The Joint Committee on Taxation of
The Canadian Bar Association
and
Chartered Professional Accountants of Canada

Chartered Professional Accountants of Canada, 277 Wellington St. W., Toronto Ontario, M5V3H2
The Canadian Bar Association, 500-865 Carling Avenue Ottawa, Ontario K1S 5S8

August 8, 2017

The Honourable Diane Lebouthillier, P.C., M.P.
Minister of National Revenue
7th Floor
555 MacKenzie Avenue
Ottawa, ON K1A 0L5

Dear Minister:

Proposed Changes to the Voluntary Disclosure Program Announced June 9, 2017

On June 9, 2017, in your capacity as Minister of National Revenue (the "**Minister**"), you issued a news release (the "**News Release**") announcing proposed changes (the "**Proposed Changes**") to the Canada Revenue Agency's (the "**CRA**") Voluntary Disclosure Program (the "**VDP**"). This release invited members of the public to provide their views on the Proposed Changes as part of an online consultation process.

In light of the important role the VDP plays in the administration of the Canadian tax system, and the significant changes to the VDP announced as part of the Proposed Changes, the Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada (the "**Joint Committee**") wishes to make the following submission to the Minister as part of the consultation process. The Joint Committee, which has been in existence for more than 70 years, is a collaboration of the Canadian Bar Association (the "**CBA**") and Chartered Professional Accountants of Canada ("**CPA Canada**"), and is comprised of volunteers representing lawyers and accountants. The Joint Committee has been an important and respected commentator on the government's tax policy and tax administration. As the comments that follow are quite detailed and because they will be made public, we have not used the online process for making comment but rather provide this written submission.

In addition to commenting on the Proposed Changes, the following submission also discusses certain aspects of the current VDP policy which are not affected by the Proposed Changes, but which the Joint Committee believes the Minister should consider as part of the current proposal to amend the VDP guidelines.

The Proposed Changes apply to disclosures relating to income taxes, GST/HST and certain other taxes. The following submission focuses principally on the Proposed Changes as they relate to taxes payable

under the *Income Tax Act* (Canada) (the "**ITA**"). However, many of the comments below will be equally applicable to the Proposed Changes as they relate to GST/HST or other taxes. In this regard, the Joint Committee understands that each of the CPA's Commodity Tax Committee and the CBA's Commodity Tax Section will be providing the Minister with a separate submission which deals specifically with changes to the VDP relating to GST/HST. Nonetheless, we believe it important to state that, because taxpayers often undertake a VDP in respect of matters relevant to both income tax and GST/HST, in our view, the criteria for VDP should be the same for both, with the exception of issues (e.g. wash transactions) which are relevant to only one of the two taxes.

Executive Summary

The VDP plays an important role in combatting tax evasion and achieving increased levels of tax compliance, by encouraging taxpayers to come forward voluntarily, correct their tax affairs, and pay their taxes. Not only does the VDP generate significant tax revenues that otherwise would go uncollected, but it also is a cost-effective way for the CRA to foster and achieve tax compliance.

Under the current VDP policy a taxpayer is generally entitled to relief regardless of whether the failure to report was inadvertent. The underlying rationale for this approach has been that it is desirable, from a fiscal as well as social contract perspective, to encourage non-compliant taxpayers to reintegrate into the tax system, rather than to rely solely on the threat of prosecution to discourage non-compliance. The Proposed Changes reflect a shift in this policy, by introducing a multi-tier system where eligibility for relief depends partly on the identity or characteristics of the taxpayer, and on whether the taxpayer is considered to have engaged in "major non-compliance".

The historical success of the VDP has, in large part, been a result of the fact that taxpayers applying under the VDP (and professional advisors) have been able to predict with a relative degree of certainty the implications and consequences of initiating a voluntary disclosure. This facilitates non-compliant taxpayers assessing the benefits of participating in the program compared to the ongoing uncertainty and risk associated with continued non-compliance. The Proposed Changes are likely to lead to considerable uncertainty as to the eligibility for relief in any given set of circumstances, and so, the Proposed Changes may in fact create a systemic bias towards, and thereby encourage, continued non-compliance. This is clearly contrary to the purpose of the VDP and the government's objective of combatting tax non-compliance.

The Proposed Changes also exclude certain categories of taxpayers and transactions from qualifying for relief. The Canadian tax system is complex, and all varieties of taxpayers make honest errors. In our view, all taxpayers should be encouraged to correct past errors and non-compliance, without singling out certain types of taxpayers for reduced relief on grounds other than true culpability. At the extreme, a policy which denies relief to certain classes of taxpayer may constitute an improper exercise of the Minister's statutorily granted discretion.

In light of the foregoing, and for the reasons discussed in greater detail in this submission, the Joint Committee recommends that:

- The Minister reconsider whether the introduction of a multi-tier system of relief under the VDP is consistent with the objectives of the VDP and encouraging non-compliant taxpayers to become compliant;

- The Minister reconsider the proposal to deny any relief to large corporations, whether based on the proposed gross revenue test or any other means of classifying a "large" corporation;

- The Minister reconsider the proposal to deny any relief with respect to transfer pricing adjustments;

- To the extent the Minister decides to adopt a multi-tier system of relief under the VDP, the Minister revise paragraph 20 of draft Information Circular IC 00-1R6 (the "**draft Information Circular**") to ensure that taxpayers whose non-compliance is not the result of culpable conduct continue to be entitled to full relief under the VDP;

- The Minister retain the No-Name method of disclosure currently available under the VDP;

- The Minister reconsider the appropriateness of entitling a particular taxpayer to relief under the VDP only on a single occasion, especially in circumstances where the non-compliance is inadvertent;

- The Minister reconsider the appropriateness of entitling a taxpayer to relief only in respect of information that is at least one year past due, especially where the relief sought does not relate to late-filing penalties; and

- The Minister reconsider the requirement that the name of the professional advisor be provided as a condition of an application under the VDP.

Submission Outline

For ease of reference, this submission has been organized under headings addressing the following topics:

- Comments regarding General Policy Considerations

- Comments regarding the Exercise of Ministerial Discretion

- Comments regarding the Proposed VDP Guidelines

- Additional Matters for Consideration by the Minister

General Policy Considerations

Historically, the objective of the VDP has been to encourage compliance with Canada's tax rules by offering relief from penalties (and, where applicable, prosecution) to taxpayers who, whether knowingly or unknowingly, fail to properly comply with the ITA. The underlying rationale for the VDP has been that it is desirable, from a fiscal as well as social contract perspective, to encourage non-compliant taxpayers to "come clean" and reintegrate into the tax system of their own accord, rather than to rely solely on the threat of prosecution to discourage non-compliance. The VDP also permits taxpayers who have made an inadvertent or honest mistake or omission in their tax filings to correct such errors without undue costs, such as penalties.

The benefits of the VDP, which are shared by all Canadians, include the resultant tax revenues generated by the VDP and the increased likelihood of future compliance by those taxpayers who participate in the VDP. In our view, the current VDP has functioned reasonably well in achieving those objectives.

