

FBAR Enforcement—Five Years Later

By Steven Toscher and Michel R. Stein

Steven Toscher and Michel Stein continue their discussion of FBAR reporting requirements and the IRS's initiatives to enforce compliance.

In 2003, we cautioned that the Internal Revenue Service was embarking upon a large-scale initiative to seek out taxpayers with undisclosed overseas bank accounts.¹ At the time, the IRS had recently been delegated authority by the Treasury Department to enforce rules against U.S. taxpayers for failing to disclose foreign bank accounts.² Criminal and civil prosecution of those failing to comply with the Foreign Bank Account Reports (FBAR) reporting requirements had been rare, but following the enactment of the USA PATRIOT Act (requiring the Treasury to study and report to Congress methods to improve FBAR compliance)³ and the expiration of the Offshore Voluntary Compliance Initiative (that provided, *inter alia*, amnesty to qualifying FBAR nonfilers), the IRS appeared ready, willing and able to crack down on the noncompliant.

Since that time, Congress, the Treasury Department and the IRS have taken steps to increase compliance—reflecting a serious effort to curb abuse in the use of offshore accounts. The Department of Justice Tax Division has also added its resources to the enforcement effort. A significant step—adding some institutional continuity—was the establishment of a new IRS organization, the Office of Fraud/BSA, to lead the IRS efforts in fraud development and not simply Bank Secrecy Act enforcement. The Office of Fraud/BSA consists of five BSA territories, each with a Territory Manager having seven Group Managers under his or her direction, with about 375 field examiners reporting to managers located in 35 field offices nationwide. The office of Fraud/BSA

has primary jurisdiction for civil FBAR enforcement.⁴ Congress also expanded the civil penalties for violations of FBAR reporting requirements, adding a new penalty for non-willful failures and increasing the penalty for willful violations to potentially draconian levels.⁵ Most recently, the IRS issued new Delegation Order 4-35,⁶ which establishes responsibility in the IRS for the various FBAR enforcement functions within the IRS, and has updated the Internal Revenue Manual (IRM) to provide guidance to IRS personnel involved in the new enforcement initiative. The IRS has also made serious efforts to educate tax professionals and the public about the FBAR reporting requirements including hosting an IRS National Phone Forum on FBARs in 2007.

It appears that FBAR compliance has improved. In 2001, the number of FBAR forms filed with the Treasury was 177,151.⁷ At the time, it was believed that there may have been as many as one million U.S. taxpayers required to file an FBAR in any given year.⁸ The recent data for 2007 shows that there were more than 322,000 filings, almost twice the 2001 number.⁹ This represents a compliance rate of around 30 percent (assuming there are one million U.S. taxpayers required to file) leaving room for improvement and fertile ground for IRS enforcement.¹⁰

While most IRS enforcement actions are not public because of taxpayer privacy laws,¹¹ the IRS's enforcement is becoming more public and seems to have an ongoing place in the pages of the *NEW YORK TIMES* and *WALL STREET JOURNAL*. There was a time when many U.S. taxpayers took comfort in foreign bank secrecy laws and other impediments to the IRS obtaining information on foreign income generating activities. Just like Las Vegas, the belief was “what happened overseas stayed overseas.” Not so any more. The “comfort” is proving

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to be a false—especially for those taxpayers who are now in the cross-hairs of U.S. tax enforcement.

In February, 2008 the IRS announced it was investigating more than 100 Americans with bank accounts in Liechtenstein.¹² UBS AG, Switzerland's largest bank, is also under investigation by the United States into whether it helped clients evade taxes.¹³ As part of this investigation, the Department of Justice is expected to seek to obtain the names of high income United States citizens holding UBS AG accounts—estimated to be up to 20,000 taxpayers.¹⁴ Recently, the Department of Justice charged a former UBS AG banker and a Liechtenstein consultant with helping clients (U.S. taxpayers) avoid taxes.¹⁵ The banker pled guilty to helping an American evade millions of dollars in federal income taxes.¹⁶ It is likely that the many taxpayers who hold foreign bank accounts and who have not properly reported them are starting to feel just a bit uncomfortable.

FBAR Reporting Requirements—In General¹⁷

The FBAR is not a tax return, but a report filed with the Treasury stating that the person filing has a financial interest in, or signatory authority over, financial accounts in a foreign country with an aggregate value exceeding \$10,000 at any time during the tax year. As part of the FBAR reporting requirement, persons are instructed to indicate on their Form 1040, Schedule B, Part III, whether the individual has an interest in a financial account in a foreign country by checking “Yes or “No” in the appropriate box. The Schedule B then directs the taxpayer to file the FBAR, which is used to report a financial interest in or signatory authority over bank accounts in a foreign country. The deadline for filing an FBAR for each calendar year is on or before June 30th the following year and this date cannot be extended.

The prescribed Department of Treasury form is TD F 90-22.1, *Report of Foreign Bank and Financial Accounts*¹⁸ (otherwise referred to as “FBAR”) and is available on the IRS website. The instructions to the FBAR explain how compliance with the statute is achieved and sets forth in detail the required information and those persons obligated to comply with the FBAR reporting requirements.

American Jobs Creation Act of 2004 Changes

In further effort to improve FBAR compliance and enforcement, Congress, in Section 821 of the American Jobs

Creation Act of 2004, reorganized Title 31 USC §5321(a) (5), and enacted a new civil penalty for non-willful violations of FBAR reporting requirements and increased the penalty for willful violators.¹⁹ Under these changes, the new civil penalty for non-willful violations is up to \$10,000 and the existing penalty for willful violations was increased to an amount up to the *greater of*: (1) \$100,000 or (2) 50 percent of the amount of the transaction or the balance in the account at the time of the violation. The American Jobs Creation Act of 2004 made no changes to criminal FBAR penalties under Title 31 USC §5322. Criminal violations of the FBAR rules can result in a fine of not more than \$ 250,000 or five years in prison or both, and if the failure to file an FBAR is part of a pattern of illegal activity, the statute provides for a fine of up to \$500,000 and imprisonment of up to 10 years.

The statute states that the civil penalty can be imposed despite the fact that a criminal penalty is imposed with respect to the same violation.²⁰ The IRS has six years to assess a FBAR civil penalty,²¹ and once assessed, the IRS has two years from the date of assessment to bring an action to recover an unpaid penalty.²² The statute of limitations for criminal violations is five years.²³

Taxpayer Education and Guidance

The rules and regulations governing the FBAR reporting requirements have been given little attention over the years by both taxpayers, tax professionals, and even those in Government charged with enforcing these requirements. Since the IRS took over enforcement responsibilities from FinCEN in 2003, much more attention is being paid to the reporting requirements. While many issues remain outstanding, the IRS has made substantial progress.

Historically, taxpayers and their advisors seeking to determine whether there was a FBAR filing obligation were limited to consulting the instructions attached to the form. That, however, is changing with the IRS establishing a unit where taxpayers and their clients can seek guidance.²⁴ While many questions remain, many have been answered—at least from the IRS' viewpoint.

On June 20, 2007, the IRS held a National Phone Forum to disseminate information to the public regarding the FBAR. The IRS provided an overview of the FBAR's purpose, reporting requirements, penalties and compliance initiatives. As part of the program, the tax community was offered the opportunity to submit questions. In what proved to be a valuable component to the Forum, the IRS

disseminated in writing the questions and answers from the Program (see Exhibit 1, *infra*). The FBAR Questions and Answers (FBAR Q&A) indicate that they were approved by the SB/SE Counsel on October 22, 2007. The FBAR Q&A provides a valuable source of information to guide tax professionals and their clients about FBAR compliance issues. Many previously unanswered questions were addressed in the Q&A FBAR and some of the more significant issues are discussed below.

As time goes on and the education and enforcement effort grows, one should anticipate the IRS will insist on better compliance and we will see penalties asserted more often than in the past.

Aggregate Value

The FBAR reporting requirement is triggered if the aggregate value of the financial accounts exceeds \$10,000 at any time during the calendar year.²⁵ The FBAR Q&A clarifies that the largest value during the year is determined separately for each account (including those that did not exceed \$10,000) and then the accounts are added together. If the value of both accounts exceed \$10,000, then all accounts must be included on the FBAR form. The aggregate value is determined using the largest amount that appears on the bank statement, and not merely the ending balance. Thus, it would seem that if a taxpayer had two accounts during the year and at one point one account had \$5,100 and \$5,000 of the account was transferred to another account during the year, the IRS expects a FBAR to be filed—even though the taxpayer never had more than \$5,100 during the year.

Community Property Rights

If both husband and wife are joint owners of an account or both have signatory authority over an account otherwise triggering the FBAR requirements, then each spouse must file a separate FBAR. However, the FBAR Q&A clarifies that a person would not have an independent FBAR requirement by virtue of his or her community property law interest in the account. That is, under this guidance, a community property interest in funds in a foreign account is not a “financial interest” in an account which would require separate reporting.

