



Delay in California Refunds?

The state budget crisis is not yet fixed, and the state's cash flow is in a challenging position. Do not rule out the possibility of the State Controller delaying income tax refunds or issuing IOUs if California lawmakers cannot resolve the budget crisis.

Currently, the Franchise Tax Board (FTB) refund schedule is as follows:

FTB return processing schedule		
	From February 1 – April 14	April 15 – June 30
If e-filed return and refund to be direct deposited , how long will it take for the funds to be deposited into the client's account?	On average 3–5 business days	On average 3–5 business days
If e-filed return and refund to be mailed , how long will it take for the client to receive the check?	On average 5–7 business days	On average 5–7 business days
If paper filed return and refund to be direct deposited , how long will it take for the funds to be deposited into the client's account?*	On average 23 business days	On average 26 business days
If paper filed return and refund to be mailed , how long will it take for the client to receive the check?*	On average 30 business days	On average 33 business days
If paper filed return with a check , how long will it take FTB to deposit the check?*	On average 5–7 business days	On average 5–10 business days

*It can take the U.S. Post Office up to two weeks to deliver to the FTB all the April 15 post-marked returns and payments. The time frames above are calculated based on when the FTB physically receives the return/payment. Additionally, returns with errors or requiring additional analysis or review may require additional processing time.

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Further Clarification on Foreign Bank Account (FBAR) Filing Requirements

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) recently issued a Notice of Proposed Rulemaking to amend the Bank Secrecy Act (BSA) pertaining to the reporting of foreign financial accounts (*i.e.*, the Form TD F 90-22.1, a.k.a. the "FBAR"). The Internal Revenue Service also issued two notices giving administrative relief with respect to certain aspects of the FBAR filing requirements. These developments:

- include provisions to prevent persons from avoiding reporting requirements;
- define a U.S. person required to file the FBAR and define the types of reportable accounts such as bank, securities, and other financial accounts;
- exempt certain persons with signature or other authority over, but no financial interest in, foreign financial accounts from filing FBARs;
- exempt certain low-risk accounts *e.g.*, the accounts of a government entity or instrumentality for which reporting would not be required;
- clarify the definition for a person to have a financial interest in a foreign account; and
- change the filing deadline for those who have not previously disclosed accounts for which they hold signature authority.

Background

The FBAR form is filed to report a financial interest in, or signature or other authority over, one or more financial accounts in foreign countries. No report is required if the aggregate value of the accounts does not exceed \$10,000. FBARs become part of the BSA database after they are filed. They are used in combination with Suspicious Activity Reports, Currency Transaction Reports, and other BSA reports to provide law enforcement and regulatory investigators with valuable information to fight fraud, money laundering, terrorist financing, tax evasion and other financial crime.

Definitions

Treasury's proposed rulemaking contains clarifications of the following definitions for FBAR filing:

United States Person: A citizen or resident of the United States or an entity including, but not limited to, a corporation, partnership, trust or limited liability company, created, organized, or formed under the laws of the United States.

Reportable Account: A formal relationship with a foreign financial institution to provide regular services, dealings and other financial transactions. The length of the time for which service is being provided does not affect the fact that a formal account relationship has been established. An account is not established simply by conducting transactions such as wiring money or purchasing a money order where no relationship has otherwise been established.

FBAR Filing Requirements... (continued)

Examples of reportable accounts include:

- bank, securities, brokerage, commodity futures or options, and other financial accounts in a foreign country, including certificates of deposit and checking accounts;
- an annuity policy, or an insurance policy with a cash value; and
- a mutual fund or similar “pooled fund” that issues shares available to the general public with regular net asset valuations and regular redemption periods.

Under the proposed regulations, FinCEN does not require the FBAR reporting of private equity funds, venture capital funds, and hedge funds. However, FinCEN does reserve the right to mandate such reporting in the future, as Treasury remains concerned over hedge funds being used to evade taxes.

Financial Interest: The proposed regulations state that a United States person who is the owner of record or holder of legal title of a bank, securities, or other financial account is defined as having a “financial interest” in such an account, regardless of whether the account is maintained for his own benefit or for the benefit of others. Financial interest also applies to a person who is acting on behalf of that United States person, such as an attorney, agent, or nominee with respect to that account. Therefore, both the holder of record and the beneficial owner are required to file an FBAR. Each person who is listed on an account is deemed to have a financial interest in that account.

