number of practice areas, including financial services, litigation, and mergers and acquisitions to our focused approach to the wealth management industry and to wealth owning families around the world.

Our new name reflects our Firm’s commitment to the wealth management industry and its understanding of the growing importance of this area for the financial services industry. For global wealth owners, our new name reflects our dedication to them and their families, and our efforts to provide seamless services across geographies and practice specialty areas. We endeavour to meet the needs of our clients through a uniquely global approach providing effective advice through a real understanding of the legal and tax needs of those we serve. We avoid and manage conflicts of interest by sticking to what we do best - providing tax and legal input. Our Firm does not engage in asset management or the provision of trust or other fiduciary services.”

Congratulations!

Philip Marcovici received the Lifetime Achievement Award at the Citywealth Magic Circle Awards 2009, held on 14 May in London, UK.

This quarterly newsletter looks at important issues facing private bankers and trustees operating internationally.

If you would like any further information relating to any of the topics covered in this issue or wish to suggest items that you would like to see covered in future issues, please contact Sebastien Guelet of our European Business Development Unit at fax number +44 (0) 20 7919 1438, or any of the individual lawyers listed at the end of the newsletter.

Pursuant to requirements relating to practice before the Internal Revenue Service, any tax advice in this communication (including any attachments) is not intended to be used, and cannot be used, for the purpose of (i) avoiding penalties imposed under the United States Internal Revenue Code, or (ii) promoting, marketing, or recommending to another person any tax-related matter.

This may qualify as “Attorney Advertising” requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.
(Compulsory notice under New York Bar Rules)

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Featured Article

UK Chancellor's 2009 Budget

The UK Chancellor's 2009 Budget was delivered against the worst economic backdrop in well over half a century and with the prospect of a general election in just over a year. The Chancellor was forced to dramatically cut the economic growth forecasts made in last November's Pre-Budget Report, restrict public borrowing and raise taxes - introducing a new 50% tax rate for those earning £150,000 or more which also applies to many trusts (effective from 6 April 2010).

The increase in the top rate of income tax to 50% (with an unchanged rate of capital gains tax at 18%) will increase the differential between income tax and capital gains tax to 32% and will no doubt prompt many higher earners and trusts to review their investment strategies.

1. Rates of tax & allowances

The UK tax rates and allowances for the UK tax year 2009/2010 will be as follows:

Taxable Bands	Rate	
	Dividends from UK & non-UK companies	All other income
£0 to £37,400	10%	20%
Over £37,400	32.5%	40%

The personal allowance for 2009/2010 is increased to £6,475 (from £6,035).

From 6 April 2010, those earning more than £100,000 (after certain specified deductions) will have their personal allowance gradually reduced to nil; the amount of the allowance will be reduced by £1 for every £2 above the £100,000 income limit.

Higher earners will also be hit with a new 50% tax rate from 6 April 2010 on income over £150,000. Dividends received by those subject to this new rate of 50% will be subject to tax at a new dividend rate of 42.5%. In the Pre-Budget Report last November it was announced that a new top rate of income tax of 45% would be introduced with effect from 6 April 2011. The increase in the new top rate of tax and its earlier introduction are politically driven measures which will not raise a great deal of tax but, together with the removal of the personal allowance and the reduction of pension relief for those earning over £150,000 from 2011 (see paragraph 2 below), will potentially have a significant impact on individual high earners.

The new higher rates of tax will also apply to trusts. From April 2010, the dividend trust rate will be increased to 42.5% and the trust rate of tax (payable by discretionary trusts) will be increased to 50%.

The capital gains tax annual exemption has increased from £9,600 in 2008/2009 to £10,100 in 2009/2010.

The inheritance tax nil rate band rises to £325,000 in 2009/2010.

2. Pensions

With effect from 6 April 2011, income tax relief on pension contributions will be restricted to the basic rate (20%) for those earning more than £150,000. Under current rules a taxpayer can claim tax relief at their marginal rate of income tax on pensions contributions of up to £245,000 for the UK tax year 2009/2010 (increasing to £255,000 for the UK tax year 2010/2011).

Legislation will be introduced in Finance Bill 2009 to prevent individuals making larger than normal pension payments in advance of the restriction on income tax relief coming into effect in April 2011. There will be a special tax charge on pension contributions made after Budget day 2009 if the payments exceed £20,000 and they are over and above the relevant taxpayer's normal pattern of pension savings.

3. Taxation of personal dividends

Since 6 April 2008, individuals who receive dividends from non-UK resident companies have, subject to certain conditions, been entitled to the same

Taxable Bands	Rate
	Savings income
£0 to £2,440	10%
£2,440 to £37,400	20%
Over £37,400	40%

non-repayable tax credit as applies to dividends from UK companies. The tax credit is available where the individual owns less than 10% of the shares of the relevant non-UK resident company. Finance Bill 2009 will further extend eligibility for the non-repayable tax credit to individuals in receipt of dividends from non-UK resident companies where the individual owns a 10% or greater shareholding in the relevant company. The tax credit will only be available where the source of the dividend is a "qualifying territory" - broadly, those with which the UK has a double tax agreement containing a non-discrimination clause.

Measures will also be introduced in Finance Bill 2009 to extend the non-repayable tax credit to individuals who receive dividends from offshore funds which are largely invested in equities. However, where an offshore fund is substantially (more than 60%) invested in interest bearing assets, UK resident individuals receiving distributions from such funds will be treated as having received interest and not a dividend and will be taxed accordingly.

4. Foreign dividends

Following a period of consultation, legislation is to be introduced in Finance Bill 2009 largely to exempt foreign dividends and other distributions

received, by UK companies, from foreign companies from UK corporation tax. Alongside this, anti-avoidance measures will be introduced to restrict UK interest deductions by UK members of multinational groups.

5. Offshore funds

The UK offshore income gains legislation targets offshore funds. If an offshore fund is a “distributing fund” (so that, broadly, the fund does not seek to roll up income in order to increase the capital value of the holding) the legislation does not apply and the gains realised by the investor on a disposal of his interest in the offshore fund are chargeable as capital gains in the normal way. In all other cases, the investor is chargeable to income tax on any gain realised when he disposes of a material interest in the offshore fund.

As previously announced measures will be introduced in Finance Bill 2009 to change the definition of an offshore fund for UK tax purposes. Under current legislation the definition is based upon the regulatory definition of a “collective investment scheme” in the Financial Services and Markets Act 2000. The new definition uses a character based approach. The government plans on introducing a new “reporting” and “non-reporting” funds regime to replace the existing distributing fund status. Reporting funds will be exempt from the offshore income gains legislation. These measures will apply from 1 December 2009.

Measures will also be introduced to clarify the capital gains tax treatment of interests in certain non-UK fund structures which fall within the new definition of offshore funds. The new capital gains tax treatment will apply from 1 December 2009 but investors will have the option to elect for the new tax treatment to apply retrospectively back to the UK tax year 2003/2004.

6. Second offshore tax “amnesty”

Limited details of the much heralded second offshore tax “amnesty” were announced by the Chancellor in the Budget. The “New Disclosure Opportunity” for UK residents with unpaid tax connected to an offshore

account will run from the autumn 2009 until March 2010. Taxpayers making a disclosure under this facility will have to pay all underpaid tax and any interest due as well as a penalty. The level of the penalty will be announced prior to the launch of the facility but is likely to be significantly below the maximum of 100% of any underpaid tax. It was also confirmed that HMRC will seek to issue notices, under the new information gathering powers, to financial institutions requiring them to disclose details of UK customers with offshore accounts.

7. Naming and shaming

Under provisions to be introduced in Finance Bill 2009, HMRC will have power to publish the names and details of individuals and companies who are penalised for deliberate defaults leading to the loss of tax of more than £25,000. The legislation will be drafted to catch only deliberate defaults and not defaults arising from a failure to take reasonable care. Those who make a full unprompted disclosure or a full prompted disclosure within the required time frame (as specified by HMRC) will not have their names published. No details of deliberate defaults committed prior to the provisions coming into effect will be published.

8. Residence & domicile

After the radical changes to the taxation of non-UK domiciled individuals introduced in Finance Act 2008 such individuals may be breathing a sign of relief that no significant changes to the rules affecting them were announced in the Budget.

Finance Bill 2009 will, however, introduce a number of minor amendments to the rules, including the extension of certain exemptions which allow individuals taxable on the remittance basis to bring property (such as clothing and jewellery), which has been purchased out of foreign source investment income, into the UK without triggering a charge to UK tax. The exemptions will be extended, with effect from 6 April 2008, to include exempt property purchased out of foreign employment income and foreign chargeable gains.

9. Inheritance tax agricultural property relief

Agricultural property is subject to favourable UK inheritance tax treatment. If an individual makes a gift of agricultural property (during their lifetime or on their death) the value of the gift for inheritance tax purposes may be reduced by 100% or 50%, depending on the nature of the agricultural property gifted.

Currently, in order to benefit from the relief the agricultural property must be situated in the UK, the Channel Islands or the Isle of Man. Earlier this year the European Commission issued a formal request to the UK to amend agricultural property and woodlands reliefs so that they extend to property Europe wide. In response to this the Chancellor announced in the Budget that measures would be introduced in Finance Bill 2009 to extend the relief to agricultural property in the European Economic Area. These measures are backdated to 23 April 2003.

10. ISAs

The amount which can be invested in an ISA each year will be increased to £10,200, up to £5,100 of which may be invested in cash. The new limits will apply to people aged 50 or over from 6 April 2009 and to all other investors from 6 April 2010.

11. Stamp Duty Land Tax

The exemption from stamp duty land tax for residential properties costing £175,000 or less, announced in September 2008 and due to come to an end on 2 September 2009, will continue to apply until 31 December 2009.

12. VAT (Value Added Tax)

The Chancellor confirmed that the standard rate of UK VAT will revert to 17.5% on 1 January 2010. A temporary reduction in the standard rate of UK VAT from 17.5% to 15% was introduced with effect from Monday 1 December 2008 to 31 December 2009.

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Case Summaries

THE NETHERLANDS

ECJ Rules on the Extension of the Recovery Period to 12 Years

In the Netherlands, a maximum recovery period applies during which the Dutch Tax Authority (DTA) is allowed to levy back taxes concerning (deliberately) undisclosed assets and income. When the assets or the income are of foreign origin, the recovery period is longer (12 years), than in a strictly domestic situation (5 years). It has long been debated whether such a provision is in breach of the fundamental freedoms of the European Union, especially the freedom of capital (which extends also to third parties, such as Switzerland) and the freedom of services.

On June 11, 2009, the European Court of Justice (ECJ) ruled on this issue in two cases, the X-case (C-155/08) and the Passenheim-van Schoot-case (C-157/08). The ECJ concluded that, in principle, the extension of the recovery period constitutes a justifiable limitation of the basic freedoms. The reasoning behind this decision is that the extended recovery period seeks to combat tax evasion in a situation where the Netherlands cannot effectively gather the same information they would have in a strictly national situation.

The ECJ, however, does limit the use of an extended recovery period in situations where the DTA has evidence concerning taxable items located in another Member State which enables an investigation to be initiated. In that situation, the application by the Netherlands of an extended recovery period cannot be justified in all cases.

In conclusion, the DTA will, in general, be able to levy back taxes for undisclosed funds during the extended recovery period of 12 years. However, the ECJ has sent a clear warning to

the DTA that they may not abuse this extended recovery period by applying it to situations where the tax assessment has been delayed for other reasons than the lack of exchange of information between Member States.

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Legislative Developments

GLOBAL

Will Placing a Jurisdiction on the OECD's White List Prevent Offshore Tax Abuse?

The Organisation for Economic Cooperation and Development ("OECD") has been working with members of the G20 world leaders to help revive the confidence in the international banking system, and to restore stability and sustainable growth in the global economy. One method to reach this goal has been to create global transparency and prevent offshore tax abuse through the implementation of Tax Exchange and Information Treaties ("TIEAs").

The OECD has defined a "white list" threshold for jurisdictions that have substantially complied with internationally agreed tax standards. A country will be placed on the white list, and will be considered to have substantially implemented internationally agreed tax standards, when it has twelve or more TIEAs. Countries that have committed to compliance, but have not yet substantially implemented the requisite twelve TIEAs, will be placed on the "grey list." And finally,

countries that have not committed to the internationally agreed tax standard will be placed on the "black list."

The new OECD compliance list was published after the recent G20 Summit in April, 2009. As a result of pressure directed towards noncompliant jurisdictions by the G20 members, no countries remain on the blacklist. All jurisdictions have (at least in theory) agreed to become substantially compliant in the near future, and have been placed on the

grey list. Jurisdictions on the grey list include Switzerland, Liechtenstein and the Cayman Islands.

