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HIRE Power: New Reporting Requirements and Penalties for Holders of Offshore Bank Accounts

Holders of offshore bank accounts, along with their accountants and tax advisors, should be aware of recently enacted changes in their reporting requirements. Under the HIRE Act signed by President Obama on March 18, individuals are required to include certain information with their tax returns beginning with the 2011 tax year. The newly required information reporting is in addition to the information already provided to the U.S. Treasury Department on the Form 90-22.1 ("FBAR").

The scope of the new reporting requirement is greater than what is currently covered on the FBAR. Therefore, individuals who have never had an FBAR filing requirement may be subject to the reporting requirement, and individuals who are familiar with FBAR filing requirements may have to provide additional information. Taxpayers should be aware of the new information that is subject to reporting and the applicable penalties for failing to report the information.

Assets Subject to Reporting

Any of the following assets may be subject to reporting if the value of all of the specified assets held by the taxpayer is greater than \$50,000:

- Any financial account maintained by a foreign financial institution.
 - Unless regulations provide otherwise, this could include a bank account maintained with a U.S. branch of a foreign financial institution.
 - Investments with foreign private equity or hedge funds may need to be reported.
- Stock or securities issued by a non-U.S. person.
- Any financial instrument or contract held for investment that has an issuer or counterparty that is a non-U.S. person.
 - Interest rate and other swap agreements, futures and forward contracts, and other derivatives to which a foreign entity is a party could be subject to reporting, regardless of whether the instrument is considered to be a "foreign" instrument.

Penalties

Failing to provide the required information could subject an individual to severe penalties. Any of the following penalties would be in addition to penalties that could be imposed on the individual with respect to any FBAR failures.

- \$10,000 for each year that the required information is not provided on a timely filed tax return, with additional \$10,000 penalties imposed if the failure is not cured within a certain period of time after the IRS provides notice of the failure. The penalty will not exceed \$50,000 for any one failure.
 - A penalty will not be imposed if the failure is shown to be due to reasonable cause.
- A 40% accuracy-related penalty would apply to understatements attributable to undisclosed foreign financial assets.
 - Undisclosed foreign financial assets for these purposes would include assets required to be disclosed under sections 6038, 6038B, 6046A and 6048. The failure to disclose these assets is already subject to significant penalties under those provisions.

Statute of Limitations

The HIRE Act extends the statute of limitations from 3 years to 6 years in cases where the income omitted from the taxpayer's U.S. tax return exceeds \$5,000 and the omission is with respect to assets that were subject to the new reporting requirements. This differs from the typical 6-year statute extension which applies where there has been a 25% or greater understatement of gross income.

Although the reporting requirements are not effective until the 2011 tax year, the ability to extend the statute of limitations to 6 years could be applied to income tax returns due after March 18, 2010, or for tax returns filed on or before March 18, 2010, if the statute of limitations has not yet expired. This means that income tax returns for calendar year tax payers filed for the 2006, 2007, 2008, 2009 and 2010 tax years are potentially subject to the new 6-year statute rather than the traditional 3-year statute, unless the IRS or Congress clarify how the statute extension is supposed to apply.

Conclusion

All individuals should determine whether the reporting requirements apply in any transaction or investment of theirs in which a non-U.S. person is a party. Because the reporting and filing requirements differ from the FBAR requirements, individuals who are familiar with FBAR reporting should review their other investments to determine whether additional reporting is required under the new rules. The reporting of foreign financial accounts and information has been an area of increased scrutiny by the IRS in recent years and this focus will only continue with the new reporting requirements.

For further details, [click here](#).

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