Due Diligence Regarding FBARs

Circular 230 requires that a practitioner exercise due diligence in preparing or assisting in the

preparation or, approving and filing of tax returns, documents or other papers relating to IRS matters.²⁶ The FBAR Q&A states that in most cases, if (1) the preparer asks if the taxpayer had a foreign account and the answer is no, and (2) if the preparer has no reason to believe that the taxpayer has a foreign investment account, that should be sufficient to demonstrate due diligence on the part of the tax preparer.

The FBAR Q&A would seem to require that all preparers ask the taxpayer this question—which does

not seem to have been the practice in the past—at least for most preparers. While the foreign bank account question is found in tax organizers sent to taxpayers, they are not used in all cases, and in many cases, the taxpayers never complete the organizer. Moreover, most tax return software programs default to the answer “no” when it comes to this question. The IRS would no doubt like to enlist tax preparers in their effort to increase FBAR compliance and given increased IRS enforcement focus on preparers and preparer penalties, it is not too far a field to anticipate that if a taxpayer violation is found, the focus could turn to the preparer as to whether due diligence was exercised under Circular 230. Attached as Exhibit 2 are the Office of Professional Responsibility Comments on Professional Responsibility and the Report of Foreign Bank and Financial Accounts.

Fax Signatures

The FBAR requires a signature, but does not contain a penalty of perjury statement. The FBAR Q&A states that the IRS does not accept a fax signature on the FBAR. However, if the taxpayer is pressed for time, the FBAR should be filed with a fax signature. The taxpayer should follow up with an Amended FBAR with an original signature with an explanation of the why the original signature was obtained late.

Foreign Branch of US Bank

The FBAR Q&A states that a bank account in a branch of a United States bank that is located in a foreign country is considered a foreign account requiring the FBAR disclosure requirements. However, an account with a

US military banking facility that services US Government installations overseas need not be reported on an FBAR, even though the account may be located in foreign country. For FBAR reporting purposes, Puerto Rico, the Virgin Islands, Northern Mariana Islands and the Territories and Possessions of the United States are not considered to be foreign countries.

Foreign Life Insurance Policies & Other Assets

The term “financial accounts” for FBAR reporting purposes is broadly defined to include any bank, securities, savings, demand, checking, deposit, time deposit or any other account maintained with a financial institution.²⁷ The FBAR Q&A states that if the cash surrender value insurance policy can be used to store cash that can be withdrawn at a later time, it would be treated as a financial account for FBAR reporting purposes. If the policy is located overseas, and the cash surrender value exceeds \$10,000, the policy holder should report the policy on an FBAR. Policies acquired in the United States from an insurance agent in the United States are not policies located overseas.

According to the FBAR Q&A, an account holding gold bullion is considered a reportable account. Whereas an investment in an interest bearing security issued by a foreign government, such as savings bonds, acquired through a bank in the United States or mutual funds located in the United States that invest in securities located in a foreign country, does not create a FBAR obligation. Lines of credit or an ownership interest in real estate are not interests in foreign financial accounts.

Postmarks

Tax returns are considered timely on the day they are mailed. FBARs are not tax returns, and according to the FBAR Q&A, are considered filed on the day they are received, not on the date they were mailed.²⁸

Delinquent FBARs, Penalties and Voluntary Disclosures

The IRS provided important insight how it will treat taxpayers with no previous knowledge of the FBAR requirement who would like to get into compliance. The FBAR Q&A states that the taxpayer should file any FBAR that was required during the past six years and attach an explanation as to why the FBARs were

delinquent. No penalty will be assessed if there was reasonable cause for not filing the FBAR

It was stated during the Forum that the IRS does not have a formal voluntary disclosure policy specifically related to FBARS,²⁹ but it was suggested that it would be highly unlikely that the IRS would investigate and attempt to penalize taxpayers who voluntarily come forward and file.

New IRS Examination Procedures

On January 1, 2007, the IRS issued the Internal Revenue Manual (“IRM”) provisions relating to the Bank Secrecy Act Chapter (IRM 4.26.17) to set forth FBAR examination procedures not previously formalized in writing. On May 5, 2008, the IRS revised IRM 4.26.17, modifying and superseding portions of IRM 4.26.17.

The new manual provisions set forth the procedures to be followed by IRS examiners in the Small Business/Self Employed (SB/SE) division who are responsible for enforcing compliance with the reporting and record keeping requirements of the FBAR. These provisions also provide helpful guidance for tax professionals whose clients are under FBAR examination. The new IRM provisions sets forth procedures for initiating and closing FBAR investigations, investigation procedures, and procedures for referrals of FBAR violations for criminal enforcement.

The increased attention which the IRS now affords to FBAR matters can be seen from the manual provision which requires that a separate FBAR file be set up if there appears to be a FBAR violation, regardless of whether a penalty is asserted.³⁰ This should help address the historical deficiencies when case files failed to contain sufficient documentation necessary to assess civil penalties.³¹ If the examiner determines that a FBAR should have been filed during a tax year, the examiner will determine whether the FBAR was filed and whether the records required by the FBAR instructions and the regulations were retained.³²

Code Sec. 6103 Privacy Issues

A FBAR examination can be initiated independently of a BSA or tax examination or can be initiated in the course of a tax or other BSA examination. Internal Revenue Manual provisions are geared to prevent the unauthorized use of information obtained by the IRS in a tax investigation for FBAR purposes.³³ If the

source of the FBAR information is a tax examination, the information acquired is “return information” protected by Code Sec. 6103.³⁴ The examiner must obtain a “related statute determination,” signed by an IRS Territory Manager, before using the return information in the FBAR case.³⁵ A related statute determination is necessary to allow the examiner to use the information obtained in the course of the tax investigation.³⁶ As part of the related statute determination, the Territory Manager should determine whether the potential FBAR violation is in furtherance of tax violations.³⁷ Without a related statute determination, the “return information” *cannot* be used in the FBAR examination and such use could subject the examiner to civil and criminal penalties for violating Code Sec. 6103.³⁸

If the examiner is conducting an examination solely under the BSA, however, a related statute determination is not needed to examine FBAR compliance, because no information from a tax examination or other Code Sec. 6103 protected information is involved.³⁹

Power of Attorney

A person may authorize a representative to receive information with respect to the FBAR examination. In a case that involves both tax matters and FBAR matters, an IRS Form 2848, power of attorney may be used.⁴⁰ In an FBAR case that does not involve a related income tax case; a general power of attorney should be used.⁴¹

The FBAR Examination

If it is determined that a taxpayer has an unreported foreign bank account, there can be a number of different consequences depending on whether the IRS determines there was a violation, a violation which should not be penalized, a violation subject to a penalty or a violation which warrants a referral to the Criminal Investigation Division.

No FBAR Violation

If no FBAR violation is found, the examiner will complete a summary memorandum and a FBAR Monitoring Document (“FMD”) and close the FBAR case to the group manager, who will review the case for technical and procedural issues.⁴² The Detroit Computing Center (“DCC”) will record the information from the FMD into the FBAR database and note

in the FBAR database if and when a follow-up FBAR examination is needed.⁴³

FBAR Violation Without Penalty

If a FBAR violation is found, but no penalty is warranted in view of the facts and circumstances, the examiner may issue a FBAR warning letter, Letter 3800.⁴⁴ In this situation, the examiner will issue the Letter 3800 to the person in violation of the FBAR requirements and a copy will be retained in the file.⁴⁵ The person in violation will be asked to return any delinquent or corrected FBARs and a copy of the warning letter to the examiner.⁴⁶ The examiner will retain the original and a copy of the FBAR in the FBAR case file, and mark the FBAR as secured through examination.⁴⁷ DCC will note in the FBAR database if and when a follow-up FBAR examination is needed.

FBAR Violation With Penalty

If the examiner determines it is appropriate to assert an FBAR penalty and that a referral to the Criminal Investigation Division is not appropriate or has been declined, the examiner will assert penalties in accordance with the FBAR penalty guidelines.⁴⁸ The examiner will submit the FBAR case file to a SB/SE Counsel Area FBAR Coordinator (“Counsel”).⁴⁹ Counsel will render advice within 45 days or will work with the examiner to establish a shorter time frame if expedited review is needed.⁵⁰ Counsel will prepare a written memorandum of review of the FBAR case.⁵¹ If counsel recommends imposition of the penalty, the review will assist Appeals in the event the case is appealed.⁵² If Counsel does not recommend imposition of the penalty, the review will state the reasons for disagreement.⁵³ If disagreement is based upon inadequate factual development, the review should recommend areas for further examination.⁵⁴

Taxpayer’s counsel should carefully monitor the case and be actively engaged if it is determined the examiner is considering asserting penalties. This includes making appropriate submissions on whether there was a violation and, if so, whether there was reasonable cause for and a lack of willfulness regarding the violation. These submissions may not only convince the examiner, but could be influential with the examining agent’s Group Manager and Area Counsel as to whether the penalty is warranted and if warranted, the appropriate amount of the penalty.

