

## IRS Provides One-Time Opportunity to Minimize Penalties Related to Foreign Accounts

By Christopher J. Loughran, Perkins & Company, P.C.

The IRS issued a series of guidance over the last several months that provides for the possibility of reduced penalties on two issues:

- 1.) past due filings of mandatory annual information reports relating to foreign bank accounts and
- 2.) unreported earnings from foreign ("offshore") accounts.

You must act by September 23, 2009 in order to take advantage of this one-time window of opportunity to minimize the related penalties. The IRS could otherwise assess penalties that may exceed the value of the accounts, depending on the type of failure to comply and the period of delinquency.

As summarized in more detail below, if you have merely failed to file the annual information return relating to foreign accounts (Form TD F 90-22.1), but have reported timely and paid tax on all income from such accounts, you should ensure that you file all delinquent forms TD F 90-22.1 by September 23, 2009. By doing so, you will avoid all late filing penalties, which could otherwise be multiples of \$10,000. We recommend that you consult your Perkins or other tax advisor to ensure timely and complete filings occur.

If for any years the possibility exists that you did not fully and timely report for U.S. income tax purposes all income from all foreign accounts of any kind, or did not fully pay all related U.S. tax, then you need to consider taking advantage of the voluntary disclosure program before September 23, 2009. The program does not eliminate all penalties, but it does provide the opportunity to minimize the penalties significantly, especially compared to what will occur if penalties are assessed after the deadline, or before, if you are audited in the interim. **The voluntary disclosure program for unreported foreign account income requires initial eligibility to be determined by the IRS Criminal Investigation group. Therefore, any taxpayer considering this program should retain legal counsel before filing or contacting the IRS.**

Note that in general terms "taxpayers" subject to the foreign account and income reporting rules, include not only individuals who own, control, or have signature authority over such accounts, but also all types of entities (corporations, partnerships, LLCs, trusts, estates, etc.) that may own, control or have signature authority over such accounts. In addition, owners, employees, and trustees of such entities may also have filing obligations (in addition to the entity itself) where they have signature authority over the entity accounts. Such individuals should be aware that they would be subject to personal penalties for failure to file reports relating to entity level foreign accounts.

### Procedure for Late Filed Foreign Bank Reports

If you reported and paid the tax on all foreign source income in your U.S. returns for each year, but you did not file the required annual information report via Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (commonly referred to as FBARs), then you should file the delinquent FBAR(s) **by September 23, 2009** in original form according to the filing instructions along with a statement explaining why they are late to:

U.S. Department of the Treasury  
P.O. Box 32621  
Detroit, MI 48232-0621

In addition, a copy of each such late filed FBAR should also be filed by this date, along with copies of all income tax returns for relevant years, with the IRS at the following address:

Internal Revenue Service  
Philadelphia Offshore Identification Unit  
Attn: Charlie Judge, Offshore Unit, DP S-611  
11501 Roosevelt Blvd.  
South Bldg., Room 2002  
Philadelphia, PA 19154

The IRS has indicated that penalties will not be imposed if the FBARs are filed by September 23, 2009.

### Procedure for Voluntary Disclosure of Unreported Offshore Income or Unpaid Tax

As noted, since this program involves oversight by the IRS Criminal Investigation group, it is highly recommended that you retain legal counsel before contacting the IRS in any way under this program. A voluntary disclosure requires, at a minimum in the initial submission, the disclosure of the taxpayer's name and identification number, which is submitted to the nearest IRS Criminal Investigation group. Typically, the submission would also include other information including a summary of the unreported income and accounts and an explanation for the error or omission. There is no standard questionnaire that is required to be answered. The IRS may require an interview, depending on the facts of each case. The voluntary disclosure program requires the taxpayer to file correct delinquent or amended returns for tax years 2008 back to 2003.

An accepted voluntary disclosure does not eliminate the need to pay all back taxes and interest for the 6 years. In addition, accuracy related penalties equal to 20% of the tax amount will be assessed, and an additional penalty of 20% of the highest value of the foreign account for the last 6 years is assessed in lieu of all other foreign bank account and other penalties that might apply.

Although the voluntary disclosure program penalties are still significant, failure to participate could be much more expensive. If the taxpayer does not come forward voluntarily and is assessed taxes, interest and penalties under IRS examination, the total tax, interest and penalties would likely exceed the value of the account. The IRS guidance example states that for an unreported offshore account with a value of \$1,300,000 (including \$300,000 of income earned) outstanding from 2003-2008, an audited assessment would result in taxes, interest and penalties aggregating \$2,306,000 (versus approximately \$386,000 under the voluntary disclosure program).

The penalties that apply outside the voluntary program include the 20% accuracy related penalty; a failure to file FBAR of \$10,000 or more per year; a fraud penalty of as much as 75%; and other potential information return penalties depending on the entities involved. In addition, there are a myriad of potential criminal charges and penalties, in addition to the civil penalties, that could apply.

### What is a reportable foreign bank or financial account?

The following types of accounts may be reportable: checking accounts; savings accounts; money market accounts; merchant accounts in which online credit card receipts are deposited; accounts in which you hold securities, derivatives or other intangible financial instruments; demand accounts; any other foreign account with a financial institution or person in the business of being a financial institution.

Accounts outside the US maintained in US dollars are still reportable foreign accounts.

### Who has to file?

If you have a direct financial interest in an account that meets these criteria, you have a filing requirement. There are, however, other circumstances that may involve a filing requirement. If you have any of the following relationships with a reportable account, you may have a filing requirement:

- You directly or indirectly own a majority of an entity that owns a reportable account or group of accounts.
- You can sign (or sign in combination with others) documents that release funds from a reportable account or group of accounts.
- You can authorize (via a fiduciary relationship) the transfer of funds from a reportable account into any other account.

### Why is the IRS providing this opportunity to come forward?

The IRS has stepped up its international enforcement efforts in recent years and lists tracking down unreported foreign income as one of its top compliance priorities. Along with this effort, the IRS has recognized that the hefty potential penalties discourage taxpayers who want to become compliant from coming forward.

If you have any concern that you may have unreported income from foreign accounts, it is critical that you obtain professional assistance quickly since the September 23rd deadline is not far off. In addition, the same deadline applies for the more common issue, which is mere noncompliance with submission of the foreign bank report informational form, for which action also must be taken by September 23rd. Please contact your tax advisor or one of the Perkins shareholders below as soon as possible if you are associated with foreign bank accounts and you are unsure whether you are fully compliant.

Chris Loughran	(503)221-7565	cloughran@perkinsaccounting.com
Tim Kalberg	(503)221-7511	tkalberg@perkinsaccounting.com
David Uslan	(503)221-7597	duslan@perkinsaccounting.com
Roy Abramowitz	(503)221-7500	roya@perkinsaccounting.com
Keith Meyers	(503)221-7579	kmeyers@perkinsaccounting.com
Carol-Ann Simon	(503)221-7580	csimon@perkinsaccounting.com
Eric Hormel	(503)221-7585	ehormel@perkinsaccounting.com

*This bulletin is a summary and is not intended as tax or legal advice. You should consult with your tax advisor to obtain specific advice with respect to your fact pattern.*

*Based on the most recent "best practice" standards for tax advisors issued by the Treasury Department, commonly referred to as Circular 230, we wish to advise you that this bulletin has not been prepared to be used, and cannot be used, to provide assurance that penalties which may be assessed by the IRS or other taxing authority (including specifically section 6662 understatement penalties) will not be upheld.*

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