Foreign Financial Account Reporting ("FBAR")

May 11, 2009

On March 23, the IRS implemented a nationwide initiative aimed at taxpayers with unreported foreign financial accounts. The initiative revised and gave new life to a long-standing self-disclosure process, commonly known as a Voluntary Disclosure. The major changes to the Voluntary Disclosure program involve the tax years covered and the penalties. Specifically, for qualifying taxpayers, the IRS will review the previous six tax return years, and assess applicable taxes, interest and understatement of tax penalties. Additionally, and most importantly, barring extreme circumstances, taxpayers may avoid criminal prosecution. With regard to the undisclosed foreign financial account reporting (or “FBAR”), the IRS will assess a penalty between five-percent and twenty-percent of the aggregate account balance for the highest balance year. This FBAR penalty will apply to all U.S. taxpayers that have a beneficial interest in an undisclosed account or signatory authority over such. If the IRS contacts a taxpayer prior to the taxpayer initiating proceedings under the Voluntary Disclosure program, the IRS has the authority to audit beyond six years and the IRS has the authority to assert civil and criminal tax fraud penalties. In addition, the IRS has the authority to assert a minimum foreign financial account non-reporting penalty of $100,000 or fifty-percent of the account balance (per account), whichever is greater. The initiative, which went into effect on March 23, 2009, will remain in effect for six months, after which the IRS will re-evaluate its position and provide new guidance. Although practitioners cannot predict future IRS guidance, all indications are that the IRS will impose much harsher penalties, both civilly and criminally. This initiative comes as no surprise given the recent political and judicial IRS actions involving Lichtenstein, UBS and the Swiss banking system. For example, the IRS continues to pressure UBS into disclosing 52,000 U.S. taxpayers with unreported Swiss bank accounts. Additionally, on April 13, the IRS secured a John Doe summons targeted at First Data Corp. The summons seeks access to First Data Corp.’s list of U.S. taxpayers that maintain debit cards linked to foreign financial accounts. It appears that foreign bank secrecy may be coming to end for U.S. taxpayers. To determine if participating in the current initiative is the best option (as other avenues of self-disclosure are available), U.S. taxpayers should consult with U.S. tax counsel and U.S. white collar criminal counsel.

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