The Proposed Changes to the VDP appear to signal a shift in government policy away from the historical "stick and carrot" approach to non-compliance (*i.e.*, one where the threat of penalties/prosecution is tempered by the prospect of relief if taxpayers come forward voluntarily) to more of a "stick" approach. In particular, we note that under the current VDP policy, a taxpayer is generally entitled to relief regardless of whether the failure to report was inadvertent (so long as the disclosure itself is voluntary). The Proposed Changes, on the other hand, distinguish between inadvertent non-compliance and so-called "culpable conduct", with availability for relief in the latter circumstances being significantly curtailed. As discussed in greater detail below, we are concerned that this change in approach, and the uncertainties it will likely create in the administration of the VDP, could in fact have a detrimental impact on the VDP and its ability to encourage non-compliant taxpayers to come forward and comply with their statutory obligations. Further, we believe that the apparent objective to restrict relief available to taxpayers whose non-compliance was intentional, rather than accidental, can be better focused, to ensure that Canadians who wish to come forward and correct accidental non-compliance continue to be encouraged to do so by the relief afforded under the VDP.

We also note that the Proposed Changes appear to reflect a bias against certain categories of taxpayers, including large businesses, which we submit is not justified on policy grounds. In a jurisdiction such as Canada that is governed by the rule of law, non-compliance by *any* taxpayer (including any relief offered to non-compliant taxpayers) should be subject to the same treatment, regardless of the taxpayer's economic situation, means or social status. Any distinction in the treatment of taxpayers should be dependent on the culpability of their conduct, and not on other characteristics of the taxpayer.

The VDP plays a valuable role in Canada's broader strategy of combatting tax evasion and achieving increased levels of tax compliance. "Encouraging taxpayers to come forward, correct their tax affairs and pay their fair share is a cost-effective way for the CRA to obtain compliance," as stated by the CRA in its commentary about the VDP.[1] As further noted by the Organisation for Economic Co-operation and Development (the "**OECD**"), a voluntary disclosure program is "a pathway to tax compliance" and a means for governments to "secure payment of missing revenue, using relatively limited administrative resources."[2]

In its 2016 report on the VDP, the Offshore Compliance Advisory Committee referred to the fact that "striking a balance between fairness, on one hand, and revenue generation, on the other hand, is critical to the successful operation of a VDP." Research shows that offering a VDP in an environment of increased transparency and detection results in maximizing tax revenues net of administrative cost.[3] In Canada, for example, voluntary disclosures in 2014-2015 increased by 21 per cent over the previous year. In this way, a VDP is in the public interest, and serves to strike a balance between fairness and revenue generation which benefits all Canadians. Many other countries have programs similar to the VDP. For your reference, we have included with this submission a summary comparing key policies of voluntary disclosure programs in seven countries, including Canada (taking into account the Proposed Changes). It appears

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[1] See the CRA's *Annual Report to Parliament 2013-2014*, at page 44.

[2] See the OECD's *Update on Voluntary Disclosure Programmes*. 2015

[3] Langenmayr, D., "*Voluntary Disclosure of Evaded Taxes—Increasing Revenues, or Increasing Incentives to Evade?*", CESIFO Working Paper No. 5349, May 2015.

other tax administrations have grappled with similar concerns, and their approach and experience may be beneficial in assessing how the Canadian system should be structured.

The effectiveness of a VDP depends in good measure on how it is designed. Historically, the success of the VDP has been attributable in large part to the fact that non-compliant taxpayers seeking to enter the VDP (and their advisors) have been able to predict with a relative degree of certainty the implications and consequences of initiating a voluntary disclosure. This ability to anticipate the likely outcomes makes it easier for non-compliant taxpayers to assess the benefits of participating in the program compared to the ongoing uncertainty and risk associated with continued non-compliance (or with being compliant on a going forward basis, but leaving past errors or omissions unaddressed). The new "two-tier" system contemplated by the Proposed Changes introduces significant uncertainty as to the expected outcome under the VDP for non-compliant taxpayers (and thus for professional advisors, who play an important role in encouraging non-compliant taxpayers to participate in the VDP). Moreover, taxpayers (and their advisors) may be uncertain about which of the two programs applies to them. These uncertainties increase the likelihood that non-compliant taxpayers will be more willing to continue to "roll the dice" and remain non-compliant, rather than face an uncertain outcome associated with entering the VDP. Therefore, we are concerned that the Proposed Changes may in fact create a systemic bias towards ongoing non-compliance, and that Canada risks missing out on realizing higher compliance and increased tax revenues in an era when non-compliant taxpayers might otherwise be more motivated than ever to disclose their errors or omissions.

Discretion of the Minister

Under the *Financial Administration Act* (Canada), the ability of the Minister to compromise debt claims, including claims for taxes owing, is generally limited unless such power is expressly provided for under an applicable statute. The statutory basis for the VDP, at least insofar as income tax is concerned, is the discretion afforded to the Minister under subsection 220(3.1) of the ITA, which provides as follows:

> 220(3.1) **Waiver [or cancellation] of penalty or interest** — The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

On its face, this provision grants a broad discretion to the Minister. The only statutory constraint on the exercise of Ministerial discretion in subsection 220(3.1) is that the relief may be granted only with respect to the ten preceding calendar years.

While we support the publication of administrative pronouncements outlining the factors that the Minister will typically consider in exercising the discretion to grant relief under the VDP, we are concerned

that some of the pronouncements contained in the draft Information Circular, discussed below, may amount to an impermissible fettering of the Minister's discretion.[4]

In this regard, it is a fundamental principle of administrative law that a decision maker may not fetter his or her discretion by adopting rigid rules that prevent the decision maker from considering the particular circumstances of each case:

> The decision maker may not adopt inflexible policies, as the existence of discretion inherently means that there can be no rule dictating a specific result in each case, and the flexibility and judgment that are an integral part of discretion may be lost. Discretion, by its nature, can lead to different results in similar or different cases, and every individual may expect an independent assessment of their situation. Failure to do so may lead to judicial review of the decision maker's decision for failure to exercise discretion, which is akin to a jurisdictional error.[5]

The above principle is reflected in the jurisprudence, which establishes that the Minister cannot limit the exercise of discretion conferred on the Minister by statute through administrative directives or pronouncements. For example, in discussing the scope of the Minister's discretion under the corresponding interest waiver provision contained in subsection 281.1(1) of the *Excise Tax Act* (Canada) and the related pronouncements contained in GST/HST Memoranda 16.3 and 16.3.1,[6] the Federal Court recently held:

> [39] Subsection 281.1(1) provides the Minister with an unfettered discretion to grant taxpayers relief from interest owing under the [Excise Tax] Act, free of any restrictions on either the circumstances in which the Minister may grant a taxpayer relief or the quantum of relief the Minister may provide. The establishment of various criteria in Guidelines 16.3 and 16.3.1 for when the Minister will exercise his discretion does not change this. Thus, contrary to the respondent's submission, it is simply not the case that Guideline 16.3 and Guideline 16.3.1 exhaust all of the circumstances in which the Minister may consider granting a taxpayer relief.[7]

Similarly, in *Stemijohn Investments Ltd. v. Canada (Attorney General)*,[8] the Federal Court of Appeal held that the Minister had impermissibly fettered his discretion in a taxpayer relief application by considering only the factors set out in the relevant information circular. In the Court's view:

> [28]…the Minister fettered his discretion, and thereby made an unreasonable decision. He did not draw upon subsection 220(3.1) of the [Income Tax] Act to guide his discretion. He looked exclusively to the Information Circular. This is seen from the Minister's reasons for decision.

