IRS Issues Revised Foreign Account Reporting Form

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In an unanticipated and unannounced development, the IRS posted a new version of Treasury Form 90-22.1, "Report of Foreign Bank and Financial Accounts" (known as the FBAR), on its Web site on September 30. The FBAR has been the focus of attention for many practitioners due to IRS efforts to publicize its filing requirements and because of ongoing investigations of Americans with undeclared foreign accounts at LGT Bank of Liechtenstein, UBS, and other institutions. Recent activity includes the service of a John Doe summons on UBS for a list of American accountholders, the plea agreement of a Geneva-based UBS private banker, and hearings held by the Senate Permanent Subcommittee on Investigations on the problem of undeclared accounts.

The FBAR is a creation of the Bank Secrecy Act, see 31 U.S.C. section 5314, which, with its associated regulations, requires any U.S. person with signature authority *or* a financial interest in a foreign bank or financial account to file an information return with Treasury by June 30 of the succeeding calendar year. The filing requirement applies to corporations and individuals, although there are special rules for large corporations that permit abbreviated filings with an explicit commitment to provide more information on request.

The FBAR gathers information for the database of the Financial Crimes Enforcement Network in support of federal efforts against terrorism, money laundering, and narcotics, but it also has significant implications in the tax world as well.[1] Among other things, it is referenced on every taxpayer's Form 1040, Schedule B, Part III, question 7a, the so-called check-the-box provision requiring taxpayers to answer whether they have signature authority or a financial interest in any foreign account. Federal tax prosecutors frequently base tax evasion indictments on a false negative

[1] Information collected in the FBAR is not subject to the taxpayer confidentiality provisions of section 6103, and thus can be shared with any law enforcement agency that may request it.

response to question 7a, the failure to file the FBAR, and the failure to report income on a foreign account.

There are criminal sanctions and severe civil penalties for any willful failure to comply with FBAR filing requirements, up to as much as 50 percent of the balance of an undeclared account, per year, for forms due after a legislative change in October 2004. 31 U.S.C. sections 5321 and 5322. As it has ramped up enforcement activity against Americans with undeclared offshore accounts, the IRS (which is delegated the authority to enforce the FBAR provisions) has made it a point to publicize the filing requirement. On June 17, two weeks before this year's FBAR deadline, the Service issued IR 2008-79, *Doc 2008-13356*, *2008 TNT 118-10*, reminding taxpayers and practitioners of the obligation to file the FBAR.

The new form notes that it has been revised as of October 2008 and states that it, as opposed to the older form, must be used for any filing after December 31. This article will identify substantive changes in the FBAR form and instructions that appear in part to be a reaction to recent enforcement activity.

First, the IRS has clarified the definition of a financial account to include debit card and prepaid credit card accounts. The prior instructions did not contain that explicit provision, and some practitioners questioned whether a filing requirement was imposed on a U.S. person with nothing more than a debit or credit card issued by a foreign bank, perhaps guaranteed with deposited funds. The new instructions now make that clear. The clarification is undoubtedly a result of recent IRS enforcement efforts, including reams of data obtained by the Service earlier this decade after serving John Doe summonses on U.S. credit card processors identifying Americans who used credit and debit cards issued by foreign institutions.[2]

Second, the new instructions wade into the problem area of foreign trusts. The instructions provide that a U.S. 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 such a trust, that was established" by that person "and for which a trust protector has been appointed." Trust protector is defined 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."

Many undeclared foreign accounts are associated with trusts, in some places called *stiftungs,* in which a trust protector is in place. These instructions now make it clear that the FBAR filing requirement applies to a U.S. person who has established such a foreign trust or *stiftung*, bringing a form of tax noncompliance involving

[2] A recently issued Internal Revenue Manual Supplement also notes that cash value life insurance maintained in a foreign country is included, but this did not make it into the new instructions. *See* IRM section 4.26.16.3.2 (1)(a).

undeclared accounts explicitly within the ambit of the serious civil and criminal sanctions noted above.[3]

Interestingly, however, the filing requirement applies only to the U.S. person who has established the trust, not that person's heirs. Many situations involving undeclared accounts held in trusts emerge after the death of the person who created the account, when heirs, only immediately before or after the decedent's death, learned of the account's existence. Under the new FBAR instructions, heirs do not appear to have an FBAR filing requirement arising solely from the existence of a trust. Having said that, the new instructions include the previous rule, whereby any U.S. person who is the beneficiary of more than 50 percent of a trust holding a foreign account must file the FBAR.[4]