The forty jurisdictions on the white list include the G20 members (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States, and the European Union). Interestingly, China is on the white list even through two of its principal banking administrative

regions, Hong Kong and Macau, have only “committed to implement” the internationally agreed tax standard. Other countries new to the white list include Bermuda (qualifying early in June, 2009), the Seychelles, Barbados, Guernsey, Jersey and the Isle of Man (all qualifying in time for the recent April, 2009 G20 Summit).

Some of the newest white list members, and other jurisdictions eager to be removed from the grey list, have directed their focus towards implementing TIEAs with the Nordic

region, which has agreed to negotiate its TIEAs as a collective body. The seven Nordic jurisdictions include Finland, Sweden, Norway, Iceland, and Denmark. In addition to Denmark, the Danish Kingdom includes two autonomous jurisdictions, Greenland and the Faroe Islands. Thus, in one giant leap, a grey list jurisdiction can obtain seven TIEA deals in one negotiation, and be more than half way towards obtaining their seat on the white list (Jersey, Guernsey, Isle of Man and Bermuda all have TIEAs with the Nordic regions).

At a recent meeting in Washington D.C., OECD spokesman Angel Gurría, stated that the OECD has made more progress towards global transparency in the past three months than in the prior ten years. However, some critics are concerned that the twelve-treaty standard might become an arbitrary standard. Others worry whether vigilance against offshore tax abuse will be maintained once a jurisdiction is placed on the white list.

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AUSTRALIA

Recent Changes to Foreign Investment in Australian Real Estate

On 18 December 2008, the Australian Government announced details of changes to the Foreign Investment Policy regarding residential real estate. Amendments to the *Foreign Acquisitions and Takeovers Regulations* implementing these changes took effect from 31 March 2009.

The changes are intended to streamline and simplify the notification and administrative arrangements currently in place while maintaining the majority of the current restrictions. Material changes include:

- Investment in hotels and resorts will now be treated in the same manner as general commercial real estate rather than residential real estate.
- Foreign corporations now have 24 months from the date of purchase to build a new dwelling on vacant blocks of residential land (previously 12 months from the date of purchase with the cost of development totalling at least 50% of the value of the land). Similarly, the time for redevelopment of existing dwellings has also been extended to 24 months (previously 12 months) from the date of demolition.
- Conditions on purchase of single blocks of vacant residential land by temporary residents have been abolished.
- The requirement that no more than 50% of units in a new development be sold to foreign persons on an off-the-plan basis has been abolished, provided that developers advertise both locally and internationally.
- Foreign companies may now purchase established dwellings for use by their Australian based staff provided that the dwellings do not remain uninhabited for periods of more than 6 months at a time.
- Temporary residents are no longer required to notify when they purchase residential land or established dwellings for their own residence.

Detailed information

On 18 December 2008, the Assistant Treasurer released details of changes to the Australian Government’s foreign investment screening policies for the foreign acquisition of accommodation facilities and more generally in relation to the acquisition of residential real estate by foreign persons. These changes have now been given legislative force via amendments to the *Foreign Acquisitions and Takeovers Regulations (Regulations)*.

The changes are aimed at streamlining notification procedures, reducing post purchase conditions on the development of single blocks of vacant land and aligning the definition of temporary residents with visa categories. Current restrictions aimed at encouraging the supply of new dwellings while managing demand in the housing market will be retained

such as the rule requiring nonresidents to purchase new rather than existing dwellings.

Accommodation facilities

Accommodation facilities such as resorts and hotels are now to be treated as commercial real estate rather than residential real estate. Acquisitions of such facilities are now exempt from the Act and their acquisition will not require notification and approval, **provided that** they are valued below the relevant developed commercial property threshold, being:

- AUD \$5 million for heritage listed property,
- AUD \$50 million for non-heritage listed property; or
- AUD \$953 million (indexed annually) for US Investors.

Accommodation facilities previously did not enjoy the benefit of these exemptions. While the new exemption will extend to individual units in a facility (e.g. a hotel room in a strata titled hotel under management) it is not intended to apply to units that are simply located within a facility physically, or for example which are owner-occupied or privately rented out. These will continue to be assessed under the residential accommodation restrictions.

Temporary residents' exemption

"Temporary resident" includes all foreign persons living in Australia on a valid visa (excluding some categories such as tourists and visiting business professionals), irrespective of the expiry date of that visa. Temporary residents are no longer required to notify proposed acquisitions of:

- an established dwelling for their own residence (not for investment purposes);
- any new dwellings; and
- single blocks of vacant residential land (other acquisitions of vacant land will require notification and will normally be approved subject to development of that land taking place within 24 months).

The exemption also includes acquisitions of property by temporary residents via their wholly owned trust or Australian incorporated company.

The existing notification requirements continue to apply to non-residents, who must notify all proposed acquisitions of residential real estate.

Vacant residential land

Previously, foreign owned companies, trust estates and non-resident foreign persons acquiring single blocks of vacant residential land were required to build a dwelling on that land within 12 months. That period has now been extended to 24 months, and the additional requirement that development expenditure total at least 50% of the cost of the land has been abolished.

"Single blocks" of vacant land generally refer to a block of land on which only a single dwelling could be constructed. There may be additional development conditions imposed in relation to the acquisition of large tracts of land (e.g. for subdivision) or multiple adjacent single blocks.

New dwellings

The requirement that only 50% of new dwellings in an off-the-plan development be sold to foreign persons, has been removed from the Regulations in circumstances where developers market the property both locally and internationally. Similarly, in order to be able to sell a new standalone dwelling to a foreign person, vendors are no longer required to have concurrently developed a similar dwelling.

A "new dwelling" was previously defined as never having been occupied or sold, but has now been expanded to include dwellings that have not been sold and have been rented out for no longer than 12 months.

Foreign companies purchasing existing dwellings

Foreign owned companies can now purchase established dwellings for

the use of their Australian-based staff provided that they sell or rent the dwelling if it is expected to remain vacant for a period of more than 6 months. There is no limit to the number of established dwellings that can be purchased where required for employee accommodation. We have already seen some of our clients participating in this streamlined acquisition process, with approvals being issued in less than a week from the date of application (and on one occasion in the afternoon of the same day).

Redevelopment of existing dwellings

A proposed redevelopment of existing dwellings must increase the total number of dwellings and no rental income can be obtained from the existing dwellings prior to demolition. Developers must demolish the existing dwellings and commence construction within 24 months of an approval to do so, in line with the vacant land requirements (previously 12 months) and development expenditure must be at least 50% of the purchase price of the property.

Streamlined administrative procedures

Streamlined administrative procedures are now in place for foreign-owned companies, trust estates and non-resident foreign persons to notify and receive approval for proposed acquisitions of vacant residential land and newly constructed dwellings. New application forms and statutory notices have been introduced to facilitate the streamlined procedures.

Developers will no longer be issued advance approval for sales of new dwellings to foreign persons. All non-resident purchasers must now submit individual applications (although developers may submit these on their behalf).

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CANADA

Canadian Government to Re-introduce NRT and FIE Rules - Major Changes Unlikely

We have received a number of questions recently about whether or not the proposed Non-Resident Trust (“NRT”) Rules and Foreign Investment Entity (“FIE”) Rules will eventually come into force, and if so, in what form. The NRT Rules will have an impact on any trust with beneficiaries or settlors resident in Canada. The FIE Rules will have an impact on the way high-net-worth Canadian families structure the holding of assets offshore, particularly passive investments. Client requests for further information appear to be based on rumours that the new rules are either not going to become law or that the legislation will be somehow radically altered. At this time we have no reason to believe that the new rules will not become law or that there will be any significant changes to the legislation that would be relevant to private banking situations.

Specifically, at the end of January 2009, as part of the latest federal budget, the current Canadian minority government indicated that it would be re-introducing the NRT and FIE Rules to parliament for approval.

The previous time the enabling legislation for the FIE and NRT Rules was sent to parliament for approval as part of an omnibus technical tax amendments bill at the end of 2007, the bill quickly went all the way through the process, requiring only a third reading in the Senate before it would have received royal assent. At that point, this otherwise innocuous technical tax bill was sent to the Senate Finance Committee. Unlike the usual rubber-stamp exercise, at that point the bill was caught up in political issues that had nothing to do with the NRT and FIE Rules. Hearings were held, and hundreds of letters were written to the Senate committee reviewing the bill, but the focus was almost entirely on one change tax credits for film production in Canada. As a result of this one political dispute, which had nothing to do with the NRT and FIE Rules, the entire bill stalled in the Senate committee. When the minority government of the day decided to call an election to see if it could win a majority, the bill died.

Although there was a review of all of the provisions of the bill conducted during its previous trips through parliament, to our understanding, the only significant changes to the NRT and FIE Rules will be to clarify that they will not apply to Canadian non-taxable entities (pension plans). In our view, the FIE and NRT Rules did not apply to Canadian domestic pension plans in any event. Canada’s large

and powerful pension plans had some theoretical fears that they might become liable for tax under the rules, so the Senate committee promptly recommended that pension plans be made entirely exempt *ab initio* from the rules. There may be other technical amendments to clarify certain issues. However, as far as the private banking sector is concerned, the new rules are expected to be re-introduced effectively as-is, meaning they will be effective retro-active to January 1, 2007.

The NRT and FIE Rules are basically anti-avoidance rules in the eyes of the Canadian Department of Finance (the “Department”) and the Canada Revenue Agency (“CRA”). The Department and the CRA have invested considerable effort in getting them into law, so we do not expect any significant changes to the rules that would undermine the basic idea of preventing Canadian tax residents from making passive investments offshore and not paying tax currently on the income from those investments. The rules were originally announced in 2001, and would normally have been retroactive back to that date. Generally speaking, when the Department announces a change to the *Income Tax Act*, the enabling legislation specifically makes the change retroactive back to the date of announcement. Up until the surprise announcement that the NRT and FIE Rules would only be retroactive back to 2007, the Department had never previously backed off on the effective date, of any legislation. The fact that the Department had to make so many amendments to the proposed legislation between 2001 and 2007 that they had no choice but to change the effective date, was quite an

embarrassment for the Department, as it showed that they had not thought it through properly in the beginning. As a result, it would be an utter failure and even greater embarrassment for the Department if it had to significantly alter the new rules, or had to reset the effective date of the legislation again. As such, although it is still an open question as to when these rules will become law, it seems fairly clear that the Department and the CRA will do everything they can to force the legislation through as-is in order to avoid any further embarrassment. Although Canada currently has a minority government, the NRT and FIE Rules are non-political and in these difficult times, all the parties ostensibly support tax anti-avoidance rules targeted at the wealthy and non-resident in particular.

At the same time, from the perspective of new immigrants to Canada and also various planning strategies involving non-Canadian life insurance, these new rules will simplify matters enormously. As a result, the NRT and FIE Rules are not necessarily completely negative in their effect. If we hear any further news on the progress of this legislation or hear of any changes, we will issue an alert. Until such time, we continue to advise on the basis that the NRT and FIE Rules will apply retroactively to the 2007 taxation year as currently drafted.

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Recent Italian tax law developments

The Italian Government approved on June 26, 2009 a Law Decree (the “Decree”) which, in the context of a series of legislative measures aims at tackling the financial crisis and covering the state’s financial needs, and also introduced the two following sets of provisions aimed at counteracting international tax evasion schemes: (1) widening the scope of application of the Italian “controlled foreign companies” legislation and (2) increasing the sanctions for the holding by Italian tax residents of undisclosed assets abroad.

The Decree is effective as of July 1, 2009, its date of publication in the Official Gazette under no. 78/2009. Unless confirmed by the Italian Parliament within 60 days, the Decree will become ineffective and be deemed as never enacted.

1. Widening of the scope of application of the Italian “controlled foreign companies” legislation (art. 13 of the Decree)

The regulations which tackle the tax avoidance achieved through the use of controlled companies that are resident or located in fiscal havens (CFC legislation is contained in art. 167 of the Italian Income Tax Code), have become more restrictive as a result of two legislative measures.

The first one imposes stricter requirements in order to benefit from a safe harbour from the application of CFC legislation through a tax ruling. The second pertains to the extension of the CFC provisions to countries other than those on the “black list”.

Both interventions should become applicable from the tax period running as of the date of publication of the Decree in the Official Gazette (July 1, 2009).

The two new elements are separately commented upon below.

1.1 Safe harbour provision of the CFC legislation

Before the Decree, the Italian taxpayer could request, through a ruling procedure, that the CFC legislation be set aside by proving that the non-resident entity carries on an actual industrial or commercial activity in the country where it has its registered office. By virtue of the new measures, the non-application of the CFC rules is now possible only if such industrial or

commercial activity is carried out mainly in the market of the country where the controlled company is located.