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[4] Presumably, a taxpayer may apply for relief from interest and penalties outside the VDP, but that is a less certain process and, if a VDP is perceived as the best means to address non-compliance, the VDP policy clearly should be consistent with that.

[5] See G. Régimbald, *Canadian Administrative Law*, 2d ed. (Markham: LexisNexis Canada, 2015) at 236.

[6] We note that GST/HST Memorandum 16.3.1 is proposed to be replaced by draft GST/HST Memorandum 16.5 – *Voluntary Disclosures Program*, which was released by the Minister on June 9, 2017 in conjunction with the News Release and the Proposed Changes to the VDP.

[7] *Gordon v. Attorney General of Canada*, 2016 FC 643.

[8] 2011 FCA 299.

And again, in *Canada v. Guindon*,[9] the Federal Court of Appeal confirmed that:

> [58] [t]he Minister's discretion on an application for relief must be based on the purposes of the [Income Tax] Act, the fairness purposes that lie behind subsection 220(3.1) of the Act, and a rational assessment of all the relevant circumstances of the case. Her discretion must be genuinely exercised and must not be fettered or dictated by policy statements…

In light of these well-established principles, we are concerned that a number of the Proposed Changes to the VDP contained in Information amount to the impermissible fettering of the Minister's broad discretion under subsection 220(3.1).

For example, we are concerned with the statement in paragraph 19 of the draft Information Circular that corporations with gross revenue in excess of $250 million in at least two of the last five taxation years will no longer generally qualify for relief under the VDP. As discussed in greater detail under the next heading below, we are unable to ascertain any policy basis or justification for this exclusion. Moreover, we submit that a directive by the Minister that such corporations are ineligible for the benefits of the VDP, regardless of the circumstances giving rise to the potential disclosure, amounts to an inappropriate and impermissible fettering of the broad discretion conferred upon by the Minister by subsection 220(3.1) of the ITA. Accordingly, we recommend that paragraph 19 of the draft Information Circular be revised to delete the reference to large corporations.

For similar reasons, and as discussed in greater detail under the next heading below, we also recommend that the reference to adjustments relating to transfer pricing be deleted from paragraph 19 of the draft Information Circular.

Specific Aspects of the Proposed VDP Guidelines in Draft Information Circular IC 00-1R6

The Proposed Changes to the VDP guidelines as they relate to income tax matters are contained in the draft Information Circular, which was released in conjunction with the announcement of the Proposed Changes by the Minister. The draft Information Circular is stated to replace existing Information Circular IC 00-1R5, dated January 2017 (the "**current Information Circular**"), and to apply after December 31, 2017.

As noted above, certain aspects of the Proposed Changes reflected in the draft Information Circular constitute a significant departure from the current VDP policies and guidelines. Several of the key changes, and their anticipated impact on the administration of the VDP, are highlighted below.

1. Circumstances Where Relief Will Not Be Considered

Paragraph 19 of the current Information Circular lists a limited number of circumstances that will currently not be considered under the VDP. For the most part, these circumstances involve discretionary elections under the ITA, or situations where no tax is otherwise payable.

The draft Information Circular expands the list of circumstances where relief under the VDP will not be considered.[10] In particular, the draft Information Circular proposes to add the following additional

[9] 2013 FCA 153, aff'd at 2015 SCC 41 (without a discussion of this issue).

[10] See paragraph 21 of the draft Information Circular.

circumstances (in addition to those already referred to in the current Information Circular) where relief under the VDP generally will not be considered:

- applications reporting income from proceeds of crime;
- applications by corporations with gross revenue in excess of $250 million in at least two of its last five taxation years; and
- applications relating to transfer pricing adjustments or a penalty under section 247 of the ITA.

As discussed above, we are concerned that specifically mandating the circumstances where relief will not be considered constitutes an improper fettering of the Minister's discretion, contrary to law. Rather than reiterating those arguments here, we wish to comment more specifically on the above-mentioned circumstances and whether it is appropriate to deny such taxpayers relief under the VDP.

Proceeds of Crime

Whether to grant relief to taxpayers who fail to report income from proceeds of crime involves multiple policy considerations that are largely beyond the scope of this submission. It bears noting, however, that the proceeds of crime are taxable like any other form of income. As such, there is some merit in the view that, just as the ITA does not differentiate between income earned legally or illegally, the administration of the tax system also should not differentiate between sources of income on this basis.

Large Corporations

The refusal to grant relief to corporations with gross revenue in excess of $250 million in at least two of the last five taxation years does not appear to be supportable on any public policy basis whatsoever. As stated in the News Release, the Proposed Changes are intended to ensure that "severe cases of non-compliance" do not benefit from the same level of penalty and interest relief. We are not aware of any evidence to suggest, much less support, that large corporations are collectively engaged in "severe cases of non-compliance" such that none of them should, as a matter of public policy, ever be entitled to relief under any circumstances.

Our experience is that most large corporations actively seek to comply with their statutory obligations under the ITA, often expending considerable effort and costs (both through the employment of internal tax compliance personnel as well as through the retention of external tax experts and professionals) in doing so. It is also our experience that applications by large corporations under the VDP typically do not relate to matters involving culpable conduct, but rather are attributable to inadvertent oversights or mistakes. This is understandable: as the size and complexity of an organization increases, so too does the number and complexity of tax-reporting issues that the organization is likely to encounter. It logically follows that corporations with significant revenues are, as a simple matter of statistics, more likely to make inadvertent errors than, for example, an individual taxpayer with only once source of income.

While we are in full agreement with the government's objective of "cracking down on tax cheats" and "ensuring that those who break the law face the consequences of their actions", there is no evidence that denying the benefits of the VDP to large corporations in all circumstances serves to achieve those objectives, especially where inadvertent error or oversight is involved. There is also no evidence to suggest that treating one category of taxpayers differently from another simply on the basis of annual revenues (or, for that matter, any other criterion that is not directly related to a finding of culpable

conduct) is fair. To exclude certain corporations from the VDP based solely on annual revenues serves to violate the fundamental principle of fairness upon which our tax administration system is based and to which the government is committed.

