



# **IRS and SECRET OFFSHORE BANK ACCOUNTS & ASSETS**

by  
**Howard L Richshafer, Esq./CPA**  
**Wood & Lamping, LLP**

**Northeast Lawyers' Club**  
**March 7, 2014**



# History

**2009---UBS Bank plea bargains with DOJ.**

**UBS turns over 4,500 American names, accounts to DOJ.**

**UBS avoids felony conspiracy to commit tax evasion.  
\$780,000,000 fine paid by UBS.**

- **DOJ commences prosecutions for secreting foreign accounts/assets, omitting income, false tax returns, tax evasion.**
  - **Ty Warner (Beanie Babies founder).**
  - **Raoul Weil (UBS Head: Wealth Management/Banking).**
  - **UBS banker Martin Lack.**



# **History**

**November 2013—IRS investigating 100 Americans holding undisclosed accounts in India.**

**IRS investigating Americans holding undisclosed accounts in Israel.**

**December 2013—deadline for more than 300 Swiss banks to identify Americans with undisclosed accounts, and, reveal how the bank assisted with hiding.**

**Swiss banks issuing letters to American customers encouraging them to voluntarily disclose accounts to IRS before bank discloses customers' account data to IRS.**



# **Foreign Bank Account Report (“FBAR”)**

- **Bank Secrecy Act (31 USC 5311).**
- **“U.S. Persons” must file FBAR with FINCEN.**

**Financial interest in “foreign financial account,” or signature control, and Account exceeded \$10,000 that year.**

**FBAR due no later than June 30<sup>th</sup>, following year (No Extensions).**

**Must file electronically (Form 114 “Report of Foreign Bank and Financial Accounts”).**



# **What is a “foreign financial account”?**

- 1) Foreign securities, brokerage, savings, demand, checking, deposit, time deposit, or other financial account maintained with financial institution.**
- 2) Commodity futures or options account.**
- 3) Life insurance policy with cash value.**
- 4) Annuity policy with cash value.**
- 5) Shares in mutual fund.**



# **What is a “U.S. Person”?**

**U.S. citizen.**

**U.S. resident.**

**Entities: corporations, partnerships, limited liability companies.**

**Trusts, estates formed under U.S. law.**

**“U.S. Persons” required to file annual FBAR with FINCEN.**



# **Exceptions to Filing an FBAR**

- 1) Owners of jointly-owned accounts: may file only one FBAR, under certain circumstances.**
- 2) Correspondent/Nostro Accounts.**
- 3) IRA.**
- 4) Qualified retirement plans.**
- 5) Certain trust beneficiaries.**
- 6) Foreign accounts maintained on U.S. military facility.**



# FBAR Penalties:

## □ Civil Penalties:

- Nonwillful penalty for failing to file: up to \$10,000 per failure; must demonstrate “reasonable cause” for failure.
- Willful penalty: higher of (a) \$100,000, or (b) 50% of the account balance on June 30<sup>th</sup> of due date, per failure.

## □ Criminal Penalties:

- **Willful failures: up to \$250,000 fine,**
- **Up to five years imprisonment ,**
  - **Or both. (31 USC 5322(a) ).**





# **FOREIGN ACCOUNT TAX COMPLIANCE ACT (“FATCA”)**

**26 USC 6038D (applies to certain U.S. taxpayers).**

**26 USC 1471 through 1474 (applies to withholding agents).**

**Became law in March 2010.**

**Taxpayers must report foreign financial accounts/assets.  
Generally, more than \$50,000 in value at end of a year.  
Taxpayers must attach IRS Form 8938 to annual tax  
returns.**

**Certain statutory exceptions apply.**

**FATCA: also requires certain foreign financial institutions  
to withhold 30% federal income tax on U.S. accounts unless  
they report accounts to IRS.**



# FATCA PENALTIES

## Civil:

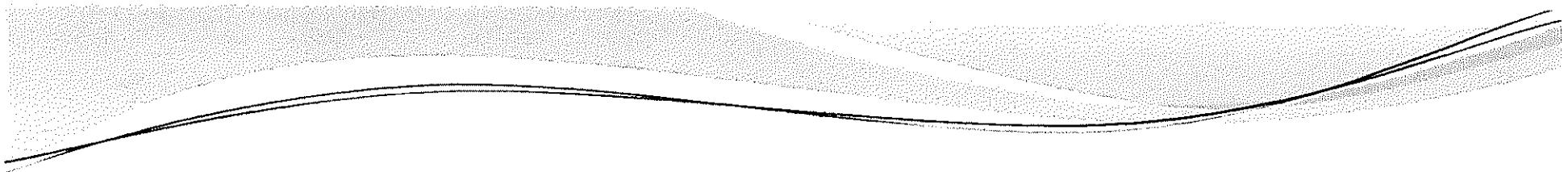
**Failing to file Form 8938: \$10,000/per each 30-day failure, but subject to reasonable cause abatement. Max Penalty: \$50,000.**

**Failing to report INCOME from account: 40% of tax underpaid.**

**75% civil fraud penalty could also apply. Burden of proof on IRS (“clear and convincing standard”).**

## Criminal:

**False Form 8938: 3-year felony + \$100,000, or both.**



# **IRS' CURRENT OFFSHORE VOLUNTARY DISCLOSURE PROGRAM**

**Must file amended income tax returns (8 years).**

**Pay delinquent tax and interest in full.**

**Pay 20% accuracy-related penalty.**


**Incur one 27½% FBAR penalty—on highest account balance.**

**or, 12½% or 5% FBAR penalty under certain conditions.**

**File delinquent FBARs.**

**File delinquent Forms 8938 (beginning with tax year 2011).**

**File any other IRS Forms related to entities or trusts holding foreign accounts.**



# **IRS' CURRENT OFFSHORE VOLUNTARY DISCLOSURE PROGRAM**

**Clients do not qualify if they are under IRS audit or IRS criminal investigation.**

**No end date. Still open as of March 7, 2014.**

**More and more foreign financial institutions are cooperating with IRS and DOJ to avoid either prosecution and withholding.**

**Hence, clients are well-advised to seriously consider participating in IRS' voluntary disclosure program.**