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Proposed Legislation Affecting Assets Held Overseas

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The budget proposal that President Obama presented on February 26, 2009 emphasized his strong desire to crack down on perceived tax haven abuses, although it did not include any specific details. Some US Senators have recently stepped up to fill this void. President Obama was one of three sponsors of the Stop Tax Haven Abuse Act in 2007. One of his co-sponsors, Senator Carl Levin, has introduced a newly revised version. This new bill establishes the presumption that amounts transferred between a US person and an “Offshore Secrecy Jurisdiction” represent previously unreported income to the U.S. person in the year of transfer. The presumption can only be rebutted by clear and convincing evidence. The bill lists 34 Offshore Secrecy Jurisdictions (with discretion to add or subtract more). Switzerland, not surprisingly, is on the list.

The bill would also impose US filing and withholding responsibilities on foreign banks that know that the beneficial owner of an accounts is a US taxpayer. Penalties would be imposed for failure to file such forms.

Very disturbingly, the bill proposes to expand the list of taxable trust distributions to include loans of real estate, marketable securities, and personal property of any kind, including artwork, furnishings and jewelry.

The bill also proposes to eliminate a major benefit of notional principal contracts based on US equities by characterizing dividend equivalent payments as US source income subject to withholding.

In contrast, Senator Baucus has presented a draft bill that focuses on giving more power to the Internal Revenue Service to detect US tax evaders, rather than condemning certain offshore jurisdictions outright. He would toughen the reporting requirements on offshore transfers and extend the statute of limitations from three to six years for returns that report, or should have reported, certain international transactions. His proposal would also double the fines and penalties for failure to comply.

While it is unclear which direction the final law will take, it seems clear that some kind of legislation will be passed that will have substantial impact on foreign trustees and foreign financial institutions.