

CANADIAN TAX *Highlights*

FBAR Uncertainties

Any US person with a financial interest or signature authority over one or more financial accounts in a foreign country must file IRS form TD F 90-22.1 (the foreign bank account report, or FBAR) if the aggregate value of the accounts exceeds \$10,000 at any time in a calendar year. The FBAR is due on June 30 following the year in which the filing requirements are met. No filing extension is available; the form's instructions indicate that a taxpayer should not file the FBAR with his or her federal income tax return. In October 2008, Treasury updated and substantially changed the form, effective after 2008, to require more detailed disclosure from a broader base of filers.

One major change is definitional: a US person now includes "a person in and doing business in the United States." The reach of this language is less than clear, and thus without IRS guidance many non-resident aliens may file an FBAR as a precautionary measure. The definition of a "financial account" is also expanded to include debit card and prepaid credit card accounts. However, the form's instructions now state that the term does not include individual bonds, notes, or stock certificates held by the filer, or an unsecured loan to a foreign trade or business that is not a financial institution.

The definition of "financial interest" also now extends to accounts "for which the owner of record or holder of legal title is a trust, or a person acting on behalf of a trust, that was established by such United States person and for which a trust protector has been appointed." A US person now has a financial interest in a corporation's bank or other financial account if he owns more than 50 percent of its shares' voting power, a test that was formerly based only on the shares' value. Similarly, a financial interest in a partnership's bank or other financial account is now attributed to a person who owns an interest in more than 50 percent of the partnership capital, a change from the previous test based solely on the person's profit percentage.

The penalties for not filing an FBAR are stiff. A civil penalty may rise to \$10,000, but for willful violations, for each year an account is omitted, the penalty may be \$100,000 or 50 percent of the balance in the unreported account(s), whichever is greater, and criminal penalties may apply. There is no reasonable-cause exception for a willful violation. Two US senators recently proposed a law to enhance Justice's ability to prosecute tax evasion by applying the international money-laundering statute against a taxpayer who fails to file an FBAR. Recent case law and policy changes in Justice's tax division also heighten the risk of money-laundering charges for tax offences.

A taxpayer who believes that he should have filed an FBAR in a previous year and has not yet been contacted by the IRS should consider voluntary disclosure of the omission. Voluntary disclosure is typically viewed favourably by the IRS and Justice when they consider criminal prosecution, but it is no guarantee of immunity from prosecution and probably offers no relief from civil penalties.

UBS Switzerland's February 18, 2009 agreement with the Justice Department to release the names and account information of some of its US-person account holders, including some who failed to file an FBAR, provides even more incentive for taxpayers to file the form. When it admitted to helping numerous US persons conceal taxable assets by hiding income in offshore accounts, UBS agreed to pay the United States \$780 million under a deferred prosecution agreement. Although the Swiss banking authority approved the disclosure of the client data, UBS's cooperation has been slowed, and may be prohibited, by Swiss bank secrecy laws. However, the United States has

already filed a motion in US district court seeking enforcement of the IRS summons against UBS for the client data. The information of those clients deemed to have committed tax fraud under Swiss law is already subject to disclosure under article 26 (exchange of information) of the US-Switzerland tax treaty.

Whether or not the United States is successful in obtaining information on more UBS US account holders who failed to file an FBAR, Canadians (including US citizens living in Canada and possibly certain non-US citizens doing business in the United States) should be wary of the increased scrutiny of FBAR reporting and the willingness of banks to comply with IRS requests for banking information disclosure. If there is any chance that a taxpayer should file an FBAR, he or she should be sure to do so on time and should consider voluntary disclosure of any past failure to file. One hopes that the IRS will issue guidance that clarifies ambiguities in the revised form's expanded scope.

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