The change introduced by the Decree reflects the strict interpretation given to the earlier legislation by the Italian Revenue Agency on a number of different occasions (see Ruling n. 427/2008 and Ruling n. 165/E/2009). The Revenue Agency had in fact maintained that, in order not to apply the CFC rules, the presence of an organizational structure in the foreign country where the CFC company has its registered office is not sufficient, it being also necessary for the foreign company to be “*effectively rooted in the foreign territory so as to participate in an ongoing permanent manner in its economic life*”.

In relation to the safe harbour of the CFC provisions, the Decree also states that:

- with respect to banking, financial and insurance activities, the above-described condition of carrying out an actual business activity in the market of the country of residence is deemed met when the main portion of the respective sources, investments and proceeds originate in the State or territory where the foreign company is localized;
- the safe harbour provided for companies actually carrying out a business activity is, in any case, not applicable when more than 50% of the foreign company’s proceeds derive from (i) the management, holding or investment of securities, shares, receivables or other financial assets, (ii) the transfer or grant of the right to use intangible rights on industrial, literary or artistic property, or (iii) the supply of services, including financial ones, in favour of the group. As a matter of fact, such a provision prevents controlled foreign companies

which earn passive income or income from intra-group services from claiming the condition of carrying out of an actual business activity in the market of the country of residence in order not to apply the CFC rules.

1.2 Extension of the CFC provision to countries not included on the “black list”

The scope of application of the CFC legislation has also been extended to controlled companies localized in States or territories different from those included on the “black list” (or once the “white list” is issued, to countries included on it), if both of the following conditions are met:

- the controlled foreign company is subject to an actual taxation, lower by more than a half, than that which would have been levied if it was resident in Italy;
- the controlled foreign company earns more than 50% of its proceeds from (i) the management, holding or investment of securities, shares, receivables or other financial assets, (ii) the transfer or grant of the right to use intangible rights relative to industrial, literary or artistic property, or (iii) the supply of services, including financial ones, in favour of the group.

Such provisions do not apply if the Italian controlling entity proves that the localization abroad does not constitute an artificial scheme aimed at achieving undue tax advantages. To this purpose, the Italian resident has to apply for a compulsory ruling with the Italian tax authorities.

Lastly, it is noted that:

- the restrictions commented on at paragraph 1.1 above, also apply to cases of “significant participation” to the foreign company’s profits.

The significant participation condition is met when the Italian shareholder is entitled to not less than 10% or 20% of the foreign entity's profits depending on whether the shares of the foreign company are listed or not on a stock exchange market;

- the provision commented on in this paragraph 1.2, which extends the CFC rules to countries not included on the "black list", applies only to foreign companies which are under the "control" of an Italian taxpayer in the same meaning as in article 2359 of the Civil Code, i.e. (i) holding of the majority of the voting rights in the ordinary shareholders' meeting or (ii) exercise of a dominant influence by virtue of the voting rights held or particular contractual arrangements with the foreign entity.

2. Increase of sanctions for Italian residents holding undisclosed assets outside of Italy (art. 12 of the Decree)

In view of the forthcoming issuance of a new tax amnesty (the so called "Tax Shield" or "*Scudo Fiscale*") aimed at the repatriation of funds illegally held abroad by Italian tax residents, the Decree has introduced tougher sanctions for individuals, non-commercial entities and fiscally transparent partnerships (such as *società semplici*, *società in nome*

collettivo and *società in accomandita semplice*) not disclosing the holding of assets and investments outside of Italy.

Under the existing penalty system, taxpayers holding undeclared funds abroad are subject to a proportional penalty ranging from 5% to 25% of the value of the assets, and to the confiscation of assets and funds for an equal amount. In addition to such severe penalties, in order to attempt to tackle the issue of illegal transfers of funds abroad, art. 12 of the Decree:

- introduces a rebuttable presumption that investments and assets which have not been properly reported in accordance with Italian legislation, and which are held in countries on the list contained in Ministerial Decrees of May 9, 1999 and November 21, 2001 ("black list countries"), are deemed, for tax purposes only and in the absence of evidence to the contrary, to have as their source unreported income. Therefore, a discovery by tax auditors of undeclared funds and assets held in black list countries, exposes the taxpayer to an automatic assessment for tax evasion;
- provides that, in case the above presumption is applied, the penalties set by art. 1 of Legislative Decree no. 471/1997 for failure to file the

annual tax return (ranging from 120% to 240% of the evaded tax), or filing a defective tax return (ranging from 100% to 200% of the evaded tax), are doubled.

Moreover, in order to increase the effectiveness of audits aimed at avoiding and counteracting the illegal transfer and holding of assets outside of Italy, the Decree provides that the Italian tax administration (*Agenzia delle Entrate*) will set up, in coordination with the Italian Tax Police (*Guardia di Finanza*), a specific force dedicated to fighting international tax evasion and avoidance, to acquiring information which may be used to detect such illegal practices, and to strengthening international cooperation in this area.

Finally, the Italian government plans to present the text of the new legislation related to the *Scudo Fiscale*, directly to Parliament as an amendment to the Decree. Consequently, in approving the provisions contained in the Decree, the Italian Parliament should also approve the new edition of the *Scudo Fiscale*, which, given the 60-day limit for the approval of the law decrees, should become law by the end of August.

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THE NETHERLANDS

Changes in the Business Succession Facilities in the Personal Income Tax

The introduction of a business succession facility during the life of an entrepreneur, and the end of the business succession facility for passive investment vehicles upon death.

The State Secretary of Finance has made an official announcement to the Dutch Lower House of Parliament of his intention to improve the position of directors with a substantial shareholding. A variety of incentives will be introduced. The proposed legislation is intended to take effect as of January 1, 2010.

First of all, a facility will be introduced to pass on a substantial shareholding during the life of the director. In the case where shares are granted in a company with an active enterprise, only gift tax, but no personal income tax, will be due. Until now, passing on a business in the form of a legal entity from generation to generation was only facilitated in case

the entrepreneur (substantial shareholder) had passed away. In all other situations, the entrepreneur would have to pay income tax over the 'capital gain' he was deemed to realize upon the transfer of the entity.

Second, a one-off facility is introduced for privately held assets which are used in the business of the substantial

shareholding. The income from these assets is taxed at the progressive income tax rates. For a limited time only, it will become possible to transfer these assets to the entity which uses these assets, without taxation of the silent reserves. Furthermore, if it concerns real estate, the real estate transfer tax will also not be levied during this limited timeframe.

Third, for privately owned assets which are not transferred using the above mentioned one-off facility, part of the entrepreneurial facilities (ondernemersfaciliteiten) for private

entrepreneurs (eenmanszaken) will also apply. These facilities include a reinvestment reserve, a cost equalisation reserve and a facility which will be comparable to the 'small and medium-sized enterprise facility', which lowers the effective maximum tax rate for entrepreneurs from 52% to 46.5%.

The above mentioned facilities are funded by limiting the facility for passing on substantial shareholdings upon the death of the substantial shareholder, to those shareholdings which constitute an active

investment. This means that a capital gain will be realised on passive investment vehicles, at the occasion of the death of the substantial shareholder.

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Proposed New Estate Tax, Tax Evasion Legislation

New Estate Tax legislation: Lower rates, Expansion of the business succession facility, Tax Evasion legislation, Transparent treatment of Trusts, Anstalts, Stiftungs and the like.

On April 21, 2009 the Dutch State Secretary of Finance, sent the *Bill to Amend the Gift and Inheritance Tax Act (GITA)* to the Lower House of Parliament, for its consideration. The legislation is likely to enter into force on January 1, 2010.

The Bill provides for several changes. The proposed changes are deemed to be budget neutral as the Dutch tax authorities will combat certain structures that, in their view, are to be treated as abusive of law.

Lower rates

The new legislation entails a significant decrease in the tax burden on inheritances and gifts. The highest tax bracket for non-related recipients is lowered from 68% to 40% and for first degree related recipients (children/partner) from 27% to 20%.

Transfer Tax

The GITA will no longer apply to foreign taxpayers with Dutch real estate and/or businesses in the Netherlands, as the Transfer Tax (Recht van Overgang) will be abolished. It is no longer considered to be cost-effective, and furthermore, was recently declared to be in violation of the freedoms of the EC Treaty by the European Court of Justice.

Business succession facility

The proposed new law also broadens and simplifies the business succession facility. In case the business is carried on for at least five years after the succession, 90% of the value of the business will be tax exempt (conditional exemption). The remaining 10% will be taxed with a so-called "preserved tax assessment". The payment of this preserved tax assessment is postponed for ten years (conditional interest bearing postponement). Furthermore, the facility now also extends to entrepreneurs who wish to donate their business to a successor before they reach the age of 55, or become disabled.

Provided all conditions are met, the maximum effective tax rate due on a transfer of the business will be reduced to only 2%, being 10% times the reduced (maximum) tax rate of 20%.

Anti-abuse legislation

In connection with the proposed decrease in the tax burden, a broader tax base is proposed. This is achieved in part by the introduction of anti-abuse legislation. The proposed measures counteract structures such as life-insurance constructions

between related parties, and constructions where usufruct and bare ownership are split for purposes of avoiding Inheritance Tax.

Transparent treatment of trust-like entities for tax purposes

As of January 1, 2010, all "isolated private equity", for example equity placed in a trust, Stichting Particulier Fonds, Anstalt or any other legal form of a similar nature (hereinafter: Trust), where there is a more than incidental private interest (e.g. the children of the contributor are the beneficiaries), will be taxed as an asset of the original contributor (hereinafter: settlor). This is achieved by assuming that the funds continue to remain within the power of the settlor, regardless of the provisions of the Trust deed. Therefore, the settlor will have to pay personal income tax in the Netherlands with regard to this income, if he is a resident of the Netherlands. Based on the current proposal, this will also apply to any person who becomes a resident of the Netherlands in the future. It might also apply to non-residents who are settlors of a Trust, if Trust receives Dutch source income, for example income from Dutch real estate or Dutch legal entities.

In cases where an agreement has been reached with the tax authorities in the past (before April 21, 2009), stating that the beneficiaries are to be considered the 'owners' of the equity for personal income and/or estate tax purposes, this agreement will be honoured and the beneficiaries will be treated as the owners of the equity.

In principle, when the Trust is liable to withholding taxes on its income, these withholding taxes will become creditable against Dutch income tax, as if the income were received by the settlor directly. The credit is of course subject to the provisions in the tax treaty between the state of source and the Netherlands, or the provisions for unilateral relief in Dutch tax law, as it would have been when received directly.

Based on the fiction that transferring funds to a Trust does not imply that the funds are no longer within the power

of the settlor, the actual transfer will no longer trigger any tax consequences. It is unclear, however, how the tax authorities will deal with contributions which were originally taxed with gift tax at the non-related rate (max. 68%). In principle, these funds will also be considered to 'return' to the settlor's control as of January 1, 2010, with double taxation as a consequence.

Upon the death of the settlor, his legal heirs will be considered to have acquired the power over the funds, as if they have inherited them. Consequently they will be subject to personal income tax on an annual basis. An exemption applies to the legal heirs who can meet the burden of proof that they are not, and will never become, a beneficiary of the Trust.

Lastly, when the settlor dies, or when a beneficiary receives a legally

enforceable right to a contribution from the Trust, this will be considered a taxable event for purposes of the GITA.

Action

In case you are a settlor of a Trust and you wish to mitigate the effects of the transparent treatment of this Trust as of January 1, 2010, it will be necessary to take action well before that date.

As we are highly experienced with entities such as Trusts, SPF and Anstalts, we can advise you on the consequences of the new legislation for your situation and possible solutions.

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Tax Regularization in The Netherlands

Changes in the voluntary disclosure procedure: maximum penalty for undisclosed assets raised from 100% to 300%, voluntary disclosure procedure will now lead to penalties, penalties for voluntary disclosure limited to 15%.

Never before in the history of the wealth management industry have such major developments come so fast and had such a significant impact on the way in which the industry will operate in the next 20 years. As the financial crisis deepens and the demand for greater transparency continues, there have been further calls for greater regulation and enhanced transparency among financial institutions.

Governments around the world will no longer tolerate the use of bank secrecy by their residents and nationals as a means of avoiding meeting their tax obligations. The Netherlands is no different in this regard.

A. Non-declaration

In the Netherlands, the non-declaration or incomplete declaration

of income or wealth is treated as fraud under Dutch tax and criminal law and as a consequence is a criminal offence. In cases where undeclared funds are discovered, the unpaid tax should be paid, together with interest. A fiscal penalty of up to 100% of the amount of unpaid tax may also be due. Legislation is pending to raise the maximum penalty to 300%. The Public Prosecutor may also commence criminal proceedings in respect of the incorrect filing of the tax return(s). In such cases, no fiscal penalty will be due based on the *una-via* principle.

