



IRS Releases Revised Foreign Bank Account Reporting Form

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Introduction

The Internal Revenue Service (IRS) has posted a new version of the Report of Foreign Bank and Financial Accounts, TD F 90-22.1 (commonly referred to as 'FBAR'). The IRS had not previously announced this posting or the changes to the FBAR form. The form indicates that it is revised as of October 2008 and must be used for any filing after December 31. Key changes include:

- an expanded definition of a 'financial account';
- the inclusion of foreign accounts owned by trusts established by US persons;
- a requirement for the provision of more detailed information on value and identification;
- clarification of corporate filings; and
- provision for a specially designated amended filing.

US Citizens and Residents Required to Report Foreign Accounts

The Bank Secrecy Act requires US citizens and residents who have a financial interest in, or signature authority or other authority over, any financial accounts - including bank, securities or other types of financial account - in a foreign country to file the FBAR form. This can include individual and trustee owners of single-member limited liability companies with foreign bank accounts. FBAR reporting is required if the aggregate value of such financial accounts exceeded \$10,000 at any time during the previous calendar year, even if the accounts do not generate taxable income. Although there are many legitimate reasons to hold foreign financial accounts, the IRS stresses that account holders who do not comply with the reporting requirements may be subject to civil penalties, criminal penalties or both.

The FBAR must be filed on or before June 30 and requests for a filing extension will not be granted. As it is not an income tax return, the FBAR is filed on its own and not with the filer's income tax return. The FBAR form asks for:

- the type of account;
- its maximum value;
- the account number;
- the name of the financial institution;
- the country in which the account is held; and
- the last name or organization name of the account holder.

The penalty for failing to file Form TD F 90-22.1 is the total amount in the account up to \$100,000 or \$25,000, whichever is greater. No report is required if the aggregate value of the foreign accounts did not exceed \$10,000.

Changes to FBAR Reporting

Expanded definition of 'financial account' and 'US person'

Under "General Definitions" in the new FBAR instructions, financial

accounts include debit card and prepaid credit card accounts. An explicit inclusion of such accounts was not included on the previous form. The definition of 'US person' is now expanded to include anyone "in and doing business in the United States". In addition, the new instructions make clear that even where an agent, nominee or attorney controls the account, the US person who can instruct, either orally or by some other means, the intermediary to act has the FBAR filing requirement. Individual bonds, notes or stocks are not, by themselves, a financial account; nor is an unsecured loan to a foreign trade or business that is not a financial institution.

Clarification of trust ownership

In addition to financial interest as owner of record or legal title holder to the foreign account, the new instructions clarify that a US person has a financial interest in any foreign account:

"for which the owner of record or holder of legal title is a trust, or a person acting on behalf of a trust, that was established by such US person and for which a trust protector has been appointed."

It goes on to define 'trust protector' as:

"a person who is responsible for monitoring the activities of a trustee, with the authority to influence the decisions of the trustee or to replace, or recommend the replacement of, the trustee."

The filing requirement applies to the US person who established the trust. The heirs to such a trust do not appear to have a FBAR filing requirement solely by virtue of the existence of the trust. However, the new instructions retain the previous rule requiring a US person who has a present beneficial interest, either directly or indirectly, in more than 50% of the trust assets or who receives more than 50% of the current trust income to file the FBAR.

More detailed information

In addition to the information detailed above, the new form also asks for the following:

- foreign identification number, such as a foreign passport number;
- exact 'maximum value' of the account (instead of merely checking a box associated with a range, the largest being over \$1 million); and
- identification of the non-US person having the financial interest in an account over which the US filer has signature authority.

Corporate filings

The FBAR filing requirement extends to corporations and to individual employees who hold signature authority over corporate accounts even though in most cases the employee has no financial interest in the account. However, if the employee receives certification that the account was included on the company's filing, the employee does not have a separate filing requirement. The new instructions extend this to employees of a subsidiary, who need not file a separate FBAR form when they have received proper certification that the account has been included in the parent company filing.

Comment

Although unexpected, the new form is clearer and easier to use, the instructions include significant clarifications of previously uncertain points and consolidated filing by spouses is now permitted. However, it demands more information and preparation may not be easy for foreign persons who have a filing requirement or are named on the form. Careful consideration must be given when counselling US persons seeking to make voluntary disclosures of previously undeclared foreign accounts. In such cases previously, delinquent or amended FBARs were filed in addition to amended tax returns. The new form includes a box to be ticked indicating that it is an amendment and requires the inclusion of a statement explaining why the FBAR is late or has been amended. Such statement should be drafted with care, given the IRS's ability to seek penalties for non-compliance.

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