



Increased Scrutiny of Foreign Bank Accounts

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On May 4, 2009, President Obama introduced a variety of proposals aimed at closing corporate tax loopholes utilized by U.S. multinational companies and at cracking down on offshore tax havens. These proposals build on related offshore tax enforcement initiatives announced in April.

The Treasury Department recently updated and substantially changed IRS Form TD F 90-22.1 (commonly known as the Foreign Bank Account Report or FBAR). The changes went into effect on January 1, 2009, and require more detailed disclosure from a broader base of filers. In addition, the penalties for not filing an FBAR are onerous. The highest civil penalty is \$10,000, but for willful violations, for each year an account is omitted, the penalty may be the greater of \$100,000 or 50 percent of the balance in the unreported account(s).

Any U.S. person (or corporation) 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 if the aggregate value of the accounts exceeds \$10,000 at any point during the calendar year. One of the major changes to the FBAR is definitional: a "U.S. person" now includes "a person in and doing business in the United States." The reach of this language is less than clear.

The definition of a "financial account" was also expanded to include debit card and prepaid credit card accounts. However, the FBAR's instructions now state that the term "financial account" 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 new version of the FBAR also expanded the definition of "financial interest" to include 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 U.S. person and for which a trust protector has been appointed." In addition, a U.S. person now has a financial interest in a corporation's bank or other financial account if that person owns more than 50 percent of its shares' voting power. Previously, the test was based strictly on the value of the shares held. Similarly, a financial interest in a partnership's bank or other financial account is now attributed to a U.S. person who owns more than a 50 percent interest in partnership capital. Previously, the test was based solely on the partner's profit percentage.

In addition to the monetary penalties noted above, the U.S. may impose certain criminal penalties for a willful violation. Furthermore, there is recently proposed legislation that, if passed, would increase the Justice Department's ability to prosecute tax evasion by applying the international money laundering statute against taxpayers who fail to file an FBAR. Recent case law and policy changes within the U.S.

Department of Justice's Tax Division have also heightened the risk of possible money laundering charges for tax offenses.

UBS Switzerland's February 18, 2009 agreement with the Justice Department to release the names and account information of some of its U.S. account holders, including some who failed to file an FBAR, provides even more incentive for taxpayers to file an FBAR or voluntarily disclose the fact that they previously failed to file one. Additionally, the information of those clients deemed to have committed tax fraud under the laws of a foreign country may already be subject to disclosure under the Exchange of Information article of the U.S.'s tax treaty with that country.

U.S. persons (including U.S. citizens living abroad and possibly certain non-U.S. citizens doing business in the United States) with foreign bank accounts should be aware of the increased scrutiny on FBAR reporting and the willingness of banks to comply with the IRS's requests for disclosure of banking information. The IRS recently launched a new voluntary disclosure initiative in an effort to encourage U.S. persons with offshore accounts to come forward and report any unreported income relating to a foreign account. The program offers a reduction in, but does not completely eliminate, the civil penalties that could otherwise be imposed. The voluntary disclosure program may also provide protection from criminal prosecution.

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