B. Voluntary disclosure procedure

The Dutch General Tax Act does not provide for a specific amnesty program, but it provides taxpayers another solution with respect to

undeclared funds. If the taxpayer rectifies his incorrect tax return or gives information to the Dutch tax authorities to correct or complete his tax position, no criminal charges or (high) penalties will be brought or imposed. However the voluntary disclosure procedure is only open to the taxpayer when he does not know or suspect the Dutch tax authorities are or will become aware of the undeclared funds.

The Dutch tax authorities have taken the position that these more relaxed rules will **not** apply if:

- the tax inspector has already contacted the taxpayer with regard to undeclared funds;
- the tax inspector has already given notice of a planned

examination of the books, through which undeclared funds could be discovered;

- a detective of the Fiscal Intelligence and Investigation Service has already informed the taxpayer about an investigation into undeclared funds possibly owned by the taxpayer.

There are no requirements for voluntary disclosure, other than that the taxpayer should contact the tax authorities and provide them with all the information necessary to enable the Dutch tax authorities to assess the tax correctly (a standard form is available). The Dutch tax authorities may investigate the details of all taxable events and will issue assessments retrospectively up to 12 years. In principle, separate additional tax assessments should be issued for every incomplete year. However, in most cases, the Dutch tax authorities will include all assessments in an agreement with the taxpayer.

In addition, interest and penalties may still be due on the assessments if and when the tax return was filed late (up to a maximum amount of EUR1,134 per calendar year). In principle, this penalty can be due for every year for which a declaration of undisclosed funds has been made. It is important to realise that, in the case of a voluntary disclosure, **no penalty** can be applied when an income tax return (corporate or personal) has been filed in time, even when this return omits the undisclosed funds or income. The calculation of interest may result in significant extra amounts of tax being due, which should be taken into account when calculating the tax burden. Currently legislation is pending which will make it possible to levy a penalty even if the assets are voluntarily disclosed. This penalty will be limited to 15% and will not apply when voluntary disclosure takes place within a two-year period after the filing of the (incomplete)

tax return. Considering the 12 year statutory period, this could mean that a 15% penalty will be due over the first 10 years!

The interesting part of the voluntary disclosure procedure, is therefore that the taxpayer will not be charged with filing a false tax return or with forgery, which could lead to a 100% penalty or even imprisonment. Nevertheless, if the funds are used to commit other criminal offences or accrued through criminal offences, the taxpayer can still be prosecuted by the Public Prosecutions Department. For instance, if the undisclosed funds were used for smuggling activities, the Public Prosecutions Department will still be able to prosecute the suspect for smuggling.

C. Statute of limitation

On June 1, 2007 A-G Wattel concluded that the extended period of 12 years for making an additional tax assessment for Dutch residents with foreign income might not be in line with EU law. The period during which the tax authorities can impose an additional tax assessment for domestic source income is 5 years, whereas the period for foreign source income is 12 years. The A-G considered this an unjustified extension.

The A-G advised the Dutch Supreme Court to raise preliminary questions to the European Court of Justice with regard to a possible conflict between this extended 12-year period and EU law. The Ministry of Finance announced that it does not agree with the view of the A-G.

The Supreme Court decided on March 21, 2008 to raise preliminary questions to the European Court of Justice on the justification for the 12-year period and the possibility of imposing a fine based on such 12-year period. The third question raised by the Supreme Court is whether the answers to the above questions would differ if the bank account is

held in an EU member state with banking secrecy. A decision is pending.

D. Exchange of information

The Netherlands may provide information to the tax authorities of other countries, either on request or voluntarily. This means that the Netherlands may, based on its domestic laws, provide information to other states in cases of a suspicion of tax fraud or tax evasion. In addition, the large treaty network permits the exchange of information with most treaty partners. As a result of these instruments, tax authorities now have a better chance of discovering hidden financial assets throughout the world.

On March 1, 2008 the Netherlands entered into an exchange of information treaty with Jersey. The Netherlands had already concluded such a treaty with the Isle of Man on July 21, 2006. A treaty with Guernsey was concluded on April 25, 2008, but is not yet in force. On May 29, 2009, the Netherlands signed an exchange of information treaty with Luxembourg, increasing the possibilities for the exchange of information currently laid down in the tax treaty. Similar negotiations are now being held with jurisdictions such as Switzerland, Belgium, Austria and the Cayman Islands.

E. Conclusion

While there are no formal legislative provisions for the voluntary disclosure of undeclared funds, it is clear that the Dutch tax system is in keeping with the worldwide trend towards the greater regulation of tax affairs. Taxpayers can follow a clearly defined process in order to regularize their tax position.

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SWITZERLAND

Trustees: when to say “No”

Background

Trusts have come under intense scrutiny recently, as vehicles which are perceived by many, including governments, as open to misuse by individuals with something to hide. Whether it be tax fraud, money laundering or some other illegal activity, legislation introduced in a number of jurisdictions evidences this view. As a global trend, trusts are being forced to be more transparent, both generally, and in particular whenever a trustee (or other intermediary) may have a reasonable suspicion of wrongdoing.

Any failure by a trustee to tow the line may result in incurring criminal, civil or financial penalties, and serious damage to its reputation, particularly given that another well-documented global trend is the move towards increased co-operation between national prosecuting and tax authorities. With economic markets as they are, financial institutions provide ripe pickings for hefty fines. Now, more than ever, it is imperative that institutional trustees are seen to be whiter than white. (We would go as far as to suggest that this is likely to be a determining factor in which institutions survive in the reshaped markets over the long term.) However in practice, commercial reality means that trustees often come under pressure to step into the grey, and if the client exercising that pressure is particularly wealthy or influential, it may seem difficult to resist. Often, a trustee may not even be conscious that its actions may be criminal, concentrating only on avoiding being breach of trust.

Historically, trustees may have assumed that the chances of being discovered were limited, and therefore any risk relatively low. Increasingly, this approach is misguided. Transparency is already a reality, as is an aggressive stance by many governments against wealth management industry players suspected of criminal wrongdoing. Charging a trustee where there is a realistic chance of a successful prosecution, could well be seen as

something of a coup. More high-profile cases will often involve clients whose business is judged more lucrative, and therefore more worthy of holding on to by turning a blind eye to attendant risks.

Which acts by a trustee are potentially criminal?

In short, once a trustee is on notice of any sort of criminal activity involving the structure, it must avoid any act or omission which may further the criminal purpose (including avoiding detection or obstructing the recovery of funds). This is true even if that act or omission is allowed by the terms of the trust instrument, and even if, from a pure trust law perspective, it might arguably be in the interests of the beneficiaries as a whole.

Trust law is distinct from criminal law. If a trustee's knowledge of background facts means that an act may be criminal, it will not provide any protection from prosecution that the act is envisaged by the trust instrument. In reality, since a trustee cannot use its powers for a reason other than those set down by the trust, knowledge or suspicion will also mean that the trustee is also limited as to what it can do according to trust law.

The point is best illustrated by examples. If an individual with a level of control over a trust (for example, a settlor with retained powers or a protector), is suspected of criminal activity in respect of trust assets, or of criminal activity not linked to the trust but where there is a reasonable suspicion that assets may be directed out of the trust in furtherance of that criminal aim (imagine a settlor-beneficiary needing funds for sudden and urgent travel arrangements out of the country!), the trustee should refuse to make any distribution, or follow any direction by the person who is under suspicion, where the act might be linked to the criminal activity suspected. The trustee should usually not be concerned that by refusing to act it is in breach of trust, since to act would likely be *ultra vires* of its powers,

in that they would be being exercised for a purpose other than those for which they were granted.

Similar considerations apply to a company within a structure which may have been criminally mismanaged. Once a trustee is on notice of this, it should not engage in any act which could potentially implicate it in a criminal offence for which, according to the terms of most trust instruments, it would not be responsible (i.e. usually the trustee will be entitled to assume that a company is being properly managed unless and until the trustee has knowledge to the contrary). Again, it would depend on the specific facts and offence, but examples of the sort of actions which should raise alarm bells under these circumstances are requests to add additional holding companies, to transfer assets to another company within the structure or outside the structure, to change the company's residence or shareholders.

Any constructive act could amount to assisting in the commission of the primary offence (for example, conspiracy or aiding and abetting). Depending on the jurisdiction and the relevant legislation, this could also be true in respect to money laundering. For example, if a trustee becomes suspicious that assets under a trust are illegally sourced (for example because the person who settled the funds is charged with an offence that could have resulted in his holding the assets), by taking any positive action in respect of those funds the trustee may be open to a charge of assisting in the laundering of the proceeds of a crime (i.e. a primary offence). This is *in addition* to any failure by the trustee to report its suspicions.

Some additional points to consider

First, verdicts as to guilt are reached by human beings employing subjective criteria based on facts and actions, analysed for their probable motives. Whenever a trustee contemplates an act in the sort of circumstances discussed here, it should ask itself

“might a lay person assume I had done this to assist with a criminal act?” If the answer is yes, it is time to seek specialist advice.

Second, individual employees of a trust company may be prosecuted on criminal charges. Each and every person involved in an act should be satisfied as to the position at criminal law, since the fact that one acted under instructions from a superior, or in accordance with company policy, may not constitute a defence.

Third, when we are talking about global trust structures for global families, any possibility of criminal prosecution means that travel becomes a risky business, and extradition to a foreign country (and therefore prison) to await trial a real possibility.

Conclusion

It is not intended to suggest that as soon as a trustee has any suspicion or knowledge of a criminal act directly or indirectly related to a trust, it should immediately refuse to undertake any

action: rather, the trustee should seek specialist legal advice at the earliest opportunity. Indeed, it may be that the action in question is advisable in view of a pending prosecution, as long as this can in no way further the suspected criminal end. The key consideration will be *why the trustee chose to take the steps it did*, and will depend on the facts of the case.

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UNITED KINGDOM

OECD White Listing for UK's Crown Dependencies

As part of the solution to the global financial crisis, financial centres and the wealth management industry, including large international banks, are being required by the world's leading economies to agree global transparency in the financial services sectors and a crack down on tax havens and other financial centres that do not accord to internationally accepted standards. A key element of this comprises ensuring transparency and the effective exchange of information in tax matters.

The G20 summit communiqué, issued on 2 April 2009, sets out the commitment of the G20 countries to “take action against non-cooperative jurisdictions, including tax havens”. The communiqué goes on to state “we stand ready to deploy sanctions to protect our public finances and financial systems”. “The era of banking secrecy is over”.

In conjunction with the G20 summit and communiqué, the OECD published, on 2 April 2009, a detailed progress report on jurisdictions surveyed by the OECD Global Forum in implementing the internationally agreed standard on exchange of information for tax purposes. The report consists of four parts: (i) jurisdictions that have substantially implemented the internationally agreed tax standard; (ii) tax havens that have committed to the internationally agreed tax standard but have not yet substantially implemented it; (iii) other financial centres that have committed to the internationally agreed tax standard

but have not yet substantially implemented it; and (iv) jurisdictions that have not committed to implement the internationally agreed tax standard. At the time the progress report was published, the OECD stated that it stood ready to assist jurisdictions in their implementation of the OECD standard on the exchange of information and that the OECD Global Forum would undertake robust reviews to strengthen the implementation of the standard.

When the G8 Heads of State met in Japan in July 2008 they “urged all countries that have not yet fully implemented the OECD standards on transparency and effective exchange of information in tax matters to do so without further delay, and encouraged the OECD to strengthen its work on tax evasion”. In the weeks and months before the G20 summit in London on 2 April 2009, a number of countries (including Monaco, San Marino, the Bahamas and Macao (China)) announced their

intention to enter into agreements for the exchange of information in all tax matters in accordance with the international standards developed by the OECD.

In March 2009, it was announced that Austria, Luxembourg, Singapore and Switzerland were to be removed from the “black list” being drawn up by the OECD for the G20 summit after they agreed to accept the OECD's standards on exchange of information. These jurisdictions now appear on the OECD “grey list” as jurisdictions that have committed to the internationally agreed tax standard but has not yet substantially implemented it.

On 7 April 2009 the OECD announced that Costa Rica, Malaysia, the Philippines and Uruguay (the last remaining countries on the “black list”) had committed to the OECD standard on the exchange of information in tax matters and would, in 2009, propose legislation to remove the impediments to the

implementation of the standard and would incorporate the standard in their existing laws and treaties. As a result, these countries were removed from the OECD “black list” and placed on the “grey list” of jurisdictions that have committed to the internationally agreed tax standard but have not yet substantially implemented it.

In a connected move, in light of the recent political commitments made by Andorra, Liechtenstein and Monaco to implement the OECD standards of transparency and effective exchange of information and the timetable set for implementation, the OECD’s Committee on Fiscal Affairs has decided to remove all three jurisdictions from its list of uncooperative tax havens.