Third, in several important respects, the new form asks for more detailed information, including the following:

- **Foreign identification number.** The definition of a U.S. person required to file an FBAR has been expanded beyond U.S. citizenship, residency, or (as to entities) domicile. The filing requirement now extends to anyone "in and doing business in the United States." Thus, the FBAR now requires a foreign identification number, such as a foreign passport number. This means that foreign persons who are "in" the United States and have business interests here are required to file and provide their identifying information.[5]
- **Exact 'maximum value' of the account.** There are specific instructions for calculating and reporting the exact "maximum value" of the account, including directions on the impact of foreign currency holdings. The old FBAR simply asked the filer to check a box associated with a range, with the largest range being over $1 million.
- **Identification of non-U.S. person with financial interest.** When one has signature authority over a foreign account in which a non-U.S. person has a financial interest, the person with the financial interest must now be identified. Previously, the filer could simply note that no U.S. person had a financial interest in the account. Thus, when a U.S. person holds a power of attorney, for example, over an account owned by a foreign family member, the relative must be identified, and an identifying number provided.

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[3] The new instructions also make clear that correspondent or "nostro" accounts maintained by banks for bank-to-bank settlements are not the subject of the filing requirement.

[4] Moreover, the decedant's estate may have to report the account's assets on an estate tax return, and the heirs may have other reporting and filing requirements, such as an affirmative answer to question 8 on Schedule B of the 1040 and the filing of a Form 3520.

[5] Foreign subsidiaries of U.S. parent companies are explicitly excluded from the filing requirement, but the U.S. parent may have to file, as may an unincorporated branch of a foreign entity doing business in the United States.

Fourth, the IRS has clarified a provision involving corporate filings. The FBAR requirement applies not just to corporations, but to individual employees who hold signature authority over corporate accounts -- even when, as in most cases, the employees have no financial interest in the account. The IRS has not required individual employee filings when the CFO of the company certified to the employee in writing that an account was included on a company filing. This CFO certification exception did not, at least explicitly, apply in the parent-subsidiary context. For example, an account may have been included in a parent company filing but the CFO does not certify this information in writing to the subsidiary's employees. The new instructions now clarify that the employees of the subsidiary need not file a separate form when the parent's CFO makes the proper certification to the subsidiary's employees and the account has been included in the parent company filing.

Fifth, of great interest to practitioners who counsel U.S. persons on voluntary disclosures involving undeclared foreign accounts, the new form and the instructions provide for a specially designated amended filing by including a box on the form noting that it is an amendment. The instructions request that the filer "attach a statement explaining the changes." Similarly, the instructions note that for delinquent filings, the filer should "attach a statement explaining the reason for the late filing."

When taxpayers make voluntary disclosures involving undeclared accounts, they generally file delinquent or amended FBARs in addition to amending their tax returns. They will now need to include statements explaining why the FBAR is late or has been amended. Voluntary disclosures offer some general assurance that the IRS will not proceed with criminal investigations, but given the size of the potential civil penalties (possibly 50 percent of the account balance per year), these statements should be drafted with care, as they will undoubtedly be important factors in any IRS decision to seek penalties for prior noncompliance.

There are other changes in the form and the instructions:

- the instructions state that one has "signature or other authority" if he can exercise authority over an account "directly or through an agent, nominee or attorney . . . either orally or by some other means," which makes it clear that one cannot rely on the existence of an intermediary who controls an account to dodge a filing requirement, when one can instruct the intermediary to act;
- the new FBAR permits a consolidated filing by spouses and requires the filer to provide the identifying information of the "principal joint owner" (previously, the instructions did not provide for joint filings);
- the instructions add an explicit five-year record retention requirement, which is already included in the pertinent regulations;
- the form itself is clearer and easier to use; it is divided into separate sections for separate filing categories; and
- the instructions note that individual stocks or other instruments, in and of themselves, are not separate "financial accounts," and that an unsecured loan to a foreign business (not a financial institution) does not trigger the filing requirement.

All in all, the new form demands much more information and the new instructions make significant clarifications. Preparation of the new form may present complications, especially for foreign persons who have a filing requirement or who may be named on the form. The new instructions will also affect the advice practitioners give to the growing number of U.S. persons who are seeking to make voluntary disclosures arising from previously undeclared foreign accounts. The issuance of the new form and instructions is a significant event, and tax advisers should parse the new rules carefully.