Meetings with the Group Manager or Area Counsel should also be requested in appropriate circumstances—even if they might be resisted by the IRS. The penalty for willful failures carries a high burden of proof which the government must meet to sustain the penalty⁵⁵ and the amount of the penalty may depend on the taxpayer's degree of culpability under the IRS' penalty mitigation guidelines. There is substantial opportunity at the examination stage for counsel to influence a more favorable outcome of the examination.

If the IRS determines the FBAR penalty is appropriate, the examiner will issue Letter 3709, the FBAR 30 day letter, and transmit with that letter, the Form 13449, FBAR Agreement to Assessment and Collection, which sets forth the basis for the FBAR penalty.⁵⁶ No interest accrues on the FBAR penalty prior to assessment or if payment is made within 30 days after the date a notice of penalty amount due is mailed to the taxpayer.⁵⁷ In addition to interest, a six percent delinquency penalty applies to amounts remaining unpaid ninety days from the date a notice of penalty amount due is first mailed to the taxpayer.⁵⁸

Agreed Case

If the taxpayer agrees to assessment of penalties, the taxpayer should return to the examiner the delinquent FBARs, along with the signed and dated Form 13449.⁵⁹ The examiner places the signed Agreement Form 13449 in the FBAR case file, and retains a copy of the FBAR in the FBAR case file, and marks the FBAR as secured through examination. The examiner will complete a summary memorandum and a FMD and close the FBAR case to the group manager, who will review the case for technical and procedural issues.⁶⁰

Unagreed Case

If the FBAR penalty is not agreed to, the taxpayer must mail a written protest in duplicate to the examiner within 30 days.⁶¹ The case is then transferred to the IRS Appeals Division.⁶² The appeal is entered on the FBAR database at the DCC which has responsibility to monitor the statute of limitations.⁶³ The DCC is to notify Appeals when the statute of limitations has less than a year to expire.⁶⁴ Placing responsibility for monitoring the statute of limitations on the DCC seems to be at odds with established procedures in tax cases which place responsibility on the examination and appeals personnel.

IRS Appeals

The new IRM provisions confirm that FBAR penalty determinations by the examination function will be subject to pre-assessment and pre-collection IRS Appeals review—like most other taxes and penalties administered by the IRS.

Collection

It should be noted that unlike a tax or penalty which is subject to collection under the Internal Revenue Code's broad administrative collection remedies of liens and levies, the FBAR penalty assessment is not subject to these administrative collection remedies. Remedies available to collect the penalty are limited to collection through the Financial Management System (FMS), which collects nontax debts for the government and in appropriate cases, by lawsuit in federal district court. This limitation on the IRS' ability to administratively collect the FBAR penalty should provide an inducement to the IRS to resolve FBAR penalty determinations in a manner which includes payment of the penalty.

FBAR Criminal Referrals

The IRS Criminal Investigation Division ("CI") has authority to examine criminal FBAR violations.⁶⁵ Acceptance by CI of an FBAR referral for criminal investigation depends on the evidence establishing willfulness.⁶⁶ A Fraud Technical Advisor (FTA) can assist an examiner in determining whether or not there is a willful violation and provide the examiner with information concerning referrals to CI.⁶⁷ If the examiner considers that the case warrants referral for possible criminal investigation, the examiner will involve a FTA as soon as possible.⁶⁸ If the FTA considers that criminal investigation is not appropriate, the FTA will so advise the examiner and provide a written explanation of the reason that criminal referral is not appropriate.⁶⁹ The examiner may then proceed with the FBAR case under FBAR civil procedures.⁷⁰

If there are "firm indications" of willful FBAR violations that warrant referral to CI, the FTA will advise the examiner.⁷¹ The examiner will prepare Form 2797, Referral Report of Potential Criminal Fraud Cases, with a detailed explanation of the FBAR violations.⁷² If the referral of the FBAR case to CI is declined, the exam-

iner follows procedures where material violations exist and civil penalties are asserted.⁷³ If the referral is accepted, the examiner will place a transmittal memorandum in file indicating acceptance, complete the FMD showing CI acceptance and forward the FMD to DCC, which will enter the information on the FBAR database, note on the FBAR database that a follow-up FBAR civil examination is needed and monitor the statute of limitations.⁷⁴ After completion of the criminal case, the examiner will forward any delinquent or corrected FBARs to DCC and commence any appropriate civil FBAR penalty action.⁷⁵

Conclusion

It has been over five years since the IRS was first delegated authority to administer the FBAR compliance program. More and more taxpayers and their

professionals are becoming aware of the FBAR filing requirement, but many are still unaware of the requirement. To the IRS's credit, they have recognized that FBAR compliance is as much an educational issue as one of enforcement, and for the most part have been cautious in asserting penalties. That is the only rational approach for what is in essence a "new" reporting regime which few taxpayers, their professionals and even IRS personnel, knew about or understood. As time goes on and the education and enforcement effort grows, one should anticipate the IRS will insist on better compliance and we will see penalties asserted more often than in the past. There will likely be some Office of Professional Responsibility inquiries as to why preparers did not ask the question of whether their client had a foreign bank account.

Stay tuned.

Exhibit 1. FBAR Q&A

The following materials were released 10/22/2007 by IRS following a National Phone Forum on FBAR compliance. The information is deemed reliable as of that date. National Phone Forums are sponsored by Internal Revenue Service Small Business/Self Employed Communications Liaison and Disclosure Division, Stakeholder Liaison. Additional questions for IRS concerning FBAR can be sent to FBARquestions@irs.gov.

Absence of a Signature

In an absence of signature or other authority over an account of the trust is a beneficiary of a trust exempt from filing on the foreign financial account(s) of the trust?

No. A beneficiary may have an obligation to file an FBAR even though he has no authority over the foreign accounts of the trust. The beneficiary should file an FBAR if the beneficiary is a U.S. person and either has a present beneficial interest in more than 50 percent of the assets of the trust or receives more than 50 percent of the current income of the trust. See the definition for "financial interest" in the instructions to the FBAR.

Aggregate

In the slide (page 4) stating "if the aggregate value of these accounts exceeds \$10,000 at any time during the calendar year" - Does it mean the total value of ALL the accounts exceeds \$10,000 or the largest value of EACH account over \$10,000 during the year?

For purposes of determining whether an FBAR needs to be filed, the largest value during the year is determined separately for each account (including the accounts that did not exceed \$10,000) and added together. See the instructions for Item 22, Account Valuation, for the FBAR form.

If a U.S. citizen has two foreign bank accounts with the following max. balances:

\$12,000

\$1,000

Do both accounts have to be included on the FBAR form?

Yes.

When is the aggregate value determined? For instance, if 2 foreign accounts exist and the ending monthly balances when added together do not exceed \$10,000 at any time

during the year, is there a filing requirement if during some month the balances in the 2 accounts exceeded \$10,000 for 1 day.

The maximum value of the account when there are monthly statements is the largest amount that appears on the statement, not the ending balance. See the instructions for Item 22, Account Valuation, for the FBAR form.

If a person holds a foreign account and the balance of the account fluctuates during the year and for argument purpose the amount goes over 10,000 and comes down by the end of the year. Would this person need to file forms subject to FBAR requirement.

Yes. The maximum value of the account is the largest amount during the year. See the instructions for Item 22, Account Valuation, for the FBAR form.

Bank Subsidiary

Employees of a Bank who have authority over foreign accounts with no personal interest in the account are exempt from filing the report. Are Employees of a “Bank Subsidiary” (that is not a bank, but is a subsidiary of a large domestic bank that is subject to bank Regulatory authority), also exempt from filing the report?

Yes, provided that the employees otherwise qualify for the exception for officers and employees of banks described in the FBAR instructions.

Canadian Citizen – Resident of US and Form 8891

If a Canadian citizen is a resident of the U.S. and has filed the Form 8891 each year for their various RRSPs, is an FBAR to be filed along with the 8891 each year?

Yes. Even though both the FBAR and IRS Form 8891 contain similar information about the Canadian retirement accounts, they serve different purposes. The Form 8891 contains information that is needed by IRS, including information that is not reported on an FBAR. Unlike the Form 8891, the FBAR is intended to be made available

to other government agencies, including state and federal law enforcement agencies. Internal Revenue Code restrictions on disclosure of tax return information generally prevent the use of the Form 8891 for this purpose.

If the filing of 8891 has been done the past 2-3 years, but no FBAR has been filed, how should I proceed with various clients filing needs? The FBAR filing requirement for RRSPs seems to be a duplication of the reporting process. Therefore is there any thought into allowing RRSPs to be an exception to the rule if a 8891 is properly filed?

No one is considering such an exception at this time. Even though both the FBAR and IRS Form 8891 contain similar information about the Canadian retirement accounts, they serve different purposes. The Form 8891 contains information that is needed by IRS, including information that is not reported on an FBAR. Unlike the Form 8891, the FBAR is intended to be made available to other government agencies, including state and federal law enforcement agencies. Internal Revenue Code restrictions on disclosure of tax return information generally prevent the use of the Form 8891 for this purpose.