The UK’s Crown Dependencies - Jersey, Guernsey and the Isle of Man - were all placed on the OECD “white list” of jurisdictions which have substantially implemented the internationally agreed tax standard on exchange of information. The OECD considers that a country has “substantially” implemented the agreed tax standard on the exchange of information in tax matters if it has concluded twelve or more tax treaties (which provide for the exchange of information) or tax information exchange agreements.

Some commentators consider that threshold of twelve treaties or more is an arbitrary threshold which has no significance in the global fight against tax evasion on the basis that a country may conclude tax information exchange agreements with the seven Nordic states (which have decided to negotiate tax treaties together) and by doing so be almost 60% of the way to “substantially” implementing the standard even though there is no significant financial or trade movement with the Nordic states. Some commentators have also questioned why the U.S. is included on the “white list” when certain states, such as Delaware, permit the incorporation of tax-free companies

with no information being held about the ownership or activities of those companies.

Following the pledge of the G20 summit “to take action against non-cooperative jurisdictions, including tax havens” and the publication by the OECD Global Forum of its detailed progress report on the implementation by jurisdictions of the internationally agreed standard on exchange of information for tax purposes, the UK Prime Minister, Gordon Brown, wrote to each of the UK’s Crown Dependencies and Overseas Territories stressing his full support for the current international initiatives in relation to the exchange of information for tax purposes and urging the relevant countries to continue to progress their commitment to the OECD standard on the exchange of information. The UK Prime Minister stated that it was particularly important that the UK Crown Dependencies continue to set the pace in the implementation of the OECD standard and “put clear water between themselves and those jurisdictions which only just meet the international standard”. The Prime Minister went on to state that “if genuine progress in agreeing, implementing and abiding by these agreements does not continue to be made I will encourage the G20 to look at this issue again until all abide by the highest standards” and that a “tool box of sanctions” will be applied against those who do not meet the international standard of twelve tax information exchange agreements by September 2009.

It is clear that certain jurisdictions, including Jersey and the other UK Crown Dependencies only just made it onto the OECD “white list” having signed a sufficient number of tax information exchange agreements with OECD member states in the weeks leading up to the G20 summit. However, it is equally clear that these jurisdiction will have to continue to demonstrate their willingness to implement the OECD standard for the effective exchange

of information in tax matters by entering into further tax information exchange agreements with other OECD member states and non-OECD member states.

In relation to those British Overseas Territories which were placed on the OECD “grey list” of tax havens, as jurisdictions which have committed to but not yet substantially implemented the OECD standard on exchange of information, the Prime Minister urged those territories to achieve the standard of twelve tax information exchange agreements or equivalent arrangements required by the OECD before the EU General Assembly in September 2009.

In relation to the Cayman Islands, the Prime Minister acknowledged that in addition to the eight OECD approved bilateral tax information exchange agreements which the Cayman Islands has signed, in December 2008, Cayman enacted a unilateral tax information exchange mechanism to supplement its bilateral agreement negotiations. The Cayman Islands currently has in place a unilateral arrangement for tax information assistance with twelve countries (Austria, Belgium, the Czech Republic, Germany, Ireland, Japan, Luxembourg, the Netherlands, Slovak Republic, South Africa, the UK and Switzerland). This unilateral arrangement is being considered by the OECD in order to determine whether it should be recognised and adopted as a measure equivalent to customary tax information exchange agreements. The Cayman Islands also concluded a new tax information exchange agreement with the UK on 15 June 2009.

The British Virgin Islands (“BVI”) has tax information exchange agreements with the U.S., the UK and Australia already in place and signed tax information exchange agreements with the seven Nordic economies - Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden - on 19 May. The BVI is also to sign new tax information exchange agreements with France and New Zealand

moving the jurisdiction further towards joining the OECD “white list” of compliant territories. It was announced on 17 April 2009 that Bermuda had signed eight new tax information exchange agreements, with the seven Nordic economies and with New Zealand, bringing to eleven the number of such agreements it has entered into. It had previously signed agreements with Australia, the UK and the U.S. Subsequently, Bermuda signed a tax information exchange agreement with the Netherlands on 8 June 2009 and, as a result, was moved off the OECD “grey list” and placed on the “white list” as a jurisdiction that has substantially implemented

the internationally agreed standard for the exchange of information in tax matters.

There is no doubt that, against the backdrop of the current global financial crisis, for which many partly hold tax havens and offshore financial centres responsible, the OECD campaign for the effective exchange of information in tax matters and the eradication of banking secrecy laws has gained new impetus. It is significant that jurisdictions known for their banking secrecy and resistance to the exchange of information, have committed to the OECD standard and have taken active steps towards implementing the standard.

Following the G20 summit in London it was made clear that a “tool box of sanctions” would be employed against jurisdictions who did not agree, implement and abide by the agreed standard on exchange of information. In the future, the OECD is likely to require jurisdictions to meet higher standards in relation to the exchange of information than it has previously. This is an area which is developing rapidly and will continue to do so for some time.

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UNITED STATES

Impact on QIs of Obama Administration Tax Proposals

The Treasury Department’s “Green Book”¹ detailing the Obama Administration’s tax proposals, released May 11, included proposals that would impact QIs. Some proposals are directed at tightening the QI rules. Others are directed at non-QIs (“NQIs”), in part to create “incentives” for more foreign financial institutions to become QIs. Still others tighten the general information reporting rules on US-source payments that apply to both QIs and non-QIs.

All of this is directed towards better enforcement of taxation of US citizens and tax residents (“US Persons”). An important theme of the proposals involves requiring reporting of US persons who are “beneficial owners” of foreign entities.

The proposals would be effective for the first calendar year beginning after enactment.

Draft legislation reflecting the proposals in the Green Book has not yet been released or introduced. Any legislation ultimately enacted may differ from the descriptions released on May 11.

Tightening the QI Rules

All QIs would be required to do the following:

- Identify all account holders that are US Persons to the IRS. This seems to mean that the current exemption for pre-2001 accounts governed by bank secrecy/confidentiality rules would be terminated, although this is not stated explicitly.
- Report all reportable payments received on behalf of all US account holders as if the QI were a US financial institution. Currently, dividends, interest, etc.

received from non-US sources by a QI, as well as broker proceeds, on behalf of a US account holder generally do not have to be reported to the IRS under either the QI rules or the general withholding rules applicable to foreign withholding agents.

- Report all transfers of money or property of more than \$10,000 on behalf of a US person (or on behalf of any entity more than 50% owned, actually or constructively, by a US person) (“Controlled Entity”) to or from a foreign bank, brokerage, or other

¹ Department of the Treasury, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2010 REVENUE PROPOSALS (May 11, 2009) (“Green Book”).

financial account, and report opening a foreign account on behalf of a US person or controlled entity, with no *de minimis* amount. Exceptions are made for accounts opened and transfers involving publicly traded companies and their subsidiaries. In addition, such reporting would not be required for accounts opened at or amounts transferred to a QI on behalf of a US person (or a Controlled Entity), or transfers received by or on behalf of a US person (or a Controlled Entity) from accounts held by a US person at a QI.

- Report forming or acquiring a foreign entity on behalf of a US individual (or any Controlled Entity).

The IRS would be authorized to issue regulations concerning the proposals. The Green Book specifically suggests the following:

- Regulations requiring QIs to determine the “beneficial owners” of account holders that are foreign entities, and report to the IRS any that are US Persons.
- Setting as a condition for QI status a requirement that either:
 - Other commonly-controlled foreign financial institutions must meet certain reporting obligations with respect to account holders (presumably information about US Persons who are account holders or beneficial owners); or
 - All commonly-controlled financial institutions become QIs for any one of them to be a QI.
- *Comment:* These requirements present significant administrability issues, and thus the IRS is left to solve those before imposing such requirements. If the IRS can solve those, however, such regulations would likely be issued.

Incentives for QI Status

There are a number of changes to withholding requirements for payments through nonqualified intermediaries (“NQIs”) that do not apply to payments to QIs. This distinction would give QIs a competitive advantage over NQIs, thus creating incentives for foreign intermediaries to enter into QI agreements. Creating such incentives is a stated objective of these proposals. The proposals are:

- Require full 30% withholding on US-source payments to NQIs, regardless of receipt by the withholding agent of valid Form W-8s with respect to the payment. The IRS can provide exceptions, including exceptions for foreign governments, central banks, pension funds, insurance companies and similar investors that present a low risk of tax evasion. The actual rules are supposed to avoid “disrupt[ing] ordinary and customary market transactions.” Foreign recipients entitled to reduced withholding tax would have to file a claim for refund with the IRS.
- Require withholding of 20% on gross proceeds paid to an NQI not located in a country with a tax treaty with the US that has satisfactory exchange of information provisions. The IRS can provide similar exceptions as above. In addition, the IRS could exempt NQIs in jurisdictions with a satisfactory tax information exchange agreement with the US. Overwithheld tax would require filing a claim for refund with the IRS. The refund could be applied for by the NQI, but only if it identifies all its direct account holders that are US persons and reports them and payments they receive to the IRS.
- Require US individuals to report any transfer money or property to or from a foreign bank,

brokerage, or financial account by that individual or any Controlled Entity. This requirement would not apply to transfers to or from a QI or QI account.

- Create a rebuttable presumption that any foreign account in which a US person held an interest or had signature authority over contains enough funds to require the filing of an FBAR. This would not apply to accounts held through a QI.
- Create a rebuttable presumption that failure to file an FBAR with respect to a foreign account held through an NQI is “willful” if the account has more than \$200,000. This would allow higher penalties to be imposed. The presumption does not apply to accounts held through a QI.

Tightening Withholding Rules

All withholding agents, including QIs, would be required to withhold 30% of any payment made to a foreign entity unless the entity provided documentation of its beneficial owners. Exceptions would include payments to publicly traded companies and their subsidiaries, foreign governments and pension funds. Further exceptions could be provided by the IRS for payments to entities engaged in active business in their residence country, charities, widely-held investment vehicles, and entities that enter into agreements with the IRS to report all US non-exempt owners (i.e., US individuals).

Effective Dates

All the forgoing proposals would be effective beginning in the calendar year after they are enacted. If enacted this year, they would apply beginning on January 1, 2010.

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Non-Resident Alien FBAR Filing: The IRS Provides a One Year Reprieve

In October of 2008, the Treasury updated the instructions to form TD F 90-22.1 ("FBAR"), which required certain non-resident aliens ("NRA's") to report their foreign bank accounts by filing the FBAR. However, on June 5, 2009 the IRS released Announcement 2009-51, which generally provides a one year exception to NRA's from filing FBARs that are due June 30, 2009 for the tax year 2008. The Announcement provides that additional guidance will be provided for FBAR reporting for NRA's in future years. This article examines the previously issued guidance, which will likely form the basis for future NRA FBAR reporting requirements.

Under the October instructions, "US persons" that own or have signatory authority over foreign bank accounts are required to file a form TD F 90-22.1 ("FBAR"), a form upon which all foreign bank accounts are reported to the US government. However, there was quite a bit of confusion as to when a non-resident alien ("NRA") is deemed a "US person" for FBAR filing purposes and, thus, was deemed to be a US person. Some commentators have incorrectly stated that any NRA who receives income that is effectively connected with a US trade or business ("ECI") is required to file an FBAR. However, this interpretation is incorrect because the FBAR filing requirement applies only to non-resident aliens who are "in, and doing business in the United States." ECI covers more activities than are subject to the FBAR. Thus, non-residents who generate ECI but are only occasionally or sporadically physically located in the United States to conduct the business that gives rise to the ECI are not required to file the FBAR. On the other hand if that same non-resident individual were present in the United States on a regular and continuous basis to conduct ECI generating business, he or she should be required to file the FBAR. As discussed below determining whether activity is deemed "occasional" or "sporadic" or "regular and continuous" is likely a difficult categorization.

Any United States person who has a financial interest in or signature or other authority over any financial

account in a foreign country, if the aggregate value of these accounts exceeds \$10,000 at any time during the calendar year is required to file an FBAR. For FBAR purposes, a United States person includes a citizen or resident of the United States, or a person "in and doing business in the United States."²

Whether a person is considered, for FBAR purposes, to be "in, and doing business in the United States" is determined based on an analysis of the facts and circumstances of each case. Generally, a person is not considered to be "in, and doing business in the United States" unless that person is conducting business within the United States on a regular and continuous basis. Persons who are merely visiting the United States or who sporadically conduct business in the United States, are not in, and doing business in, the United States for FBAR reporting purposes.

For example, a person who is not a citizen or resident of the United States, is engaged in a business and only occasionally visits the United States to meet clients would not be considered to be "in, and doing business in the United States" for FBAR reporting purposes. Also, artists, athletes, and entertainers who are not citizens or residents of the United States and who only occasionally come to the United States to participate in exhibits, sporting events, or performances, are not required to file FBARs. Finally, a person who is not a United States citizen or resident and who visits the

United States to manage his personal investments, such as rental property, and conducts no other business is not required to file. However, that individual would be required to file an FBAR if the person is physically present in the US conducting business on a regular and continuous basis.³

The "in, and doing business in the United States" standard requires two factors:

1. The NRA must conduct business in the United States during the year; and
2. such business must be conducted by the NRA from a location within the United States on a regular and continuous basis.

