

Foreign Bank Account Reporting (“FBAR”) Reporting Requirements - Issues To Consider

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Personal Wealth Advisors
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Introduction

With the globalization of investing and cross-border commerce, more U.S. persons have foreign financial accounts. However, while there is nothing improper about setting up or maintaining such accounts, under certain circumstances U.S. persons are required to file a disclosure report. Treasury form TD F 90-22.1, to comply with U.S. foreign bank and financial account (FBAR) reporting rules. Form TD F 90-22.1 reporting is required where persons (i) have a financial interest in, or signature or certain other authority (control) over, any financial accounts including bank, securities, or other types of financial accounts in a foreign country, and (ii) the aggregate value of these financial accounts exceeds \$10,000 at any time during the calendar year. The 2008 form TD F 90-22.1 (FBAR reporting) is required to be filed in time to be received by the U.S. Treasury by June 30, 2009, with no extensions available.

Since the fourth quarter of 2008, and in informal public comments on June 12, 2009, the United States Treasury has emphasized form TD F 90-22.1 reporting, and the reporting of foreign mutual funds and hedge funds, and potentially private equity fund investments if viewed as a comingled fund. The form TD F 90-22.1 and reporting has been expanded, and related form instructions modified. Therefore, penalty exposure for inaccurate reporting is now more prominent. At the time of this publication, the IRS has not released any guidance that would potentially clarify many issues cited in this Outline.

U.S. persons that may have FBAR reporting requirements include individuals, corporations, partnerships and other business entities, including disregarded entities, not-for-profit and charitable organizations, foundations, trusts and estates. Trustees and investment advisors may get caught in the reporting web. Certain pension plans and individual retirement accounts require reporting.

Civil and criminal penalties for non-compliance with the FBAR filing requirements are severe. Civil penalties for a non-willful violation can range up to \$10,000 per violation. Civil penalties for a willful violation can range up to the greater of \$100,000 or 50 percent of the amount in the account at the time of the violation. Criminal penalties for violating the FBAR requirements while also violating certain other laws can range up to a \$500,000 fine or 10 years imprisonment or both. Civil and criminal penalties may be imposed together.

If you were required to file FBARs for earlier years and have reported income from the foreign accounts, you should file the delinquent FBAR reports by September 23, 2009 attaching a statement explaining why the reports are filed late to avoid penalties. Copies of information contained within the TD F 90-22.1 must be maintained for five years.

Following are observations and considerations in assessing your obligation to file and comply with the form TD F 90-22.1 reporting requirements. Eisner LLP is not providing any tax advice, as such no reliance should be placed on this Outline content in order to prepare and comply with FBAR form TD F 90-22.1 reporting rules. For this purpose please consult your tax advisor.

I. Assessment of FBAR Reporting Requirements

1. Key components to determine whether FBAR filing is required

- A) Confirm the account holder or owner, or controlling party, is an individual or entity a United States (U.S.) person. U.S. persons include U.S. disregarded entities (e.g., single member LLCs), corporations, trusts, estates, partnerships, and exempt entities. (See 3.).
- B) Do you have a financial interest in or signature authority over any financial account? (See 7.).
- C) Is the financial account located in a foreign country? A foreign country includes geographical areas outside the U.S., including territories and possessions of the U.S. (e.g., Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa).
 - i. Focus on the geographic location of the branch of the institution where the account was opened.
- D) Does the aggregate value of the financial accounts exceed \$10,000 at any time during the calendar year ? (See 9.).
- E) You may not be required to file if you meet certain exceptions. (See 2.).

2. Exceptions for when a U.S. Person is not required to file an FBAR

A) **Bank Officer/ Employee Exception:** There is no reporting required if you are an officer or employee of a bank having signature or other authority over a foreign bank, securities, or other financial account maintained by a bank which is currently examined by a U.S. federal bank supervisory agency for soundness and safety if you meet the following condition:

- i. No personal financial interest in the account.