To conclude, we see no policy basis or justification for treating some corporations differently from other taxpayers based solely on the size of their revenues.[11] We also are concerned that this aspect of the Proposed Changes constitutes an unlawful fettering of the Minister's discretion based on irrelevant considerations. Furthermore, we believe that if this policy were adopted, it would have the adverse effect of reducing substantially the amount of revenues that the government collects from the VDP. Accordingly, we submit that the reference to applications by corporations with gross revenue in excess of $250 million in at least two of its last five taxation years should be deleted from paragraph 21 of the draft Information Circular. Instead, we submit that if the Minister is concerned that certain large corporations may be engaged in "improper" conduct, that conduct should be reviewed and considered in determining eligibility for relief under the VDP on a case-by-case basis, just as with any other taxpayer.

It has been suggested that the motivation for this change may be that the issues raised by large corporations require greater time and expertise to process than may be currently available under the VDP. With respect, if that is the concern, our recommendation is not to exclude large corporations but rather to establish a large corporations division, or to create parallel program for large corporations offering relief substantially similar to the VDP.

We finally note that this differentiation does not appear in the draft GST/HST memorandum, raising the question of whether the two processes will be administered consistently. As the above indicates, while we consider different processes for “large” and “small” taxpayers inappropriate, whatever decision is made should be consistent across the income tax and GST/HST programs.

Transfer Pricing Adjustments

For much the same reasons, we submit that the reference relating to transfer pricing adjustments or a penalty under section 247 of the ITA should be deleted from paragraph 21 of the draft Information Circular.

We presume that the reason transfer pricing adjustments were included in paragraph 21 of the draft Information Circular is because the Minister is concerned that some taxpayers may be taking positions relating to non-arm's length transfer prices that do not accord with the CRA's views. That does not, however, mean that transfer pricing adjustments should automatically be excluded from the VDP. For example, it is possible that a taxpayer, having established a transfer price, subsequently becomes aware of additional information which indicates that the methodology selected in establishing the transfer price, or the factual assumptions on which the transfer price was based, were incorrect, or are no longer appropriate or valid. We fail to see why a taxpayer who, in those or similar circumstances, *voluntarily* comes forward to request an adjustment and relief from penalties should not be entitled to such relief. Specifically, we fail to see any policy basis for distinguishing the foregoing situation from that of a taxpayer who voluntarily discloses unreported income that is not attributable to a transfer pricing adjustment (for which the latter taxpayer would be eligible for relief).

[11] We observe that none of the other countries programs described in the Appendix make a distinction of this nature.

Once again, we presume that part of the Minister's justification in seeking to exclude transfer pricing adjustments from relief under the VDP is a concern that certain taxpayers may knowingly establish or use an inappropriate transfer price, in the hopes that the transfer price is not challenged on audit. If that is the Minister's concern, then we would note, firstly, that transfer-pricing is not an exact science; the determination of what constitutes an "appropriate" transfer price in any given circumstance often involves a multiplicity of complex factors that need to be considered and weighed, with the result that even experts may differ widely in their views regarding the "correct" transfer price. Secondly, even if a taxpayer were to knowingly use an inappropriate transfer price, we fail to see how that situation differs from one of a taxpayer who knowingly fails to report income that is not attributable to a transfer price, and why relief is available in the latter circumstance but not in the former. Finally, as transfer pricing impacts all corporations irrespective of size, we fail to understand why a taxpayer who honestly and reasonably attempts to comply with its transfer pricing obligations, but who for whatever reason subsequently discovers that the transfer price used is inappropriate, should not be entitled to relief merely because the Minister is concerned that *other* taxpayers may be engaged in inappropriate transfer pricing. This too would seem to violate the fundamental principle of fairness.

In conclusion, we are concerned that the exclusion of all transfer pricing adjustments from relief under the VDP may constitute an inappropriate fettering of the Minister's discretion based on irrelevant considerations and violates the principle of fairness. Accordingly, we submit that the reference to applications relating to transfer pricing adjustments or a penalty under section 247 of the ITA should be deleted from paragraph 21 of the draft Information Circular.

2. Limited Program vs. General Program Relief

A second key change reflected in the draft Information Circular relates to the introduction of a so-called "two-tier" system of relief.[12]

Specifically, the draft Information Circular contemplates both a "General Program" and a "Limited Program". A taxpayer who qualifies under the General Program will not be assessed penalties or be subject to prosecution, and may be eligible for partial interest relief. On the other hand, a taxpayer who qualifies only under the Limited Program will not be subject to prosecution or gross negligence penalties (although they will remain liable for other penalties, such as late-filing penalties), but will not be entitled to interest relief.[13] This differs from the current VDP policy, under which all eligible taxpayers are entitled to relief from prosecution and from all penalties, and are eligible for partial interest relief (subject to the Minister's discretion).

The circumstances in which an application will qualify only under the Limited Program, as opposed to the General Program, are set out in paragraph 20 of the draft Information Circular. Specifically, paragraph 20 indicates that the Limited Program will apply to applications that disclose "major non-compliance", including one or more of the following situations:

[12] In fact, given the proposed exclusion of corporations with revenues in excess of $250 million in at least two of its last five taxation years, the Proposed Changes effectively result in a "three-tier" system: one for large corporations and a two-tier system for other taxpayers.

[13] See paragraphs 13 to 16 and paragraph 20 of the draft Information Circular.

- active efforts to avoid detection through the use of offshore vehicles or other means;
- large dollar amounts;
- multiple years of non-compliance;
- a sophisticated taxpayer;
- the disclosure is made after an official CRA statement regarding its intended focus of compliance or following CRA correspondence or campaigns; or
- any other circumstance in which a high degree of taxpayer culpability contributed to the failure to comply.

We have a number of concerns regarding the proposed two-tier system, which are set out below.

Appropriateness of certain factors

An initial concern relates to the inclusion of certain criteria in paragraph 20 of the draft Information Circular as indicative of "major non-compliance", thereby disentitling a taxpayer from qualifying under the General Program. It appears that the CRA is seeking to differentiate inadvertent non-compliance from culpable conduct by the taxpayer. If this is the case, we recommend paragraph 20 state this more clearly, indicating that the Limited Program will apply to applications in circumstance in which a high degree of taxpayer culpability contributed to the failure to comply.

We assume, based on the comments by the Minister in the News Release, that the introduction of the Limited Program was intended to strike a balance between the historical objectives of the VDP – namely to encourage non-compliant taxpayers to come forward voluntarily – and a concern that the VDP not be perceived by members of the public as potentially "rewarding" so-called tax cheats, by ensuring that the latter do not benefit from the same level of penalty and interest relief as other taxpayers whose non-compliance is not the result of culpable conduct.

Assuming the foregoing to be correct, we are concerned that the net cast by paragraph 20 of the draft Information Circular is considerably wider than it needs to be in order to achieve the purpose of ensuring that "tax cheats" are not "rewarded" for the conduct, as the proposed guidelines are likely to cover numerous situations that do not involve any culpable conduct at all. In part, this concern stems from the use of the ambiguous term "major non-compliance" in paragraph 20, but it is reinforced by certain of the factors listed in paragraph 20 as being indicative of "major non-compliance", namely: large dollar amounts; multiple years of non-compliance; and a sophisticated taxpayer.

