



Tax Law Alert

A Corporate Department Publication

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New Voluntary Disclosure Initiative Highlights Need for Offshore Foreign Bank and Financial Account Reporting

The Treasury Department and Internal Revenue Service have made enforcement of foreign bank and financial account reporting obligations a top priority for both corporate and individual taxpayers. Reporting is required on the taxpayer's regular tax return and, if the account is large enough, also on a special form known as the Report of Foreign Bank and Financial Accounts (FBAR). The FBAR is due **annually** by **June 30** for accounts maintained during the previous calendar year. Penalties for noncompliance can be extremely severe. In an effort to bring taxpayers with undisclosed foreign accounts into compliance with United States tax laws, the I.R.S. has instituted a voluntary reporting procedure under which taxpayers can notify the I.R.S. of offshore accounts and potentially face less severe penalties.

Background. On its federal income tax return, each United States corporation, partnership, and individual must disclose the existence of any foreign bank or financial account if the taxpayer has a financial interest in, or signature or other authority over, the accounts. In addition, these taxpayers have a responsibility to file the FBAR (Form TD F 90-22.1) by June 30 if the aggregate value of such accounts exceeded \$10,000 at any time during the previous calendar year. Reporting is required even if the account is legitimate and all taxable income has been correctly reported. No extensions or retroactive relief are generally available.

The definitions of "financial interest" and "signature or other authority" are broad. Considering the extent of cross-border business relationships today, many companies, including even small to mid-size firms, are likely to maintain foreign bank accounts for which both the company and its officers must report. Reporting obligations could apply to an officer of a corporation, partnership, or other business entity who maintains signature authority over the entity's foreign financial accounts. Officers of large publicly traded companies are sometimes exempt from filing and, in some situations, a corporate parent may fulfill reporting obligations for a U.S. subsidiary. There are few other exceptions available.

Recent changes to FBAR.

- The Treasury Department and the I.R.S. have identified locating and penalizing non-disclosed foreign bank accounts (even legitimate, non-abusive accounts) as a top priority.
- The FBAR now requires a filer to calculate and report the maximum value of the account during the calendar year reported.
- The definition of financial account, which has always been broad, has been expanded to include debit card and prepared credit card accounts in addition to any bank, securities, derivatives, savings, demand, checking, deposit, or “other” account.
- The FBAR now requires any U.S. person with signatory authority over an account to identify the owner of the foreign account.

Penalties. The Treasury Department may impose a civil penalty of up to \$10,000 for each non-disclosure on any person who violates the reporting requirements, **even if the violation is not willful**. No penalty is imposed if the violation is non-willful and due to reasonable cause. What constitutes reasonable cause is quite narrow and requires that the balance in the account has been properly reported. If the violation or failure to file is willful, there is no reasonable cause exception and the \$10,000 penalty is increased to the greater of (1) \$100,000 or (2) 50 percent of the balance in each unreported account at the time of the violation. Willful failure to properly file the FBAR can also result in criminal penalties.

Voluntary disclosure of past violations. For a limited time, the I.R.S. has instituted a voluntary reporting procedure under which a taxpayer can notify the I.R.S. of offshore accounts. This program provides an opportunity to correct past FBAR and income tax reporting failures. If disclosure is made on or before **September 23, 2009**, and before the I.R.S. otherwise becomes aware of the failure, the taxpayer can generally avoid the regular FBAR penalties and instead be subject to a different set of disclosures and penalties that likely will not include criminal sanctions.

In light of the quickly approaching June 30 FBAR deadline and the window of opportunity provided by the I.R.S. to make necessary corrections, taxpayers should take steps now to ensure compliance with these sometimes overlooked requirements.

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