B) **Employee/Officers of Public Company and Private Company Exception:** There is no reporting required if you are an officer or employee of a U.S. corporation whose securities are listed upon any US exchange or which has assets exceeding \$10 million and has 500 or more shareholders of record if the officer or employee meets both conditions:

- i. Has no personal financial interest in the account and,
- ii. Has been advised in writing by CFO or similar representative that company has filed a current report which includes the account.

C) **Employee/Officers of U.S. Domestic Subsidiary Exception:** There is no reporting required if you are an officer of a domestic subsidiary of a U.S. corporation if the following conditions are satisfied (private or public company executives):

- i. Are employed by a U.S. corporation whose securities are listed upon any exchange, or which has assets exceeding \$10 million and has 500 or more shareholders of record.
- ii. No personal financial interest in the account, and
- iii. You have been advised in writing by the responsible officer of parent that the subsidiary filed a current report which includes the account. (the subsidiary can be named in a consolidated FBAR of the parent to satisfy this condition).

D) **Employee/Officer of 50% U.S. Owned Foreign Sub Exception:** No reporting if an officer or employee of a foreign subsidiary (owned more than 50% by a U.S. corporation) if the following conditions are satisfied (private or public company executives):

- i. The officer has no personal financial interest in the account, and

- ii. Has been advised in writing by the responsible officer of parent that subsidiary has filed a current report which includes that account.

3. A U.S. person is defined as, and has a filing obligation, if any of the below items apply:

- A) A citizen of the U.S. (e.g., born in the United States).
- B) A citizen of the U.S. and resides outside the U.S.
- C) A Green Card holder.
- D) A U.S. resident under the substantial presence test, which is applicable when/if:
 - i. Physically present in the U.S. for at least 183 days over a 3 year testing period, and
 - ii. Physically present in the U.S. for at least 31 days during the current year under IRC section 7701(b)(3).
- E) A non-resident alien who makes an election under IRC section 7701(b)(4) to be treated as a U.S. resident.
- F) Foreign persons in, and doing business in, the U.S will be subject to reporting in 2010 for the 2009 tax year. The IRS suspended the filing requirement for the 2008 FBAR report due on June 30, 2009.

II. Interest in Financial Accounts and Control that Create an FBAR Reporting Requirement

4. When a U.S. person is considered to have a "financial interest" in a financial account (as an account owner)

- A. If you are a legal owner (e.g., legal title) of record, even for benefit of others (e.g., foreigners).
- B. If you own the account jointly (if married you can file one form if neither spouse has a separate account) or with multiple parties (each party files a separate form).

- i. You are not considered to have a financial interest with your spouse and your spouse does not have a filing requirement if the spouse is not considered a joint owner except by virtue of the state's community property laws.
- C. A U.S. person who has a financial interest in financial accounts of a trust for which the owner of record or legal title holder is a trust for which a trust protector has been appointed.

5. A U.S. person has a financial interest in each bank account, or in a securities or other financial account, in a foreign country for which the U.S. person can control an entity holding such accounts

- A. A person acting as an agent, nominee, or attorney on the U.S. person's behalf
- B. Corporation in which the U.S. person has a greater than 50% ownership (by vote or value).
- D. Partnership in which the U.S. person has a greater than 50% interest in the profits or capital; or
- E. A trust in which U.S. persons either have a present beneficial interest (direct or indirect) in more than 50% of assets, or from which a U.S. person receives more than 50% of current income. IRS representatives have interpreted this rule to conclude that:
 - i. U.S. beneficiaries of a discretionary trust should file a protective FBAR report if the expectation that each can receive more than 50% of the assets or income—even if there has been no history of distributions to U.S. beneficiaries.
 - ii. No filing of an FBAR by a trust beneficiary if he or she only holds a limited power of appointment over trust corpus.
 - iii. U.S. settlors (a trust creator, a person who formed a trust) must file the FBAR report with respect to the trust assets--The IRS representatives did not provide any additional guidance.