Canadian Registered Retirement Plan

My taxpayer has had a Canadian Registered Retirement plan. He has not had any contributions to it for many years, however, he began receiving distributions from it in 2006. He filed form 8891 reporting the distribution and account balance with his 2006 individual income tax return. Is it also necessary to file TD F 90-22.1? This is his only foreign account and since the 8891 was filed, it would seem redundant. I believe he filed the TD F 90-22.1 in 2005, but may not have filed in previous years.

Yes, both forms should be filed. Even though both the FBAR and IRS Form 8891 contain similar information about the Canadian retirement accounts, they serve different purposes. The Form 8891 contains

information that is needed by IRS, including information that is not reported on an FBAR. Unlike the Form 8891, the FBAR is intended to be made available to other government agencies, including state and federal law enforcement agencies. Internal Revenue Code restrictions on disclosure of tax return information generally prevent the use of the Form 8891 for this purpose.

CFC

Does a CFC have to file a TD-F 90-22.1 or only the shareholders? If so what is the support for this position? Do attribution rules apply? If so in what way and what is the support for this position?

Presently, if the controlled foreign corporation (the CFC) was not incorporated in the United States, it does not have to file FBARs since only domestic corporations have to file FBARs. This is expected to change with the next revision to the FBAR form. In the current draft for the next revision, foreign corporations that are in, and doing business in, the United States will also have to file FBARs. A shareholder who is a United States person may have to file FBARs depending on the shareholder's ownership interest in the CFC. If a shareholder owns directly or indirectly more than 50 percent of the total value of shares of stock in the CFC, the shareholder has to file FBARs, even if the CFC does not have to file. Concerning indirect ownership interests, the attribution rules in the Internal Revenue Code are not applicable with respect to FBARs. The FBAR instructions, however, provide guidance on whether an individual has a financial interest in a foreign account held by a partnership, corporation, estate, or trust.

Community Property State and Joint Ownership

Does the spouse of a person with an interest in / signature authority over a Foreign Bank Account by reason of residing in a community

property state have a separate (for her only) FBAR filing requirement? The spouse with the interest in / signature authority over a Foreign Bank Account does file the FBAR. The account is not listed with the foreign financial institution as jointly owned.

No. If the spouse is not a joint owner of his or her spouse's account except by virtue of the state's community property laws, and does not have signature authority or other authority comparable to signature authority over the account, there is no filing requirement.

Say the wife has her own foreign bank account, but lives in a community property state, should the FBAR indicate the account is jointly owned by the spouse?

No. If the husband is not a joint owner of the account except by virtue of the states' community property laws, and the husband does not have signature authority or other authority comparable to signature authority over the account, the wife should not indicate on the FBAR that the account is jointly owned with the husband.

Corporation

Can you please explain how FBAR reporting should be done where a corporation owns a foreign bank account? Can the corporation file the FBAR form as the entity having a financial interest in the account? Individual employees of the corporation would have signature authority over the account, but cannot personally benefit from the account. Would the corporation's reporting cover those individual employees?

The domestic corporation should file an FBAR to report the corporation's financial interest in the foreign bank account but the employees who are United States citizens or residents also have an obligation to file FBARs if they have signature authority or other authority that is comparable to signature authority over the bank account.

There is an exception for officers and employees of domestic corporations that are listed on a national securities exchange

or that have assets exceeding \$10 million and at least 500 shareholders. In order for the exception to apply, the officer or employee must have no personal interest in the account and must have been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report which includes the account.

I have a client that is an S-corporation (Company A). Company A's stock ownership is as follows: 6% John Doe (the father), 6% Jane Doe (the mother), 44% Bill Doe (John and Jane's son) and 44% Bob Doe (John and Jane's son). Company A owns 100% of the stock of Company B (which is a Qualified Subchapter S Subsidiary of Company A). Company B has a bank account in Montreal, Canada. The value of the account exceeded \$10,000 for 2006.

Who is required to file a Form TD F 90-22.1 for 2006? Company A? Company B? John Doe? Jane Doe? Bill Doe? Bob Doe? All six of them?

S corporation status has no effect on the FBAR reporting requirements. Companies A and B would have to file FBARs but Company A can file a consolidated FBAR for both corporations. The shareholders do not have to file FBARs. Although any shareholder who owns directly or indirectly more than 50% of the value of the stock of either of the two corporations would have to file FBARs, the attribution rules in the Internal Revenue Code do not apply to FBARs. The FBAR instructions provide guidance on whether an individual has a financial interest in a foreign account held by a partnership, corporation, estate, or trust.

You are an officer of a corporation that is not a large public company. The corporation files the FBAR and indicates on the FBAR that you have signature authority over a financial account. Am I correct in understanding that both the corporation and the officer should have filed FBARs? Is this situation similar to the joint account situation where only one FBAR was filed even though two were technically required? So is it safe to infer that penalties would not be assessed and that going forward separate FBARs should be filed?

Yes, both the corporation and the officer should have filed FBARs. The officer can file delinquent FBARs, attaching a statement explaining the circumstances, and file current FBARs, keeping copies for his records. No penalty will be assessed if there was reasonable cause for not filing the FBAR. Reasonable cause is determined based on the facts and circumstances of each case.

Our parent company owns more than 50% of several US entities and we file a consolidated 1120 return. We have more than 25 foreign bank accounts in which we have financial interest. On many of these accounts we also have signature authority. What is the proper way to report this? If the accounts are included in the consolidated report as a result of the financial interest, do we also have to report them separately as a result of having signature authority?

The corporation can file a consolidated FBAR to report the accounts but officers and employees who are United States citizens or residents also have an obligation to file FBARs if they have signature authority or other authority that is comparable to signature authority over the account. There is an exception for officers and employees of domestic corporations that are listed on a national securities exchange or that have assets exceeding \$10 million and at least 500 shareholders. In order for the exception to apply, the officer or employee must have no personal interest in the account and must have been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report which includes the account.

Do US shareholders that own over 50% of a corporation file a form TDF 90-22.1? Therefore the corporation, the 2 employees that can transfer the funds from the US bank account to pay the suppliers (check signers), and the two 50% shareholders need to file a form TDF 90-22.1 for the accounts? So 5 forms for the same bank accounts need to be filed.

A shareholder will only have to file FBARS as a shareholder if he or she owns directly

and indirectly more than 50% percent of the total value of shares of the corporation. If a shareholder owns exactly 50% of the total value of the shares, then the shareholder does not have to file FBARs as a shareholder. The FBAR reporting requirement can result in multiple FBARs that report the same bank account.

Corporate Foreign Account

If a U.S. person has signature authority over a corporate foreign account, but doesn't own 50% of the corporation do they need to file the FBAR?

Yes, even though the corporation files an FBAR to report the foreign account, a United States person who has signature authority or other authority comparable to signature authority also has to file an FBAR to report the same account. There is an exception for officers and employees of domestic corporations that are listed on a national securities exchange or that have assets exceeding \$10 million and at least 500 shareholders. In order for the exception to apply, the officer or employee must have no personal interest in the account and must have been advised in writing by the chief financial officer of the corporation that the corporation has filed a current report which includes the account.

Issues Respecting Decedents

If a taxpayer is deceased and the Personal Representative of the Estate discovers that an FBAR was never filed for the deceased when preparing the FBAR for the Estate, and believes that the taxpayer had foreign financial accounts that may have had an aggregate amount above \$10,000, (the documentation of such accounts is not readily available) what is the P.R.'s responsibility and what steps should the personal representative take?

The personal representative should file an FBAR for the estate but will not be expected to file FBARs that the decedent should have filed.

What steps would the personal representative take if unable to locate the documents from the foreign accounts?

The personal representative should take reasonable steps to obtain the information needed to complete the FBAR, including contacting the foreign financial institution. The personal representative can file the FBAR with the information the personal representative was able to obtain and attach an explanation as to why the FBAR is not complete, keeping copies for his records.

Who is responsible for the penalties for the deceased taxpayers non-filing?

If penalties were assessed against the deceased taxpayer, the penalties are debts against the estate. No penalty will be assessed if there is reasonable cause for the nonfiling and delinquent FBARs are filed.

Domestic company making legitimate loan to foreign company/individual

What about a domestic company that makes a legitimate loan (market value rates and terms) to a foreign company or individual?

Generally, a loan by a domestic company to a foreign company or individual is not a financial account for FBAR reporting purposes. An exception would be if the foreign company or individual routinely entered into such loans, or accepted deposits, with the general public or otherwise acted as a bank or other financial institution with respect to such loans.

Due Diligence

When we, as preparers, question our clients and get a negative response to the "Foreign investment" questions on Sch B - Form 1040, how do you suggest we prove "due diligence"? Can a question be added below those to questions so that the Preparer can indicate that the client has responded negatively?

If the preparer is not reasonably expected to know that the taxpayer has a foreign financial account and the preparer asks the taxpayer if the taxpayer had a foreign financial account this should be sufficient, in most cases, to show due diligence. There are no plans to add another question to the Schedule B with respect to foreign accounts.

Expansion of the Large Corp exception to include Universities

I would like to know whether Treasury is looking at an expansion of the Large Corp exception to include Universities and their employees. The current exception requires shareholders (>500) as well as domestic corporation status in order for the employees to be exempt from filing.