This determination of the first factor is made on a facts and circumstances basis. Whether a business is conducted is likely based on the same concepts used in determining whether income is effectively connected with a US trade or business. The trade or business test has two aspects. First, a foreign taxpayer is engaged in business only if its activities for the production of income, wherever located, are considerable, continuous, and regular. Second, a foreign taxpayer engaged in business is deemed to carry on the business in the United States only if all or a significant part of the business activities are located in the United States or the United States is the situs of activities, comprising a portion of the business, which are considerable, continuous, and regular. Whether a foreign taxpayer is engaged in a U.S.

² 31 U.S.C. § 5314(a).

³ See "The definition of 'in and doing business in' the United States for FBAR purposes", Headliner Volume 262, Feb 26, 2009, <http://www.irs.gov/businesses/small/article/0,,id=204798,00.html>; and IRS, FAQs Regarding Report of Foreign Bank and Financial Accounts (FBAR), March 13, 2009, <http://www.irs.gov/businesses/small/article/0,,id=148845,00.html>

trade or business during any taxable year is a question of fact determined on a case-by-case basis.⁴

Whether the business is conducted from a location within the United States on a regular and continuous basis appears to be more of a troublesome question because very little guidance has been issued on the topic. As discussed above for the first prong of the test, continuity and regularity are a requirement for business to be deemed conducted in the United States. However, that requirement does not require the person conducting the business to be physically located in the United States. It appears that the second prong of the test requires a person to be physically located in the United States on a regular and continuous basis in the furtherance of his or her business.

Therefore, the question becomes what is activity that constitutes regular and continuous business conducted within the United States. The IRS has provided examples of individuals not required to file an FBAR - an individual who only occasionally visits the US to meet clients, entertainers who occasionally visit the US to perform, and an individual who visits the US to manage his personal investments. Furthermore, the activities of agents in the United States likely should not be attributed to the individual for purposes of the “in and doing business in the United States” test.

Thus, it seems clear that in the simple case where a person is deemed to generate ECI simply by passively owning a partnership interest in a partnership or a membership interest in a Limited Liability Company that is engaged in a US business, and that person has no other contact with the

US, that person would not be required to file an FBAR. Without more guidance, the distinction between the occasional or sporadic conduct of business within the US and the continuous and regular conduct of business from within the US seems to be a fine line. For those individuals who do conduct business from within the United States and are in doubt of their status, the best policy seems to be to file the FBAR.

The penalties for not filing the FBAR are \$10,000 per year.⁵ An exception to the penalty may be made if the FBAR is not filed for reasonable cause.⁶ However, the penalty for willfully not filing the FBAR is increased to the greater of \$100,000 or 50% of the amount held in the account at the time of the violation.⁷

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Recent Developments Affecting Voluntary Disclosures Involving Offshore Issues and Related Topics

On March 26, 2009, the IRS released three memoranda that affect the voluntary disclosure process for cases involving offshore issues. Since that time, there has been much confusion regarding those memoranda and some commentators and practitioners have offered what we view to be incorrect interpretations of them. In addition, in light of the significant changes to the voluntary disclosure process made by these memoranda for cases involving offshore issues, there has been heightened interest in alternatives for resolving compliance issues if it is not possible to do so through voluntary disclosure or other administrative means.

This article describes the changes to the current practice for making a voluntary disclosure as well as the new IRS penalty framework for such voluntary disclosure as released by the IRS on March 26. In addition, the article provides important clarifications on the new penalty framework set forth in one of those memoranda and clarifies the extent that pre-payment review in the United States Tax Court is available

for additions to tax and penalties for which a taxpayer with offshore issues, may be liable.

I. The IRS Voluntary Disclosure Policy

The IRS voluntary disclosure policy is set forth in Internal Revenue Manual (“I.R.M.”) 9.5.11.9 (Sep. 9, 2004). Historically, a voluntary disclosure was the process of voluntarily reporting previously undisclosed income (or

false deductions) through an amended return or the filing of a delinquent return (the “informal approach”) or by direct contact with the IRS Criminal Investigation Division (“CI”) (the “formal approach”). Under recent IRS practice, which has evolved in light of the ongoing investigation by the U.S. Department of Justice (the “DOJ”) and the IRS of UBS AG, however, it appears that only a disclosure under the formal approach will constitute a complete voluntary

⁴ Lewnhaupt v. Commissioner, 20 TC 151 (1955); Inez de Amodio, 34 TC 894 (1960).

⁵ 31 U.S.C. § 5321(a)(5).

⁶ Id.

⁷ Id.

disclosure under I.R.M. 5.5.11.9 for purposes of the new penalty framework. There has been no change to the IRS's voluntary disclosure practice in that a voluntary disclosure will be considered with all other factors in a case in determining whether criminal prosecution will be recommended to the DOJ.

The IRS voluntary disclosure policy is a matter of internal IRS practice provided solely for internal guidance to IRS personnel and does not create any substantive or procedural rights for taxpayers. A timely voluntary disclosure does not automatically guarantee immunity from criminal prosecution, but generally will result in the IRS not recommending a criminal prosecution to the DOJ. Whether a case is recommended for criminal prosecution is evaluated on a case-by-case basis, and taxpayers cannot rely on the fact that other similarly situated taxpayers may not have been recommended for criminal prosecution. Voluntary disclosure does not apply to taxpayers with illegal source income and those who failed to report income from embezzlement, Medicare fraud or other white collar crimes.

A voluntary disclosure must be truthful, timely, and complete. The taxpayer also must show a willingness to cooperate (and does in fact cooperate) with the IRS in determining his/her correct tax liability and must make good faith arrangements with the IRS to pay in full, the tax, interest, and any penalties determined by the IRS to be applicable. To be timely, the disclosure must be received before:

- a. The IRS has initiated a civil examination or criminal investigation of the taxpayer, or has notified the taxpayer that it intends to commence such an examination or investigation.
- b. The IRS has received information from a third party (e.g., informant, other governmental agency, or the media) alerting the IRS to the specific taxpayer's noncompliance.
- c. The IRS has initiated a civil examination or criminal investigation which is directly related to the specific liability of the taxpayer.

- d. The IRS has acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena).

The IRS Voluntary Disclosure Policy provides examples of timely voluntary disclosures such as:

- A letter from an attorney that encloses amended returns from a client that are complete and accurate (reporting legal source income omitted from the original returns), which offers to pay the tax, interest, and any penalties determined by the IRS to be applicable in full and which meets the timeliness standard set forth above.
- A disclosure made by a taxpayer of omitted income facilitated through a widely promoted scheme regarding which the IRS has begun a civil compliance project and already obtained information that might lead to an examination of the taxpayer or notified the taxpayer of its intent to do so. This is a voluntary disclosure because the civil compliance project involving the scheme does not yet directly relate to the specific liability of the taxpayer.
- A disclosure made by an individual who has not filed tax returns after the individual has received a notice stating that the IRS has no record of receiving a return for a particular year and inquiring into whether the taxpayer filed a return for that year. The individual files complete and accurate returns and makes arrangements with the IRS to pay, in full, the tax, interest, and any penalties determined by the IRS to be applicable. This is a voluntary disclosure because the IRS has not yet commenced an examination or investigation of the taxpayer or notified the taxpayer of its intent to do so.

The IRS Voluntary Disclosure Policy also provides examples of what will not be considered a voluntary disclosure such as:

- A letter from an attorney stating his or her client, who wishes to remain anonymous, wants to resolve his or her tax liability. This is not a voluntary disclosure until the identity of the taxpayer is disclosed and all other required elements are satisfied.
- A disclosure made by a taxpayer who is under grand jury investigation. This is not a voluntary disclosure because the taxpayer is already under criminal investigation. The conclusion would be the same whether or not the taxpayer knew of the grand jury investigation.
- A disclosure made by a taxpayer, who is not currently under examination or investigation, of omitted gross receipts from a partnership, whose partner is already under investigation for omitted income that was skimmed from the partnership. This is not a voluntary disclosure because the IRS has already initiated an investigation that is directly related to the specific liability of this taxpayer. The conclusion would be the same whether or not the taxpayer knew of the ongoing investigation.
- A disclosure made by a taxpayer, who is not currently under examination or investigation, of omitted constructive dividends received from a corporation which is currently under examination. This is not a voluntary disclosure because the IRS has already initiated an examination which is directly related to the specific liability of this taxpayer. The conclusion would be the same whether or not the taxpayer knew of the ongoing examination.
- A disclosure made by a taxpayer after an employee has contacted the IRS regarding the taxpayer's double set of books. This is not a voluntary disclosure even if no examination or investigation has yet commenced because the IRS has already been informed by the third party of the specific taxpayer's noncompliance. The conclusion would be the same

whether or not the taxpayer knew of the informant's contact with the IRS.

In any event, the IRS will review the actual status of any prior interest in the taxpayer, the taxpayer's potential knowledge of such interest, and the taxpayer's fear of some potential trigger that could have alerted the IRS to determine whether the disclosure is truly voluntary.

II. The Procedures for Making a Voluntary Disclosure

Under current practice, a "voluntary disclosure" does not occur until the IRS has actually been contacted.

This does not preclude taxpayers from disclosing their offshore income and assets by filing amended returns in appropriate circumstances, but such a filing will not constitute a voluntary disclosure for purposes of the new IRS penalty framework effective March 23, 2009.

A. Filing or Amending Previously Filed Returns (The Informal Approach).

Generally, a taxpayer may disclose his or her offshore income and assets by merely submitting new or amended tax returns (typically 6 years) with payment of the taxpayer's tax liability including interest and penalties directly to the Service Center assigned to the taxpayer's area of residence. This approach does not require any contact with IRS personnel; however, the IRS may issue letters relating to penalties (e.g., failure-to-file penalties) and may initiate an audit.

A taxpayer should correctly reflect the taxpayer's income and expense item because the filing of amended tax returns has a significant audit potential. Applicable state returns also should be amended and contemporaneously filed within 30 days of filing the federal returns. Returns for related entities also should be contemporaneously filed or amended. If the IRS has begun an investigation and the taxpayer is not aware of this when he or she files the returns, the filing becomes an admission of understatement of income.

B. Direct Communication with CI (The Formal Approach).

A formal voluntary disclosure requires a taxpayer to directly contact CI and arrange a meeting to discuss whether or not the taxpayer's facts and circumstances meet the terms of the IRS voluntary disclosure policy. As a practical matter, the IRS no longer will confirm whether or not it has begun an investigation that the taxpayer is not aware of. A taxpayer should consult with counsel and carefully evaluate his or her eligibility under the voluntary disclosure policy before making contact with CI.

Generally, CI will meet with taxpayer's counsel to discuss the taxpayer's facts and circumstances to include the so-called "30 questions" that the IRS National Office has required local IRS district offices to inquire with respect to each voluntary disclosure. In some districts, however, CI has required an interview of the taxpayer. Generally, if CI accepts a taxpayer into the voluntary disclosure program, CI will issue a letter reciting the voluntary disclosure, the fact that the disclosure was timely, and referral to the Philadelphia Offshore Identification Unit (POIU) for filing of the amended tax returns and payment of tax, interest, and penalties.

III. Failure to Comply with U.S. Filing and Reporting Requirements

This section discusses the various forms that U.S. persons must file with respect to their offshore income and assets and the associated penalties for the failure to file such forms.

A. FBAR

Generally, if a U.S. person has an interest in or signature authority over a financial account located in a foreign jurisdiction that exceeds \$10,000, such person must then file Treasury Department Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"). As part of the FBAR reporting requirement, a U.S. person must report the income from such financial accounts on a Federal

income tax return and check the appropriate box on a Form 1040, Schedule B, Part III, regarding whether such individual has an interest in a foreign financial account.

The FBAR must be filed by June 30 of the year following the year when the \$10,000 threshold is met. As of June 30 of any given year, a U.S. person that has willfully failed to file, and anyone that has assisted or agreed to facilitate such a failure to file a FBAR could be guilty of a felony. Records that are required to be reported on an FBAR must be kept for five years. Failure to keep the records for the stated period may result in civil and/or criminal penalties.

