

Beware Foreign Account Reporting Changes

By Robert W. Wood

Some offshore account reporting is changing, although the civil — and potential criminal — penalties are still frighteningly high. American citizens and residents with any non-U.S. bank or financial accounts — or any non-U.S. assets for that matter — have been grappling with myriad changes over the last handful of years. It can sometimes feel like the Internal Revenue Service does not want to you have anything anywhere that is not 100 percent American.

You are free to have it, of course. But you had better *report* it. That means reporting the income on your tax returns and the existence of the non-U.S. accounts or assets on other reporting forms. Much of the IRS's myopia about offshore assets started with the IRS going after Swiss banking a decade ago.

UBS got into trouble with the IRS and Justice Department, launched thousands of voluntary disclosures to the IRS, and changed bank secrecy forever. Eventually, the Swiss Parliament passed a measure enabling banks to hand over client identities to American authorities without violating Swiss bank-secrecy laws. After getting bruised in court battles with the IRS, in 2009, UBS paid \$780 million to settle charges that it helped wealthy Americans evade taxes.

Credit Suisse and many other banks fell into line, cutting deals and paying out huge. Nearly 100 Swiss banks lined up to take their bitter medicine. And with FATCA (discussed below), the whole world is now transparent. But let's begin with FBARs. Amazingly, they have been in the law since 1970, an ant-money laundering form.

FBARs started being noticed — and enforced — around 2005 when IRS attacks on Swiss banking were underway. Now, now everyone worries about FBARs. If you have foreign accounts, you should.

FBARs — also now called FinCEN Form 114, Report of Foreign Bank and Financial Accounts — are not filed with the IRS. They are filed with FinCEN, the Financial Crimes Enforcement Network, part of the Treasury Department. That itself is a little scary. FinCEN's existing regulations say you must file if you have a financial interest in, or signature authority over, foreign financial accounts with a total value exceeding \$10,000 during the previous calendar year.

The due date is June 30 of each year, but next year that due date changes to April 15, the same due date as tax returns. And starting next year, like tax returns, you will be able to extend it. Previously, you could not.

FinCEN has made a number of proposals to the rules. FinCEN's proposal (RIN 1506-AB26) would revise its regulations to reflect the new filing deadline. The proposed regulations would also update the available filing exemption for officers and employees with signature authority, but no financial interest in a foreign financial account. Finally, they would require filers with 25 or more accounts to begin reporting detailed information on each account on their annual FBAR filing.

The American Institute of CPAs (AICPA) has submitted comments to the government regarding proposed changes to the filing requirements. The AICPA recommended in its October 18 letter that:

- Any taxpayer who submits a timely extension request for their calendar year federal income tax return should automatically receive a corresponding extension to October 15 to file their FBAR;
- FinCen make available on its website a simple-to-complete electronic extension request for use by taxpayers who do not request a filing extension of their federal income tax return;

- FinCEN coordinate with tax preparation software vendors to ensure that both tax professionals and individual taxpayers have ready access for electronic filing of FBAR extensions through their products;
- FinCEN's final regulations include a provision to grant an automatic extension until June 15 to FBAR filers located overseas or who maintain their books and records overseas;
- FinCEN permit taxpayers with signature authority but no financial interest in accounts whose filing requirements have been deferred since 2011 to not be required to file the deferred FBARs provided they would have qualified for the expanded filing exemption proposed by FinCEN;
- FinCEN allow filers with 25 or more accounts to provide the information as an attachment to their FBAR return; and
- FinCEN continue to provide an exemption from filing an FBAR to officers and employees of certain federally-regulated entities for accounts over which they have signature authority but no financial interest.

As we wait for these further FBAR changes, a bigger worry for many Americans is FATCA, the Foreign Account Tax Compliance Act. It was enacted in 2010, and has since been aggressively implemented worldwide by President Obama's Treasury Department. It now spans the globe with a network of reporting that is unparalleled in the world.

America is requiring foreign banks and governments to hand over secret bank data about depositors. Non-U.S. banks and financial institutions around the world must reveal American account details or risk big penalties. Offshore banks that do not hand over Americans are withholding at 30 percent on most transactions.

Non-compliant institutions are frozen out of U.S. markets, so there is little choice but to comply. FATCA cuts off companies from access to critical U.S. financial markets if they fail to pass along American data. More than 100 nations have agreed to the law. Countries must agree to the law or face dire repercussions. FATCA also helped fuel efforts by the OECD to adopt Common Reporting Standards for nations around the world.

The IRS has warned offshore account holders to disclose before it's too late. Under FATCA, banks everywhere want to know if you are compliant with the IRS. The cost of compliance for many people is growing. Still, one must distinguish between future compliance and fixing the past. If you are organized, the future compliance is mere drudgery.

But for many, the tough issues are how to handle past years when you may not have done it all correctly. One danger is that starting to file correctly prospectively may prompt questions about the past. And to correct the past, the IRS still has several amnesty programs.

The mainstay is the IRS's long-running Offshore Voluntary Disclosure Program (OVDP). It remains the safest program, with amnesty even for willful acts. Less expensively, for those with the right facts, there is the IRS Streamlined program. And some people try to comply without either. But whatever you do, be careful out there.



Robert W. Wood is a tax lawyer with www.WoodLLP.com, and the author of "Taxation of Damage Awards & Settlement Payments" (www.TaxInstitute.com). This is not legal advice.