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FBAR Reporting Requirements May Be Enhanced Under New Obama Proposal

On May 11, 2009, the U.S. Treasury released its *General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals*, also known as the Green Book. The Green Book discusses the Obama administration's proposed changes to the current rules that require a U.S. person to file disclosure reports regarding offshore financial accounts.

Under current law, U.S. persons must disclose whether, at any time during the preceding year, they had an interest in, or signatory authority over, financial accounts in a foreign country if the aggregate value of these accounts exceeds \$10,000. The disclosures are made on the Report of Foreign Bank and Financial Accounts, Form TD F 90-22.1 ("FBAR"). A non-willful failure to file will result in a civil penalty up to \$10,000, but a willful failure to file will result in a civil penalty up to the greater of \$100,000 or 50% of the amount in the account. Criminal penalties may also apply and include a maximum fine of \$250,000, a maximum term of imprisonment of five years, or both, with higher penalties if the defendant violates any other U.S. law, or if the violation was part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period. Civil and criminal penalties can be imposed simultaneously. The Obama administration proposes to enhance the current reporting regime with several new rules.

Reporting Transfers to Foreign Accounts

Transfers of money or property above certain amounts to or from foreign partnerships or corporations must be disclosed. There is currently no such disclosure requirement for transfers of money or property to or from foreign financial accounts. The Obama administration proposes to

require individuals to report transfers of money or property that exceed \$10,000 per year in the aggregate by an individual or a company in which the individual owns a controlling interest. If the foreign account is with a qualified intermediary, however, no report will be required. Failure to file the report will result in a penalty equal to the lesser of \$10,000 per reportable transfer or 10 percent of the cumulative amount or value of the unreported covered transfers.

Disclosures Attached to Tax Return

U.S. persons must file a required FBAR with the Treasury Department, but not the IRS, no later than June 30th of each year. The Obama administration proposes to add a similar disclosure directly in the taxpayer's tax return that must be filed with the IRS by the applicable tax return filing deadlines. This would not replace the FBAR, but would instead supplement it. The FBAR penalties would not apply, but other penalties under the tax code could apply.

Third-Party Reporting

Currently, no third-party reporting requirements apply for transfers to and from foreign financial accounts. The Obama administration proposes to require any U.S. financial intermediary and any qualified intermediary to file information reports on any transfers of money or property in excess of \$10,000 to or from a foreign bank, brokerage or other financial account on behalf of a U.S. person or an entity in which a U.S. person owns more than a 50% ownership interest.

Legal Presumptions

The Obama administration proposes to apply two new rebuttable evidentiary

presumptions in any civil administrative or judicial proceeding. First, any financial account in which a U.S. person owns an interest, or has signatory authority, will be presumed to have had a high enough balance at some point during the year to require an FBAR filing. Second, it will be presumed that any failure to file an FBAR was willful if the financial account had a balance of greater than \$200,000 at any point during the calendar year. Under current law, it is the responsibility of the government to prove wrongdoing by the taxpayer for these purposes. Under the Obama proposal, the burden would shift to the taxpayer to prove innocence.

Statute of Limitations

With respect to events that require disclosure on certain information returns, the statute of limitations on assessments does not expire until three years after the information return is provided to the IRS. The Obama administration proposes to extend the statute of limitations to six years in such cases.

Accuracy-related Penalties

The 20% accuracy-related penalty imposed on (i) substantial understatements of income tax, (ii) understatements resulting from negligence or disregard of rules or regulations, or (iii) a reportable transaction understatement would be doubled to 40% when the understatement arises from a transaction involving a foreign account that the taxpayer failed to disclose properly under the proposed requirement that taxpayers disclose FBAR-related information on their income tax returns.

[View the 2009 Green Book.](#)
[View the president's budget for fiscal year 2010.](#)

Hunton & Williams Offices

Atlanta

Bank of America Plaza
Suite 4100
600 Peachtree Street, NE
Atlanta, Georgia 30308-2216
(404) 888-4000

Austin

111 Congress Avenue
Suite 1800
Austin, Texas 78701-4068
(512) 542-5000

Bangkok

34th Floor, Q. House Lumpini
Building
1 South Sathorn Road
Thungmahamek, Sathorn
Bangkok 10120
Thailand
+66 2 645 88 00

Beijing

517-520 South Office Tower
Beijing Kerry Centre
No. 1 Guanghua Road
Chaoyang District
Beijing 100020
PRC
+86 10 5863 7500

Brussels

Park Atrium
Rue des Colonies 11
1000 Brussels, Belgium
+32 (0)2 643 58 00

Charlotte

Bank of America Plaza
Suite 3500
101 South Tryon Street
Charlotte, North Carolina 28280
(704) 378-4700

Dallas

1445 Ross Avenue
Suite 3700
Dallas, Texas 75202-2799
(214) 979-3000

Houston

Bank of America Center
Suite 4200
700 Louisiana Street
Houston, Texas 77002
(713) 229-5700

London

30 St Mary Axe
London EC3A 8EP
United Kingdom
+44 (0)20 7220 5700

Los Angeles

550 South Hope Street
Suite 2000
Los Angeles, CA 90071-2627
(213) 532-2000

McLean

1751 Pinnacle Drive
Suite 1700
McLean, Virginia 22102
(703) 714-7400

Miami

1111 Brickell Avenue
Suite 2500
Miami, Florida 33131
(305) 810-2500

New York

200 Park Avenue
New York, New York 10166-0091
(212) 309-1000

Norfolk

500 East Main Street
Suite 1000
Norfolk, Virginia 23510-3889
(757) 640-5300

Raleigh

One Bank of America Plaza
Suite 1400
421 Fayetteville Street
Raleigh, North Carolina 27601
(919) 899-3000

Richmond

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

San Francisco

575 Market Street
Suite 3700
San Francisco, California 94105
(415) 975-3700

Singapore

Samsung Hub
#29-04, 3 Church Street
Singapore 049483
+65 6876 6700

Washington

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1500

If you have any questions about President Obama's proposal or would like to discuss issues regarding the reporting requirements for cross-border transactions, please contact:

[Alexander G. McGeoch](#)

(214) 979-3041
amcgeoch@hunton.com

[Jeffry M. Blair](#)

(214) 468-3306
jblair@hunton.com

[Andrew W. Lawrence](#)

(214) 979-3052
alawrence@hunton.com

[Mark A. Melton](#)

(214) 979-2952
mmelton@hunton.com

[George C. Howell, III](#)

(804) 788-8793
ghowell@hunton.com

[Cecelia Philipps Horner](#)

(804) 788-7394
chorner@hunton.com

[Kendal A. Sibley](#)

(804) 788-8697
ksibley@hunton.com

[Joshua Z. Mishoe](#)

(404) 888-4197
jmishoe@hunton.com

[B. Cary Tolley, III](#)

(305) 810-2533
ctolley@hunton.com

[Michael A. Silva](#)

(305) 810-2512
msilva@hunton.com

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