Civil and/or criminal penalties may apply if the FBAR is not timely filed or the information supplied is inaccurate or incomplete. Criminal penalties may be as high as \$500,000 or half the account balance, and up to 10 years in prison. Civil penalties may be assessed before the end of the 6-year period beginning on the date of the transaction with respect to which the penalty is assessed. There are civil penalties for negligence, pattern of negligence, non-willful, and willful violations as follows:

- (1) The negligence and pattern of negligence penalties apply only to trades or businesses, not to individuals. A negligence penalty up to \$500 may be assessed against a business for any negligent violation. An additional penalty up to \$50,000 may be assessed for a pattern of negligent violations.
- (2) An individual who willfully fails to file an FBAR may be subject to civil penalties equal to the greater of \$100,000 or 50 percent of the amount in the account at the time of the violation.
- (3) An individual who fails to file, but is not willful, may be subject to civil penalties under title 31 equal to \$10,000 for each negligent violation.

B. Reporting obligations for accounts that are held as part of a structure (e.g., trusts and non-U.S. corporations such as a controlled foreign corporation)

1. Form 3520 and Penalties for Failure to File Form 3520.

Individuals who are involved with certain transactions with respect to foreign trusts, or who receive certain large gifts or bequests from certain foreign persons, must file Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*. Form 3520 is due at the time an individual income tax return is due (including extensions).

Failure to file Form 3520, or providing incomplete or incorrect information, results in the following penalties (absent demonstration that the failure to comply was due to reasonable cause and not willful neglect): (1) 35% of the gross value of property transferred to a foreign trust; (2) 35% of the gross value of distributions received from a foreign trust; or (3) 5% of the amount of certain foreign gifts for each month for which the failure to report continues (limited to 25%).

2. Form 3520-A and Penalties for Failure to File Form 3520-A.

A U.S. owner of a foreign grantor trust is required to file Form 3520-A, *Annual Information Return of Foreign Trust with a U.S. Owner*. Form 3520-A must be filed with the Internal Revenue Service Center, Philadelphia, PA 19255, by the 15th day of the third month after the end of the trust's tax year (e.g., March 15). In addition, copies of statements from Form 3520-A (including the Foreign Grantor Trust Owner Statement and the Foreign Grantor Trust Beneficiary Statement) must be provided to all U.S. owners and U.S. beneficiaries by such time.

If an individual owns a foreign trust and the trust either fails to timely file Form 3520-A or does not furnish the required information with respect to trust activities and income, the individual will be subject to a penalty equal to 5% of the gross value of the portion of the trust's assets such individual is treated as owning.

3. Form 5471 and Penalties for Failure to File Form 5471.

A U.S. person must file a Form 5471 to report significant ownership interests in foreign corporations (referred to as "controlled foreign corporations" or "CFCs"). A Form 5471 is due at the time of the filing of an individual income tax return (including extensions). The IRS may assess a penalty of \$10,000 for failing to timely file Form 5471, unless such failure is due to reasonable cause. Criminal penalties also can apply.

4. Form 5472 and Penalties for Failure to File Form 5472.

Generally, a reporting corporation must file Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*, to report information under sections 6038A and 6038C if it had a reportable transaction during the tax year with a foreign or domestic related party. A Form 5472 by the due date of the reporting corporation's income tax return (including extensions). The IRS may assess a penalty of \$10,000 for failing to timely file a complete Form 5472 or maintain records as required by Treasury Regulation section 1.6038A-3. If the failure continues for more than 90-days after notification by the IRS, an additional penalty of \$10,000 will apply. This penalty applies with respect to each related party for which a failure occurs each 30-day period (or part of a 30-day period) during which the failure continues after the 90-period ends.

Criminal penalties under sections 7203, 7206, 7207 also may apply for failure to submit information or for filing false or fraudulent information. Each member of a group of corporations filing a consolidated information return is a separate reporting corporation subject to a separate \$10,000 penalty and each member is jointly and severally liable.

5. Form 926 and Penalties for Failure to File Form 926.

In general, if a U.S. taxpayer transfers either tangible or intangible property to a foreign corporation in a tax-free

exchange (e.g., a tax-free contribution of stock, securities, or other property to a foreign corporation), the taxpayer is required to file Form 926, *Return by U.S. Transferor of Property to a Foreign Corporation*. Form 926 is due at the time an individual income tax return is due, including extensions, and should be attached to an individual's return at the time of filing.

If a U.S. transferor fails to comply with the obligation to report required transfers on Form 926, the taxpayer may be subject to at least three adverse tax effects. Failing to file Form 926 may result in a penalty equal to 10% of the fair market value of the transferred property (valued at the time of transfer), limited to \$100,000, unless the failure to file is intentional.

6. Form 8865 and Penalties for Failure to File Form 8865.

A U.S. person who (1) controlled a foreign partnership (i.e., more than a 50% interest), (2) owned a 10% or greater interest in the partnership while the partnership was controlled by U.S. persons owning at least 10% interests, (3) contributed property to a foreign partnership in exchange for an interest in the partnership under certain circumstances, and (4) had a reportable event under section 6046A must file Form 8865, *Return of U.S. Persons with Respect to Certain Foreign Partnerships*. Form 8865 is due at the time an individual (or partnership) income tax return is due, including extensions, and should be attached to such return at the time of filing.

A \$10,000 penalty is imposed for each tax year of each foreign partnership for failure to timely file Form 8865. Such person also is subject to a reduction of 10% of the foreign taxes available for credit under sections 901, 902, and 960. Criminal penalties also may apply for failure to file or filing false or fraudulent information. For a person who contributed property, the person may be subject to a penalty equal to 10% of the fair market value of the property at the time of the contribution subject to a maximum of \$100,000, unless the failure is due to intentional disregard. For a person who fails to

properly report all the information required by section 6046A, the person is subject to a \$10,000 penalty. In addition, if the person is required to file Form 8833, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*, an additional \$1,000 may be imposed.

C. Civil Penalties

1. Failure to File Penalties.

A penalty is imposed if a required tax return is not filed on or before its due date unless the failure is due to a reasonable cause and not willful neglect. The amount of the failure to file penalty is generally equal to 5% of the net tax amount required to be shown on the tax return for each month that the return is late up to a maximum of 25% of such net tax amount. If the failure to file is fraudulent, then the penalty is increased to 15% for each month.

2. Failure to pay tax.

A taxpayer who fails to timely pay the amount shown as tax on any return maybe penalized. The penalty will not apply if the failure is due to a reasonable cause and not willful neglect. The late payment penalty is generally .5% of the late payment for each month that the payment is late, up to a maximum of 25%.

3. Accuracy-related penalties.

The accuracy-related penalty for underpayments is imposed at the rate of 20% on the portion of any underpayment of tax required to be shown on a return attributable to any of the following: Negligence; substantial understatement of tax; substantial valuation misstatement; substantial overstatement of pension liabilities; or substantial estate or gift tax valuation understatement.

4. Civil Fraud Penalty.

If any part of any underpayment of tax is required to be shown on a return is due to fraud, a penalty is imposed equal to 75% of the portion of the underpayment attributable to fraud.

D. Criminal Penalties.

1. Tax evasion.

Tax evasion is a felony defined as a “willful attempt to evade or defeat any tax imposed” under the Code. The basic elements are: (1) the existence of a tax deficiency; (2) an affirmative act constituting an evasion or attempted evasion of the tax; and (3) willfulness. Upon conviction of tax evasion the defendant may be fined or imprisoned not more than five years, or both, and made to pay the costs of prosecution and any special assessments. The maximum fine is \$250,000 for individuals and \$500,000 for corporations.

2. Willful failure to file return, supply information or pay tax.

It is a misdemeanor to willfully fail to pay any tax or estimated tax, make a return, keep any records, or supply any information required to be supplied under the Code. This crime is based on the omission of a statutory duty to make a return. The elements of the offense include willfulness and omission of at least one of the four required acts enumerated in the statute. Upon conviction, the defendant may be fined or imprisoned for up to one year (unless a willful violation). The maximum fine is \$250,000 for individuals and \$500,000 for corporations.

3. False returns.

The filing of a false return is a felony. This felony provision is violated if any person willfully makes any document that he or she does not believe to be true and correct and any person who willfully aids and assists in the preparation of any document under the U.S. tax laws that is fraudulent or false. Upon conviction the defendant may be fined, or imprisoned not more than three years, or both, and made to pay the costs of prosecution. The maximum fine is \$250,000 for individuals and \$500,000 for corporations.

4. False documents.

Any person who willfully discloses any list, return, account, statement, or other document that is false is guilty of filing

a false document. Upon conviction, the defendant may be fined up to \$100,000 or imprisoned not more than one year or both.

IV. Three IRS Memoranda Released on 26 March 2009

The three memoranda that the IRS released on March 26, 2009, were dated March 23, 2009, and address (1) emphasis on and proper development of offshore examination cases, managerial review, and revocation of the Last Chance Compliance Initiative (LCCI); (2) routing of voluntary disclosure cases; and (3) authorization to apply penalty framework to voluntary disclosure requests regarding unreported offshore accounts and entities.

A. Memorandum Addressing Emphasis on and Proper Development of Offshore Examination Cases.

This purpose of this memorandum “is to ensure examinations with offshore transactions and/or entities continue to be emphasized and receive priority treatment during the examination process.” The memorandum directs examiners to “utilize the full range of information gathering tools in properly developing offshore issues, with special emphasis on detecting unreported income”, such as interviewing taxpayers, making third party contacts, issuing summonses to taxpayers and third parties, and requesting foreign-based information through exchange of information under applicable treaties and tax information exchange agreements (TIEAs) in any cases where the taxpayers have accounts or transactions in countries with such agreements. The memorandum further urges examiners to “be alert for badges of fraud and consult with Fraud Technical Advisors in developing cases for criminal referrals or the assertion of the civil fraud penalty.”

The memorandum also states: “Managers should ensure that income and penalty considerations are sufficiently developed and documented during both unagreed and Embedded Quality reviews. Cases should be

discussed with employees regarding the need for additional income probes, use of indirect methods of proof to reconstruct income, penalty development and/or other considerations as necessary.”

Finally, the memorandum revokes the LCCI, effective as of the date of the memorandum (*i.e.*, March 23, 2009). As a result, all notices and letters with respect to the LCCI and relevant portions of the Internal Revenue Manual will be obsoleted. For any currently open examinations where the LCCI terms had already been offered, however, taxpayers were afforded the opportunity to resolve their cases under LCCI if they responded to the examiner within 15 days of their prior notification. This gave taxpayers with open examinations where such terms had been offered a short window to accept them, despite the revocation of LCCI effective March 23, 2009.

A. Memorandum Addressing Routing of Voluntary Disclosure Cases.

This memorandum directs that, effective as of March 23, 2009, voluntary disclosure requests containing offshore issues, where IRS CI has preliminarily determined taxpayer eligibility, will be forwarded by CI to the POIU for civil processing. Additionally, any voluntary disclosures with offshore issues that were in Area/Industry case inventories as of the date of the memorandum will be forwarded to the POUI (regardless of whether there has been prior taxpayer contact by SBSE or LMSB). However, all incoming voluntary disclosure requests will continue to be screened initially by CI to determine if the taxpayer is eligible to make a voluntary disclosure and for voluntary disclosure requests containing only domestic issues, where CI has preliminarily determined taxpayer eligibility, CI will continue to forward those requests to the appropriate Area/Industry PSP for civil processing.

B. Memorandum Addressing New IRS Penalty Framework for Voluntary Disclosure of Offshore Income and Assets.

Under the new penalty framework, the IRS is authorized to execute agreements to resolve tax liabilities related to offshore issues of taxpayers who make voluntary disclosure requests, according to the following terms:

1. All taxes and interest due for the prior six tax years will be assessed. Where an account or entity was formed or acquired within the 6-year look back period, taxes and interest will be assessed starting with the earliest year in which an account was opened or acquired or an entity was formed.
2. The taxpayer must file or amend all returns for all tax years at issue, including information returns and FBARs.
3. Either an accuracy or delinquency penalty will be assessed for all years (and no reasonable cause exception may be applied).
4. In lieu of all other penalties that may apply, including information return and FBAR penalties, a penalty equal to 20% of the amount in foreign bank accounts and/or entities in the year with the highest aggregate account and/or asset value will be assessed.

If (a) the taxpayer did not open or cause any accounts to be opened or entities formed, (b) there has been no activity in any account or entity (no deposits, withdrawals, etc.) during the period the account or entity was controlled by the taxpayer, and (c) all applicable U.S. taxes have been paid on the funds in the accounts and/or entities (where only account and/or entity earnings have escaped U.S. taxation), then the penalty in lieu of all other penalties that might apply is reduced to 5%.

The terms authorized under the March 23 memorandum are available

to all voluntary requests containing offshore issues that have been submitted to the IRS, but are not yet resolved, and any such requests that are submitted within 6 months from the date of the memorandum. The new penalty framework offers the potential for significant relief for taxpayers who make voluntary disclosures within the terms authorized. In particular, the terms offer significant relief from the FBAR penalty (penalty for failure to comply with the requirement that U.S. persons report their financial interest in, or authority over, financial accounts located in a foreign country), the fraud penalties under sections 6651(f) and 6663, and the various penalties arising from the failure to file required information returns or otherwise provide required information.

