

Foreign Bank Account Report (FBAR) - due October 15 if the April 15 deadline was missed

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Introduction – reporting not taxation

Under the Bank Secrecy Act (BSA), US persons are required to file a Foreign Bank Account Report (FBAR), Form 114, to report certain foreign financial accounts, such as bank accounts, brokerage accounts and mutual funds. The FBAR is an annual report filed through the Financial Crimes Enforcement Network (FinCEN) BSA e-filing system: <https://bsaefiling.fincen.gov/>

If a US person fails to meet the regular FBAR April 15 due date, an automatic extension is provided to October 15. It is not necessary to request an extension to file the FBAR by October 15. If a US person does not have all necessary information to file by the extended due date, they should file as complete an FBAR as possible and amend it when information becomes available.

There are many legitimate reasons for US persons to have foreign financial accounts. The FBAR is an information return, not a tax return. Nevertheless, US persons who do not comply with FBAR filing requirements may be subject to civil penalties, criminal penalties or both.

Basic rule

A US person must file an FBAR if that person:

1. has a financial interest in or signature or other authority over one or more financial accounts located outside the United States *and*
2. the aggregate value of those foreign financial accounts exceeded \$10,000 at any time during the calendar year reported.

US person

US person for FBAR filing purposes includes the following:

- US citizen
- US resident
- US corporation
- US partnership
- US limited liability company (LLC) – even if disregarded for US tax purposes
- US trust - even if classified as foreign for US income tax purposes
- US estate

A US corporation, partnership or LLC is one that was created, organized, or formed under the laws of any US state, the District of Columbia, a US territory (which includes Puerto Rico and the US Virgin Islands), or US Indian Tribe. An estate where the decedent's will is admitted to probate under the laws of the United States will also be a US person for FBAR purposes. See below regarding trusts.

Financial interest

For FBAR purposes, "financial interest" is broadly defined to include direct ownership as well as indirect ownership through various entities. The IRS, which administers the FBAR examination and penalty programs, has an FBAR Reference Guide which describes seven situations where a US person has a reportable financial interest: <https://www.irs.gov/pub/irs-pdf/p5569.pdf>

Signature or other authority

Generally speaking, the test to determine whether an individual has signature or other authority over an account is whether the foreign financial institution will act upon a direct communication from that individual regarding the disposition of assets in that account. It does not matter whether the authority has ever been exercised. Even holding a power of attorney for another individual that would allow the agent to sign on behalf of the principal could trigger an FBAR filing requirement for both the US agent and the US principal.

Financial account located outside the United States

The term "financial account" is also used broadly and the FBAR Reference Guide includes a list of examples. In addition to bank accounts and securities accounts, a "financial account" for purposes of the FBAR includes commodity futures, cash value insurance policies, and mutual funds. It does not include foreign hedge funds or private equity funds. Currently, "financial account" also does not include a foreign virtual currency account, but FinCEN has indicated that it intends to revise this rule.

It is the location of the account, not the nationality of the financial institution, that determines whether an account is foreign. The account will be foreign if not located in a US state, the District of Columbia, a US territory, or US Indian lands. Thus, an account maintained with a US bank physically located in Portugal is a foreign account, while an account maintained with a Swiss bank physically located in New York is not a foreign account.

\$10,000 reporting threshold

FBAR reporting is required if the aggregate value of foreign financial accounts exceeds \$10,000 **at any time** during the prior calendar year. If the \$10,000 threshold is met, the FBAR must report all such accounts regardless of each account's specific value. It is irrelevant for FBAR purposes whether the accounts generate taxable income.

If an account is in a foreign currency, the maximum account value during the prior calendar year should be determined in the currency of the account and then be converted to US dollars using the US Treasury exchange rate *on the last day of that year*: <https://fiscaldata.treasury.gov/currency-exchange-rates-converter/>

Considerations for Trusts

Where foreign accounts are held in a trust structure, the trust, its trustee, grantor, and in some cases beneficiaries, may be required to file an FBAR.

1. US trust for FBAR defined differently than for tax purposes

The FBAR rules define a US trust as a trust that has been created, organized or formed under the laws of the United States. Thus, even if such a trust has a non-US decision maker causing it to be a foreign trust for US tax purposes, it may have an FBAR filing obligation.

2. US trustee and US trust may both have FBAR filing obligation

A US trust that holds a foreign bank account, directly or indirectly, will have an FBAR filing requirement assuming the value of the account is in excess of \$10,000. In addition, the US trustee with signature or other authority over the foreign account will have its own FBAR filing obligation.

3. US grantor

When the trust, either US or foreign, is a grantor trust for US income tax purposes and the grantor is a US person, that grantor will be required to file an FBAR when foreign accounts held in the trust structure meet the filing criteria.

4. US beneficiaries

FinCEN has stated that it does not intend for a beneficiary of a discretionary trust to have a financial interest in a foreign account simply because of that person's status as a discretionary beneficiary; nor does it intend to include a remainder interest. The final FBAR rules provide that a beneficiary has a financial interest in the trust's foreign account where that beneficiary has a present beneficial financial interest, either directly or indirectly, in more than 50% of the trust assets or receives more than 50% of the trust's current income for the calendar year. Uncertainty remains as to how 'present beneficial interest' is determined in various situations. Nevertheless, if the beneficiary does have a financial interest, the beneficiary does not need to report the trust's foreign account if the trust or trustee files the FBAR.

Submitting the FBAR

An individual filer does not need to register to file the FBAR. Simply navigate to the FinCEN website <https://bsae filing.fincen.treas.gov/NoRegFBARFiler.html> and choose an e-filing method. Individuals who want to prepare and submit a PDF form will need the basic Adobe Reader (which is free). On-line filing does not require Adobe Reader.

Anyone not filing the FBAR as an individual, such as an attorney, CPA, or enrolled agent filing the FBAR on behalf of a client, must obtain an account to file the FBAR by registering to become a BSA e-filer.

Conclusion - FATCA may mean failure to file won't go unnoticed

Foreign banks and financial institutions are reporting their US account holders to the IRS under the Foreign Account Tax Compliance Act (FATCA). Bearing this in mind, advisors to families with international investments should advise clients to file the FBAR and assist with analyzing the relevant details, especially foreign accounts in trust structures. Clients or their family offices should annually review foreign account balances and carefully consider those accounts held in trust. Penalties for non-compliance can be high. A US tax accountant with experience reporting non-US assets will be a valuable addition to the team.

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