Universities are becoming more and more involved on a global level. We have “European Campuses” or “Semester Abroad” programs and hundreds of students in “Exchange” programs. Many Universities have multiple foreign bank accounts and the definition of “signature authority” is often 15 to 20 people who administer the foreign programs, wire funds, set budgets, and process payments, as well as the Dean of the College offering the program, the Controller, Asst. Treasurer, Treasurer and President. Basically, anyone who can expend money from that “Fund”.

I’m sure that this is the reason that employees of Large Corps are excluded... What about large Universities??

There is no exception to the FBAR reporting requirement for officers and employees of large universities. The officers and employees of the universities who are United States citizens and residents will have to file FBARs if they have signature authority or other authority comparable to signature authority over the foreign financial accounts, even if they have no personal financial interest in the accounts.

Fax Signatures

Does the IRS accept a fax signature on the FBAR?

No.

Should you file the FBAR with fax signature if pressed for time, then follow up with Amended FBAR with an original signature later and an explanation of why the signature was obtained late?

Yes.

Filing Requirements

Is a U.S. Citizen who is permanently living outside of the U.S. required to file the form?

Yes.

We have a client who has a domestic corporation in which there are two foreign directors and a foreign corporation which holds a financial interest in said domestic company. The 2 foreign directors also hold interest in the same foreign corporation. There is also an officer who we believe has access to at least one of the foreign accounts, but as of yet we do not know if he holds any financial interests in them. Who is required to file the FBAR, if they meet the over 10,000 aggregate total?

If the domestic corporation has a financial interest in foreign accounts, then the domestic corporation is required to file an FBAR. If the client owns directly and indirectly more than 50% percent of the total value of shares of the corporation, then the client is required to file an FBAR. If an officer or employee is a citizen or resident of the United States and has signature authority or other authority comparable to signature authority over foreign financial accounts of the corporation, then that person is required to file FBARs.

Financial Interest

Is ownership in a foreign country such as a trust, real estate, collectables, and inheritance considered financial interest under FBAR?

An ownership interest in real estate or collectibles is not a financial account for FBAR purposes and is not reported on an FBAR.

A trust is generally not a foreign account for FBAR purposes, it can be if, for example, it is an investment trust similar in function to a mutual fund with account owners holding an equity interest in the trust. This would not include trusts set up under a will to manage the interests of the beneficiaries in the decedent's estate. If the trust is a domestic trust, it is subject to the FBAR reporting requirements. Whether the trust is domestic or foreign, if a beneficiary is a citizen or resident of the United States and has either a present beneficial interest in more than 50 percent of the assets of the trust or receives more than 50% of the current income of the trust, then the beneficiary is also subject to the FBAR reporting requirements.

If a citizen or resident of the United States inherits an interest in a foreign financial account, then that person is subject to the FBAR reporting requirements with respect to his or her inherited interest in the foreign financial account.

Does the exemption for officers in a large corporation extend to smaller non-publicly traded corporations? At what level of the corporation would an individual be responsible for filing FBAR forms? For example would a controller be responsible, manager or CEO? How many forms per corporation need to be filed?

The exception for officers and employees of large corporations does not apply to non-publicly traded corporations unless the corporations have over \$10 million in assets and at least 500 shareholders.

Only the officers and employees who have signature authority or authority comparable to signature authority must file FBARs for the corporation's financial accounts. If their supervisors do not have this authority, they do not file FBARs.

The corporation files FBARs for its financial accounts and each officer or employee with signature authority or other authority comparable to signature authority files an FBAR for the accounts they have authority over.

Form 1099-INT

A U.S. bank account issued a U.S. Form 1099-INT. However, the banker's name and address on Form 1099-INT indicated foreign branch. Does this bank account subject to FBAR filing requirement, assuming the balance is over \$10K? If so, how do I report this on Form TD F 90-22.1, line 25?

Generally, if the account is maintained with a branch of a U.S. bank that is located in a foreign country, then the bank customer should file an FBAR. For FBAR reporting purposes, Puerto Rico, the Virgin Islands, the Northern Mariana Islands, and the territories and possessions of the United States are not considered to be foreign countries. In addition, an account with a United States military banking facility that serves U.S. Government installations overseas is not reported on an FBAR even though the account may be located in a foreign country.

Foreign Entity for Depository

What is actually considered a foreign entity for depository? Military clients often answer the question that they do have an account on base overseas, however I am assuming this is just an extension of a U.S. banking system established in the U.S. Is this a correct assumption, that there would be no filing requirements even if they deposited greater than \$10000 into this on base bank.

An account with a United States military banking facility that serves U.S. Government installations overseas is not reported on an FBAR even though the account may be located in a foreign country. The military clients may wish to confirm that their accounts are with a military banking facility as described in the FBAR instructions. If so, then they do not have to file FBARs for the accounts.

Foreign Life Insurance

A second question pertains to an internet posting in 2005. The posting contains an email

response from Elizabeth Witzgall and states that Treasury's position is that paying the premium on a foreign life insurance policy that has a cash value component is a "deposit" within the meaning of FBAR. Thus, the cash value account of a foreign life insurance policy would essentially be a financial account. If this is indeed a valid posting on the website, why has this not been reflected on the FBAR instructions or on the FBAR FAQ IRS Website? Needless to say, the insurance lobby should understand the issue.

The definition for financial account in the FBAR instructions includes "savings, demand, checking, deposit, time deposit, or any other account maintained with a financial institution or other person engaged in the business of a financial institution. Since a cash surrender value insurance policy can be used to store cash and withdraw it at a later time, it is treated as a financial account with a financial institution for FBAR purposes. If the policy is located overseas, and the cash surrender value exceeds \$10,000, the policy holder should report the policy on an FBAR. This only applies to policies located overseas, policies acquired in the United States from an insurance agent located in the United States are not policies located overseas.

Foreign Life Insurance Accounts

Are foreign life insurance products considered other financial instruments? If a US Citizen is a beneficiary of a Canadian insurance policy required to file an FBAR if the proceeds exceed \$10,000? Example: Canadian insurance policy pays annual dividends of an amount under \$50. Should we then be inquiring details about the insurance?

The U.S. citizen does not have to report being the beneficiary of a foreign life insurance policy. If, on the other hand, the U.S. citizen is a policy holder of a life insurance policy located in a foreign country, and the cash surrender value of the policy exceeds \$10,000, the U.S. citizen is required to report the policy on an FBAR.

Foreign Postmark

Would a foreign postmark on June 30th (or July 2 this year) count as timely filed?

Unlike with tax returns, FBARs are considered filed on the day that they are received, not the date that they are mailed.

Foreign Trust

A US person is deemed to have a financial interest in a foreign account when the person has a beneficial interest in 50% or more of the assets in a foreign trust or receives 50% or more of the current income. If the foreign trust is a wholly discretionary trust, how does one measure the percentages? Is it solely determined retrospectively based upon distributions that were actually made?

A beneficiary files an FBAR to report his interest in the foreign financial accounts that are held by the trust. It does not matter if the trust itself is foreign. If the trust is a domestic trust, it also has an obligation to file FBARs.

If the beneficiary's interest in the assets or income of a trust that holds foreign financial accounts cannot be determined, the beneficiary should file an FBAR. If you have a question as to how the terms of a particular trust agreement affect a beneficiary's obligation to file FBARs, you may request a written ruling from IRS.

Gold Bullion

Is an account that is holding 'gold bullion' considered a reportable account?

Yes. An account with a financial institution that is located in a foreign country is a reportable account whether the account holds cash or non-monetary assets.

Interest-bearing Securities Issued by Foreign Country

Interest-bearing securities issued by Foreign Country. Fiscal Agent and Financial agent of the securities is a US Bank. Is there a potential

FBAR requirement for one who invest in these securities?

No. Investments in interest-bearing securities, such as savings bonds, that are issued by a foreign government and that are acquired through a bank located in the United States are not reported on FBARs.

IRA Account

Assume an Individual Retirement Account with a custodian domiciled in the United States. Assume that the owner of the account is an individual who is a citizen of the United States and who is domiciled in the United States. Assume that the IRA account owns an interest in an off-shore hedge fund. Question 1: Is an FBAR report required? Question 2: Who is required to file the report? - the custodian? - the owner? - both the custodian and the owner?

The IRA is an account located in the United States. The owner of the IRA does not have to report the interest in the foreign hedge fund that is held in the IRA located in the United States. If the custodian does not have signature authority (or other authority comparable to signature authority) over the hedge fund account, but instead, is only holding units of the hedge fund as an investment in the IRA, and does not control the hedge fund, then the custodian does not have to file an FBAR either.

With so many clients now using International Funds (e.g. Vanguard Target Retirement Funds, or other similar funds) for IRA and/or 401k Investments, will they be required to report on an FBAR form? And to answer the question on the Schedule B - Form 1040?

