

Gregory P. Rhodes

Voluntary Disclosure – Now Is the Time To Fulfill That Obligation You Might Not Have Known You Had

In February the Department of Justice (DOJ) and Swiss Bank, UBS, entered into a deferred prosecution agreement relating to various offshore accounts maintained by UBS. In connection with the deferred prosecution agreement, UBS disclosed information about its U.S. account holders to the IRS.

Luckily for the UBS investors, the IRS recently initiated its Offshore Account Voluntary Disclosure Program, through which it has offered various offshore investors a chance to disclose any unreported offshore accounts in order to avoid criminal, as well as many civil, penalties. The Voluntary Disclosure Program was originally set to expire on September 23, 2009, but was subsequently extended until Oct. 15, 2009.

Although the DOJ's recent prosecutions focused on UBS account holders, many of which were intentionally concealing income from the IRS, the prosecutions and the subsequent Voluntary Disclosure Program have highlighted the breadth of "ordinary" individuals that might unwittingly be out of compliance with IRS and other federal disclosure requirements regarding foreign accounts.

A. Who Must Disclose?

Any individual that has "signatory authority over" or "financial interests in" foreign accounts with an aggregate value of over \$10,000 at any time during a calendar year has an obligation to disclose such accounts. Due to the IRS's failure to provide meaningful guidance on the terms "signatory authority" and "financial interest", there is a vast array of individuals that might unknowingly have an obligation to make such a disclosure.

The following illustrations provide some examples of "ordinary" individuals who might, to their surprise, be out of compliance with the disclosure requirements:

1. An individual that maintains a "gambling" account through an offshore bank which, at any point during the year, exceeds

\$10,000 is likely to have a disclosure obligation. It is worth noting that, due to recent banking law changes, it is likely that any online gambling account (including sports book or poker accounts) owned by an individual will be located in an off-shore jurisdiction, thus creating a disclosure obligation.

2. An individual that previously resided in another country and had a joint account with their husband, wife, child, mother or other family member who moves to the U.S. and becomes a U.S. resident and fails to relinquish their interest in, or signatory authority over, the account is likely to have a disclosure obligation. It is worth noting in this context that such individuals have a disclosure obligation even if the individuals have only signatory authority over (with no income interest in) the account.

3. An individual that is an officer of a foreign located company which maintains bank accounts in excess of the \$10,000 is likely to have a disclosure obligation, even if the individual has minimal dealings with the company.

4. A U.S. resident that has a foreign located family member that dies leaving them an inheritance might have a disclosure obligation if the inheritance is located in a trust or other account located in a foreign jurisdiction (a common scenario). Such would be the case even if the beneficiary was receiving no current distributions from the account.

5. A U.S. resident that has any interest in (e.g., as a Trustee, Co-Trustee or Beneficiary) a foreign trust that is held through a foreign bank likely has a disclosure obligation.

The above examples provide only a very small sample of situations which might result in a disclosure obligation. There are a myriad of situations which could result in such an obligation, and we have found that it is often the case that U.S. residents who maintain family members or relationships abroad often have disclosure obligations for which they are not aware.



B. Penalties

There is a vast array of penalties – both civil and criminal – which could apply to an individual which is not meeting the foreign account disclosure requirements. An explanation of these penalties is beyond the scope of this article, but they are generally very harsh. In our opinion, a voluntary disclosure and corrective actions through the current program being offered by the IRS is generally advisable, and such a disclosure can eliminate all criminal liability and substantially reduce any applicable civil penalties.

C. Disclosure Time Line

There are several different time frames which could apply to a given situation, and these deadlines are constantly changing. The general voluntary disclosure deadline has, as of the time this article is being written, been extended until October 15, 2009, but it is very possible this deadline could be extended again in some form or fashion.

Certain individuals that have only signatory authority over, but no interest in, a financial account can potentially take advantage of a later June 30, 2010 deadline. Additionally, individuals that have failed to properly disclose a foreign account, but have been properly reporting income earned on such an account (or had no obligation to report such income) can take advantage of other provisions and deadlines.

D. Do Not Delay

There are several factors to be considered by a taxpayer who holds a foreign financial account. Not only are there a multitude of potential civil penalties applicable to individuals who own such accounts, there are potential criminal penalties as well. A proper and timely voluntary disclosure or other action could mitigate or eliminate these penalties, and the timely reporting of these accounts is critical to taking advantage of the reduced penalty framework.

If you have any questions about your disclosure obligations, please contact one of the following members of Sirote's Tax Controversy Department: David Wooldridge, Ronald Levitt or Greg Rhodes. ☐



Gregory P. Rhodes

Greg practices in the areas of Corporate and Tax Law, Mergers and Acquisitions, and Tax Controversies at Sirote. He received his LL.M. from New York University School of Law in 2008 and his J.D. from University Of Mississippi School Of Law in 2005. Greg received his B.A. in 2002 from Millsaps College.