6. Determining if a U.S. person has signatory or other authority over an account

- A. Can the U.S. person control the disposition of money or property by delivering a document containing their signature ?
- B. Can the U.S. person exercise a power over an account by oral communication or by some other mechanism (e.g., communication can be with financial institution directly or through an agent) ?
- C. The power to direct investment activity without power to withdraw or transfer funds does not constitute signature authority.

Examples:

- i. A U.S. person with signatory authority to bind an offshore investment fund, or to bind the general partner or managing member itself if a U.S. entity.
- ii. U.S. trustee that has signature authority over a foreign account owned by a U.S. trust.

7. Does a U.S. person hold a financial interest in any of the following accounts?

- A. Bank account (e.g., savings, demand, checking, deposit, time deposit, debit card).
- B. Prepaid credit card.
- C. Margin account.
- D. Securities account.
- E. Securities derivative.
- F. Any account in which assets are held in a commingled fund and the account owner holds an equity interest (e.g., instructions cite a mutual fund). IRS representatives have stated that a U.S. person holding an equity interest in an investment fund or hedge fund/private equity fund that pools funds for investment would be a reportable account. A reportable interest includes an investment in an offshore hedge fund, and potentially an offshore private equity fund.

- G. Certain foreign retirement accounts a U.S. person owns and controls.
- H. 401(k) accounts, and Canadian RRSPs (even if Form 8891 is filed).
- I. Life insurance policies if policy has cash value and U.S. person is policy owner.
- J. Gold bullion or commodities held in a financial account (not holding in a safe deposit account without instructions to financial institution to transact the holding).
- K. Direct or indirect interests in a PFIC.
- L. Lines of credit.
- M. Currency accounts.
- N. Mortgage escrow accounts.

III. Interests in Financial Accounts that Do Not Create FBAR Reporting Requirements

8. If a U.S. person holds a financial interest in the following assets, reporting is not required

- A. Bonds, notes or stock certificates held by the U.S. person.
- B. Unsecured loans to a foreign business that is not a financial institution.
- C. U.S. branch account of a foreign bank.
- D. An ownership interest in real estate or collectibles.
- E. Safe deposit box (holding gold/precious metals unless you communicate to financial institution to deposit or withdraw the contents on your behalf).

IV. Measuring the \$10,000 Valuation Threshold for FBAR Reporting Purposes

9. **Does the aggregate value of the financial accounts in which the U.S. person owns a financial interest, or have signature authority, exceed \$10,000 at any time during the calendar year**

- A. Measure the value of cash accounts using the maximum value (of the account) at any time during the year. Use the end of the year values for stock, brokerage accounts, or non monetary accounts (with the exception if assets are withdrawn during the year, then value at date of withdrawal).
- B. Margin accounts are reported using the highest gross value, not net of any margin loans.
- C. Utilize year end exchange rates for conversion of foreign currency in all cases.

V. Additional FBAR Reporting Considerations

10. **FBAR form TD F 90-22.1 reporting considerations**

- A. Cite the address of the financial institution branch where the financial account is maintained.
- B. Cite the form filer's relationship with the entity that owns the account.
- C. Does the filer have an interest in more than 25 accounts ? If so, limited reporting required, but must maintain records for 5 years.
- D. Does the filer have a signature authority or other authority over more than 25 accounts ? If so, limited reporting required, but must maintain records for 5 years.

- E. The FBAR is not an income tax return and should not be mailed with any income tax returns. The FBAR must be received by the U.S Treasury on or before June 30 of the following year to (June 30, 2009 for the 2008), and mailed to:

U.S. Department of the Treasury
P.O. Box 32621
Detroit, MI 48232-0621.

The address for commercial delivery is:

U.S. Department of Treasury
Attn: FBAR processing
985 Michigan Avenue
Detroit, Mich., 48226.

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