A United States person is deemed to have a financial interest in a bank, securities, or other financial account in a foreign country for which the owner of record or holder of legal title is—

- A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than a trust) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits.
- A trust, if the United States person is the trust settlor and has an ownership interest in the account for United States federal tax purposes. See 26 U.S.C. 671–679 to determine if a settlor has an ownership interest in a trust’s financial account for a year.
- A trust in which the United States person either has a beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.
- A trust that was established by the United States person and for which the United States person has appointed a trust protector that is subject to such person’s direct or indirect instruction.

Under the proposed regulations, persons who use special purpose companies to disguise the transfer of funds between commonly controlled entities must now file an FBAR.

Signature or Other Authority: Per the IRS notice, it extends the filing deadline to June 30, 2011 for reporting those foreign financial accounts over which United States persons have “signature or other authority” but in which they have no financial interest, including accounts held during or prior to 2010.

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FBAR Filing Requirements... (continued)

In general, a United States person who has signature or other authority over a foreign financial account may also be required to file the FBAR. Signature or other authority generally means authority, either alone or in conjunction with another, to control the disposition of money, funds, or other assets held in a financial account by delivery of instructions (communicated in writing or otherwise) to the person with whom the financial account is maintained. Officers or employees who have signature or other authority over a foreign financial account may be required to file the FBAR. There are exceptions, but they will only apply if the officer or employee does not have a financial interest in the account.

Simplify FBAR filing

The proposed regulations also provide some simplified reporting procedures:

- *25 or more foreign financial accounts*: A United States person having a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate. Similarly, a United States person having signature or other authority over 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.
- *Consolidated reports*: An entity that is a United States person and owns directly or indirectly more than a 50 percent interest in an entity required to file the FBAR.
- *Participants and beneficiaries in certain retirement plans*: Participants and beneficiaries in retirement plans under sections 401(a), 403(a) or 403(b) of the Internal Revenue Code as well as owners and beneficiaries of Individual Retirement Accounts under section 408 of the Internal Revenue Code or Roth IRAs under section 408A of the Internal Revenue Code will not be required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.
- *Certain trust beneficiaries*: A beneficiary of a trust described in proposed paragraph (e)(2)(iv) is not required to report the trust's foreign financial accounts if the trust, trustee of the trust, or agent of the trust is a United States person that files an FBAR disclosing the trust's foreign financial accounts and provides any additional information as required by the report.

Last Chance to Get Deferred Compensation Plans Right

The American Jobs Creation Act of 2004 mandated that all nonqualified deferred compensation plans had until December 31, 2005 to meet specific requirements of IRS Code Section 409A in both form and operation. Section 409A regulates the tax treatment of "nonqualified deferred compensation" paid to "service providers," including executives, employees, and board members. The affected plans must comply with the rules of Section 409A regarding the timing of deferrals and distributions. The December 2005 deadline was later extended to December 31, 2008.

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Deferred Compensation Plans... (continued)

In January 2010, the IRS provided guidance for plans that have failed to meet the documentation requirements. For example, payments are allowed only under certain circumstances, such as for termination from service, death, disability, or change in control of a corporation. If a payment is made for an unauthorized reason, a “document failure” has been committed. The penalty for such an infraction is steep. The employee becomes immediately responsible for taxes on all amounts deferred under the plan and, in addition, must pay a 20% penalty tax.

There is a way to avoid such penalties due to noncompliance with Section 409A. If corrective action is taken by December 31, 2010, the taxpayer will not be liable for the potential additional taxable income and accompanying penalty. However, taxpayers under audit are exempt from such relief.

This “breathing room” has been granted by the IRS to give taxpayers the chance to make sure that their deferred compensation plans comply with Section 409A in both form and operation. Now is the time for companies to clean up any “document failures” before December 31, 2010.

The President's Tax Proposals: A Reality Check

The administration has gone through all the proposals in the President's budget. Now, let us look at which of these tax proposals will actually become law.

Proposals That Will Go Forward

Jobs/Hiring Credit: By a vote of 70 to 28, the Senate has passed H.R. 2847, the legislative vehicle carrying the Hiring Incentives to Restore Employment Act (the Senate jobs bill).

