

PUBLICATION

IRS Offers Enhanced Voluntary Disclosure Program for Taxpayers with Unreported Overseas Accounts

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Having a foreign bank account and failing to report all of your overseas income, or failing to file appropriate disclosures, can result in harsh civil or criminal penalties. Under U.S. tax laws, the worldwide income of any U.S. citizen or resident alien is subject to tax. Additionally, if there is an interest in, or signature authority over, a financial account in a foreign country containing more than \$10,000, then disclosure of such interest or signature authority is required on a Form TD F 90-22.1 ("Report of Foreign Bank and Financial Accounts," commonly known as an FBAR). Penalties for failing to observe these requirements can in some instances include civil penalties up to \$100,000 or 50% of the total value of the underlying accounts at the time of the violation and/or criminal penalties of up to \$500,000 and 10 years imprisonment.

Over the past year, there have been significant developments associated with the reporting and filing requirements related to unreported overseas accounts and income, such as follows:

UBS Litigation. The U.S. government and UBS, a Swiss financial services firm, have been embroiled for the past year in a well publicized lawsuit over the disclosure of the identity of U.S. taxpayers who own foreign UBS accounts. For decades, the Swiss bank privacy laws have prevented such firms from turning over the names of customers to foreign governments, except where the disclosure was part of a criminal investigation.

On February 18, 2009, UBS agreed to pay a fine of \$780 million to the U.S. Government and entered into a deferred prosecution agreement on charges of conspiring to defraud the U.S. by impeding the Internal Revenue Service. In an unprecedented move, the Swiss government disclosed the identities of, and account information for, approximately 250 U.S. customers of UBS's cross-border business. A day later, on February 19, 2009, the U.S. government filed suit against UBS to reveal the names of approximately 52,000 U.S. customers of UBS, alleging that UBS and these customers conspired to defraud the IRS and federal government of legitimately owed tax revenue. On July 31, 2009, it was reported that UBS and the Swiss government have reached a settlement with the IRS, and will disclose some (if not all) of the U.S. taxpayers who own foreign UBS accounts.

Recent Criminal Proceedings. A number of taxpayers have pled guilty over the past few months to tax charges stemming from the UBS litigation and investigation. In April of 2009, a company accountant became the first U.S. taxpayer to be charged with tax evasion related to the UBS litigation. Two months later, he reportedly pled guilty to tax evasion charges related to hidden funds in a Swiss bank account maintained by UBS, and is currently cooperating with the IRS and the U.S. government.

On July 28, 2009, a business executive reportedly pled guilty to willfully filing a false tax return in a case linked to UBS that involved the use of nominee entities, offshore credit cards and sham loans. Under the plea agreement, the executive accepted responsibility for concealing several million dollars in Swiss bank accounts, for failing to report that he had an interest in or a signature authority over an overseas financial account at UBS, and failing to report income earned on the overseas UBS account.

Voluntary Disclosure. The IRS recently announced an enhanced voluntary disclosure program for those taxpayers with unreported offshore accounts. The purpose of the program, which ends September 23, 2009, is

to encourage voluntary disclosure of unreported offshore accounts and income. The program is open to all taxpayers, including corporations, partnerships and trusts. For those taxpayers who make a timely disclosure and pay the relevant amounts, the risk of criminal prosecution (and the amount of civil penalties) is greatly reduced.

In order to be eligible for the enhanced voluntary disclosure program, the taxpayer must meet certain requirements. The taxpayer must cooperate with the IRS in determining his or her correct tax liability and make good faith arrangements with the IRS to pay any tax, interest and penalties in full as described below:

1. Assessed taxes and interest for the preceding six years (2003 through 2008). The taxpayer must file or amend all returns, including information returns and FBARs.
2. An accuracy or delinquency penalty for the preceding six year period (no reasonable cause exception will be applied).
3. In lieu of all other penalties that may apply (including FBAR and information return penalties), a penalty equal to 20% of the amount held in the foreign bank account in the year with the highest aggregate account or asset value over the preceding six year period. The penalty is reduced to 5% if, with respect to the accounts or entities formed: (a) the taxpayer did not open them or cause them to be opened or formed; (b) there has been no activity during the period the accounts/entities were controlled by the taxpayer; and (c) all applicable U.S. taxes have been paid on the funds in the accounts/entities (where only the earnings have escaped U.S. taxes).

In addition, the taxpayer's disclosure must be truthful and complete and the taxpayer must timely disclose the unreported offshore accounts and income. In general, a disclosure is not timely if the IRS has already initiated a civil examination or criminal investigation of the taxpayer. Also, a disclosure is considered to not be timely if the IRS has received information from a third party, like UBS, regarding the taxpayer's noncompliance.

In order to meet the demand of taxpayers electing to participate in the voluntary disclosure program, the IRS released a form disclosure letter on July 29, 2009,. While taxpayers are not required to use the form disclosure letter, the form provides a good checklist of the items that a taxpayer must disclose in order to be eligible for the program.

As noted above, the deadline to participate in the enhanced voluntary disclosure program is September 23, 2009. If you are interested in taking part in the program or otherwise wish to discuss the reporting and filing requirements related to unreported offshore accounts and income, please contact any one of the attorneys in the Firm's Tax Department.