No FBAR is required for mutual funds that are located in the United States even though the funds invest in the securities of companies located in foreign countries. If, however, the mutual funds are located in a foreign country, then an FBAR is required even if the funds only invest in the securities of companies located in the United States. It is the location of the mutual fund, not the types of investments made by the fund that determines whether a

mutual fund investor should file an FBAR. If the client's mutual fund is located in a foreign country, then the client is subject to the FBAR reporting requirement with respect to the mutual fund account and must treat the mutual fund account as a foreign financial account for purposes of answering the Schedule B question.

Does having the ability to vote (due to an IRA or 401k holding) during an annual meeting of a company in which a client invests (less than \$10K) globally cause a requirement to file a FBAR form?

No.

If a taxpayer has an IRA type account in a foreign country, does it need to be reported on an FBAR? If that is the case, which item should be checked in box 21 of the 90-22.1?

IRA accounts located in the United States are not reported on an FBAR. IRA type accounts that are located in a foreign country are financial accounts that are reported on an FBAR.

If the IRA-type account is not a bank or securities account, then check item c., Other, on the FBAR form and write a short description, in the space provided, of the type of account that it is.

LLC

Why would a domestic legal entity of an LLC not be included as a US person?

The definition in the FBAR instructions for "United States person" was not updated to include LLCs and other types of legal entities that may not have existed or that were not as common when the FBAR instructions were first published. The next version of the FBAR will include all legal entities in the definition of "United States person." Because LLCs share characteristics of both corporations and partnerships, we believe that the instructions may be interpreted to include such organizations in the definition of "United States person." For this reason, we advise that LLCs file FBARs. The next version of the FBAR form should make it clear that LLCs are subject

to the FBAR reporting and recordkeeping requirements.

Matching Program

Is there a matching program between Schedule B interest and FBAR account disclosure?

The information reported on an FBAR can be used by IRS for tax compliance purposes. Beyond this, we do not feel it is appropriate to discuss here whether there is such a matching program. The purpose for this conference call is to answer questions about the FBAR filing requirements.

Mexico Real Estate

Mexico does not allow a U.S. person to own real estate in Mexico. Therefore, when a U.S. citizen buys real estate in Mexico they buy the property through a Foreign Bank Trust. Is this the equivalent of a foreign trust and a U.S. beneficiary? Does this give rise to a 3520 or 3520-A?

If the U.S. citizen has an interest in a foreign trust, he should file a form 3520 or 3520-A. If a person has a question as to whether he should file a form 3520 or 3520A to report an interest in Foreign Bank Trust located in Mexico, he should consult a tax professional. An ownership interest in real estate is not an interest in a foreign account for FBAR reporting purposes.

What about a foreign trust in Mexico that owns real estate for a US citizen? Does this require a form TDF 90-22.1? US citizens cannot own certain real estate, so a trust is set up to purchase, mortgage, own the property.

No. An ownership interest in real estate is not an interest in a foreign financial account for FBAR reporting purposes.

Military

What about government and military employees stationed overseas? I assume the same rules apply if they open a bank account in the local area and have a balance greater than 10k at any point in time, correct?

Yes, generally, they would have to file FBARs if they opened a foreign bank account but there is an exception for certain banks operating on the military installation.

An account with a United States military banking facility that serves U.S. Government installations overseas is not reported on an FBAR even though the account may be located in a foreign country. The military clients may wish to confirm that their accounts are with a military banking facility as described in the FBAR instructions. If so, then they do not have to file FBARs for the accounts.

Money Laundering

Would you please discuss the how this reporting has uncovered money laundering? It doesn't seem that the individuals it is aimed to catch would actually file this form.

The reporting requirement was intended to discourage the use of foreign accounts by U.S. persons for money laundering and other illegal purposes since the civil and criminal penalties for failing to comply are substantial.

Non-Resident

A husband, who is a U.S. citizen, is living in a foreign country and married to a foreign national of that country. She is not a U.S. citizen and has never filed a U.S. tax return either with her husband or by herself. She has no social security number or tax identification number. She has never been to the United States. She has bank accounts with funds greater than \$10,000. Does she have to file the TD F 90-22.1? Their kids who also have never been to the United States and have no social security number or taxpayer identification number, but who are U.S. citizens, also have bank accounts that exceed \$10,000.. Do they have to file TD F 90-22.1

2) A U.S. Sub Chapter S. Corporation whose ownership consists of two U.S. citizens formed an off shore Business Trust(Corp)in the British Virgin Islands. The Foreign Corporations only bank accounts are in the United States.

All administrative work is performed within the United States. The British Virgin Island Corporation is owned 80% by the U.S. Sub S. Corp and 20% by individuals with no one of these individuals owning 10%. The individuals are all passive investors. Does the foreign Corporation have to file a TD F 90-22.1? What about the U.S. Domestic Sub S. Corp.

For the first scenario, the wife, who is not a U.S. citizen or resident, does not have to file FBARs but the children, who are U.S. citizens, do have to file with respect to their financial interests in foreign bank accounts.

For the second scenario, if the foreign corporation's only financial accounts are the bank accounts located in the United States, and the foreign corporation is not acting as a financial institution (such as a mutual fund company) then neither the investors nor the domestic corporation is required to file an FBAR to report a financial interest in the bank accounts.

Definition of US person for FBAR filing: An individual who is not a US citizen satisfies the substantial presence test for being a resident alien. They however file a 1040NR as a non-resident by using a treaty tie breaker or closer connection exception. Are they subject to the FBAR filing requirements?

Although the definition for "resident alien" in section 7701(b) of the Internal Revenue Code is not applicable with respect to the FBAR reporting requirements, individuals can establish that they are not residents for FBAR reporting purposes if they can show that they are not "resident aliens" for income tax purposes. In this case, the taxpayer who files as a nonresident alien does not have to file an FBAR. Please note that the filing instructions will change with the next version of the FBAR to require persons in, and doing business in the United States to file FBARs.

If someone is on a J visa, for example, so they are considered a nonresident for income tax purposes under 7701(b), even though they may be living in the US for two years, for example, are they required to file an FBAR? I know one speaker mentioned that the visa did not matter, but the

visas in question (Neville's question) were H and L visas. Those individuals would be residents under 7701(b), whereas a J or F visa holder would usually be a nonresident under 7701(b).

Although the definition for "resident alien" in section 7701(b) of the Internal Revenue Code is not applicable with respect to the FBAR reporting requirements, individuals can establish that they are not residents for FBAR reporting purposes if they can show that they are not "resident aliens" for income tax purposes. In this case, the taxpayer who files as a nonresident alien does not have to file an FBAR. Please note that the filing instructions will change with the next version of the FBAR to require persons in, and doing business in the United States to file FBARs.

A follow up question on the definition of US resident. If an individual is a resident alien under substantial presence test of IRC sec 7701(b), but under an income tax treaty residency tie-breaker provision he is a non-resident for US income tax purposes, will he be required to file an FBAR?

Although the definition for "resident alien" in section 7701(b) of the Internal Revenue Code is not applicable with respect to the FBAR reporting requirements, individuals can establish that they are not residents for FBAR reporting purposes if they can show that they are not "resident aliens" for income tax purposes. In this case, the taxpayer who files as a nonresident alien does not have to file an FBAR. Please note that the filing instructions will change with the next version of the FBAR to require persons in, and doing business in the United States to file FBARs.

Other Financial Instruments

"Other Financial Instruments" was not adequately defined in the seminar. Does that term include an investment in a foreign stock traded on a U.S. exchange or a mutual fund from a U.S. mutual fund company which is invested in foreign securities?

Although investments in brokerage accounts and mutual funds located in the United

States are accounts that can hold financial instruments (such as stock certificates and bond notes), the accounts are not foreign accounts for FBAR reporting purposes. It is the location of the account, not the type of securities held in the account that determines whether an FBAR should be filed.

Ownership Attribution

Is there ownership attribution? If so, what are the ownership attribution rules and what is the support for the rules?

The attribution rules in the Internal Revenue Code are not applicable with respect to FBARs. The FBAR instructions, however, provide guidance on whether an individual has a financial interest in a foreign account held by a partnership, corporation, estate, or trust.

Partnership

When you say indirectly control more than 50% stock or interests in partnerships, does this include accounts owned by Spouse, Children, Siblings etc?

No, the attribution rules found in the Internal Revenue code are not applicable with respect to the requirement to file FBARs. An individual holds a foreign financial account in his or her name and this account has less than \$10,000 during the calendar year. The individual also has signature authority over a foreign account held by a partnership where the individual is a partner owning a less than 5% interest in capital and profits. The partnership will file the FBAR form for its foreign account. Is the individual also required to file an FBAR? If so, what accounts should be included on the FBAR?

The individual would file an FBAR for the partnership account because he has signature authority over the account, not because he is a partner with less than a 5% interest in the partnership. The individual would also include, in the FBAR, his personal foreign financial account. This will

result in the partnership's foreign account appearing on two FBARs: the one filed by the partnership and the one filed by the individual who had signature authority over the partnership's foreign account.