The Senate jobs bill features a payroll tax break and a tax credit for new hires. More specifically, for wages paid after the enactment date and before 2011, employers would not have to pay the employer portion of Old-Age, Survivors, and Disability Insurance (OASDI) with respect to new hires who have been unemployed for at least 60 days, and who are hired after February 3, 2010 and before January 1, 2011. Additionally for tax years ending after the enactment date, the bill would create a \$1,000 business credit for unemployed individuals hired after February 3, 2010 and before January 1, 2011, who (a) work for the employer for a period of not less than 52 consecutive weeks, and (b) whose wages for such employment during the last 26 weeks of such period equal at least 80% of the wages for the first 26 weeks of the period.

The bill would also:

- permit qualifying issuers of tax credit bonds the option of issuing tax credit bonds under current law, or utilizing the direct subsidy Build America Bond structure for bonds issued after the date of enactment. The federal subsidy would equal 45% of the borrowing cost (65% for qualifying small issuers);

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The President's Tax Proposals... (continued)

- extend highway and transit programs through calendar year 2010, and transfer from the General Fund to the Highway Trust Fund \$19.5 billion in interest foregone since 1998;
- enact a comprehensive set of measures to reduce offshore noncompliance. IRS would be given new administrative tools to detect, deter, and discourage offshore tax abuses; and
- delay application of worldwide allocation of interest under Code Section 864(f) until 2020.

Section 179: As of now, the Senate jobs bill includes the enhanced 2008 and 2009 Section 179 expensing thresholds to be extended through 2010. Under the extension, taxpayers can elect to write off up to \$250,000 of certain capital expenditures (subject to a phase-out for expenditures that exceed \$800,000).

Extenders/Alternative Minimum Tax (AMT): An expanded R&D tax credit will be the key component in the effort to include business and individual tax extenders in the jobs bill. An important provision of the bill would allow small- to medium-sized businesses to take the general business credits, such as the R&D tax credit, without being limited by the AMT. This assumes that Congress has not reached a compromise yet on the separate extenders package. The House has now agreed to drop carried interest.

Estate/Death Tax: A \$5 million exemption (\$10 million/couple), with rates somewhere in the 35%-40% range, is expected to be added to the Senate's version of the jobs bill. The next step would be to get House approval of the Senate provision.

Top Rates/Capital Gains/Dividends/Deductions/Exemptions: The Obama Administration has gone on record as a strong supporter of increasing the top two levels from 33/35% to 36/39.6% and capital gains and dividends to go to 20%. Not long ago, such an increase seemed all but certain. However, several Democratic members of Congress have written the President to support keeping the current rates intact. In addition to a potential rate hike, tax increases caused by itemized deductions and personal exemptions are expected to be brought back. This increase would have a more than \$200 billion impact on higher income families over a ten-year period.

Other Proposals Expanded

Both the House and Senate included the expanded 1099 reporting requirements for payments to corporations for property and services.

In addition, the administration has proposed to extend the phase-out period for LIFO accounting to ten years.

Proposals With an Uncertain Outlook

Health Bill: Despite what some political insiders in Washington are saying, the prospects for passing the proposed legislation aimed at overhauling the current health care system appear bleak at best.

Independent Contractor vs. Employee Status: There is a major new development regarding the issue of independent contractors vs. employees. The administration is proposing that the Treasury/IRS be given the authority to issue guidance on who is or is not an independent contractor, something they have been banned from doing since 1978. Other union-supported policies have had a tough time in the Senate, but it is too early to determine whether there are enough votes to get approval for this important change.

The Impact of the Massachusetts Senate Election

The Massachusetts Senate election had a big impact on D.C., especially in the area of tax policy. It is not only the fact that Brown's victory greatly strengthens the ability of Senate Republicans to prevent legislation from going forward (but watch out for reconciliation), but the loss of a Senate seat in a state with a strong Democrat voting tradition, coupled with the wide margin of Brown's victory, has done much to provide focus to many Senators on both sides of the aisle to be more critical about possible tax increases – and views towards the administration's tax proposals.

Bottom Line

Business owners should not depend on Washington to cut their taxes. Businesses should continue working with their trusted financial advisors to develop strategies that take full advantage of federal and state incentives in order to reduce their taxes.

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