C. Comments on the New Penalty Framework.

Since its release, there has been much confusion regarding the new penalty framework. In particular, some commentators and practitioners have characterized the term stating that “[i]n lieu of all other penalties that may apply, including information return and FBAR penalties, a penalty equal to 20% of the amount in foreign bank accounts and/or entities in the year with the highest aggregate account and/or asset value will be assessed” as imposing a mandatory 20% penalty described in all cases, regardless of the specific facts of the case. In our view, this is an incorrect interpretation because the IRS may only impose a penalty that it is specifically authorized to impose by statute. Thus, as is clear from the language of the term itself, the 20% penalty will only be imposed “*in lieu* of all other penalties that may apply” (emphasis added). It will not, and cannot, be imposed if no such “other penalties” apply, or if the “other penalties that may apply” do not exceed 20% of the amount in foreign bank accounts and/or entities in the year with the highest aggregate account and/or asset value. Similarly, if that penalty is reduced to 5%, it will not be imposed unless the total of the “other penalties that . . . apply” exceed 5% of

the amount in foreign bank accounts and/or entities in the year with the highest aggregate account and/or asset value.

An analysis of the application of the 20% in-lieu-of penalty under the new penalty framework should take into consideration the following points:

- The term “other penalties that may apply” is exclusive of the negligence or delinquency penalty that will be applied under the new penalty framework.
- If the IRS assesses an accuracy-related penalty under section 6662 with respect to any portion of the underpayment for any of the years at issue, the civil fraud penalty under section 6663 cannot also be applied to that portion of the underpayment.
- In addition, the accuracy-related penalty under section 6662 and the civil fraud penalty under section 6663 apply only where a return of tax is filed. Therefore, if a taxpayer fails to file a return, he or she may be subject to the delinquency penalty for failure to file a return under section 6651(a)(1), but neither the accuracy-related penalty nor the civil fraud penalty would apply.
- As a corollary of the points above, the civil fraud penalty should generally not be included in the “other penalties that may apply” for purposes of applying the fourth term of the new penalty framework, as described above.
- Where a negligence, rather than a fraud penalty, is applied to the taxpayer’s underpayment, as a practical matter, it is less likely that the willful FBAR penalty would be applied.

Finally, it should be noted that the new penalty framework set forth in this memorandum does not in any way change the current IRS voluntary disclosure policy that a timely voluntary disclosure will not automatically guarantee immunity from criminal prosecution, but will be considered with all other factors in a case in

determining whether criminal prosecution will be recommended to the DOJ.

D. Examples Illustrating the Application of the New Penalty Framework.

1. Example 1: Illustrating “Other Penalties” of Less Than the 20% In-Lieu-Of Penalty (in the context of a foreign corporation and bank account).

A U.S. individual taxpayer (“T”) established a foreign corporation with US\$1 million in assets over 6 years ago. The corporation in turn established a foreign bank account that T would be considered to have a financial interest in or authority over. For each of the prior 6 years, T failed to file either Form 5471 with respect to the corporation or an FBAR with respect to the foreign bank account. The amount in the account has remained unchanged.

Because T failed to file Form 5471 for any of the prior 6 years, he is subject under section 6679(a)(1) to a \$10,000 penalty for each of those years for a total of US\$ 60,000. Also, because T failed to file an FBAR for any of the prior 6 years, it is subject to at least the non-willful FBAR penalty for the prior 5 years (the statute of limitations for the FBAR penalty is 5 years) for a total of US\$ 50,000.

Assuming no other penalties apply, in this case, the 20% in-lieu-of penalty will not apply in full because the “other penalties that may apply” are only US\$ 110,000, which is less than US\$ 200,000 (20% of the US\$ 1 Million.)

2. Example 2: Illustrating “Other Penalties” of Greater Than the 20% In-Lieu-Of Penalty (in the context of a foreign trust and bank account).

A U.S. individual taxpayer (“T”) established a foreign trust with US\$1 million over 6 years ago. The foreign trust in turn established a foreign bank account that T would be considered to have a financial interest in or authority over. For each of the prior 6 years, T failed to file either Form 3520-A with respect to the foreign trust or an FBAR

with respect to the foreign bank account. The amount in the account has remained unchanged.

Because T failed to file Form 3520-A for any of the prior 6 years, he is subject under section 6677(b) to a 5% penalty on the US\$ 1 million for each of those years for a total of US\$ 300,000. Also, because T failed to file an FBAR for any of the prior 6 years, he is subject to at least the non-willful FBAR penalty for the prior 5 years (the statute of limitations for the FBAR penalty is 5 years) for a total of US\$ 50,000.

In this case, the 20% in-lieu-of penalty is clearly advantageous because rather than paying US\$ 350,000 in penalties, T will pay only US\$ 200,000 (20% of the US\$ 1 million.).

E. Tax Court Review of Additions to Tax and Penalties.

If an individual is unable to satisfactorily resolve their compliance issues through voluntary disclosure or other administrative means, they may face significant potential liability for the additions to tax and penalties mentioned above (namely the accuracy and delinquency penalties, the FBAR penalty, the fraud penalties under sections 6651(f) and 6663, and the various penalties arising from the failure to file required information returns or otherwise provide required information). In such a situation, it would be highly desirable to have the opportunity to litigate those issues in the pre-payment forum of the United States Tax Court. Unfortunately, the Tax Court is a court of limited jurisdiction and it may only exercise jurisdiction to the extent expressly provided by statute. As a result, while some additions to tax and penalties may be contested in the Tax Court, most, including the FBAR penalty and nearly all of the penalties arising from the failure to file required information returns or otherwise provide required information, cannot be. For any addition to tax or penalty that cannot be contested in the Tax Court, the taxpayer must first pay the penalty and then seek a refund in either the United States District Court or the Court of Federal Claims.

* * * * *

Pursuant to requirements relating to practice before the Internal Revenue Service, any tax advice in this communication (including any attachments) is not intended to be used, and cannot be used, for the

purpose of (i) avoiding penalties imposed under the United States Internal Revenue Code, or (ii) promoting, marketing, or recommending to another person any tax-related matter.

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U.S. State Tax Issues Associated with Federal Voluntary Disclosure Program

Much has been written lately about the efforts by the IRS efforts to obtain information from foreign financial institutions regarding U.S. taxpayers holding funds in unclaimed foreign bank accounts. As a result of the heightened attention, many U.S. taxpayers holding such accounts are reviewing their options to regularize, i.e., disclose such accounts and pay the resulting federal tax liabilities. As noted in prior articles, various issues must be considered in making a decision regarding the disclosure of offshore accounts and resulting regularization for federal tax purposes.

In addition to these federal tax considerations, U.S. residents must also contend with the respective state, and in some instances local, tax consequences. As for federal tax purposes, additional state income tax, penalty and interest will be due in connection with the disclosure to the taxpayer's state of residence. As a general rule, taxpayers are required to file state amended returns within a limited number of days of filing a federal amended return. In some states, the time allowed for preparation and filing of the corresponding state returns may be as short as 30 days. As a result, the state tax consequences should be reviewed well in advance of filing federal amended returns pursuant to the IRS Voluntary Disclosure Program.

Most importantly, in addition to the payment of back taxes, penalties and interest, certain taxpayers may have exposure to state level civil fraud penalties and/or criminal charges. In many states, filing a false return with the intent to evade tax is considered a criminal tax offense. For example, under New York law, filing a false return with intent to evade tax is a misdemeanor offense. NY Tax Law § 1801, 1804. Further, individuals filing false or fraudulent returns that

substantially understate their tax liability (in excess of \$1,500) can be charged with a class E felony under New York law. NY Tax Law § 1804. The failure to previously disclose an offshore bank account is by no means subject to criminal prosecution per se. However, the respective state laws must be carefully reviewed in order to determine the resulting state tax liabilities as well as any claims of fraud and/or potential criminal prosecution by state revenue authorities.

In addition to understanding the respective state tax/penalty regime, taxpayers seeking to disclose previously unreported amounts should carefully review state law and related authorities for opportunities to obtain relief from civil penalties and, more importantly, potential criminal prosecution through state voluntary disclosure and/or amnesty programs. Much like the federal Voluntary Disclosure Program, these state programs afford taxpayers the opportunity to come forward and voluntarily pay past liabilities in exchange for waiver of certain penalties including, in most instances, potential criminal prosecution.

For example, New York recently established the Voluntary Disclosure and Compliance (VDC) program. Eligible taxpayers receive late

payment/ filing penalty abatement in exchange for self-assessment/ payment of back taxes and interest. In addition, taxpayers obtain protection against any criminal action or proceeding relating to the self-assessed liability. It is important to note that eligible taxpayers must apply for participation in New York's VDC program prior to making payment of past due liabilities.

Similarly, New Jersey recently enacted its 2009 Tax Amnesty Program. Much like the New York VDC program, New Jersey's Tax Amnesty Program provides for abatement of penalty and protection against criminal prosecution in exchange for the self-assessment of past tax liabilities. However, unlike New York's VDC program, which currently has no window for participation, New Jersey's program requires disclosure and payment of past liabilities during a specified Amnesty Period, currently scheduled for May 4, 2009 through June 15, 2009, in order to secure benefits under the program. Further, New Jersey has specifically stated that taxpayers concerned about past liabilities associated with offshore accounts should make use of the Tax Amnesty Program's opportunity to avoid both civil and criminal penalties.

As noted by the state, “[o]nce the Amnesty is period is over, taxpayers in this situation face severe penalties and possible criminal prosecution.” As a result, New Jersey taxpayers seeking to satisfy past liabilities through disclosure of offshore accounts should strongly consider doing so during the Amnesty Period.

New York and New Jersey provide but two examples of the types of programs offered to taxpayers who come forward. As illustrated, in some instances taxpayers must obtain certain up

front approval and/or meet specific criteria in order to secure financial benefit and/or protection from criminal prosecution. As such, the respective program terms/conditions should be reviewed prior to disclosing past liabilities related to offshore accounts. Further, while formal programs are not offered by every state, certain benefits/protections may still be available to those who voluntarily disclose past liabilities prior to being contacted by the state for audit.

As illustrated, taxpayers considering participation in the federal Voluntary Disclosure Program must carefully consider the resulting state tax issues and consider options for minimizing their exposure to civil and potential criminal penalties.

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Other Events

Event: Private Banking Boot Camp Training Program

Date: 26 August 2009, Wednesday

Location: Hong Kong

Description: This one day program is designed as a basic introduction to trusts, foundations, investment funds and insurance products and to the tax issues they attract. The course will be ideal for attendees wishing to be “up to speed” on wealth management issues affecting their clients. The presenters will particularly address issues facing those who wish to enter or expand into the PRC market.

For more information, please contact:

Marianne Shaw at +852 2846 1078 or at marianne.shaw@bakernet.com

Event: 14th Annual International Tax & Trusts Training Course

Date: 27-28 August 2009, Thursday & Friday

Location: Hong Kong

Description: This is the leading annual conference in Asia aimed at wealth management professionals who are involved in structuring their clients' affairs and in ensuring compliance for both their clients and their own institutions. This two day seminar will describe recent legal and tax developments in Asia.

For more information, please contact:

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Event: 6th Annual International Insurance Training Programme

Date: 22 September 2009, Tuesday

Location: Widder Hotel, Rennweg 7, 8001 Zurich, Switzerland

For program information, please contact:

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For registration information, please contact:

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Event: Private Investment Fund Program

Date: 23 September 2009, Wednesday

Location: Seedamm Plaza, 8808 Pfäffikon SZ, Switzerland

For program information, please contact:

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For registration information, please contact:

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Event: US Securities Issues Relevant to Non-US Financial Institutions

Date: 24 September 2009, Thursday

Location: Hotel St. Gotthard, Bahnhofstrasse 87, 8023 Zurich, Switzerland

For program information, please contact:

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For registration information, please contact:

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Event: **10th Annual International Tax and Trust Training Program**
Date: 1-2 October 2009
Location: Conrad Miami Hotel, Miami
Description: The program will focus on current tax compliance and regularization procedures (post-September 23, 2009), restructuring, international tax planning and the use of trusts, and is especially designed for private bankers and trust company personnel.

For more information, please contact:
Jeanne Carbonell at +1 305 789 8925 or at jeanne.carbonell@bakernet.com

Event: **London Annual Tax & Trust Training Conference**
Date: 5-6 October 2009
Location: Baker & McKenzie, London

For more information, please contact:
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Event: **15th Annual International Tax, Trust and Insurance Training Programme**
Date: 17 March 2010
(supplementary programmes)

18-19 March 2010
(main programme)

Location: Montreux, Switzerland

For more information, please contact:
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