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

Dear Minister,

Re: Proposed changes to the Voluntary Disclosures Program – Deloitte's comments

We are writing to provide our comments on the draft *Information Circular IC001R6 – Voluntary Disclosures Program* (Draft Circular) and related draft *GST/HST Memorandum 16.5, Voluntary Disclosures Program (*Draft Memorandum*)* that were released on June 9, 2017.

We commend the Minister for releasing the Voluntary Disclosures Program (VDP) proposals in order to afford stakeholders the opportunity to provide feedback. This approach allows for practical issues to be considered up front and helps ensure that the guidelines are effective in achieving the underlying policy objectives. In addition, we commend the government for proposing a separate policy in the Draft Memorandum to cover the GST/HST and other non-income tax areas, given the unique nature of the GST/HST regime.

Our comments include several general observations and also specific comments on the impact of the changes on transfer pricing.

General observations

Proposed revenue limit for access to the VDP

In general, it is unclear why corporations with gross revenues in excess of $250 million are being excluded from participation in the VDP program. Generally, large corporations are frequently the most compliant. However, larger corporations often have more complicated structures that could enhance the possibility that errors or omissions may occur unintentionally. As such, we would recommend that larger corporations should have the opportunity to participate in the VDP and obtain relief as appropriate. As currently proposed, larger corporations would not be eligible for this proactive resolution.

Ambiguity in administrative terms

In addition, we are concerned about the introduction of new undefined administrative terms in both the Draft Circular and Draft Memorandum that could be given a broad interpretation and limit the relief provided under the VDP. The following are examples of this potential ambiguity:

- Track 2 in the Draft Circular and Track 3 in the Draft Memorandum apply to situations involving "large dollar amounts". It is unclear as to what constitutes a large dollar amount, as it is often

relative to the facts and circumstances of each case. We recommend that the term "large dollar amount" be clarified or removed. Given that the objective of the program is to encourage increased compliance, it is not clear why larger dollar amounts would be differentiated.

- Under Track 2 of the Draft Circular and Track 3 of the Draft Memorandum, the concept of a "sophisticated" taxpayer is included. A sophisticated taxpayer/registrant is limited to Track 2 for income tax and Track 3 for GST/HST. The term is undefined and potentially very broad. Sophisticated taxpayers, however defined, do make mistakes. In many cases, a mistake is simply an error or a misunderstanding of matters that are complex and subject to interpretation rather than not understanding legal obligations. Given the objectives of the program, we suggest that limiting the relief available under the VDP program for sophisticated taxpayers/registrants be reconsidered.

- Both the Draft Circular and Draft Memorandum limit the relief under the VDP for multiple years of non-compliance. It is not clear what is meant by multiple years of non-compliance. Without clarification, multiple years of non-compliance could potentially include a taxpayer that failed to properly report a recurring amount over a period of several years before discovering the error. In this case, it is not clear why this taxpayer would not be entitled to full relief under the VDP program.

- For GST/HST registrants, under Track 2, there is the concept of "reasonable errors". As it is not clear what constitutes reasonable errors, the term allows for too much subjectivity and leaves too much room for different interpretations. We recommend this term be clarified.

- Finally, in the Draft Memorandum, under Track 3, situations of "tax collected but not remitted" are singled out. In our view, each case should be reviewed on the facts to determine why tax was collected and not remitted and then it should be decided whether the case should be Track 2 or Track 3. In many situations, we have seen mistakes arising from purely clerical or accounting errors and no negligence was involved. In these cases, registrants should be allowed to be in Track 2 if they quickly come forward to disclose a mistake once the mistake is uncovered and they have otherwise exercised proper diligence.

No-name disclosures

Both the Draft Circular and Draft Memorandum appear to reflect a significant change from the current "no-name" disclosure policy. In particular, the option of making a written no-name disclosure does not appear to be available any longer. This will result in a significant degree of uncertainty for taxpayers/registrants. We recommend that the written no names disclosure be permitted with acceptance or denial based on facts in each case. Furthermore, before a name is provided, the Minister should indicate which Track of the VDP the taxpayer/registrant falls under.

Limitation on multiple applications by the same taxpayer

As outlined in the drafts, a second application for voluntary disclosure will only be considered if the circumstances surrounding the second application are both: (i) beyond the registrant's control; and (ii) related to a different matter than the first application. Although it is an existing policy, we find this "one chance" approach overly restrictive and potentially punitive. The facts and circumstances of each case should dictate whether a second or more disclosures should be allowed under the VDP.

Transfer pricing comments

In the Draft Circular, the Minister proposes a change in policy such that applications relating to transfer pricing adjustments or a penalty under section 247 of the Income Tax Act (ITA) will not be accepted under the VDP. This proposed change to the VDP appears to be based upon a recommendation put forward by the Minister's Offshore Compliance Advisory Committee which states:

> "Given the overall purpose and objectives of the VDP, it should not be available for multinational enterprises seeking relief in respect of related-party transfer-pricing issues, including transfer-pricing penalties under subsection 247(3)."

We maintain that taxpayers that had determined their transfer prices based on inaccurate or incomplete information should continue to be permitted access to the VDP to correct their filings and that allowing access in no way offends the overall purpose and objectives of the VDP.

As stated in the Draft Circular, the purpose of the VDP is to promote compliance with Canada's tax laws by encouraging taxpayers to voluntarily come forward and correct any previous errors or omissions in their tax affairs. It is not designed to reward noncompliance or allow taxpayers to avoid their legal obligations. Similar to other errors that are frequently corrected under the VDP, transfer pricing errors most often come to light on a change in personnel or a change in control. These situations are often simple arithmetic errors or changes in estimates and are not part of any effort by taxpayers to avoid their legal obligations under the ITA.

Furthermore, we note that voluntary disclosures with respect to transfer pricing only involve taxpayers reporting increases to taxable income and thus, represent additional tax revenue. A specific provision, subsection 247(10) of the ITA, exists to allow taxpayers to request appropriate reductions in transfer prices and associated taxable income.

In addition, absent the transfer pricing penalty contained in subsection 247(3) of the ITA, these cases could potentially be dealt with by amending a return and filing it with the appropriate taxation centre. However, the existence of and uncertainty around the transfer pricing penalty may discourage correcting filings in this manner. As a result, access to the VDP alleviates this concern and encourages taxpayers to voluntarily come forward to correct these errors.

The Offshore Compliance Committee also recommended the introduction of procedures to ensure that large or complex cases are reviewed by specialists before acceptance into the VDP. Acceptance of this recommendation would eliminate any risk to the Crown and ensure that only cases that meet the purpose and objective of the program would receive the benefit of the VDP.

Currently, we understand that VDP applications involving transfer pricing adjustments are referred to the regional international tax advisors of the international tax division for review. These individuals are transfer pricing specialists and this review should address any concerns on the eligibility of these cases for the VDP. Thus, in the transfer pricing area, having large or complex cases reviewed by specialists before acceptance to the VDP would appear to already be in place.

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Deloitte is committed to making a significant contribution to help shape Canada's tax policy and its application. We would welcome the opportunity to meet with you or anyone you suggest from the Canada Revenue Agency to discuss our recommendations. Please feel free to contact the undersigned with any questions or to arrange a meeting.

Yours truly,

Deloitte LLP

Albert Baker, FCPA, FCA
National Tax Policy Leader