



U.S. Prosecutions of Foreign Financial Institutions Create Extreme Risk of Disclosure for Offshore Account Holders and Prospects of Multiple 50 Percent FBAR Penalties

As shown by recent headlines, the pressure is mounting on individuals who have yet to come into compliance with their reporting obligations concerning undisclosed offshore accounts. Taxpayers who are not in compliance may soon find themselves facing significant civil penalties and possibly criminal prosecution. The steady momentum by the U.S. government to achieve high profile prosecutions of foreign financial institutions is opening the door to the government's obtaining a wealth of new information on U.S. taxpayers holding offshore accounts and using that data to enforce tax compliance.

At a news conference announcing the recent plea agreement with a bank regarding U.S. taxpayers hiding money abroad, Assistant U.S. Attorney General Kathryn Keneally stated that the U.S. is "obtaining information that is enabling us to follow the funds to other Swiss banks or to banks in other tax haven and bank secrecy countries." It is likely that the Internal Revenue Service (IRS) and Department of Justice (DOJ) will acquire detailed information on customer accounts, as well as intelligence about operations and practices of other banks.

Indeed, the U.S. government has taken enforcement actions against taxpayers with accounts all over the world, including India, Israel, Luxembourg, the Cayman Islands and several other Caribbean countries. IRS Commissioner John Koskinen stated that "pursuing international tax evasion is a priority area for IRS criminal investigation, and we will continue to follow the money here in the United States and around the world."

As part of its specific focus on Swiss facilitation of bank secrecy, the DOJ initiated a program last fall allowing financial institutions in Switzerland to voluntarily come forward with evidence of their past

noncompliance in order to avoid criminal prosecution and receive reduced civil penalties ([see GT Alert](#)). Various media outlets have reported that more than 100 Swiss banks are currently participating in that program. Banks entering into the program have already begun contacting their U.S. customers to inform them that their account information will be turned over to the U.S. government and to seek proof of their U.S. tax compliance.

What this means for U.S. taxpayers who have not yet come into compliance is that the IRS and DOJ will eventually uncover holdouts and use the harsh force of law to make examples of them. The IRS has offered a special offshore voluntary disclosure program since 2009 that allows individuals with untaxed income or unreported accounts to come into compliance without fear of criminal prosecution and at reduced civil penalties ([see GT Alert](#)). Taxpayers participating in the offshore voluntary disclosure program agree to file amended tax returns and Foreign Bank Account Reports (FBAR) for an eight-year period reporting the undisclosed foreign accounts and all income generated from the accounts, to pay all of the reported tax and interest due in addition, generally, to a 20 percent accuracy-related penalty, and to pay a one-time 27.5 percent offshore penalty based on the highest balance in the undisclosed foreign accounts/assets in lieu of any FBAR penalties. A U.S. person that fails to timely report an interest in a foreign financial account on an FBAR can be subject to a penalty equal to 50 percent of the value of the assets in the unreported accounts for each year that the taxpayer willfully failed to file the FBAR. In the past, the IRS seemed to be asserting a one-time 50 percent penalty against taxpayers outside the voluntary disclosure program, similar to what taxpayers that pled guilty to criminally failing to file FBARS had been receiving. However, the IRS has been aggressively asserting multiple 50 percent penalties where it deems it is applicable and this practice was recently validated in the case of *U.S. v. Zwerner*, S.D. Fla., No. 1:13-cv-22082, 5/28/14. In *Zwerner*, the taxpayer was found to have willfully failed to file FBARS for three out of the four years asserted by the government. The government's victory in *Zwerner* may mean taxpayers with undisclosed foreign accounts will face multiple 50 percent willful FBAR penalties if they do not make a voluntary disclosure to report their foreign accounts.

Although the IRS has to date said that its offshore disclosure program is open ended, the program can be terminated by the IRS at any time. IRS Commissioner Koskinen recently warned "Our message is [that] uneasy lies the head that doesn't take advantage of the offshore voluntary disclosure program."

Taxpayers who have resisted entering the offshore voluntary disclosure program should consider the costs, both criminal and civil, of failing to come into compliance. At this point, the IRS and DOJ generally presume that any individual with undisclosed accounts is engaged in willful tax evasion and will seek appropriately severe sanctions. Moreover, changes appear to be coming to the offshore disclosure program; it is conceivable that the program may be eliminated entirely. The time to act is now.

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