A partnership has an escrow account with a foreign bank. The escrow account has a main account and many sub-accounts because a new sub-account is established each time funds are received from a separate transaction. A partner in the partnership, owning a less than 5% interest in capital and profits, has signature authority over the foreign bank account. This signature authority gives him or her access to the main account and all of the sub-accounts without having to sign new papers each time a sub-account is formed. The partnership will file the FBAR and report the foreign account and all of the sub-accounts. Is the partner required to file the FBAR? If so, does he or she report only the main account or the main account and all of the sub-accounts?

The partner should file an FBAR to report his signature authority over the partnership's foreign financial account. This will result in the partnership's foreign account appearing on two FBARs: the one filed by the partnership and the one filed by the partner who had signature authority over the partnership's foreign account. The partner and the partnership need only report the main account. The aggregate value of the account includes the value of each subaccount.

If a U.S. person holds partnership interests with FMV > \$10,000, but the ownership is less than 50% of the profits, is an FBAR required?

No, the U.S. person does not have to report an ownership interest in the foreign financial accounts of a domestic partnership in this case. The U.S. person would only have to file an FBAR to report a financial interest in the partnership's foreign financial accounts if the U.S. person owned an interest in more than 50 percent of the partnership's profits. It is the aggregate value of the foreign financial accounts in question (the accounts held by the partnership), not the fair market value of the partner's partner-

ship interest, that determines whether an FBAR is required.

Partnership serving as Investment Manager

We are a domestic partnership acting as an investment manager for about 12 domestic mutual funds. Our domestic partnership has employees which have signatory authority over these mutual funds. The mutual funds have financial interests in foreign bank accounts through a domestic custodian. In order for the signatories to move monies from these foreign bank accounts they must contact our domestic custodian. Then our custodian must contact a sub-custodian located in the foreign country of the foreign bank account. Should we recommend the filing of the FBAR for the signatories?

Yes, the employees of the partnership who have signature authority should file FBARs to report the foreign accounts for which they have signature authority.

Penalties and Abatement

About the penalty - For US Persons who have foreign bank accounts, but absolutely have no knowledge about FBAR over the years, if they file TD F 90-22.1 for 2006, do they also need to file from 2001 to 2005? If so, how to waive the penalty and what kind of documents need to be attached?

The U.S. persons should file any FBARs that were required during the past 6 years and attach an explanation as to why the FBARs are delinquent. They should also keep copies for their records.

No penalty will be assessed if there was reasonable cause for not filing the FBAR. Reasonable cause is determined based on the facts and circumstances of each case.

Summary of the penalties

For violations occurring after October 22, 2004, civil penalties can be as high as the greater of \$100,000 or 50% of the amount in

the foreign account at the time of the violation for each willful violation. For violations occurring after October 22, 2004, civil penalties can be as high as \$10,000 for each nonwillful violation that is not corrected and for which there was no reasonable cause. There are also criminal penalties for willful violations.

You can view a table of FBAR penalties by clicking on the following link: <http://www.irs.gov/businesses/small/article/0,,id=159757,00.html>

What criteria does IRS use to determine whether an individual is subject to criminal prosecution for failure to file TD-F 90-22.1 for two or more consecutive years?

As with tax cases, referrals of FBAR cases for criminal investigation are based on the facts and circumstances of each case. If a revenue agent believes that a case should be referred for criminal investigation, he will first discuss this with his group manager. The criteria that IRS uses in determining whether to pursue a criminal investigation is not made available to the public. See IRM 4.25.5.4 for IRS's procedures with respect to criminal referrals of FBAR cases.

Have penalties been assessed to taxpayers that are not involved in criminal activity (or willfulness) to date? (clerical error, not aware of filing requirement.)

Yes but a determination with respect to penalties is made taking into account the facts and circumstances of each case. No penalty will be assessed if there was reasonable cause for not filing the FBAR. Reasonable cause is determined based on the facts and circumstances of each case.

Pension Issues

Does this other financial account include foreign pensions if the person is not yet receiving it and just has this established in a foreign country either by self saving or by a company pension plan?

No, financial accounts for FBAR purposes do not include foreign pension accounts maintained by employers. A foreign retire-

ment account maintained by the employee (such as an IRA-type account) would, however, be a foreign financial account that should be reported on an FBAR filed by the employee.

Qualifying PFIC

Does a US individual owner of a qualifying electing fund (QEF) or a Passive Foreign Investment Company (PFIC) that files an IRS form 8621 need to file TDF 90-22.1?

Yes. Even though both the FBAR and the Form 8621 may contain similar information about the shareholder's interest in a Passive Foreign Investment Company (PFIC) or a Qualified Electing Fund (QEF), they serve different purposes. The Form 8621 contains information that is needed by IRS, including information that is not reported on an FBAR. Unlike the Form 8621, the FBAR is intended to be made available to other government agencies, including state and federal law enforcement agencies. Internal Revenue Code restrictions on disclosure of tax return information prevent the use of the Form 8621 for this purpose.

The shareholder's interest in the PFIC or the QEF is an interest in an account in which the assets are held in a commingled fund and the account owner holds an equity interest in the fund. Such interests are reportable as financial accounts for FBAR purposes.

Schedule B, F 1040

If client has foreign bank account but does not meet filing criteria that year, should you still file the Sch B, 1040 and indicate yes they have a foreign bank account, even if they won't need to file the FBAR.

No. The instructions for Form 1040 Schedule B identify situations, such as the one described in the question, for which an FBAR would not be required. For such situations, the instructions advise taxpayers to check the "no" box on

Schedule B to indicate that they do not have a foreign bank account. See the 2006 Instructions for Schedules A & B (Form 1040), page B-2.

Can you please cite your authority for the schedule B filing requirement if interest/dividend income < \$1,500 but has a foreign account?

The authority for the requirement to answer the Schedule B question about foreign accounts regardless of the amount of interest or dividend income reported on the tax return is in the regulations under section 5314 of Title 31. Section 5314 provides the authority to require that FBARs be filed and, although section 5314 is not part of the Internal Revenue Code, it provides clear authority for IRS to ask the question about foreign accounts on Schedule B. Section 103.24 of the Title 31 regulations requires United States persons to both file FBARS and to report to IRS the fact that they have a financial interest in or signature or other authority over a foreign financial account. This requirement is met by answering the Schedule B questions in accordance with the Schedule B instructions.

Statute of Limitations

Also the code section for the statute of limitations was mentioned, can you send me the code section?

The 6-year statute of limitations for assessing civil penalties for an FBAR violation is in 31 U.S.C. 5321(b)(1).

Stock

Does holding an individual stock (such as BNSF) - which may or may not pay dividends - and which invests a portion of its funds into foreign countries require filing of a FBAR form?

Generally, no. Only shareholders who own directly or indirectly more than 50 percent of the total value of the corpora-

tion's stock need to file FBARs to report a financial interest in the foreign financial accounts held by the corporation.

If a U.S. person owns stock in a corporation but that person holds less than 50% of the value of the stock, is an FBAR required?
No.