We submit that if the reason for the introduction of a new two-tier system is to ensure that "tax cheats" are not perceived as being rewarded for their conduct, the reference to "major non-compliance" should be replaced with a reference to "culpable conduct" (or some other term that makes it clear that the failure to comply with the taxpayer's obligations was done knowingly, as opposed to being attributable to error or mistake). Furthermore, we submit that the references to large dollar amounts, multiple years of non-compliance and a sophisticated taxpayer also should be removed or modified, as these factors do <u>not</u>, of themselves, constitute evidence of culpable conduct.

For example, use of a "large dollar amounts" criterion would mean that taxpayers with significant revenues (for example, large corporations) could effectively be prevented from qualifying under the General Program solely because of the absolute dollar amounts involved, even if the amounts are small in relation to their overall revenues and there is no culpable conduct involved. We fail to see why such taxpayers should not be entitled to relief under the General Program in those circumstances.

As another example of our concern, it is unclear whether this criterion is directed at absolute or relative dollar amounts. For example, would this factor be more applicable to a taxpayer with annual income of $100 million which makes an error of $1 million, than a taxpayer with annual income of $50,000 who reports only $15,000? If this criterion is retained, we recommend that the meaning of “large dollar amounts” be clarified.

Similarly, the "sophisticated taxpayer" criterion would potentially prevent corporations that have an accountant on staff from qualifying under the General Program, regardless of the amount involved, even where the oversight or error was inadvertent and not the result of culpable conduct. An example might be where the taxpayer claims a reserve under paragraph 20(1)(m) of the ITA at the end of a taxation year, and inadvertently forgets to include a corresponding amount in income at the start of the subsequent taxation year under subparagraph 12(1)(e)(i). Many other examples of potential inadvertent errors or omissions of a similar nature exist. Once again, we do not understand why such taxpayers should not be entitled to relief under the General Program in those circumstances.

The "multiple years of non-compliance" criterion could potentially include a situation where the taxpayer has inadvertently, and without any culpable conduct, failed to properly report a recurring amount over a period of several years before discovering the error. An example might include a corporation that has been paying dividends on its shares for several years to arm's length shareholders on the mistaken belief that such shareholders qualified for a reduced treaty withholding rate, but subsequently discovers that the withholding should in fact have been made at a higher rate. A second example, common in practice, is an individual who does not recognize that investments held in Canadian securities accounts may be required to be reported on Form T1135, and fails to file that form for many years. Many other examples of such inadvertent recurring errors or omissions are likely to exist. Once again, we fail to understand why such taxpayers should not be entitled to relief under the General Program in those circumstances.

While we acknowledge that the afore-mentioned criteria may also be present in circumstances involving culpable conduct (and in some cases may serve to support the position that culpable conduct was involved), it is clear, as demonstrated above, that those criteria *do not of themselves constitute evidence of culpable conduct*. Accordingly, if the listing of those factors in paragraph 20 of the draft Information Circular remains as proposed, we are extremely concerned that the result will be the automatic denial of interest relief, and relief from most penalties, in many situations that do not involve any culpable conduct. In many such situations, failure to grant relief would carry a greater risk of offending any notions of public policy or otherwise impugning the perceived fairness of the tax administration system.

Accordingly, we submit that reference to the afore-mentioned criteria (large dollar amounts / multiple years of non-compliance / sophisticated taxpayer) in paragraph 20 should be removed or paragraph 20 should be amended to make it clear that those criteria do not disentitle a taxpayer from qualifying under the General Program where there is no evidence of culpable conduct on the part of the taxpayer.

Uncertainty as to whether taxpayers qualify under the General Program or Limited Program

A second concern is that the introduction of a two-tier system is likely to create considerable uncertainty, both for taxpayers and professional advisors, as to how the VDP will be administered, and what sort of relief a particular taxpayer is likely to qualify for, under the new policy. This in turn could serve to reduce the willingness of some taxpayers to come forward under the VDP, with the result that the Proposed Changes could in fact result in a reduced level of compliance as compared to the current VDP policy.

Under the existing VDP policy, provided the taxpayer meets certain well-defined criteria (notably, that the disclosure qualifies as voluntary, and involves amounts that are more than one year old), there is a high degree of certainty as to the relief that the taxpayer can expect to be granted under the current VDP. This means that taxpayers who are contemplating making a disclosure, and their professional advisors, are generally able to anticipate the likely outcome (and associated cost to the taxpayer) of requesting relief under the VDP. In our experience, the ability to anticipate the likely outcome of an application under the VDP – both in terms of process and cost – is an important motivating factor for many taxpayers to proceed with the request for relief under the VDP.

The introduction of a new two-tier system will, in many cases, create considerable uncertainty as to what relief taxpayers may ultimately be eligible for. In particular, many of the criteria set out in paragraph 20 of the draft Information Circular are subjective or ambiguous, and thus subject to differing views and interpretations. This will make it more difficult for taxpayers, and professional advisors, to assess the potential outcome of applying for relief under the VDP.

The foregoing will be particularly true if, contrary to our recommendation above, paragraph 20 of the draft Information Circular is retained in its current form. In that case, how is someone to determine whether the potential disclosure involves "major non-compliance", especially in situations that do not involve active efforts to avoid detection (or so-called culpable conduct)? Is this determination to be made based solely on the dollar amount involved? If so, what is a "large dollar amount" – is it ten thousand dollars, a hundred thousand dollars, a million dollars? In determining whether an amount is "large", does one look solely to the absolute amount involved, or does it involve a subjective determination based on the taxpayer's other declared income (in which case even small absolute dollar amounts could potentially be considered "large")? What constitutes a "sophisticated taxpayer"? Is someone who has achieved a certain level of education (for example, a university degree) automatically considered a "sophisticated" taxpayer, such that they may no longer qualify under the General Program, regardless of their knowledge of the tax rules? Does it mean that corporations with an accountant on staff are no longer eligible under the General Program, regardless of the circumstances?

We raise the foregoing questions because, in many cases involving historic non-compliance, the arrears interest otherwise payable may approach (or in some cases even exceed) the tax otherwise payable. Consequently, determining whether a taxpayer qualifies under the General Program (and thus for partial interest relief) or the Limited Program (no interest relief) will in many cases have a significant impact on the total "cost" to the taxpayer of the disclosure, and therefore could influence whether a particular taxpayer decides to proceed with the disclosure. In particular, we anticipate that the introduction of a Limited Program, and the resultant uncertainty as to whether a particular taxpayer qualifies under the General Program or Limited Program, could deter many taxpayers from initiating a voluntary disclosure, especially in circumstances where such taxpayers perceive the likelihood of detection as low. As a result, we are concerned that the introduction of a two-tier system could serve to encourage, rather than

discourage, continued non-compliance (or correction but on a go-forward basis only) as compared to the current VDP policy. Put another way, we are concerned that by increasing the cost of voluntary compliance, the Proposed Changes actually serve to increase the perceived benefit associated with continued non-compliance, which is directly contrary to the government's objective of encouraging compliance by all Canadians.

