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SANFORD I. MILLAR
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Why Should I make A Voluntary Disclosure, My Money is Not in a Swiss Bank

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I was asked recently, "why should I make a Voluntary Disclosure when my offshore money is not in a Swiss Bank?"

This is a very important question. First, no lawyer admitted in California is going to advise a client to commit a future crime. The crime(s) would likely be charged as "willful failure to file an FBAR " and subscribing to a false income tax return (by answering "NO" to the offshore account questions). These FBAR crime is punishable by up to ten years in prison the false statement crime is punishable by up to five years in prison. The prison sentence is in addition to monetary penalties, under the criminal statutes plus the income tax, penalties and interest. The act of providing advice on how to commit a future crime is NOT subject to the attorney client privilege and may result in criminal charges against the lawyer for aiding and abetting, as well as State Bar disciplinary actions and professional liability. So, obtaining legal advice is just a first barrier. There is no accountant -client privilege that would attach in these circumstance and the same aiding and abetting rules apply to accountants as well as well as potential action against the account by the IRS under Circular 230.

Professional liability risks also exist. The result is that a competent professional adviser, whether lawyer of accountant, should advise proper reporting and the filing of a Voluntary Disclosure. The preparation and filing of a Voluntary Disclosure has serious legal implications, including waiver of Fifth Amendment rights and should only be done by a lawyer.

In addition, changes in federal disclosure rules for U.S. taxpayers,(Foreign Financial Asset Reporting- new IRC §6038D) will require U.S. taxpayers to schedule foreign financial assets (of $50,000 or more) and attach the schedule to their income tax return. Failure to attach an accurate schedule is, of course a false statement crime.

Law Offices of Sanford I. Millar

Office: 310-556-3007
Fax: 310-556-3094
Address: 1801 Avenue of the Stars, Suite 600
Los Angeles, CA. 90067
Email: smillar@millarlaw.net

www.millarlawoffices.com

The potential big reason, however, is that foreign financial institutions that have investments in the U.S. will under the Foreign Account Tax Compliance Act (FATCA) be required to enter into disclosure agreements with the IRS and actually disclose account information of U.S. persons with offshore accounts. This means, that if you have an account at a foreign financial institution that has U.S. investments (not necessarily a presence in the U.S.) your account information may be turned over to the IRS beginning January 1, 2013.

Balancing the penalty risks for not coming clean against the likelihood of ultimate discover it is without doubt that if you have a foreign financial account and have not made a voluntary disclosure you should. There are some reasons why a full Voluntary Disclosure is not necessary, such as when all income has been reported and timely paid and the only failure is the failure to file an FBAR, but absent the permissible exceptions, now is the time to resolve outstanding liabilities even it you think that you will never get caught. This comment is limited to federal law and for California taxpayers there is no similar Offshore Voluntary Disclosure Initiative.

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