

Voluntary Disclosure Program

New look coming to CRA's Voluntary Disclosure Program

By **Robert Kepes**



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(July 14, 2017, 8:55 AM EDT) -- The Canada Revenue Agency (CRA) recently issued a draft circular with proposed changes to the Voluntary Disclosure Program (VDP). The changes, effective after 2017, are deep and far reaching.

The VDP is a long-standing CRA program that allows taxpayers to apply to correct inaccurate or incomplete information, or to disclose information not previously reported. The statutory authority for the VDP comes from a single section in the *Income Tax Act* by which the CRA: 1) waives or cancels all or any portion of any penalty or interest otherwise payable under the act, 2) issues assessments as are necessary to take into account the cancellation, even for statute-barred years.

To add substance to that section, the CRA periodically publishes guidelines that set out how it will administer the VDP, and criteria for granting relief.

If relief is denied, there is an appeal to the Federal Court for a judicial review under administrative law principles of procedural fairness.

The VDP is a win-win. The upside to a taxpayer granted relief is a waiver of penalties (late filing, gross negligence), including criminal charges and a reduced rate of interest on unpaid taxes over three years old.

The upside to the CRA is that taxes and interest are collected with little administrative cost because the CRA does not have to hunt, find and audit the scofflaw who then turns over a new leaf and becomes tax-compliant.

The VDP was working well until the federal government took notice of media reports regarding offshore structures and activities (e.g., Panama Papers, Isle of Man) that questioned if the program was too generous. The Offshore Compliance Advisory Committee (OCAC) was struck in April 2016 with a mandate to advise on administrative strategies dealing with offshore compliance.

The OCAC's recommendations in a final report last December have been adopted and adapted into the CRA's proposed changes to the VDP, and are set out in the June 9 draft circular IC00-1R6. The CRA has provided a 60-day public consultation period.

A valid VD must:

- be voluntary and complete;
- involve the application or potential application of a penalty;
- include information that is at least one year past due, and;
- include payment of the estimated tax owing. In case of financial difficulty, the onus is on the applicant to show inability to pay and to disclose their net worth and cash flow.

The new VDP will exclude disclosures:

- reporting income from proceeds of crime (other than tax evasion presumably);
- by corporations with annual gross revenue over \$250 million;
- relating to transfer pricing adjustments or advance pricing arrangements.

The draft circular proposes two tracks for processing disclosures. The General Program is similar to the existing VDP – no criminal charges or penalties and reduced interest on the back taxes. But the penalty and interest relief is only for the most recent 10 years. Penalties and interest will apply for years beyond that.

The Limited Program meets the OCAC's recommendations and is tailored to the offshore situations described in media reports. The Limited Program avoids criminal charges and only gross negligence penalties (equal to 50 per cent of unpaid taxes). Other penalties, such as late filing of tax returns, or non-filing of foreign reporting forms, will apply. These penalties can be severe and there is no interest relief under the Limited Program.

The CRA's intention is that the Limited Program is intended for major noncompliance, including:

- active efforts to avoid detection through use of offshore vehicles or other means;
- large dollar amounts;
- multiple years of noncompliance;
- a high degree of taxpayer culpability contributing to failure to comply, or a sophisticated taxpayer; or
- disclosure is made after a CRA statement regarding its intended focus of compliance or following CRA correspondence or campaigns.

Questions arise about the factual circumstances, degree of taxpayer knowledge and burden of proof required to meet the conditions. While CRA's intention may be to apply the Limited Program to the most egregious cases, the concern is that over time the bar will be lowered until it will be the rule and not the exception.

The Department of Finance should establish an independent committee to review and approve each case across Canada that the CRA intends to process under the Limited Program.

Under the existing VDP, the period of disclosure is generally limited to the years for which the taxpayer has or can obtain records. For example, most banks don't keep records beyond 10 years and sometimes less. Under the proposals, taxpayers are expected to make estimates of income for years in which documentation is not available.

The takeaway from the draft circular is that disclosures should be done before the new VDP is in effect.

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