3. Pre-Disclosure Discussion

The VDP currently provides for two different disclosure methods: Named and No-Name.[14] Under a Named disclosure, the identity of the taxpayer is stated on the initial disclosure submission to the VDP. Under a No-Name disclosure, a professional advisor retained by the taxpayer to assist with the disclosure may provide certain information to a VDP officer, but not the identity of the taxpayer, in order to gain better insight into how the taxpayer's case may be treated and the nature of the relief that might be available to the taxpayer. Provided the facts disclosed are complete and the identification of the taxpayer is provided to the VDP within the applicable time period, the disclosure is considered to have been initiated at the time the initial information is provided to the VDP officer.[15]

No-Name disclosures are typically, and frequently, used in situations where there is some uncertainty as to the potential treatment of a particular item, or where other technical reporting issues exist, since they afford taxpayers (and their professional advisors) a greater degree of assurance as to the likely outcome under the VDP. As noted above, the ability to predict the potential outcome under the VDP is an important factor for many taxpayers in deciding whether to proceed with a voluntary disclosure. Furthermore, it is our general experience that non-compliant taxpayers are more likely to proceed with a voluntary disclosure if they perceive the process to be transparent and predictable, as opposed to a process that is unpredictable and may lead to unanticipated outcomes (such as items the taxpayer thought were non-taxable being treated as income, capital gains being taxed as business income, etc.).

Based on our review of the draft Information Circular, it appears that the No-Name method will no longer be available for disclosures commencing after December 31, 2017.[16] Should our conclusion be incorrect,

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[14] See paragraphs 22 to 30 of the current Information Circular.

[15] See paragraphs 44 and 50 of the current Information Circular. The effective time of the disclosure under the No-Name method is potentially relevant insofar as a disclosure under the VDP only qualifies if it is voluntary. Consequently, if a taxpayer initiates a No-Name disclosure and, subsequent to that disclosure but prior to the identification of the taxpayer to the VDP officer, the CRA independently commences an audit of the taxpayer, the disclosure will still be considered to be voluntary as long as the taxpayer otherwise completes the No-Name disclosure.

[16] This conclusion stems from the fact that the draft Information Circular no longer explicitly refers to the No-Name method. Although paragraph 38 of the draft Information Circular refers to preliminary discussions on a "no-name" basis, paragraph 39 of the draft Information Circular goes on to state that such discussions do not constitute acceptance into the VDP and have no impact on the CRA's ability to audit, penalize, or refer a case for criminal prosecution. In addition, paragraphs 41 and 45 of the draft Information Circular now require the taxpayer to sign Form RC 199 to initiate the disclosure, and require the taxpayer’s identity to be included on the Form RC 199 (whereas under the current Information Circular, a No-Name disclosure can be initiated by the taxpayer's advisor filing the form without disclosing the identity of the taxpayer at the time of filing.).

then we would recommend that the draft Information Circular be revised to make it clear that the No-Name method remains an available disclosure method.

If, on the other hand, our conclusion that the Minister is proposing to eliminate the No-Name disclosure method is correct, then we would urge the Minister to reconsider this important and fundamental change to the VDP policy. As noted above, the No-Name disclosure method plays an important role in the current VDP insofar as it provides a useful mechanism for addressing potential technical issues that may exist with respect to contemplated disclosures, thereby resulting in greater certainty for taxpayers and advisors and increasing the likelihood that non-compliant taxpayers will initiate a voluntary disclosure. We are concerned that elimination of the No-Name method will serve to create additional uncertainty for taxpayers and their advisors, and that this could negatively undermine the policy objectives of the VDP by discouraging taxpayers from coming forward voluntarily (as opposed to taking the risk that their non-compliance will remain undetected).

The draft Information Circular refers to the ability to engage in preliminary discussions on a no-names basis, but provides no details. Depending on the process envisioned, this could alleviate at least some of the concerns arising from the elimination of the No-Name disclosure method. If this preliminary discussion will afford the taxpayer (or their advisor) the opportunity to communicate directly with a VDP officer to discuss the details of a potential disclosure, and obtain some indication of how the CRA might view a particular matter, subject to the same restrictions presently applied to No-Name disclosures, this would allow a greater degree of certainty to be obtained.

In addition to the obvious benefits of greater transparency and certainty, this would also enable the taxpayer, or their advisor, to identify the documents which will need to be provided with the disclosure, making the process more efficient for the CRA, as well as the taxpayer. It would seem appropriate that details of the preliminary discussion, including the date and the identity of the VDP officer, be disclosed in the disclosure itself. Ideally, that VDP officer would remain involved with the file. If this is the intention of the "preliminary discussions" approach, we would recommend this be elaborated on in the Information Circular.

4. Limitation on Multiple Applications by Same Taxpayer

The current Information Circular provides that taxpayers are generally entitled to be granted relief only once under the VDP, although a second disclosure for the same taxpayer may be considered if the circumstances surrounding the second disclosure are beyond the taxpayer's control.[17]

A similar position is set out in the draft Information Circular, namely, taxpayers are generally entitled to obtain the benefits of the VDP only once, although a second application may be considered if the circumstances surrounding the second application are both beyond the taxpayer's control and relate to a different matter than the first application.[18] As a result, the Proposed Changes do not reflect any significant changes in this aspect of the VDP policy.

Nonetheless, in light of the fact that the Minister has asked for public comment on the VDP policy, we submit that the Minister should give due consideration to whether maintaining this historical position

[17] See paragraph 46 of the current Information Circular.

[18] See paragraphs 23 and 24 of the draft Information Circular.

continues to be appropriate. In particular, we submit that generally limiting a taxpayer's ability to access the VDP to a single occasion is not only unnecessarily restrictive, but could in fact serve to undermine the policy objectives of the VDP itself.

We understand that the policy justification for generally allowing only one voluntary disclosure for any particular taxpayer is a concern that, without such a limitation, taxpayers will be more likely to engage in serial non-compliance, in the expectation that they can always rely on the VDP to correct incomplete or erroneous tax filings without having to worry about potential penalties. If so, we question to what extent that assumption is correct. Furthermore, even if that were the case in some instances, we believe it should be possible to fine-tune the VDP policy to address such concerns without the necessity of imposing an arbitrary "one time only" restriction applicable to all taxpayers.

The "one time only" policy appears to be based on the underlying premise that taxpayers should at all times be able to correctly report and comply with all of their tax obligations, and that any failure to do so is necessarily the result of culpable conduct. Unfortunately, this premise is not reflective of the complex environment in which most of today's businesses operate. While we acknowledge that the "one time only" policy may be appropriate in a situation where – to cite the example given at paragraph 20 of the draft Information Circular – a taxpayer has been transferring undeclared income earned in Canada to an offshore bank account, we question its appropriateness in other, more frequently encountered situations where culpable conduct is not involved.

