



## Foreign Bank Accounts: Immediate Action May Be Required to Avoid Criminal Prosecution

Alert 2009-11 – September 2, 2009

### Introduction: Voluntary Disclosure Deadline Approaching

After September 23rd, unless the IRS extends the deadline, the terms of settling with the IRS for failing to disclose a foreign account are likely to become less advantageous and criminal sanctions become more likely.<sup>1</sup> Moreover, the IRS is making progress toward discovering thousands of accounts on its own, not only in the highly publicized case involving UBS AG, but also through increasingly sophisticated data mining techniques and criminal prosecution of the business advisors who specialize in setting up these accounts. IRS Commissioner Doug Shulman has said that “the situation will only become more dire” for account holders who fail to come forward,<sup>2</sup> and the IRS Director of Financial Crimes, Thomas J. Kelly told reporters that the IRS has “a lot more names” than has been reported in the press and “a lot of U.S. taxpayers should be concerned.”<sup>3</sup>

### Disclosure Requirements And Recent Developments

The requirement to disclose the existence of a foreign account applies not only to U.S. citizens who have an interest in or signatory authority over an account worth more than \$10,000, but the same requirement applies to non-citizens who are subject to the annual tax filing requirement only because of their presence in the United States. The penalties for failing to disclose are severe where the failure to disclose is willful and deliberate. The IRS can claim up to 50% of the assets in the account for each year in which the account was improperly undisclosed. In practice, the IRS has settled for 50% of the highest account value in a number of recent cases where the IRS discovered the account on its own. The settlement initiative allows clients to settle on more generous terms: for a penalty of between 5% and 20% of the highest account balance, depending on factors intended to gauge the level of willfulness. An account holder who inherits an account and uses it infrequently is likely to be eligible for a reduced penalty on the lower end of the range. The lower penalty rates don't apply in cases where voluntary disclosure comes too late.

### Justice Department Efforts Have Forced Disclosures

In early August, the Justice Department told the Federal District Court in Miami that it had reached a settlement in the “John Doe” summons case it filed in February to obtain the names of 52,000 United States taxpayers with undisclosed accounts with UBS in Switzerland. Previously, UBS AG admitted that it had sent 60 Swiss bankers to visit more than 20,000 clients in the United States. The accounts had a collective value of more than \$20 billion.

<sup>1</sup> See generally, Payson R. Peabody, *Treasure Hunt: Part I – Congress, Treasury, and the Department of Justice Join in the Search for Offshore Tax Bounty*, J. Tax'n and Reg. Of Financial Institutions, July/Aug. 2009 at 36.

<sup>2</sup> Statement from IRS Commissioner Doug Shulman on Offshore Income, Internal Revenue Service (March 26, 2009).

<sup>3</sup> Charles Gnaedinger, “United States Seeks More John Doe Summonses,” 123 Tax Notes 527 (May 4, 2009) (quoting Thomas J. Kelly, Director, Financial Crimes, Internal Revenue Service).

Earlier this year, the Government of Switzerland came to the aid of account holders, threatening to take control of the documents sought by the IRS to prevent the company from violating Swiss law by disclosing the names, pursuant to the summons. As of now, it seems likely that the IRS will not obtain all 52,000 names, but it will receive substantially more than the 275 names it received at the beginning of the year. How many names is uncertain, but what is clear is that the IRS will carefully guard information about who is on the list.

### **Required Action: Decisions Must Be Made Very Quickly**

For clients who may be unsure about whether they are the beneficiary of a foreign trust or have or had sufficient control over a foreign account to warrant disclosure, time may be running out to avoid civil penalties or more severe sanctions.

United States taxpayers with questions about foreign bank account disclosure requirements can contact Wayne D. Roberts at (616) 776-7514 or [wroberts@dykema.com](mailto:wroberts@dykema.com), Payson R. Peabody at (202) 906-8605 or [ppeabody@dykema.com](mailto:ppeabody@dykema.com), or Howard E. O'Leary, Jr. at (202) 906-8601 or [holeary@dykema.com](mailto:holeary@dykema.com).

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<sup>4</sup> In a criminal plea agreement, one former client of UBS admitted to paying a bribe of \$45,000 to a Swiss official to find out whether his name would be disclosed. Statement of Facts, *United States v. Jeffrey P. Chernick*, No 09-60182-CR, 4-5 (S.D. Fla. July 28, 2009). The Swiss government says it is investigating the matter. Swiss Authorities Investigate Bribery Accusation, Reuters, July 29, 2009.