ENDNOTES

- ¹ Steven Toscher and Michel R. Stein, *FBAR Enforcement is Coming!*, J. OF TAX PRACTICE & PROCEDURE (December 2003-January 2004), at 27.
- ² IRS News Release, IR 2003-48, Apr. 10, 2003.
- ³ Act Sec. 361(b) of The USA PATRIOT Act of 2001 (P.L. 107-56) mandated the Secretary of the Treasury to study methods to improve compliance with the FBAR reporting requirements.
- ⁴ Written Statement of Kevin Brown, Commissioner, SB/SE Division of IRS Before Committee on Banking, Housing and Urban Affairs, United States Senate (Sept. 28, 2004).
- ⁵ Act Sec. 821 of the American Jobs Creation Act of 2004 (P.L. 108-357), amending 31 USC §5321(a)(5).
- ⁶ Delegation Order 4-35 (March 24, 2008) is available at http://www.irs.gov/pub/foia/ig/spder/do_4-35_rev_1.pdf.
- ⁷ U.S. Treasury Department, Report to Congress in Accordance Act Sec. 361(b) of P.L. 107-56 (April 26, 2002) ("Treasury Report"), at 6.
- ⁸ *Id.*
- ⁹ IR 2008-79, June 17, 2008, (IRS Reminds Taxpayers to Report Certain Foreign Bank and Financial Accounts, by June 30; Lynnley Browning, *IRS Seeks Reports of Foreign Accounts*, NY TIMES (May 15, 2008).
- ¹⁰ The compliance rate for income taxes is estimated to be about 85 percent.
- ¹¹ See Code Sec. 6103 *et seq.*
- ¹² Browning, *supra* note 6.
- ¹³ Browning, *supra* note 6.
- ¹⁴ *U.S. Authorities expected to Subpoena Swiss Bank's Records*, 2008 TNT 96-6 (May 19, 2008); on July 1, 2008, the U.S. District Court for the Southern District of Florida authorized the IRS to serve a John Doe summons on UBS directing it to produce records identifying U.S. taxpayers with accounts at UBS in Switzerland who elected to have their accounts remain hidden from the IRS, DAILY TAX REPORT, July 2, 2008 (*Tax Havens-Federal Court Grants John Doe Summons against UBS in U.S. Taxpayer Investigation*).
- ¹⁵ Tom Herman, *Offshore-Account Holders Bite Their Nails*, WALL ST. J. (May 21, 2008), at D1.
- ¹⁶ Lynnley Browning, *Ex-UBS Banker Pleads Guilty to Tax Evasion*, NY TIMES (June 20, 2008).
- ¹⁷ For more detailed discussion on the FBAR requirements, see Toscher and Stein, *supra* note 1; Steven Toscher and Michel R. Stein, *FBAR Enforcement—An Update*, J. OF TAX PRACTICE & PROCEDURE (April-May 2006), at 41; and Steven Toscher and Michel R. Stein, *Criminal Enforcement of FBAR Filing Requirements*, BUSINESS CRIMES BULLETIN (June 2006).
- ¹⁸ *Report of Foreign Bank and Financial Accounts*, TD F 90-22.1 is available at <http://www.irs.gov/pub/irs-pdf/f90221.pdf>.
- ¹⁹ Act Sec. 821 of the American Jobs Creation Act of 2004 (P.L. 108-357), amending 31 USC §5321(a)(5).
- ²⁰ 31 USC §5321(d).
- ²¹ 31 USC §5321(b)(1).
- ²² 31 USC §5321(b)(2).
- ²³ I.R.M. 4.26.17.5.5(4); I.R.M. 4.26.17.5.5.4(1); 18 USC §3282.
- ²⁴ The IRS Web site, www.irs.gov, hosts a number of informational bulletins and offers the following e-mail address: FBARquestions@irs.gov that the public can use to ask the IRS questions regarding FBAR reporting.
- ²⁵ FBAR Instructions.
- ²⁶ Circular 230, §10.22.
- ²⁷ FBAR Instructions.
- ²⁸ While the Q&A deems the mailbox rule contained under Code Sec. 7502 nonapplicable to FBARs, Code Sec. 7502 indicates that the mailbox rule applies to "any return, statement or other document required to be filed ... on or before a prescribed date under authority of any provision of the internal revenue laws..." While most certainly an FBAR would qualify as a statement or other document required to be filed, given the IRS delegation of authority it is an open question whether the prescribed date for such filing emanates from any provision of the internal revenue laws, which could make the mailbox rule applicable to FBARs. Moreover, the common law mailbox rule could be applicable if Code Sec. 7502 does not apply. See, e.g., *L. Anderson, CA-9, 92-1 USTC ¶50,308, 966 F2d 487*.
- ²⁹ The IRS does have a formal voluntary disclosure policy with respect to taxes which is located in the Internal Revenue Manual (I.R.M.) at Section 9.5.3.3.1.2.1.
- ³⁰ I.R.M. 4.26.17.1(2).
- ³¹ TIGTA Reviews IRS BSA Compliance Program (March 18, 2004) ("TIGTA Report").
- ³² I.R.M. 4.26.17.1(3).
- ³³ I.R.M. 4.26.17.2.
- ³⁴ I.R.M. 4.26.17.2(1)(d).
- ³⁵ I.R.M. 4.26.17.2(1)(d).
- ³⁶ I.R.M. 4.26.17.2(1)(f).
- ³⁷ I.R.M. 4.26.17.2.1(3)(a).
- ³⁸ See Code Sec. 7431 (civil) and Code Sec. 7213 (criminal).
- ³⁹ I.R.M. 4.26.17.2.3.
- ⁴⁰ I.R.M. 4.26.17.5.2.1.
- ⁴¹ Along the same line, BSA summons, TF F 90-22.31, rather than a summons under Code Sec. 7602, must be used if information that is purely BSA information is sought. IRM 4.26.17.5.3.
- ⁴² I.R.M. 4.26.17.4.1.
- ⁴³ I.R.M. 4.26.17.4.1(3).
- ⁴⁴ I.R.M. 4.26.17.4.2.
- ⁴⁵ I.R.M. 4.26.17.4.2(2).
- ⁴⁶ I.R.M. 4.26.17.4.2(2).
- ⁴⁷ I.R.M. 4.26.17.4.2(2).
- ⁴⁸ I.R.M. 4.26.17.4.3; See Toscher and Stein, Note 1 and Note 17 for FBAR penalty computation rules and penalty mitigation guidelines.
- ⁴⁹ I.R.M. 4.26.17.4.3(2).
- ⁵⁰ I.R.M. 4.26.17.4.3(5)a.
- ⁵¹ I.R.M. 4.26.17.3(5)b.
- ⁵² *Id.*
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ The IRS must prove willfulness by "clear and convincing" evidence and a general presumption of correctness afforded to tax assessments does not apply. See CCA 200603026 (September 1, 2005).
- ⁵⁶ I.R.M. 4.26.17.4.3(6).
- ⁵⁷ 31 USC §3717(b); I.R.M. 4.26.17.4.3(6)e.
- ⁵⁸ I.R.M. 4.26.17.4.3(6)e.
- ⁵⁹ I.R.M. 4.26.17.4.4(1).
- ⁶⁰ I.R.M. 4.26.17.4.4(2) & (3).
- ⁶¹ I.R.M. 4.26.17.4.6(2).
- ⁶² I.R.M. 4.26.17.4.7(3).
- ⁶³ I.R.M. 4.26.17.4.7(4).
- ⁶⁴ *Id.*
- ⁶⁵ I.R.M. 4.26.17.5.4.
- ⁶⁶ I.R.M. 4.26.17.5.4(1)(3).
- ⁶⁷ I.R.M. 4.26.17.5.4.1(1).
- ⁶⁸ I.R.M. 4.26.17.5.4.1(2).
- ⁶⁹ I.R.M. 4.26.17.5.4.1(6)a.
- ⁷⁰ I.R.M. 4.26.17.5.4.1(6)b.
- ⁷¹ I.R.M. 4.26.17.5.4.1(7).
- ⁷² I.R.M. 4.26.17.5.4.1(8).
- ⁷³ I.R.M. 4.26.17.5.4.2(1).
- ⁷⁴ I.R.M. 4.26.17.5.4.2(2) & (3).
- ⁷⁵ I.R.M. 4.26.17.5.4.3.

Exhibit 2. Office of Professional Responsibility Comments on Professional Responsibility and the Report of Foreign Bank and Financial Accounts¹

There have been some questions about professional responsibility and the Report of Foreign Bank and Financial Accounts (FBAR). The FBAR, TD F 90-22.1, is not a tax return. It is an information report required under the Bank Secrecy Act (BSA), 31 U.S.C. 5314, and related regulations 31 C.F.R. 103.24, 103.27. Related records are required under 31 C.F.R. 103.24 and 103.32. This report, however, is referenced in US tax returns. These tax returns request information about the existence of foreign financial accounts in which the filer of the tax return has a financial interest or over which the filer has signature or other authority. If the response to the leading question is “yes,” then the tax return filer is prompted to file an FBAR.

In 2003 IRS was delegated responsibility for assessing penalties for failure to file this report. In 2004, Congress substantially increased penalties for failure to file the FBAR and created a non-willfulness penalty of up to \$10,000 for individuals as well as other entities. As a result, there has been increased interest in compliance.

We understand that FBAR non-filers are blaming their preparers for the failure to file – stating that they have reasonable cause for failure to file because the practitioners did not ask about or explain the foreign financial account part of the return. Accordingly, practitioners have expressed concerns about their legal responsibilities respecting this form.

Practitioners must comply with the FBAR filing rules. For example, failure to timely file required tax or information returns, including FBARs, must be disclosed on Form 8554, Application for Renewal of Enrollment to Practice Before the Internal Revenue Service.

A practitioner must comply with FBAR rules as part of his or her due diligence obligation under Section 10.22 of Circular 230:

§10.22 Diligence as to accuracy. Each attorney, certified public accountant, enrolled agent, or enrolled actuary shall exercise due diligence:

(a) In preparing or assisting in the preparation of, approving, and filing returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(b) In determining the correctness of oral or written representations made by him to the Department of the Treasury; and

(c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service.

Due diligence does not require that the practitioner “audit” their client. However, it does require that a practitioner make reasonable inquiries when a client provides information that suggests possible participation in overseas transactions/accounts subject to FBAR requirements. A practitioner may rely on information provided by a client in good faith. However, they may not ignore implications learned from information provided or actually known. The practitioner is also required to advise a client of potential penalties likely to apply to a position taken, such as failing to abide by FBAR requirements. The practitioner must make reasonable inquiries if information appears incorrect, inconsistent with an important fact or factual assumption, or is incomplete.

Additional inquiries about the FBAR filing requirements may be resolved by reading “FAQs regarding Report of Foreign Bank and Financial Accounts (FBAR),” and other FBAR information available on the IRS web site at www.irs.gov. Specific questions and comments may be emailed to the following address: FBARquestions@irs.gov. Questions concerning your ethical obligations in this area may be addressed to the Office of Professional Responsibility at: opr@irs.gov.

ENDNOTES

¹ <http://www.irs.gov/taxpros/agents/article/0,,id=100709,00.html>.

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