

**SENATE FINANCE COMMITTEE RELEASES DRAFT OF ALTERNATIVE
LEGISLATION TARGETING OFFSHORE TAX HAVEN ABUSE**

On March 10, 2009, Senator Max Baucus and the staff of the Senate Finance Committee released for comment draft legislation on “offshore tax haven abuse.” This latest draft legislation is substantially narrower than a previous proposal floated last week by Senator Carl Levin and Representative Lloyd Doggett (the “Levin/Doggett Bill”).

Unlike the Levin/Doggett Bill, the Finance Committee staff’s draft is limited to the imposition of additional penalties on taxpayers who fail to disclose information about foreign holdings, new information reporting rules for financial institutions, and changes to the foreign trust rules. The Finance Committee staff’s draft legislation does not contain the provision in the Levin/Doggett Bill that would treat non-U.S. corporations (including investment funds) as U.S. corporations if they are managed and controlled from the United States. The draft also does not contain the Levin/Doggett Bill’s expansion of withholding on dividend payments to include withholding with respect to “dividend equivalents” or revisions to the burden of proof regarding ownership of and transfers to entities in tax havens. In addition, the Levin/Doggett Bill’s provisions requiring hedge funds and private equity funds to establish anti-money laundering programs (already required for financial institutions and mutual funds) are absent from the Finance Committee staff’s draft.

The Senate Finance Committee’s Draft Legislation

The Finance Committee staff’s draft would require financial institutions that transfer more than \$10,000 to a non-U.S. account on behalf of a U.S. taxpayer to file an information return, which would include the name of the U.S. taxpayer. Such reporting would allow the IRS to better track outflows of funds from the United States. However, the Levin/Doggett Bill contained a similar but more far-reaching provision. For example, the Levin/Doggett Bill applied not just to financial institutions but to any withholding agent and also included a presumption that any account with a financial institution formed or operating in a tax haven jurisdiction contains \$10,000, which would trigger the existing information reporting requirements.

The Finance Committee staff’s draft would extend the statute of limitations from three years to six years for information returns reporting certain foreign transfers. A similar extension was contained in the Levin/Doggett Bill. The Finance Committee staff’s draft would also require Foreign Bank and Financial Account forms to be filed with tax returns. In addition, the draft contains a due diligence requirement for tax return preparers regarding certain reportable offshore transactions.

The draft bill also addresses the use of foreign trusts to transfer assets out of the United States. As in the Levin/Doggett Bill, the Finance Committee staff’s draft would amend the current definition of a loan from a foreign trust to a U.S. grantor or beneficiary so as to include not only loans of securities, but also of other property, such as real estate, artwork, and personal property, effective for loans that follow the enactment date of the measure.

The Finance Committee staff's draft doubles penalties, fines and interest on taxpayers that underreport their U.S. income tax liability with respect to any "offshore financial arrangement" or any financial arrangement that relies on the use of offshore payment mechanisms.

The Levin/Doggett Bill also contained other tax provisions that are absent from the Finance Committee staff's bill. These included a codification of the economic substance doctrine and additional reporting requirements for passive foreign investment companies.

The Finance Committee has scheduled a hearing for March 17, 2009, entitled Tax Issues Related to Ponzi Schemes and an Update on Offshore Tax Evasion Legislation to discuss this bill.

Obviously, the more limited approach taken by Senator Baucus and the Finance Committee staff will be welcomed by many affected taxpayers. Nonetheless, it is plain that foreign "tax haven" transactions are being targeted; it remains to be seen how the competing measures introduced by Senator Baucus and Senator Levin and Representative Doggett will evolve in this process.

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