

REMINDER: FOREIGN FINANCIAL ACCOUNT REPORTS ARE DUE**Filings must be made by June 30, 2009 on the revised form**

Each U.S. person having a “financial interest” in or “signature or other authority” over one or more bank accounts, securities accounts, or other financial accounts located in foreign countries the aggregate assets of which exceeded \$10,000 at any time during 2008 must file a report with the U.S. Department of the Treasury by June 30, 2009. The *Report of Foreign Bank and Financial Accounts* (“FBAR”) is filed on Form TD F 90-22.1.¹ The FBAR has been revised for this year. Failure to file an FBAR can result in significant civil and/or criminal penalties. Developments regarding the criteria for required filers and the types of accounts and information required to be reported affect this year’s filings and are summarized below.

APPLICABILITY AND KEY DEFINITIONS*Why the FBAR Must Be Filed*

The obligation to file an annual FBAR arises from the Bank Secrecy Act — the umbrella statute incorporating U.S. anti-money laundering policies — and Treasury Department regulations. The FBAR is a means by which the U.S. government tracks international movements of funds and the development of financial instruments used in terrorist financing.

Who Must Report

The FBAR reporting requirement applies to “each person subject to the jurisdiction of the United States,” including any citizen or resident of the United States, as well as domestic corporations, partnerships, any other form of domestic business, and estates and trusts — referred to collectively as “U.S. persons.” The revised FBAR instructions state that U.S. persons include “a person in and doing business in the United States.” On June 5, 2009, however, the IRS announced that this expanded definition was suspended due to uncertainty. All other definitions in the FBAR instructions still apply.

¹ Persons who are required to file an FBAR must also annually report the existence of such accounts to the Internal Revenue Service on the appropriate tax return or schedule.

What Triggers the FBAR Reporting Requirement

The FBAR requirement applies to a U.S. person who has “a financial interest in, or signature or other authority over” a foreign financial account of the type described below. In general —

- A “financial interest” exists when a foreign financial account is held in a U.S. person’s name for such person’s own benefit or the benefit of others (including non-U.S. persons); by an agent, a nominee, an attorney, or a person acting in some other capacity on behalf of a U.S. person; by a corporation of which a U.S. person owns, directly or indirectly, more than 50 percent of the total value of shares or of the voting power of all shares; by a partnership in which a U.S. person owns an interest of more than 50 percent of the profits or capital; or by a trust in which a U.S. person has a present beneficial interest, directly or indirectly, in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.
- “Signature authority” means the ability to control the disposition of funds or property in an account by delivery of a document bearing the U.S. person’s signature (either solely or with the signatures of others) to the financial institution or other person with whom the account is maintained.
- “Other authority” includes the ability to control the funds through oral or other instructions to the financial institution.

What Types of Foreign Financial Accounts Are Covered

Foreign financial accounts include:

- Any foreign “bank, securities, securities derivatives, or other financial instruments accounts”;
- Any foreign “accounts in which the assets are held in a commingled fund, and the account owner holds an equity interest in the fund (including mutual funds)”;
- Any “savings, demand, checking, deposit, time deposit, or any other account (including debit card and prepaid credit card accounts) maintained with a foreign financial institution or other foreign person engaged in the business of a financial institution.”

The inclusion of “mutual funds”² as well as debit card and prepaid credit card accounts maintained with foreign financial institutions represents an expansion of the definition of foreign financial accounts. A financial account does not include individual bonds, notes, or stock certificates, or unsecured loans to a foreign trade or business that is not a foreign financial institution.

One or more foreign financial accounts trigger the reporting requirement if the aggregate value of all such accounts exceeded \$10,000 at any time during 2008.

What Information Is Reported

Generally, a filer must report certain basic information about each foreign account. A filer must report the precise maximum value of each account during 2008 (previous versions of the FBAR permitted the filer to check one of several boxes indicating a preset range of values). The FBAR must also include the mailing address of the foreign financial institution at which the account is held. If a U.S. person has interests in 25 or more foreign financial accounts, the person may simply disclose on the FBAR the number of such accounts without providing details on each. Upon the Treasury Department’s request, however, a filer must provide additional information about the accounts.

FILING AND REPORTING INFORMATION

The revised FBAR is available at the website of Treasury’s Financial Crimes Enforcement Network (http://www.fincen.gov/forms/bsa_forms/). The FBAR must be received on or before June 30, 2009 at the Post Office address provided in the FBAR instructions, or can be hand-delivered to any local IRS office for appropriate forwarding. There are no provisions for electronic filing, private express delivery, or an extension of the filing date.

RECORDKEEPING

Each FBAR filer must retain for a period of five years certain records with respect to the foreign accounts reported, including the name of the account holder, the account number or other designation, the name and address of the foreign financial institution or other entity at which the account is maintained, the type of account, and the maximum value of the account during the calendar year for which the FBAR was filed.

² To date, the Treasury Department has provided no guidance as to the applicability of this definition to non-U.S. investment funds.

PENALTIES

The consequences of a failure to comply with the reporting requirements can be quite serious. Non-willful failure to file can result in a civil penalty of up to \$10,000 for each violation, and a willful failure to file can result in (i) a civil penalty, per violation, of 50 percent of the amount in the account at the time of the violation or \$100,000, whichever is greater, or (ii) a criminal penalty of up to \$250,000 and/or five years in prison. A violation of the reporting requirement occurring in connection with a violation of another federal law, or as part of a pattern of certain unlawful activity, can subject the violator to a fine of up to \$500,000 and/or ten years in prison.

In addition, failing to file a required FBAR, or filing an FBAR containing materially false information, may result in a separate violation of federal law, which criminalizes the act of knowingly and willfully making false statements to the government.

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If you have any questions regarding the foregoing, or need additional information, please contact Russell Smith (202-303-1116, rsmith@willkie.com); Benjamin J. Haskin (202-303-1124, bhaskin@willkie.com); Rita Molesworth (212-728-8727, rmolesworth@willkie.com); Joseph A. Riley (212-728-8715, jriley@willkie.com); Barbara Block (202-303-1178, bblock@willkie.com); Michael S. Didiuk (202-303-1280, mdidiuk@willkie.com) or the attorney with whom you regularly work.

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June 11, 2009

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