Easing the burden to prove tax evasion while stiffening the penalties

White Collar Crime Update

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By:

The Senate has approved the Fraud Enforcement and Recovery Act of 2009 (FERA) and the House Judiciary Committee has approved a similar measure.

FERA, approved by the Senate in late April, is designed to control mortgage fraud, securities fraud, financial institution fraud and other frauds related to federal assistance and relief programs. However, if enacted in its current form, FERA would also create a new money laundering crime: intent to commit tax evasion. The change would allow the federal government to punish tax evasion under the International Money Laundering statute (18 U.S.C. § 1956(a)(2)(A)) as well as the Internal Revenue Code.

The International Money Laundering statute provides much stricter sanctions than the Internal Revenue Code, including longer terms of imprisonment and larger fines. The impact of this change on businesses that conduct international transactions could be significant.

Criminalizing the Intent to Commit Tax Evasion

The version of FERA passed by the Senate would amend the International Money Laundering statute to punish the transfer of funds to, from or through the United States “with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986.” These sections of the Internal Revenue Code already penalize attempted tax evasion and tax fraud. Under FERA, the intent to commit tax evasion, without any subsequent financial transaction to effectuate that intent, could be treated as money laundering. This would enable the government to characterize international transfers of funds as a money laundering offense, without the protections found in the Internal Revenue Code.

These changes may encourage the Department of Justice to prosecute such transactions under the International Money Laundering laws rather than the Internal Revenue Code, because the prosecutors’ case would not be subject to the rigors of proof and internal approvals required in an Internal Revenue Code case, and prosecuting tax evasion under the International Money Laundering laws would open the door to longer prison terms and larger monetary sanctions.

Enhanced Penalties for Tax Evasion

Currently, under the Internal Revenue Code, tax evasion is a felony punishable by up to five years of imprisonment and a $100,000 fine. Under limited circumstances, and only with high levels of approval, the IRS may also seize a taxpayer’s assets. FERA would allow intent to commit tax evasion to be punishable with up to 20 years of imprisonment and a $500,000 fine. Additionally, the criminal forfeiture provision of FERA...
would allow the government to apply for seizure orders without giving notice to the taxpayer, shifting the burden to taxpayers to unfreeze seized funds. This penalty is especially harsh in light of the fact that the government could move to seize assets after funds are transferred if it believes that the transfer evidences an intent to commit tax evasion even if there is no subsequent transaction to support such a contention.

In order for FERA to become effective, the House still needs to pass it and President Barack Obama, who voiced his support for it earlier this month, must sign it. If, as expected, FERA becomes law, additional caution will have to be exercised when executing any tax-related transfer of funds to, from or through the United States in order to avoid the harsh penalties of the International Money Laundering laws.