

Hispanic Latino Team Blog

Posted at 4:58 PM on February 10, 2010 by Sheppard Mullin

IRS Enforcement of Foreign Bank Account Reporting Rules May Catch Non-U.S. Persons by Surprise

By [*Keith Gercken*](#)

U.S. persons are generally required to file an annual information statement with the U.S. Internal Revenue Service (IRS) disclosing any beneficial interest in, or signatory authority over, bank or other financial accounts located outside the U.S. This information statement is filed on Form TD F 90-22.1, and is generally referred to as an "FBAR" (Foreign Bank Account Report).

Due to increasing concerns regarding the potential evasion of U.S. income tax that is facilitated by hiding funds in offshore accounts, the IRS has been increasingly focused on FBAR reporting over the last several years and has aggressively pursued U.S. taxpayers who have failed to properly file these reports. The IRS' most visible recent efforts in this area involved the filing of criminal charges in the U.S. against the Swiss bank UBS and certain of its employees, which actions ultimately resulted in UBS' agreement to turn over to the IRS certain information relating to accounts maintained by U.S. customers in Switzerland.

From an accountholder perspective the failure to file FBARs as required can potentially lead to severe penalties – including monetary penalties of up to 50 percent of the account balance (per year) and criminal penalties if the failure to file was willful. A recent IRS settlement initiative, which has recently expired, provided noncompliant taxpayers with the ability to voluntarily disclose unreported foreign accounts in exchange for limited – but still significant – penalties. It remains to be seen how the IRS will treat voluntary disclosures in this area following the end of the formal settlement program, but it is anticipated that voluntary disclosure would still likely result in much lower penalty exposure than would result if the IRS were to discover the failure to report itself (e.g., as a result of an offshore bank turning over customer information).

The FBAR reporting requirement is a potential trap for non-U.S. citizens that may not consider themselves to be "U.S. persons" in any meaningful respect. The basic FBAR filing requirement is imposed by § 5314 of Title 31 of the U.S. Code, and extends to "a resident or citizen of the

United States, or a person in, and doing business in, the United States." While a person's status as a U.S. citizen should be clear, the exact parameters of other two triggers are less so. For example, is a nonresident that travels to the U.S. for 30 days a year to visit customers considered to be "a person in, and doing business in, the United States"? What about a foreign national that holds a "green card" (i.e., has been granted permanent resident status for immigration law purposes), but is nevertheless not considered to be a U.S. tax resident due to the application of a "tie breaker" rule in an applicable tax treaty – is that person considered to be a "U.S. resident" required to file an FBAR?

Unlike the definition of "U.S. citizen," the definition of a "U.S. resident" for purposes of the FBAR filing requirement does not appear to be completely clear. Probably due to the fact that this area is administered by the IRS, it is commonly assumed that U.S. residence will be interpreted for this purpose in accordance with a person's U.S. income tax filing status. This may not necessarily be the case, however, since there is no compelling reason to conclude that the rules regarding tax residency for income tax purposes under the Internal Revenue Code (Title 26 of the U.S. Code) would necessarily control for purposes interpreting the FBAR filing requirement in Title 31 of the U.S. Code – indeed, it is possible that a foreign national's U.S. resident status under applicable immigration or estate and gift tax rules could influence the determination of U.S. residence for purposes of the FBAR filing requirement.

Finally, while the definition of a "U.S. resident" in this context may be somewhat fuzzy in this context, the circumstances under which a foreign person may be considered to be "a person in, and doing business in, the United States" is even less clear. Perhaps recognizing the need to develop more concrete guidelines in this area, though, the IRS has announced that – for the moment at least – it will not require a nonresident alien to file an FBAR solely due to his or her status as "a person in, and doing business in, the United States."

In light of the potential uncertainties regarding the scope of the FBAR filing requirements under certain fairly common fact patterns, as well as the potentially draconian penalties that can be imposed as a result of failure to file, foreign nationals that have any substantial presence in or connection to the U.S. may wish to seek advice relating to any potential FBAR filing obligation they may have.

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