In particular, based on the experience of our members, we expect that the circumstances in which the same taxpayer is likely to consider applying under the VDP more than once to arise most commonly in the case of taxpayers (including large corporations) who otherwise seek to comply with their statutory obligations. These taxpayers, by virtue of the size and complexity of their business and other tax affairs, are likely to encounter all manner of difficult and complex tax-reporting issues and circumstances, some of which, despite their best efforts, may result in incorrect reporting on an applicable tax return. Given this reality, we do not believe it is appropriate from a policy perspective to impose a "one time only" limit on all taxpayers – and especially on taxpayers that, over the course of their "lifetime", may engage in thousands, and perhaps even millions, of transactions – based on concerns that permitting a taxpayer to apply more than once may serve to encourage serial non-compliance by other taxpayers.

We are also concerned that limiting taxpayers to a single VDP disclosure effectively means that otherwise compliant taxpayers who discover minor inadvertent mistakes will be less likely to correct those mistakes, out of a concern that if they make an application under the VDP they will forever prejudice their ability to apply under the VDP in future, including in circumstances that may involve a more material oversight.[19]

[19] Clearly, the prospect of a taxpayer choosing not to voluntarily report an error out of a concern that they may make a greater error in future is not desirable from a policy perspective. Nonetheless, we expect that, in light of the "one time only" policy, this does in fact happen on a regular and recurring basis. In this regard, it should be remembered that the VDP does not apply only to individuals but (subject to the proposed changes relating to corporations with revenues in excess of $250 million, and our comments in response) to corporations that have a potentially infinite duration and that may engage in thousands or even millions of transactions. As a result, statistics alone would dictate that such corporations are, despite their best efforts to be compliant, almost certain to make more than one error or omission in their tax reporting over the span of their "lifetime".

Thus, the limitation on multiple applications may in fact serve to encourage potential non-compliance by taxpayers who are otherwise striving to be compliant.

As noted above, the historical justification for the VDP has been to encourage taxpayers who make mistakes, especially inadvertent ones, to come forward and comply with their statutory obligations. We believe that this should continue to be the case, even if taxpayers have previously applied under the VDP. Accordingly, we would encourage the Minister to give due consideration to replacing the "one time only" policy with a more flexible policy that takes into account the reasons for the non-compliance.

To the extent there is a concern that such a change may act as incentive to taxpayers to knowingly engage in repeated inaccurate reporting and then seek to avoid any resultant penalties by making a voluntary disclosure, guidelines could be established to take such factors into consideration in determining whether multiple applications from the same taxpayer should be accepted. Similarly, to the extent there is a concern that taxpayers may knowingly engage in repeated inaccurate reporting in order to obtain partial interest relief (in effect, to use the fisc as a form of financing), guidelines could be established to take such factors into consideration in determining whether to grant partial interest relief to the same taxpayer on multiple occasions.

We suggest that the policy might reasonably be rephrased to indicate that a second disclosure for the same taxpayer in respect of the same underlying issue may be considered if the circumstances surrounding the second disclosure are beyond the taxpayer's control, with a future VDP in relation to unrelated issues not being prejudiced by the prior disclosure. Prior relief under the VDP could also be described as a consideration which *may* be relevant in the culpable conduct determination, thus affording the CRA the ability to reduce the relief offered in such cases where this is appropriate.

Such changes would serve to ensure that all taxpayers are treated fairly based on their own particular circumstances, rather than an arbitrary "one time only" policy that may not be appropriate for them, and would not, in our submission, serve to undermine the confidence of Canadians in the VDP.

5. Information Must Be At Least One Year Past Due

The current Information Circular generally requires that the disclosure under the VDP must include information that is at least one year past due.[20] This part of the existing VDP policy has been carried over to the draft Information Circular [21] and accordingly is not a new requirement.

Once again, however, we submit that as part of the review and consultation process, the Minister should give due consideration to amending this requirement, to permit taxpayers to access the VDP in appropriate circumstances even if the "one year past due" requirement is not otherwise met.

We understand that the policy rationale for the "one year past due" requirement is to avoid encouraging intentional late filing by taxpayers who then seek to eliminate any late-filing penalties and interest through the VDP. This policy is specifically enunciated in the draft Information Circular, which notes that "the program is not directed at providing a *de facto* filing extension".[22]

[20] See paragraph 39 of the current Information Circular.

[21] See paragraph 35 of the draft Information Circular.

[22] See paragraph 35 of the draft Information Circular.

While we agree with the underlying policy rationale of not seeking to encourage intentional late-filing, it should be noted that relief under the VDP applies not only with respect to late-filing penalties, but also with respect to other penalties such as gross negligence penalties under subsection 163(2) of the ITA. We are not aware of any policy justification for precluding a taxpayer who, after having filed a tax return on time, subsequently becomes aware of a material error in the return as filed from applying under the VDP to have the mistake corrected and any potential penalties under subsection 163(2) of the ITA waived merely because the mistake was discovered during the one-year period after the filing-due date. Furthermore, we are concerned that preventing taxpayers from applying under the VDP in those circumstances may in fact inadvertently encourage continued non-compliant behaviour, insofar as some taxpayers may conclude that the preferred course of conduct is to simply wait until the expiry of the one year period before applying (so they can qualify for relief under the VDP) rather than disclosing the error immediately (in which case they would not be entitled to any relief under the VDP policy). It seems inequitable that the taxpayer who delays addressing an error or omission should be treated more favourably than one who corrects matters more quickly.

In light of the foregoing, we recommend that the Minister consider revising the policy such that taxpayers be entitled to apply under the VDP policy at any time. As a second disclosure for the same, or a similar, issue could be rejected, even with the adoption of the more lenient policies we have suggested above, a taxpayer would not be able to use the VDP to effectively ignore filing deadline.

6. Naming of Professional Advisor

Paragraph 42 of the draft Information Circular provides that where a taxpayer received assistance from an advisor in respect of the subject matter of the VDP application, the name of that advisor should generally be included in the application. In our view, this should not be a requirement of the VDP.[23] Advice received by a taxpayer may be subject to solicitor-client privilege. Revealing that the taxpayer received professional advice or the name of a professional advisor could be viewed as a waiver of solicitor-client privilege. It is in our view inappropriate to condition the availability of the VDP on a waiver of solicitor-client privilege. We acknowledge that the draft Information Circular states the name should "generally be included". However, we are concerned that such language will be interpreted very narrowly, with the result that in some cases the acceptance of a voluntary disclosure application may depend on an applicant's willingness to waive solicitor-client privilege, which has continually been found to be a central pillar of our legal system deserving of the highest judicial protection.[24]. We therefore recommend that this statement in the draft Information Circular be removed.

We believe that changes as fundamental as the Proposed Changes should be the subject of open dialogue and consultation and, accordingly, the Joint Committee would like to thank the Minister for initiating a consultation. As we have outlined above, the Joint Committee has a number of concerns regarding the Proposed Changes and has made a number of recommended changes and clarifications. We would welcome the opportunity to work with the Minister and the CRA to refine the VDP policy to address these

[23] We observe this is not an express requirement of the programs in any of the other six countries described in the Appendix.

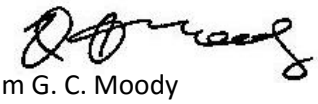
[24] See, for example, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 and *Canada (Procureur général) v. Chambres des notaires du Québec*, 2016 SCC 20.

recommendations, and would be pleased to meet at your convenience to explore these concerns in more detail, if that is considered desirable.

