

Internal Revenue Service issues revised foreign account reporting form

In light of the recent scandal involving a well-known foreign bank's involvement with American taxpayers that the Internal Revenue Service ("IRS") believes may have avoided certain reporting rules, the IRS is increasing its oversight of accounts held by American taxpayers with foreign banks. The IRS has recently posted a new version of Treasury Form 90-22.1, "Report of Foreign Bank and Financial Accounts," on its Website.

Among other changes, foreign persons doing business in the United States are now required to report their financial accounts. Provisions have also been made to allow for the reporting of previously unreported accounts and amended reportings.

This new form changes the filing requirements for, and definitions of, people with any financial interest in or authority over qualifying foreign financial accounts. This form must be used for any filings made after December 31, 2008.

This LiFTS Memo is intended to supplement a memo on the same topic distributed June 17, 2005.

Discussion

IRS Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts," is an information filing that must be filed annually, on or before June 30th of the year following the calendar year reported. It is not filed with a federal income tax return. The form must be filed by each U.S. person with a financial interest in, or signature authority or other authority over any foreign financial account—including bank accounts, securities, derivatives, etc.—held in a foreign country if the aggregate value of these accounts exceeds \$10,000 at anytime during the calendar year. "U.S. Person" is defined broadly in the form's General Instructions to include "a citizen or resident of the United States, or a person in and doing business in the United States."

Aside from the broad reach of this form generally, in that U.S. persons with mere signature authority over foreign accounts are required to file, the scope of the form has been extended and clarified in several ways that may be pertinent to multinational law firm clients:

1. The meaning of "signature or other authority" has been clarified to include persons that can exercise authority over an account "directly or through an agent, nominee or attorney... either orally or by some other means."
2. An unsecured loan to a foreign business, other than a financial institution, does not trigger the filing requirement.

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3. For disclosure of a previously undisclosed account, the form requires the filer to check a box and attach a statement explaining the changes (i.e., why the account was not disclosed earlier). Similarly, a delinquent filer must attach a statement explaining the delay. This requirement is new and meant to address past practices where filers often did not correct past misfilings or failures to file the form.
4. The definition of a financial account has been clarified. It includes debit cards and prepaid card accounts.
5. Explicit instructions have been provided to assist in the calculation of an account's "maximum value." The threshold for filing is authority over an account that exceeds \$10,000 at any time over the course of a calendar year. The maximum value of an account is, the largest amount of currency or non-monetary assets that appear on any quarterly or more frequent account statement issued for the applicable year. If periodic account statements are not issued, the maximum account asset value is the largest amount of currency or non-monetary assets in the account at any time during the year.

The instructions explain that foreign currency should be converted by using the official exchange rate available at the end of the year. Where there are multiple exchange rates, potential filers should use the rate that would apply if the account were converted into U.S. dollars at the close of the calendar year. For stock, securities and other non-monetary assets, use fair market value at the end of the calendar year, or if withdrawn, at the time of withdrawal.
6. A non-U.S. person that has a financial interest in the account must now be identified. It is no longer sufficient for a person with signatory authority that is filing the form to note simply that no U.S. person has a financial interest. A foreign identifying number, such as a foreign passport number, must also be provided. Satisfaction of the latter requirement may prove to be a practical problem for some law firms.
7. The five year record retention requirement found in the applicable regulations has now been added to the form's instructions. Records must contain the name in which each account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom the account is maintained, the type of account, and the maximum value of each account for the reporting period.

It is important to note that information filed on the form is not subject to the taxpayer confidentiality provisions in Internal Revenue Code Section 6103 and may be shared with other U.S. agencies, including law enforcement, and may provide the basis for a criminal investigation. Therefore, special care should be taken in drafting explanations and responses in attachments. A civil penalty of \$10,000 for failure to file or filing late still applies.

The new form must be used for any filings made after December 31, 2008. It can be found online at <http://www.irs.gov/pub/irs-pdf/f90221.pdf>.

Conclusion

Because there is no exception for employees or partners of partnerships, we have advised our clients that both the individual who has signatory authority over a qualifying foreign account and the partnership should each file their own Form TD F 90-22.1. This area has not been clarified, so we continue to recommend that clients continue to file in this manner.

Our professionals at PwC have been dealing with foreign bank and financial accounts reporting and have been successful in helping clients comply with filing requirements. If we can assist your firm with any aspect of IRS Form TD F 90-22.1, please contact Stanley Kolodziejczak at 646-471-3160, Gregg Sincoff at 646-471-1335, or Nancy Regan at 646-471-6104.

Solicitation

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