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The September 23, 2009 deadline for enrollment in the Internal Revenue Service's well-publicized campaign to collect tax, interest and some fairly draconian penalties from foreign bank account holders draws near. Termed the "Amnesty Program", the IRS is offering these taxpayers a temporary opportunity to declare the existence of these accounts, amend the prior six years' tax returns, complete Form TD F 90-22.1 (the FBAR, Foreign Bank Account Report) for those years, and submit to a special penalty regime in lieu of criminal prosecution. One must qualify for and be accepted into this program (taxpayers with an existing examination in progress are ineligible), and the taxpayer has a continuing obligation to cooperate, both civilly and criminally, with the Internal Revenue Service. The program is being administered through the CID (Criminal Enforcement Division).

UBS AG, the largest Swiss bank whose woes have been reported in the press for some time, is "ground zero" for this program. UBS recently agreed to disclose the identities of 4,450 names of large account-holders who are alleged to have evaded US income tax. This comes after a February, 2008 disclosure of approximately 250 names. The United States has filed multiple civil and criminal actions against UBS and its personnel, keeping up steady pressure on the lender to turn over account holders' information as quickly as Switzerland's once unbroken secrecy laws will allow. The authorities have also aggressively pursued the promoters of certain offshore trusts, prepaid credit card and similar arrangements whose purposes were, at a minimum, to facilitate US Citizens' ability to invisibly hold or spend funds that should have been reported on the taxpayer's return.

In many ways the program is just. Tax evasion cheats honest people. Ignorance of the law is no defense either. Part III of the Form 1040 Schedule B has for some time unambiguously asked whether the taxpayer has any interest in or signature or other authority over a foreign bank account. The form requires that the taxpayer file an FBAR where the value of such account (or the aggregate of multiple accounts) equaled \$10,000.00 or more at any time during the subject year.

This very big net, however, is also hauling in some very small fish. Certainly, taxpayers who failed for years to complete Part III of the Form 1040 Schedule B (assuming they knew they had the account) failed to accurately and completely report their tax liability. Nevertheless, the Service imposes accuracy and late filing penalties for each of the prior six years under this program, requiring payment for years that would otherwise be closed to examination. Even more serious is the special 20% FBAR penalty, which is assessed on the *highest* value of the account over that prior six year period. The rise and subsequent crash of the stock market means that in most cases the remaining value of the account might be a fraction of this highest value. As such, the participant could be facing an effective tax rate of 30%, 40% or more of their remaining balance. Though there is a lesser 5% penalty for inherited and/or

largely “dormant” accounts, this lesser penalty requires that all income from the account had been reported all along, unlikely in most cases.

Does the punishment fit the crime? The public persona of the tax-evading, billion sheltering tax cheat is an overstatement. There are plenty of reasons to open a foreign bank account, including currency diversification in an era of dollar hemorrhaging and access to foreign securities not widely traded on the public exchanges. Many of the account holders are retirees who will be put in a very difficult position when faced with the loss of half or more of their nest egg, previously reported or no. Should the taxpayer have declared their foreign bank account before now? Absolutely. Should there be broader application of the 5% FBAR penalty. Let’s hope so. Tax penalties should collect revenue owed and punish tax evasion and hyper-aggressive tax avoidance. It should not render the taxpayer defenseless or destitute, a distinct possibility where the taxpayer has no real chance of replacing this money and learning his or her lesson.