While a number of people in the tax community contributed to the making of a submission, the Joint Committee would like to acknowledge the contributions of the following individuals to the preparation of this written submission:

- Thomas Bauer (Bennett Jones LLP)
- Gabe Hayos (Chartered Professional Accountants of Canada)
- Salvavore Mirandola (Borden Ladner Gervais LLP)
- K A. Siobhan Monaghan (KPMG Law LLP)
- Robert Nearing (McCarthy Tetrault LLP)
- Hugh Neilson (Kingston Ross Pasnak LLP and Video Tax News)
- Joel Nitikman (Dentons LLP)
- Jeffrey Trossman (Blake Cassels & Graydon LLP)

Yours very truly,



Kim G. C. Moody
Chair, Taxation Committee
Chartered Professional Accountants of Canada

K.A. Siobhan Monaghan
Chair, Taxation Section
Canadian Bar Association

Cc: Anne-Marie Lévesque, Assistant Commissioner, Domestic Compliance Programs Branch, CRA
Ted Gallivan, Assistant Commissioner, International, Large Business and Investigations Branch, CRA

Comparison of Key Policies and Developments in VDPs in Canada's Peer Jurisdictions

Issues	Canada – Proposed Changes	Australia	Ireland	New Zealand	United Kingdom	United States	South Africa
Features of note	Significant modifications tightening the long-standing VDP program have been proposed.		Qualifying disclosures may be prompted or unprompted by the tax authority. Ireland also has in a place a five-year rule, where a disclosure will be treated as a first disclosure if the taxpayer has not made a qualifying disclosure of the same tax type in the last five years.	The tax authority is always prepared to receive voluntary disclosures and frequently reminds taxpayers of the existence of the program and its benefits.	No VDP, but 3 alternate disclosure opportunities: The Worldwide Disclosure Facility (WDF) for off-shore non-compliance; the Digital Disclosure Service (DDS) for other corrections (often prompted by tax authority campaigns); and the Contractual Disclosure Facility (CDF) where there is no prosecution if the taxpayer admits tax fraud. Other than in the last program, the UK no longer has incentives such as guarantees of non-prosecution, but unprompted disclosure may incur lower fees.	Two programs: Main Offshore Voluntary Disclosure Program (OVDP) and a limited Streamlined Disclosure Program (SDP) started in 2012.	A permanent formal VDP was only established in 2012, after previous temporary programs.
Recent changes in VDP program	Various changes including: the introduction of a limited program which offers reduced relief for "major non-compliance"; the requirement to disclose identity of advisor; the exclusion of large corporations; and the exclusion of disclosures relating to transfer pricing adjustments.	None	Starting May 2017, it will no longer be possible to make a qualifying disclosure if tax is owed for offshore matters. However, there is now no penalty for minor errors regarding offshore matters (under €6000).	None	Last VDP closed in December 2015.	OVDP has been revised since 2009, incurring higher penalties. However, the SDP was also expanded, increasing the eligibility of taxpayers and lowering penalties.	Various changes made including: exclusion of administrative penalties; reduced penalty percentages; clarification of "before" and "after" audit; limitation of the tax practitioner opinion relief exclusion to independent tax practitioners.

Comparison of Key Policies and Developments in VDPs in Canada's Peer Jurisdictions

	Canada – Proposed Changes	Australia	Ireland	New Zealand	United Kingdom	United States	South Africa
Ambiguous criteria regarding major non-compliance	Unclear criteria regarding whether a disclosure is processed under the Limited Program. (e.g. "any other circumstance" with "a high degree of taxpayer culpability", and the definition of a "sophisticated taxpayer".	None identified	Penalty rates depend whether the "error was careless or deliberate", and whether the taxpayer "cooperated fully during the process".	None identified	N/A	The SDP requires that non-compliance be due to "non-willful conduct". The definition is vague and often applied arbitrarily.	Most of the criteria are clear, with the most common behavior and least penal behaviour being a calculation. However, criteria for qualifying voluntary disclosures submitted after an audit notification are vague.
Degree of discretion on the part of the tax authority	High discretion would be introduced in the decision of whether a disclosure will be processed under the General or Limited program.	Some discretion (with guidance) in decision to treat a taxpayer who has disclosed after an audit notice as a voluntary disclosure, thereby reducing penalties by 80% vs. 20%	No discretion on the quantum of the settlement, as the parameters for interest and penalties are set in law.	Reasonable amount of discretion in New Zealand system. However, if the disclosure is accepted, penalty relief is formulaic.	N/A	High degree of discretion in determining the eligibility of taxpayers into both the OVDP and the SDP.	High degree of discretion in determining whether a disclosure is "voluntary". Experience is that high degree of discretion makes for more uncertain outcomes, and less uptake.
Relationship between increased enforcement efforts and availability of VDP		Australia's Recent program (Project Do It) aimed at disclosure of offshore income had some success. It was implemented prior to increased enforcement efforts through the exchange of financial account information between international tax authorities. Most likely the VDP will remain available even if enforcement efforts increase given that it is a resource saving measure for the Tax Office.	Ireland allows for a prompted disclosure if it is made between the date of the audit notification, and the audit start date. Penalties are then higher than for an equivalent unprompted disclosure, but lower than they could be after an audit.	New Zealand's risk review program (initial consideration of filed returns) has increased the use of VDP. However, since risk reviews are not audits, non-compliant taxpayers may now wait for a risk review notification before they feel they should disclose voluntarily. General opinion is that the VDP should remain available irrespective of enforcement efforts.	Lesser penalties for those who come forward voluntarily, but generally moved toward much tougher sanctions for tax evasion and avoidance. See research above for more detail on the impacts of these programs on taxpayer behaviour.	The tax authority has stated that disclosure programs will not be permanent, but some notice will be given before shut down.	South Africa aims for VDP to be independent of enforcement efforts and principle-based. It should provide a channel and reward for those who come forward, and yet be punitive enough so that full compliance is considered better.

Comparison of Key Policies and Developments in VDPs in Canada's Peer Jurisdictions

	Canada – Proposed Changes	Australia	Ireland	New Zealand	United Kingdom	United States	South Africa
Exclusion of large corporations	There would be no relief for corporations with gross revenue exceeding $250 million in two out of last five taxation years.	No exclusions	No exclusions	No exclusions	N/A	The OVDP is open to all taxpayers, (including entities); the SDP is only available to individuals.	None. In fact, it excludes amounts smaller than ZAR1million. Additional revenue should exceed additional cost of processing the application.
Requirement to disclose identity of advisor	Identity of advisor would be required as part of the application.	No requirement	No specific requirement, but tax authority asks for "all relevant information".	No specific requirement, but tax authority may ask for this information to consider a disclosure full and complete.	N/A. But civil penalties for enablers of tax avoidance schemes and offshore tax evasion are being introduced.	No requirement	No specific requirement, but name of advisor may be considered a "material fact" and be required.