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IRS Issues Final FBAR Regulations and Revised FBAR Form

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posted by TOM CALLAHAN

As previously [blogged by Chuck Rettig \(2/9/11\)](#) , [Kathy Keneally \(12/12/10\)](#) and [Bob McKenzie \(10/01/10\)](#), the IRS has been aggressively pursuing the disclosure of foreign financial information by U.S. citizens and residents.

Effective March 28, 2011, the Department of the Treasury, on behalf of the Financial Crimes Enforcement Network ("FinCEN"), issued final regulations (the "Reporting Regulations") amending Bank Secrecy Act ("BSA") regulations with respect to reporting of foreign financial accounts by U.S. citizens and residents. In conjunction with issuance of the Reporting Regulations, the Treasury also issued a revised Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"), together with new instructions. Finally, IRS issued Notice 2011-31 describing additional reporting matters for filing FBARs.

Who Must File FBARs?

An FBAR must be filed by a "United States Person" that has a *financial interest in or signature authority over* foreign financial accounts where

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ABOUT

The IRS Watch is a dream-team of tax controversy litigators and taxpayer advocates who are keeping watch on IRS positions and trends as influenced by regulatory changes, Congress and the Courts. Our blog will emphasize challenges taxpayers face in complying with complex tax rules, taxpayer advocacy and protection of taxpayer rights in the face of IRS efforts to enforce the laws: audits, appeals, collection of tax, civil and criminal tax practice and procedure. Follow our blog for insights from some of the nations top experts in tax controversy: Robert McKenzie, Charles Rettig, Lawrence Hill, Kathryn Keneally, Michael Desmond, Josh Ungerman, Kevin Johnson, George Clarke, Thomas Callahan, and Claudia Hill. See our profile »

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the aggregate value of those accounts exceeds \$10,000 at any time during the calendar year.

Who Qualifies as a “United States Person”?

The following persons are treated as United States Persons (“U.S. Person”) for FBAR filing purposes:

- U.S. citizens
- U.S. residents (lawful permanent residents as well as aliens with substantial presence in the U.S.)
- Entities, including corporations, partnerships, and limited liability companies organized in the U.S.
- Trusts or estates organized in the U.S.

What are Some Types of Financial Accounts That Must be Reported?

- Checking, savings, demand and time deposit accounts
- Brokerage and securities accounts
- Commodity futures or options accounts
- Insurance policies with cash surrender value
- Annuities with cash value
- Mutual funds or similar pooled funds

What Types of Foreign Financial Accounts are Subject to Reporting?

To be reportable, the foreign financial account must be physically located outside of the U.S. For example, a financial account maintained in a foreign branch of a U.S. bank is treated as a foreign financial account subject to reporting. Conversely, an account maintained in a U.S. branch of a foreign bank is not a foreign financial account subject to reporting.

What Constitutes a “Financial Interest” In a Foreign Financial Account That Triggers FBAR Reporting?

A U.S. Person can have a “financial interest” in a foreign financial account where the U.S. Person has direct ownership in the account, or where the U.S. Person has indirect ownership in the account through agents or nominees, or as the result of majority ownership in one or more entities that control the entity owning the foreign financial account. In that regard, a U.S. Person has a “financial interest” in a foreign financial account where:

- The U.S. Person is the owner of record or holder of legal title to the foreign financial account.
- An agent or nominee owns the foreign financial account on behalf of the U.S. Person.
- The U.S. Person owns, directly or indirectly, more than 50% of a corporation (vote or value), partnership (profits or capital) or other entity that owns the foreign financial account.
- The U.S. Person is treated as owner of a trust under the “grantor trust” rules, and the trust owns the foreign financial account.
- The U.S. Person owns more than 50% of the present beneficial interest in assets or income of a trust, and the trust owns the foreign financial account.



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Are There Any Exceptions to Filing FBARs?

Yes, there are a number of limited exceptions to filing FBARs. Some of the more common exceptions are as follows:

- Spouses may file a single FBAR if the foreign account is jointly owned, the FBAR is timely filed by one spouse and both spouses sign the FBAR. Otherwise, separate FBARs must be filed by both spouses.
- A trust beneficiary of a non-grantor trust is not required to report the trust's interest in a foreign financial account if the trust, trustee or agent of the trust is a U.S. Person and such trust or person files the FBAR on behalf of the trust.
- An owner or beneficiary of an IRA is not required to report a foreign financial account held in the IRA.
- A participant or beneficiary in certain tax-exempt retirement plans is not required to report foreign financial accounts held by or on behalf of the retirement plans.
- See additional exceptions for U.S. Persons with signature authority, below.

Do I Need to File an FBAR if I Have Only Signature Authority Over a Foreign Financial Account?

Unless an exception exists, the answer is yes. Signature authority means that the individual (alone or with others) can control the disposition of assets held in the foreign financial account. For example, an FBAR generally must be filed by employees who have only signature authority over their employer's foreign financial accounts. FinCEN has confirmed that duplicate FBARs will be filed where employees have only signature authority over foreign financial accounts owned by employers. That is, both the employees (signature authority) and employers (ownership) will file FBARs covering the same foreign financial accounts.

In the following limited circumstances, employees are relieved of FBAR filing where they have only signature authority over, but no financial interest in, employer foreign financial accounts:

- Officers or employees of certain regulated banks.
- Officers or employees of financial institutions examined by the SEC or the CFTC.
- Officers or employees of certain SEC registered Authorized Service Providers.
- Officers or employees of certain entities whose equity is listed on a U.S. national securities exchange.
- Officers or employees of subsidiaries of such U.S. listed entities if foreign financial account information is included in a consolidated FBAR with the parent entity.
- Officers and employees of certain other U.S. equity listed entities.

When and Where to File

The FBAR must be filed on or before June 30 for foreign account activity occurring during the preceding calendar year. In connection with filings for calendar year 2010, the revised FBAR form must be used for filings

made on or after March 25, 2011. The FBAR must be filed by mail, and addressed to:

U.S. Department of the Treasury
Post Office Box 32621
Detroit, MI 48232-0621

In addition, a box must be checked on income tax returns noting the presence of foreign financial accounts. However, the FBAR filing is independent of the requirement to file income tax returns.

What If I Ignore the FBAR Filing Requirement?

Willful failures can be subject to both criminal liability and civil penalties of up to the greater of \$100,000 or 50% of the account balance. This penalty can be applied for each year an FBAR is willfully not filed, going back to 2004.

Nonwillful failures can be subject to a penalty of \$10,000 per year for each year an FBAR is not filed, also going back to 2004. This penalty can be waived if reasonable cause is shown for the failure to file.

If a U.S. Person also failed to report income from foreign financial accounts on the applicable U.S. income tax return, back taxes will be due, and the U.S. Person can be subject to criminal and civil penalties. In that regard, a U.S. Person can enter into the 2011 Off-Shore Voluntary Disclosure Program ("2011 OVDI") until August 31, 2011 in order to come back into compliance. See Chuck Rettig's blog of 02/09/11 for more information about the 2011 OVDI. If you are uncertain whether these rules apply to you, seek professional assistance.

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